IN THE SUPREME COURT FOR 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.	Superior Court No. No. A711739 California Supreme Court No. S049596

APPELLANT DONALD SMITH'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE CHARLES M. HORAN, PRESIDING

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In this Reply Brief Appellant does not respond to all of Respondent's contentions, most of which are fully covered by Appellant's Opening Brief. This Reply Brief is limited to those points upon which further discussion may be helpful to the Court.

ARGUMENTS

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I

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE OF RELATED ERRORS RELATING TO THE INTRODUCTION OF ACCOMPLICE TESTIMONY.

Accomplice testimony must be corroborated by evidence connecting a defendant to the crime. As will be shown, the prosecution's original position was that James Williams was an accomplice, and the trial court held there was no other evidence connecting Appellant to the crime.

Appellant's conviction must be reversed because of several related errors arising from the introduction of accomplice testimony, including: 1) Failure to instruct the jury that Williams was an accomplice; 2) The denial of the motion of

acquittal pursuant to section 1118.1[1] as a result of the lack of corroboration for accomplice testimony; 3) Failing to instruct the jury that Tannis Curry, Bryant's ex-wife, also was an accomplice; 4) Failing to re-open deliberations after the jury returned a verdict as to Appellant, but had questions concerning the law relating to accomplice testimony and reasonable doubt while deliberating as to Settle; 5) Instructing the jury that an aider and abettor may be a principal in the offense if that person is "equally guilty;" 6) Instructing the jury that if it found Williams was an accomplice, only "slight" evidence was required to corroborate Williams's testimony.

A. JAMES WILLIAMS WAS AN ACCOMPLICE AS A MATTER OF LAW UNDER SEVERAL THEORIES, AS RESPONDENT CORRECTLY ARGUED IN THE EARLY STAGES OF THIS CASE.

1. Introduction

Appellant's convictions must be reversed because there was insufficient evidence to corroborate James Williams's testimony. Accordingly, the court should have informed the jury that Williams was an accomplice. The trial court recognized there was no evidence connecting Appellant *with the offense itself*, as required by the rules governing accomplice testimony, but the trial court went on to apply the wrong legal standard in ruling that Williams was not an accomplice.

Indeed, Respondent's current position that Williams was *not* an accomplice is a total shift from its previous factual and legal claim to the trial court that in fact, Williams *was* an accomplice.

In 1990, the prosecution adamantly argued that Williams's actions indicated he was an accomplice, as a matter of law. Specifically, the District Attorney told the trial court:

> Just because James Williams is not one of the actual shooters does not mean he is not a principal.... [Williams] *was present at the scene of the crime and willingly followed orders actively participating in*

[1]Further statutory references are to the California Penal Code unless otherwise noted.

> *the commission of both the offense* and the immediate fight [sic.] afterwards. He was a lookout on orders of Stan Bryant long before the crime was completed and his cohorts obtained a position of relative safety. He was an employee of the Bryant organization working at the cash house and murder scene at the time the murders were committed; actually let the victims into the caged in area where they were slaughtered after he buzzed Stan Bryant out; and *then backed the car into the garage where the bodies could be loaded, then disposed of.* ... James Franklin Williams was simply a loyal employee eager to assist his boss Stan Bryant and fully aware that the shooting and violence was the norm for them and the order for the day....As part of his training he was trained to use a gun and one was provided to him. As further evidence of his knowledge and intent not only did he perform his talk of looking for witnesses as he dutifully went back to the pool hall, but he actually reported those persons to Stan Bryant. *Williams was much more than a bystander.... He actively participated in leading Andre Armstrong and James Brown to slaughter knowing full well that that was about to happen.*

(23 CT 6643, 23 CT 6643, People's Response to Defendant William Gene Settle's Motion to Set Aside Information Pursuant to Penal Code Section 995, italics added.)

Although Williams later offered self-serving testimony that contradicted the fact that he buzzed Armstrong and Brown into the house, none of the other facts relied on by the prosecution in order to arrive at its determination that Williams was an accomplice as a matter of law, as noted in the above passage, have ever been disputed by the prosecution.

Respondent's current contention violates an established rule of appellate procedure that requires when the parties have proceeded on one theory in the trial court, neither party "can change this theory for purposes of review on appeal." (*Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 877; 9 Witkin, California Procedure (4th ed. 1997), Appeal, § 399, 451-452.)

This is akin to the rule that the state is not allowed to use different factual theories to obtain convictions in different trials. (*In re Sakarias* (2005) 35 Cal.4th 140.) This rule stems from the recognition that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation. (*Stumpf v. Mitchell* (6th Cir. 2004.) 367 F.3d 594, 611.)

A prosecutor's first obligation is to serve truth. (*United States v. Leung* (C.D.Cal. 2005) 351 F.Supp.2d 992, 997; *People v. Garcia* 17 Cal.App.4th 1169, 1181.) The evil in allowing the pursuit of two inconsistent and irreconcilable theories at different times is that one must be false: "Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used." (*Stumpf*, at 613.) Furthermore, a prosecutor's assertion of inconsistent theories tends to undermine society's confidence in the fairness of the process. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1262; *Thompson v. Calderon* (9th Cir. 1996) 109 F.3d 1358, 1371.)

Consequently, Respondent should be estopped from changing its position and thus, held accountable for its initial assertions to the court that Williams was an accomplice as a matter of law.

2. Respondent's Recent Position That Williams Was Not An Accomplice Is Incorrect As A Matter of Law.

Respondent concedes that one who aids in the commission of an offense may also be liable for any foreseeable offenses committed by the person he aids. Respondent distinguishes between accomplices and accessories, with the latter being those who aid only after a felony has been committed. (RB 358-359.)

Respondent contends that whether a person is an accomplice is a question of fact unless the evidence regarding accomplice status is clear and undisputed, a fact which the defendant has the burden of proving, and which Respondent now contends was not met in Appellant's case. (RB 359.)

Respondent argues that Williams cannot be considered an accomplice for a variety of reasons. Examination of those reasons reveals that they are flawed, and that Williams must be considered an accomplice as a matter of law.

The first flaw in Respondent's reasoning is that Respondent looks for the evidence of Williams's accomplice status only from the testimony of Williams, accepting that at face value. (See RB 360 – "As the trial court recognized, *Wil-*

liams's testimony did not permit the "clear and undisputed" inference that he was an accomplice...;" thereafter discussing the evidence implicating Williams from his testimony. Italics added.) This ignores the very purpose of distrusting accomplice testimony – the self-serving need to minimize one's involvement. (See AOB 49-50.) The court should have looked to all evidence relating to the issue in order to accurately determine Williams's status, and should not have merely accepted the testimony of Williams, a person receiving immunity in exchange for his testimony, at face value. Accordingly, the first error the trial court committed was in applying the wrong standard and thus, basing its ruling solely on Williams's testimony, blindly accepting that testimony as "true."

Furthermore, Respondent accepts the fact that Williams knew "something" was going to happen, but repeatedly argues that Williams did not know the others had an intent to kill, and "he had no reason to suspect" the murders would happen. (RB 360-363.) This reasoning ignores the fact that Williams knew he was a part of one of the "biggest most violent drug organization[s]" in the city (122 RT 16430S), an organization that, *in the words of the prosecution,* used violence to terrorize the neighborhood, "killing people, blowing up people, beating people." (122RT 16430T.) This was an organization, according to the District Attorney, whose norm of shooting and violence, was known to Williams. (23 CT 6643.) It belies reason to assume that a member of such an organization can hear a test shot being fired and can see four men walking around with gloves on and cocking guns (97 RT 12305-12306, 12311, 12331), but not know that a murder is being planned. This unreasonable assumption is an ostrich approach to accomplice liability.

Respondent further argues that Williams's statement to Detective Duncan that he heard a gunshot in the bathroom proves he was not an accomplice because the weapon fired in this case was actually a shotgun. According to Respondent, Williams's calling it a "gunshot" shows he was not privy to the planning of the murder, because otherwise he would have known it was a shotgun and called it such. (RB 361.)

For several reasons Respondent's argument makes little sense as a response to Appellant's accomplice liability argument. First, a shotgun is a gun. The fact that Williams did not specifically articulate the exact type of weapon he heard being discharged does not mean he remained clueless as to what was going on so as to immunize him from culpability. People do not always talk with the precision required by legal technicalities. Thus, the fact that he did not recognize the exact type of firearm being used after he heard the shot does nothing to diminish his culpability as an accomplice, nor does this fact even address the issue. It is sufficient that he knew *a gun* was going to be used. It is well established that just because a person does not know all of the details of the conspiracy he has joined, this "does not detract from the fact of conspiracy ... or from [his]...voluntary participation in it without complete knowledge of its objective or details." (*People v. Buono* (1961) 191 Cal.App.2d 203, 215, listing numerous citations.) Thus, if Williams thought a "gun" was going to be used, and in fact a "shotgun" was the ultimate weapon, whether he knew specifically the precise nature of the firearm was irrelevant.

In fact, not all of the murders were committed with a shotgun. Although a shotgun was *one* of the weapons used, all four victims received some injuries from a handgun. (75 RT 8288-8289, 8299, 8302-8303, 8346, 76 RT 8386.) Therefore, Williams's knowledge that a "gun" was being readied, even if he was imprecise as to the specific type of gun fired in the bathroom, constituted actual knowledge of the exact type of weapon that was used in the crimes.

Similarly, Respondent claims importance in the fact that Williams was mistaken as to events that happened after he left the house, such as, he might have been in error as to how the bodies were removed. (RB 361.) Again, the fact that Williams did not know every detail is not relevant in determining accomplice status. Such complete knowledge is not necessary for an accomplice, particularly when it relates to facts that occurred when the accomplice was not present. Arguably, when the prosecution informed the trial court that Williams was an ac-

complice,[2] the prosecution also believed that Williams's lack of knowledge as to every detail did not alter its determination of his accomplice status.

Indeed, Bryant left the house early and presumably was ignorant as to many of the details of how the crime actually occurred, such as, which of the remaining defendants shot which victims. Nonetheless, this lack of knowledge on Bryant's part did not absolve him of culpability, nor should Williams's lack of complete knowledge absolve him of culpability.

Respondent seeks further support for its position by claiming that the fact that Williams walked down the street to see if any neighbors were paying attention establishes he did not know what was happening, and instead proves he was the fall guy. (RB 362.) This reasoning is problematic. Williams heard the gunshots and screaming while he was walking out of the house, thus, by the time he got to the street, he had actual knowledge that people were being killed. Nonetheless, instead of alerting someone that a murder was occurring, as would be expected of someone not involved in the offense, he continued to help in the plan, following the boss's directions, checking out the neighborhood and moving the car in which the bodies were moved.

Indeed, Respondent, quoting the instructions given, notes that if a person aids the crime without knowledge of the offense, that person is not an accomplice. However, at this stage, Williams was aiding Bryant, *knowing a crime was then being committed.* The fact that Bryant may have also had other plans relating to Williams is not relevant.

Other facts relied on by Respondent are equally irrelevant. For instance, Respondent argues that Williams was not an accomplice because he did not buzz in Armstrong or Brown to the house. (RB 362.) The fact that someone else may have done other acts to further the crime along does not mean that Williams was uninvolved. His acts of moving the car in which the bodies were transported and

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[2] The position argued by the People in their Response to William Settle's Motion to Dismiss. (*Ante*, at p. 3.)

scoping out the neighborhood are sufficient, even if other people did other tasks originally assigned to Williams.

In short, while working for what he knew was a violent drug cartel, Williams became aware of facts that made him believe "something" was going to happen. These facts included armed men test firing weapons and walking around the house wearing gloves. He was given instructions as to what he should do when the people arrived, including instructions to let them in the house. When the murders began, hearing shots and screams, Williams continued to follow the instructions he had been given, including moving a car into the garage, which was later used to transport bodies, checking out the area to see if anyone had heard the shots, and later reporting back to Bryant. (97 RT 12340-12342.)

Clearly, Williams knew the crime was going to happen before it did. And, as the prosecution once argued, when he actually knew the crime was happening, he followed instructions that were designed to facilitate the crime. Respondent does not dispute any of these facts. For his role in facilitating the crime, Williams was an accomplice.

At one time after Appellant was arrested, Detective Votchecky and Deputy District Attorney Maurizi visited him while he was in custody in order to interview him. At that time, Appellant exercised his right to remain silent. (RT E20-E22.) Had Appellant not done so, and had he denied culpability, implicating Williams, and had he, instead of Williams, been the one to cut a deal with the prosecution, it would have been Williams who stood convicted of murder. To now deny that Williams was an accomplice as a matter of law ignores his active participation in the murders while they were occurring, and ignores the facts as laid out by the prosecution in the its response to the Motion Pursuant to Section 995 (*ante*, at p. 2-3), which established sufficient evidence to convict Williams of four counts of first degree murder.)

For the foregoing reasons, Williams was an accomplice because of his actual participation in the crimes for which appellant was convicted.

3. Williams Was An Aider And Abettor Because Of His Participation In The Narcotics Business.

Respondent does not dispute the rule that a principle in the target offense of narcotics sales can be liable as an accomplice for murder under the natural and probable consequences doctrine. (RB 363-364, see AOB 115-117.)

Respondent acknowledges Williams was a member of the organization, albeit, the most junior member, present in the Wheeler Avenue house, and that Wheeler arrived "'the same way as always' for his regular shift," and that he watched television while waiting for customers. (RB 360.) However, Respondent asserts that there was no evidence Williams was engaged in drug sales at the Wheeler house on the day of the murders and that he was not selling drugs to Armstrong. (RB 364.) Apart from Respondent's self-contradiction of recognizing Williams's role in the business and four pages later arguing that Williams was not engaged in the sale of drugs that day, the latter contention is simply not true.

In fact, from the lengthy descriptions of the Bryant family drug houses (AOB 19-24), it is obvious from the prosecution's facts that the only people in those houses were people engaged in the business. Whether it was a count house, the house where the money was taken, or the house where the drugs were handed out, all locations involved in the business were used only for various aspects of transacting the cartel's business. At the Wheeler Avenue location, as well as the other drug houses, such as the house at 13031 Louvre Street, the houses did not contain items evidencing that they were lived in. For example, the refrigerators were mostly empty, there was no food items or cooking utensils in the cabinets, and there were no clothes in the houses. (78 RT 8655, 83 RT 9593.) Therefore, there was no other reason for Williams to be at the house that day except as a participant in the cartel's business.

Just as it is also self-evident that the look-out man for a bank robbery or the driver of the get-away car is involved in the robbery, so anyone in the houses was

involved in the workings of the violent, terrorist, murderous, organization selling drugs in the valley. From the time that the company car came to pick him up to take him to work in the morning, the only reason Williams was there was to be involved in the company business of selling drugs.

Respondent also notes that Williams was not selling drugs to Armstrong. This is a red herring. The danger of narcotics cartels, as argued by the prosecution (122 RT 16430P-16430T), was not only to the customers but also, to those who the business killed and assaulted as a part of maintaining control. In fact, the beating of Francine Smith, the killing of Ken Gentry, the shooting of Reynard Goldman, and the fact that people working at the drug houses were armed, is illustrative of the violence that was a part of the Bryant family cartel. The danger that someone trying to shake down the cartel, and Respondent characterizes Armstrong's actions towards the Bryant Family as putting the squeeze on them (RB 17), created the danger that the cartel would kill that person.

From the prohibition wars of the 1920's to the street gangs of today, a natural aspect of crime cartels is that people get killed in business disputes. If Armstrong wanted a cut of Bryant's business, the most natural way for this dispute to be settled would be by murder. The fact that Armstrong was or was not a customer that day is not the issue.

In fact, the prosecution itself relied on this theory of liability for murder, when it charged Johnson and Newbill with murder although their only participation in the offense was as active members of the cartel, in spite of the fact that they were not selling drugs to Armstrong at the time the murders happened. (See e.g. 17 RT 4744-4745, 23 CT 6629-6637, 24 CT 6741-6747.)

Further, the prosecution argued in opposing Johnson's motion to dismiss pursuant to section 995, "The prosecution's theory of the case is that each of the defendants conspired to operate a drug sales organization and to maintain control by any and all means necessary, including violence and death." (23 CT 6634.)

Likewise, the prosecution argued:

> A thorough review of the evidence clearly indicates that defendant Antonio Johnson was a valued member of the Bryant family drug organization, that the goal of the organization was drug sales, and that in order to meet this goal, the organization freely committed murders.... As a member of the conspiracy, defendant Johnson is liable for the murders. (23 CT 6636.)

Indisputably, as with Johnson and Newbill, Williams was engaged in the narcotics business with the Bryant family. Furthermore, Bryant gave Williams a silver .45 caliber gun to carry when he was working at the house, telling him he was to be armed when he answered the door. (96 RT 12235-12236.) Thus, Williams knowingly engaged in the business of the cartel, knowing that its members were armed, and in fact, while working, possessed a gun himself.

Moreover, unlike Johnson and Newbill, Williams was actually working out of the Wheeler Avenue residence until he left the building as the instant crimes were happening. As such, he could easily have been convicted of second-degree murder as a reasonably foreseeable result of participating in a narcotics cartel.

4. Other Theories Of Second-Degree Murder

Respondent contends that Williams cannot be an accomplice if the crime in issue is second-degree murder because Appellant was not convicted of that offense. (RB 364.) Respondent is simply wrong. Appellant was convicted of two counts of second-degree murder for Counts 1 and 2. He was convicted of first-degree murder for Counts 3 and 4. (52 CT 15270-15275, 53 RT 15406-15407, 53 RT 15419-15424; 126 RT 17074-17076.)

Respondent also notes that Appellant was not convicted under a felony murder theory for second-degree murder. Respondent's argument is based on its belief that Appellant was arguing Williams is liable on a theory of second-degree felony murder as a result of his participation in the narcotics business, and if Appellant was not convicted on the same theory, Williams cannot be an accomplice. (RB 364.) There are two flaws to Respondent's interpretation of Appellant's argument. First, Williams's potential guilt as a result of his involvement in the drug trade is not only a result of the second-degree felony murder rule. It is also a re-

sult of the natural and probable consequences rule for aiding and abetting the narcotics cartel. Williams's culpability is dependent on the same theory as Appellant's – aiding and abetting.

Second, the fact that Appellant was not convicted on a felony murder theory is irrelevant. Felony murder is a theory of liability, not a crime. The crime is murder, regardless of the legal *theory* upon which liability is based. Verdict forms do not ask the jury if the defendant committed "felony murder." Just as Bryant is liable for murder, even though he never fired a gun, on a theory of vicarious liability, Williams was liable for murder, regardless of the theory used to reach that result. Section 1111 defines accomplice by as one "who is liable to prosecution for the identical offense." It does not require unanimity of theory.

Indeed, Appellant was not the shooter of Loretha and Chemise. Likewise, as to Brown and Armstrong, as between Wheeler, Settle, and Appellant, it was not known who the actual shooter was. Therefore, Appellant's entire liability for those crimes derived from his aider and abettor status.

Appellant was convicted of second-degree murder. Williams was liable for second-degree murder. The fact that Williams was liable as an aider and abettor to the drug charge does not mean he was not an accomplice. Appellant maintains that Williams was an accomplice because he followed directions and actually aided in the murder itself. However, Williams's culpability as a result of his participation in the drug trade is offered as an alternative theory should this Court fail to recognize the theory once also espoused by the prosecution (*ante*, at p. 2-3), that Williams is liable for the murders because he was an actual participant in the crimes.

If Williams was a possible accomplice to second-degree murder, which Respondent seems to concede, he must be viewed as an accomplice to all counts, since it is absurdly impossible for the jury to view his testimony with distrust as to counts 1 and 2, and accept his testimony with full faith and credit as to Counts 3 and 4.

Next, Respondent fails to understand Appellant's arguments regarding the fortuity of severing the counts (AOB 57-59), arguing that the defense requested the severance and therefore it was not "fortuitous." (RB 364.) Respondent does not address Appellant's argument that a party's status, in this case, whether Williams was an accomplice, should have been determined based on what he did, rather than on an extraordinary event, an administrative case management decision that determined the details of the severance that separated that charge.

Appellant's argument illustrated that if Williams was an accomplice to some offenses with which both he and Appellant were charged, the fact that some of those counts were ultimately severed was fortuitous in that it was done not for any legal reason, but as a matter of case management. If Bryant and Williams had escaped and never been arrested, if the District Attorney had not elected to try 12 people at the same time, thereby making the case smaller from the start, if the court severed the other defendants, but had not severed Count 7, the narcotics conspiracy, if another judge ruled on the severance and split the case along different lines, if any number of normal events had or had not occurred Appellant may very well have been tried in a case where the narcotics trafficking offense, Count 7, was not severed.

Even if the defense did request *a* severance, requests of severances are often denied. It was a twist of fate, an anomaly, and a fortuity that in this case Count 7 was severed. The significance of this fact is that had this not occurred, Williams unquestionably would be an accomplice to one of the counts for which Appellant was being tried. In such a case, it would be impossible for the jury to separate his credibility along accomplice/non-accomplice lines depending on the facts to which he was testifying. He would have been viewed as an accomplice.

Additionally, Appellant's Opening Brief addressed the issue regarding the trial court's denial of Appellant's judgment of acquittal motion pursuant to section 1118.1 because it believed that an accomplice had to be "guilty" of the same offenses as the defendant. Respondent recognizes the fact that the court made this

statement. However, in an effort to reconcile the trial court's language with the correct standard of "charged with the same offense," Respondent argues that the court was merely using "short-hand," and when it stated "guilty" it really meant "charged with the same offense." (RB 365.) For obvious reasons, this contention must be rejected.

First, it is clear that the court meant exactly what it stated. The court's comment was made just after the defense asked the court to take judicial notice of the fact that the prosecution filed the same charges against Williams that it had filed against Appellant, explaining the test of an accomplice is "liable to prosecution." (108 RT 14446-14447) The court rejected the argument that Williams was an accomplice merely because he was charged in the offense, stating three times that an accomplice is someone *who is also guilty* of the offense for which the defendant is charged. (108 RT 14448-14449 emphasis added)

Secondly, there is no authority for Respondent or this Court to interpret the words of the trial court in a manner that drastically changes the meaning and legal ramifications of the words spoken. Nor is Respondent in a position to read the court's mind. If the court repeatedly stated that an accomplice is someone who is guilty of the same offense, there is no reason to assume that something else was meant by the court's words.

Ironically, as previously noted, Respondent argues that Williams is not an accomplice because he said he heard a "gun" and not "shotgun," the actual weapon fired in the bathroom. While seeming to tie Williams's status as a result of the exact words that Williams uttered when interviewed by the police, Respondent then argues that the trial judge should not be taken at his word, but that a much wider degree of interpretation should be allowed for such a normally, highly articulate jurist.

Respondent argues that Williams being named as a defendant is not dispositive of his accomplice status. Respondent cites to *People v. Gordon* (1973) 10 Cal.3d 460, to reach this conclusion. But, this conclusion is based on faulty reason-

ing in that *People v. Gordon* rests on a prior decision made sixty years ago in *People v. Lawson* (1952) 114 Cal.App.2d 217, that *never discussed the relevant statutory language* and came to a conclusion that is in fact contrary to that statutory language.

In *Lawson*, the person that the defendant claimed was an accomplice was also charged with the same offense but was acquitted in a joint trial. With no further analysis, the court stated "[t]hat the fact that two defendants are jointly charged with a crime does not determine the question as to whether they are in fact and in law accomplices. *And a verdict of not guilty as to one defendant is a finding of fact that he was not an accomplice* of another defendant convicted of the same crime with which both were charged." (*Id.* at 220, italics added.)

Lawson relied on prior cases that reached the same conclusion. (E.g. *People v. Morgan* (1948) 87 Cal.App.2d 674, 680 – a jury finding that a co-defendant was not guilty is a determination that the co-defendant was not an accomplice.) However, Appellant contends that reliance on *Lawson* is in error because the fact of an acquittal merely shows that the jury may have had a reasonable doubt as to that defendant. As did Appellant's trial judge, this reasoning equates "guilty" with accomplice status. Thus, if a person is found not guilty, as was the case in *Lawson*, he is precluded from being an accomplice regardless of the facts. Obviously, even Respondent's re-interpretation of the trial court's language recognizes this should not be the test. Indeed, it is contrary to the statutory definition.

The statutory language mandates that an accomplice is a person *who is liable to prosecution*. A person may be liable to prosecution, and yet may ultimately be acquitted. The fact that the jury had a reasonable doubt is not the same as saying the person was not properly charged. If that were the standard, every acquittal would result in a cause of action for malicious prosecution, as it would demonstrate that the person was not initially subject to a legitimate prosecution.

Having achieved this erroneous result, after *Lawson*, in *People v. Williams* (1970) 10 Cal.App.3d 638, with no further analysis, and citing *Lawson*, the court

noted that although the witness was indicted along with the defendant, this fact "alone and as a matter of law" does not establish that he is an accomplice. (*Id.* at 641.) Later, in *People v. Gordon*, *supra*, 10 Cal.3d 460, and again with no further analysis, this court cited *Williams* for this proposition. (*Id.* at 467.) As a result, the rule that having been charged with the same crime is not enough to make one an accomplice is based on a case that expressly held that a *conviction* is a necessary condition of accomplice status, a case that did not discuss the relevant statutory language and is contrary to that language.

The express language of the accomplice statute, section 1111, provides that an accomplice is someone who is liable to prosecution for the same offense. To hold that an acquittal precludes accomplice status abrogates the legislative language.

Rather, the proper test is the one articulated by this Court in the case of *People v. Rodriguez* (1986) 42 Cal.3d 730 where it wascourt explained "liable to prosecution" means "properly liable," requiring "probable cause" to believe that the person committed the offense . (*Id.* at 759.) This is more in line with the purpose of the accomplice rule that requires corroboration because the person himself *may* be tried for the offense, creating the motive to falsify information. The fact that he was not tried because he received the benefit should not bolster his credibility.

In this case, Williams was formally charged with the exact same crimes and special circumstances as Appellant. (18 CT 4968-4973.) Thus, unless the prosecution was acting in bad faith, he was not only "liable" to prosecution for the murders, he *was* prosecuted, a prosecution which concluded when the prosecutor made a strategic decision to grant him immunity in exchange for his testimony. To regard Williams as a "non-accomplice" renders the express language of section 1111 meaningless

The absurdity of holding that a person is not an accomplice by reason of an acquittal is illustrated by this case. Appellant was acquitted of two of the counts of first-degree murder when the jury found him guilty of second-degree murder.

Nonetheless, it would be illogical to argue he is not an accomplice with Bryant and Wheeler as to all of the counts. However, this is the result that would be achieved if the analysis provided in the line of cases adopting the rule in *Gordon* were followed.

Likewise, Settle was a co-defendant throughout the trial, although he was eventually convicted of only manslaughter when he entered a guilty plea after the jury deadlocked on first-degree murder. Indeed, necessarily inherent in the trial court's acceptance of Settle's guilty plea is the acknowledgment by the trial court and prosecution that Settle was involved in the murders. There are no possible actions, which Settle could have engaged in that would support his manslaughter conviction and not subject him to liability for the murders. His conviction for manslaughter, in lieu of being re-tried for murder, was a fluke based solely on the People's decision regarding the cost effectiveness of not retrying this case.

Settle's status as an accomplice should be determined by the facts of the case and his actions, not by extrinsic matters such as the People's decision to economize and not retry the case. However, under the *Gordon* rationale, Settle would not be an accomplice.

Furthermore, there is an important distinction between this case and the line of cases adopting the rule in *Gordon*; in those cases the suspected accomplice was actually tried and acquitted. Therefore, even assuming arguendo, that an *acquittal*, the distinguishing fact of *Lawson*, precludes one from being an accomplice, at least in those cases there was a determination that the suspected accomplice was not guilty. Here, there never was such a determination because the prosecution withdrew the charges to obtain the testimony of the potential accomplice. Therefore, the very determination which Appellant seeks – whether Williams was an accomplice - is prevented by the tactical moves of the prosecution which has removed the issue of the guilt of Williams from the consideration of the jury.

While this may have been a valid tactical move on the part of the prosecution, it should not be allowed to become the conclusive determination of the "non-guilt" of Williams for purposes of determining accomplice liability. This type of

conduct should not be used as an excuse to overcome important procedural rights. As the United States Supreme Court recognized in *Davis v. Wechsler* (1923) 263 U.S. 22:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. (*id.* at 24, quoted in *Lee v. Kemna* (2002) 534 U.S. 362, 376

To allow the prosecution to advocate the view that Williams cannot be considered to be an accomplice because he was not convicted for the same offenses as Appellant, and yet, at the same time, give the prosecution discretion to *not try* Williams, in the first place, puts Appellant in an unfair position of being forced to prove something which has been rendered impossible to prove, not by reason of its lack of existence, but, rather, by the tactics of the prosecution. As *Lee* teaches, creating this type of procedural minefield can result in the denial of the right to due process of law.

In this case, Appellant should not be precluded from arguing that Williams was an accomplice and thus denied due process, based on the prosecution's procedural maneuvers, which ultimately resulted in Williams never being tried. Furthermore, even if Williams being charged is not "dispositive," as Respondent claims, Appellant submits that this fact, at a minimum, should be given significant consideration in determining his accomplice status, since this factor is closer to the intent of the legislative language than is a requirement of a conviction.

Here, Williams was a capital defendant who participated in the running of the drug cartel. He was present and engaged in the business on the day of the murders. Knowing that something was going to happen involving guns, he started helping Bryant achieve his criminal purpose. When people were test firing guns and walking around with weapons, he followed directions that assisted in the crime. Even while the crime was going on and the shots were being fired, Williams continued to follow directions that furthered the completion of the crime.

As noted in Appellant's Opening Brief, had Williams exercised his right to remain silent and his version of the events was never told, a version that must be taken with a grain of salt because of the self-serving motive behind his statements, the very purpose of the accomplice rule, Williams undoubtedly would have been convicted, as a member of the cartel leaving the scene of the murder. (AOB 62.)

Finally, Appellant has presented two alternate theories for Williams's liability in this case – liability based on his participation in the narcotics business and liability for his actual participation in the murders by following Bryant's instructions when he knew the crime was occurring. This court does not have to adopt both of these theories in order to find that Williams was an accomplice. Rather, if *either* of these theories is adopted, the result would be a finding that Williams acted as an accomplice.

In summary, Appellant submits that in light of these facts, Williams was liable to prosecution for the same offenses for which Appellant was convicted and accordingly, must be regarded as an accomplice.

B. THE CONVICTION MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CORROBORATE ACCOMPLICE TESTIMONY

Respondent contends that even if Williams was an accomplice as a matter of law, the failure of the trial court to recognize this fact was harmless because there was sufficient corroborative evidence. (RB 365-366.) As to Appellant Smith, Respondent argues corroboration of Williams's testimony can be found in two items of evidence: the shooting of Keith Curry; and the telephone calls between Appellant, Armstrong, and the other defendants. (RB 371-377.)

Respondent's argument is flawed for two reasons:

First, neither of these two items are the type of evidence that could be deemed sufficient corroboration because neither of them connected Appellant to the crime. Respondent demonstrates a lack of understanding as to the nature of

evidence required to corroborate accomplice testimony. Under the express statutory language, corroborative evidence must connect the defendant to the offense, not just to the other parties, which the evidence in this case failed to do. (Pen. Code § 1111.) Further, as discussed below, the Keith Curry shooting evidence was improperly admitted.

Second, even assuming arguendo that there was sufficient corroboration, there are other consequences to accomplice status, which would have likely affected the outcome in this case. Thus, apart from the issue of corroboration, Appellant was adversely affected by the failure of the court to instruct the jury that Williams was an accomplice.

1. Corroborative Evidence Must Connect The Defendant To The Crime

Initially, it must be re-emphasized that in ruling on Appellant's motion to dismiss, the trial court unmistakably recognized the fact that the other evidence in the case did not connect Appellant to the offense, and that if Williams was deemed an accomplice the jury would have to acquit. (108 RT 14457-14458.) The trial court's opinion was based on the court's clearly expressed belief that absent the testimony of Williams there was no evidence connecting Appellant to the offense, and without Williams' s testimony there was insufficient evidence to believe that Appellant was involved in the crimes. (108 RT 14456-14458.)

In California, the rule has long been established that corroborating evidence must connect the defendant to the offense. (*People v. Davis* (1903) 210 Cal. 540, 555.) The requirement that the corroborative evidence connect the defendant to the crime is not a matter of judicial construction or interpretation, but derives from the express statutory language of section 1111, which has had the same provision since its adoption as a part of the Criminal Practice Act in 1851. (*People v. Kempley* (1928) 205 Cal. 441, 456.)

Section 1111 requires *more* than the fact that the evidence tends to prove the defendant committed the crime. This is the definition of relevance under Evi-

dence Code section 210. The fact that Appellant knew and called Bryant has a tendency in reason to make it more likely that he committed the crime than if it could not be shown that he knew or was in touch with Bryant. But, section 1111 requires more than simply a tendency in reason. By its very language, it requires that the corroborative evidence actually "connect the defendant with the commission of the offense." (Pen. Code § 1111.)

A reviewing court must eliminate from consideration the accomplice testimony and then determine whether the corroborative evidence has a substantial connection *to the crime*. (*Kemply*, *supra*, at 457-458.) If the corroborating evidence requires the testimony of the accomplice to give it meaning, it is not sufficient. (*People v. Davis*, *supra*, 210 Cal. *Id.* at 554-555.)

The requirement that the evidence connect the defendant to the crime is an aspect of the related rule that merely showing association with other people involved in the crime is not sufficient corroboration. (*People v. Robinson* (1964) 61 Cal.2d 373, 400; AOB at p. 64.) Case law demonstrates this principle by explaining that if a defendant's fingerprints are found at the scene of the crime, or if a defendant possessed a gun similar to the one used in the crime, or if a defendant possessed property related to the crime, these facts relate to the offense itself and thus constitute corroboration. (See *People v. Andrews* (1989) 49 Cal.3d 200, 211, *People v. Narvaez* (2002) 104 Cal.App. 4th 1295, 1305, *People v. Trujillo* (1948) 32 Cal.2d 105; *People v. Williams* (1997) 16 Cal.4th 635.)

Recently, in *People v. Boyer* (2006) 38 Cal.4th 412, this Court held that there was "ample corroboration" connecting the defendant to the crime where, along with other evidence, the defendant made a comment hinting he had been involved in the murder and blood from pants recovered from defendant's house contained stains that matched both of the victims' blood. Clearly, the victim's blood on the clothes of a defendant connects him *to the crime* in a manner that is substantially different from the fact that the defendant had made telephone calls to another person charged in the offense, the situation here.

Before considering whether the telephone calls constituted evidence implicating Appellant, Williams's testimony must first be disregarded. If the telephone calls were the only evidence the prosecution possessed, the calls alone would not connect Appellant *to the crime.* The trial court reached this obvious conclusion when it determined that the other evidence in the case, including the telephone calls, did not connect Appellant to the offense. (108 RT 14457-14458.)

In this case, if Williams's accomplice testimony is eliminated and reliance is placed solely on the acts cited to by Respondent, all that is left is the fact that Appellant committed an act of violence for Bryant in the past and that around the time of the murder Appellant was in phone contact with people who were involved in the murder. Neither of these facts sufficiently "connect" Appellant to the offense in the way that he would be sufficiently connected to the offense had he owned a gun similar to that used in the crime, had he owned property involved in the crime, or had Anderson's blood been found on Appellant's clothes, such facts as required by the court in *Andrews*, *Narvaez*, or *Boyer*.

A comparison of the acts Respondent cites to as corroboration for Wheeler and Bryant as opposed to those Respondent cites to regarding Appellant, perfectly illustrates this principle of how corroboration must be related to the offense.

For example, as to Bryant, Respondent explains that one of the associates of the Bryant organization, Ladell Player, made a statement that a few days after the murder he told Bryant he had been by the Wheeler Avenue residence and had seen the police tape, and Bryant replied that they had some problems, but they were taken care of. (RB 366.) This is an admission connecting Bryant to the events at the crime scene, that is, he admitted "problems" with the victims, which was the claimed motive for the murder. Indeed, stripped of its cryptic nature, Bryant made an admission to the offense by saying that he had problems with Armstrong shaking him down, but he resolved those problems by killing him.

Similarly, Respondent notes that a car owned by Bryant was associated with the murder in that it was seen at Wheeler Avenue address right after the mur-

der, and when Bryant traded it in, blood was found in the car. Also, a bullet at the crime scene was fired from a gun found at Bryant's house. (RB 367.)

Bryant's car with blood in it, seen at the murder location, and a gun that was used in the murder being found at his house connected him to the crime and not just to the other defendants. This is even stronger evidence than the corroborative evidence required in *People v. Andrew*, *supra*, 49 Cal.3d 200, where the ownership of a *similar* gun to the one used in the crime was sufficient. Here, Bryant was connected with the very gun used.

Similarly, as to Wheeler, Respondent explains that three people saw a person matching Wheeler's description firing the shots into the Toyota and/or driving off in the Toyota with Anderson's body. (RB 369.) Likewise, Wheeler owned the same type of gun used to kill Anderson, a fact deemed sufficient corroboration under *Andrew.* (RB 370.) Similarly, Wheeler's fingerprints were found at the murder scene. (RB 370.) Being identified by witnesses as having been the shooter, owning the type of gun used, and having been at the murder scene connects Wheeler *to the crime*, and not only to the other parties. Undoubtedly, without guidance from Williams's testimony, a jury could look at this evidence and believe Wheeler was connected to the offense.

On the other hand, the fact that Appellant was in contact with the people involved in the crime was not sufficient, *without the testimony of Williams*, for the jury to conclude that Appellant was involved.

Two important principles underlie the necessity of having corroboration connect the defendant to the crime itself and not merely to the parties or the scene of the crime. The first is the recognition that the accomplice's first hand knowledge of the facts of the crime allows for the construction of plausible falsehoods not easily disproved. (*People v. Guiuan* (1998) 18 Cal.4th 558, 575 (Kennard, J., concurring.) The second is the danger that the accomplice will make up evidence to inculpate another person in order to obtain a benefit from the prosecution.

(*Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1083, 1124.)

The importance of requiring that the corroboration connect the defendant to the crime itself, and not merely to the parties or the scene of the crime, guarantees that inherently unreliable accomplice testimony that is shrouded with an aura of credibility because it is viewed as insider information, is not used to convict people on a prosecution's case that is built primarily on such a shaky foundation. If the contrary were allowed, the accomplice who needs souls to exchange for his own could ensnare many potentially innocent people.

The instant case accurately portrays the danger created by relying improperly on a person's connection to the parties and relying on insufficient ties to the crime scene rather than a sufficiently legal connection *to the crime.* Detective Lambert estimated that the Bryant family organization employed between 125 and 200 people. (84 RT 9891, 102 RT 13421.) All 125-200 of these people were connected to the parties through employment with the Bryants. Many of them also had connections to the scene of the crime merely by going to the Wheeler Avenue residence to conduct their drug business. Williams would have known many of these people from his time at the Wheeler Avenue house or from hanging around the pool hall, where members of the organization congregated. Indeed, the fingerprints of some of these people associated with the Bryant family were found at the Wheeler Avenue location, including William Settle, Antonio Johnson, Anthony Arceneaux, and Nash Newbill. (101RT 13280-13287, 13280-13281.) All of these were defendants in this case, and Johnson and Newbill were charged with the murders and were eligible for the death penalty.

If the improper measure of corroboration as advanced by Respondent were employed, then any one of these 125 to 200 individuals, if named by Williams, could have ended up on death row based on Williams's testimony plus evidence that they were associates of the family and/or their prints were found at the scene. The thought that instead of having their cases dismissed, any one of these indi-

viduals could be in Appellant's place right now based on the testimony of a character as unsavory as Williams coupled with other paltry and tenuous evidence, should give one great pause.

The insurance against an accomplice entrapping an innocent person is the requirement that the evidence does more than just prove the person named by the accomplice is an associate of other parties. Without that insurance, Williams could hand over any one of the 125 to 200 people working for the family and then the state could build a murder case based simply based on Williams's testimony and their unrelated association to the Bryant family and the crime scene.

Citing *People v. Bunyard* (1988) 45 Cal.3d 1189 and *People v. Heishman* (1988) 45 Cal.3d 147, Respondent explains that this Court has held telephone calls can be sufficient corroboration for accomplice testimony. The problem with this contention is two-fold. First, as will be explained, those cases are distinguishable from the instant case. Second, Respondent asks this court to rely on dicta reached in prior cases as a basis for finding sufficient corroboration in this case; a finding that would be contrary to the statutory language requiring corroborative evidence connect Appellant to the crime, and not merely to the parties.

In *Bunyard*, the court found corroboration for the accomplice testimony in the testimony of another person, Johnson, who the defendant had tried to hire for the murders, although the Court went on to indicate that there were "*many other* corroborative factors" in addition to Johnson's testimony, *including* the telephone calls alluded to by Respondent. (*Id.* at 1208.) As a result, because there was other corroborative evidence, it was unnecessary to the holding of *Bunyard* that the calls themselves be sufficient corroboration. Therefore, the statement to that effect is dicta.

As Chief Justice Marshall explained in *Cohens v. Virginia* (1821) 19 U.S. 264, 399:

> It is a maxim not be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those

> expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but the possible bearing on all other cases is seldom completely investigated.

Therefore, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (*Webster v. Fall* (1925) 266 U.S. 507, 511: quoted in *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127-128, fn. 2; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 415.)

Similarly, in *Heishman* the defendant had been arrested for raping the victim, whom he was later alleged to have killed in order to prevent her from testifying against him. The defendant asked an accomplice to make calls to the community college where the victim was a student in an effort to get the victim's class schedule. The court noted two items of corroboration, namely the defendant's motive and the telephone records showing phone calls between the defendant and the accomplice and the community college. (*Id.* at 164.) Additionally, the markings on the fatal bullets were consistent with those produced by a gun similar to a gun another witness testified she loaned to the accomplice. Furthermore, another witness selected the defendant's car as the one being driven away from the scene immediately after the murder. (*Id.* at 157, 161.)

Thus, in Hieshman *in addition to the telephone calls*, there was evidence connecting the defendant to the crime in that a motive for the crime was proven, a possible murder weapon was tied to the accomplice, and his car was observed at the scene of the crime. As a result, the statement by the Court that phone calls could be sufficient corroboration is dicta, not essential in any way to the resolution of the case.

Second, in *Heishman*, there was no other apparent reason for the defendant or the accomplice to be making the phone calls to three of the local community colleges. Therefore, the fact of these phone calls did more than merely connect the defendant to the other parties. It tended to connect him to the facts of the crime. Thus, *Heishman* is not contrary to the well-established rule set forth above in *People v. Robinson*, *supra*, 61 Cal.2d 373, that the corroborative evidence must connect the defendant to the crime and not just to the parties.

As shown, because there was other corroborating evidence in *Heishman* and *Bunyard*, the pronouncement regarding the phone calls was not essential to the resolution of the case and should be regarded as dicta.

In contrast to *Heishman* and *Bunyard*, here, an integral part of the prosecution's case was the theory that Appellant was friends with all of the parties and had done business out of the Wheeler Avenue residence. Thus, apart from any involvement in the murder, there were innocent reasons for his phone calls. As noted in the Statement of the Facts, it appeared that Armstrong had been living with Appellant before he was arrested. Furthermore, Appellant is related to Bryant by marriage. Finally, if Appellant was involved in the drug trade with Bryant, and if he had been to the Wheeler Avenue house to get drugs, it would not be surprising to find that Appellant made phone calls to all of the phone numbers in question.

Thus, the defense accurately argued that the phone calls at most showed that Appellant was an accomplice to drug sales and his association with the parties was separate and apart from any involvement in this case. (108 RT 14451-14452.) Consequently, the fact that he made telephone calls to these locations does not connect him to this particular crime, but only to other people involved, and is therefore not corroborative evidence under California case law. (See *Robinson, supra*, 61 Cal.2d 373.)

Finally, the evidence of the Keith Curry shooting was not evidence that could be used to corroborate accomplice testimony. First, as discussed below and

further detailed in Appellant's Opening Brief, the Keith Curry shooting evidence was improperly admitted. (*Post*, at 72-74, AOB at 1613-168.) Secondly, even assuming that evidence was properly admitted it did not corroborate the accomplice testimony because it merely connected Appellant to the other parties (Bryant) and not to the offense.

The main use of the Curry evidence, as argued by the prosecution, and as the trial court instructed the jury, was "to prove the relationship between Mr. Bryant and Mr. [Appellant] Smith in this case." (91 RT 11314.) Thus, the very purpose of this evidence was *not* to connect Appellant to the crime, but to show his connection and relationship to Bryant, from which the prosecution hoped an inference of guilt could be drawn. However, without Williams's testimony all that is left is the fact that Appellant was one of the people who did Bryant's dirty work, with no connection to this particular piece of business.

In summary, because neither the Curry evidence nor the phone calls connected Appellant to the crime, and merely connected him to the parties, this evidence was insufficient to corroborate the accomplice testimony.

2. Other Consequences Of Accomplice Status.

The second flaw of Respondent's argument is its conclusion that the error of failing to instruct the jury that Williams was an accomplice was harmless because of the existence of corroborating evidence. This conclusion overlooks the fact that there are other consequences to accomplice status besides the requirement of corroborating evidence. If Appellant was deprived of other advantages as a result of failing to instruct the jury as to Williams's accomplice status, he was still prejudiced by this error, even if, arguably, some corroboration was present.

Failing to appropriately instruct the jury was harmful to and put Appellant at a disadvantage because if the jury had properly been instructed that Williams was an accomplice, they would have been further instructed that his testimony was to be viewed with caution. (53 CT 15516). Thus, had the jury been properly informed to view Williams's testimony with caution, it is reasonable that a juror

looking at the total picture could vote to acquit based on a determination that: (1) Williams's testimony could not be trusted; and (2) only "slight" corroboration of his testimony was presented (*post*, at p. 45-47). A juror could have concluded that based on a totality of this evidence a reasonable doubt as to Appellant's guilt existed.

Further, if the jury had been appropriately instructed that Williams was an accomplice, a juror could have concluded that Williams's testimony was suspect and the remaining evidence did not tie Appellant to the offense. A conclusion of this sort would not have been unreasonable, as shown by the fact that the trial court reached the same conclusion. (*ante*, at p. 20.) Had Appellant's jurors been given the opportunity to consider Williams's testimony with caution, it is reasonable that any one of them could have voted to acquit Appellant.

On the other hand, the trial court's failure to appropriately instruct the jury that Williams was an accomplice gave the jury no ability to properly scrutinize his testimony. This failure alone made it more likely that the jury would view Williams's testimony as credible and further conclude there was some evidence to back him up, even if that evidence was dubious.

In short, informing the jury that Williams was an accomplice had ramifications beyond the requirement of corroboration. Therefore, even if slight corroboration existed, Appellant was prejudiced by the failure to inform the jury of the fact that Williams was an accomplice and thus his testimony should have been viewed with caution.

C. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE TANNIS CURRY FROM THE CALJIC NO. 2.11.5 INSTRUCTION GIVEN TO THE JURY

CALJIC No. 2.11.5 instructed the jury, in part, to not consider why Tannis Curry was not being prosecuted for her actions. The jury was told that this instruction did not apply to witness Williams; and therefore, the jury could consider

the fact that Williams testified under a grant of immunity. The trial court erred in telling the jury that they *could* apply the instruction to Tannis Curry.

Specifically, the jury should have been instructed that CALJIC No. 2.11.5 did not apply to Tannis, because like Williams, she was an accomplice who testified under a grant of immunity. Instead, the CALJIC 2.11.5 instruction effectively (and erroneously) told the jury that Tannis Curry was not an accomplice, that the jury should not consider why she was not being tried, and that the jury should not consider the grant of immunity provided to Tannis Curry in reaching its determination as to her credibility. This was improper.

As discussed in Appellant's Opening Brief (AOB 96), when a possible accomplice testifies under a grant of immunity, the CALJIC 2.11.5 instruction should not be given. Providing this instruction to the jury under this situation sends a contradictory message to the jury, telling them that they cannot consider the very thing that may have induced her testimony, i.e. the grant of immunity. In the alternative, when the instruction is given, possible accomplices, such as Williams and Tannis, should be excluded from the scope of that instruction.

Respondent argues that there was no error in failing to exclude Tannis Curry from consideration of CALJIC 2.11.5 because Tannis was not a possible accomplice. (RB 382.) Respondent disputes Appellant's argument that Tannis Curry was a lure and part of the plot to kill Armstrong, backing out of going to the Wheeler Avenue house at the last moment in order to set up Armstrong. Respondent's current position as set forth in its brief is that Tannis Curry backing out of going to the Wheeler Avenue house had nothing to do with the crime but occurred because she simply did not want to accompany her lover (Armstrong) to meet her ex-husband (Bryant).

The theory advanced by Appellant that Tannis Curry assisted in the crime by luring Armstrong, is not a product of the fevered imagination of appellate counsel. *This was the theory under which the prosecution charged Tannis Curry.* Respondent should be precluded from changing course midstream by now offering

the argument that Tannis Curry was not an accomplice. This argument is transparently factually inconsistent with the prosecution's previous position where it strongly argued before the trial court that the facts indeed showed that Tannis Curry's role was that of an accomplice in the crimes. For several years, the prosecution proceeded under this factual theory *until ultimately the prosecution gave Tannis Curry immunity in exchange for her testimony and dropped all charges against her.* (See 22 CT 6127-6258.)

Evidence of Tannis Curry's guilt, *according to the prosecution*, included the fact that Tannis Curry made numerous contradictory statements to the police, abandoned her child, apartment, and expensive car, and fled within hours of the murder. (22 RT 6253.) The prosecution made it abundantly clear that it believed Tannis Curry was an accomplice and guilty of the crimes even though she may have been surprised that the baby was killed. The prosecution noted:

> that didn't absolve her from liability therefore. *She participated in the plan to kill those people* coming down from up north to take a piece of the Bryant family drug action. *She set the victims up by feeding information to Stan Bryant after placing herself in a position of trust with the victims....* Tannis Curry is liable for the actions of her confederates....*The evidence would be sufficient to go to a jury; certainly it is more than ample to support a reasonable suspicion that defendant Tannis Curry was a co-conspirator and therefore legally responsible for the charges set forth in Counts I – IV* [murder] of the Information. (22 CT 6254, italics added.)

During the Keith Curry shooting admissibility hearings, the prosecution argued the Keith Curry shooting was similar to the Armstrong shooting because Tannis Curry was also with Armstrong before he was shot, pretending to be on his side, and then deserting him to make a phone call setting him up for Bryant. (91 RT 11287.) In the words of the prosecution, "certainly it is more than ample to support a reasonable suspicion that defendant Tannis Curry was a co-conspirator." (22 CT 6254.)

Once the prosecution proceeded on a factual theory that Tannis Curry was an accomplice, it is improper for the Attorney General to now base its appellate

response on a theory that Tannis Curry was not an accomplice. (*Dutra Construction Co.*, 57 Cal.App.4th at 877.) Due process dictates that the prosecution cannot have it both ways.

Assuming arguendo, that without a change in material facts, the prosecution can legally transform its position, its argument fails because factually and legally Tannis Curry was an accomplice and as such, should have been excluded from consideration of CALJIC 2.11.5. Indeed, the fact that Tannis Curry was originally charged as a capital defendant is strong evidence of the fact that she was an accomplice. *People v. Gordon, supra*, 10 Cal.3d 460 was decided incorrectly (*ante*, at pp, 15-17.), and under the statutory definition of an accomplice, Tannis Curry was subject to prosecution *and was prosecuted* for the identical offenses for which Appellant was tried, and therefore was statutorily deemed an accomplice.

In fact, the only reason Tannis Curry was not *actually* tried with Appellant, *as a murder defendant,* was because the case was too big and severance was needed. The court severed all non-capital defendants (i.e. Tannis) from capital defendants (i.e. Appellant). Indeed, had the trial court only severed the non-murder defendants, such as Blayock or Gillon, and decided to keep together all those charged with murder, Tannis Curry and Appellant would have been tried together.

As with Williams, Appellant contends that Tannis Curry's accomplice status should be determined by the evidence of her actions, and not by an unrelated happenstance of how many individuals the District Attorney sought to charge, what defendants were severed in order to make the case more manageable, or how many suspects were arrested.

Arguably, if Tannis Curry was not an accomplice as a matter of law, she was a possible accomplice as a matter of fact. Even if the current version of facts offered by the prosecution is accepted, it is only one possible interpretation of the facts. If another interpretation of facts, as currently argued by Appellant, and previously argued by Respondent, is accepted, the jury could have found Tannis Curry was an accomplice as a matter of fact. As such, the jury should have been

fully informed of Tannis's possible accomplice status so that they could properly evaluate all issues, including her credibility.

Accordingly, Respondent's argument that Tannis Curry should not have been excluded from consideration under CALJIC 2.11.5 is without merit.

Respondent further argues that because there was no instructional error, Appellant's related constitutional argument must fail. (RB 383.) As demonstrated, Respondent's arguments that there was no instructional error are incorrect. Appellant has sufficiently demonstrated the instructional error, and consequently, Appellant has shown that this error raises issues of constitutional concern as discussed in Appellant's Opening Brief. (AOB. 97.)

Respondent also contends that this issue is waived because the defense did not object to this instruction when it was given to the jury. (RB 383.) This overlooks the well-established principle that challenges to jury instructions affecting substantial rights are not waived even if no objection is made at trial. (Penal Code § 1259, see also *People v. Johnson* (2004) 115 Cal.App.4th 1169, 172.)

Furthermore, Respondent's argument in this area, as in other areas where Respondent raises waiver as a bar to this court's consideration of the issues, fails to understand the nature of waiver. A party's failure to object may preclude a party from asserting the issue. However, it is not a bar to the issue being resolved by an appellate court if that court sees a need to resolve the issue. As stated in *People v. Williams* (1998) 17 Cal.4th 148, n. 6:

> In *Scott* [*People v. Scott* (1994) 9 Cal.4th 331], we held only that *a party* cannot raise a "complaint[] about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons ... for the first time on appeal. " (*Id.* at 356.) We did not even purport to consider whether *an appellate court* may address such an issue if it so chooses. Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to "prevent[]" or "correct[]" the claimed error in the trial court (*id.* at 353) does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. (*Id.* at 161.)

Therefore, this Court is not precluded from addressing this issue.

Finally, Respondent argues there was no prejudice from this error. It is respectfully submitted that as to Appellant Smith, Tannis Curry's testimony was crucial. Her testimony was offered in an effort to provide the basis for the evidence of the Keith Curry shooting. (AOB. 163.) This was the prosecution's crucial evidence that it hoped would connect Appellant to the offense, as the "hit man" for the Bryant family.

Furthermore, most of the evidence in the case, including the mountain of evidence regarding other crack houses and other bad acts of the Bryant family, were not relevant to Appellant. Therefore, although Tannis Curry was a minor witness in relation to the entire trial, she was a crucial witness in relation to Appellant.

She also served to confirm the testimony of accomplice Williams. Williams, a shady character who as a drug dealer for the Bryant family continued his life of crime after fleeing to Pennsylvania, and who escaped the death chamber because he gave the prosecution the information they wanted on this case. Even Respondent must admit that Williams is not exactly the type of person who evokes a great sense of character and trust.

In the case against Appellant, Tannis Curry became a crucial witness because, as the trial court believed, she provided the necessary logical foundation for the admission of the Keith Curry shooting evidence. This evidence was the most important evidence purportedly corroborating the testimony of Williams, as it was offered to tie Appellant to Bryant in the role as enforcer. As a result, Tannis was the cornerstone for the most damaging evidence against Appellant. Because of her crucial role in the portion of the trial that related to Appellant Smith, it was crucial that the jury understand her role as an accomplice so as to be able to properly evaluate her credibility.

In summary, the instruction given to the jury failed to perform the function of alerting the jury to the credibility problems potentially inherent in Tannis's tes-

timony. Indeed, the instructions actually directed the jury in a false direction by telling the jury that Williams was the only possible accomplice. Had the jury not been precluded from believing that Tannis was an accomplice, the jury may have viewed her testimony in a less credible light. Because she was a crucial witness in the case against Appellant, Appellant was prejudiced by this instructional error.

Therefore, a reversal of the judgment is required.

D. THE TRIAL COURT ERRED IN REFUSING TO REOPEN JURY DELIBERATIONS, WHEN, AFTER THE JURY RETURNED A VERDICT AGAINST APPELLANT, BUT WHILE THE JURY WAS DELIBERATING AS TO SETTLE, THE JURY HAD QUESTIONS ABOUT ACCOMPLICE STATUS AND REASONABLE DOUBT

The trial court erred in refusing to reopen jury deliberations after Appellant's verdicts were returned. The error occurred when the jury was still deliberating as to codefendant Settle and they sent out questions demonstrating they did not understand crucial legal principles relating to the potential accomplice status of Williams and the concept of reasonable doubt as those concepts related to Appellant and Settle's trial.

As explained in Appellant's Opening Brief, section 1161 provides that when there is a verdict of conviction, in which it appears that the jury has mistaken the law, the court may explain the law and direct the jury to reconsider their verdict. Respondent suggests that the word "may" in section 1161 makes the decision of the trial court discretionary, and reversible only if there was an abuse of discretion. (RB 389.) Even if Respondent's position is true, here, the trial court did abuse its discretion in failing to order that the jury reconsider Appellant's verdicts.

First, the jurors sent out a question asking: "If one is charged with a crime *but not brought to trial* is he automatically an accomplice?" (53 CT 15439 emphasis added.) The trial court determined that this question addressed either Williams or Settle's role in the crimes. (RB 386.) This was error. The language of the ju-

rors' question coupled with the evidence presented at trial makes clear that the question was directed to only Williams's status as an accomplice.

The jurors' question *cannot* be directed to Settle, *because Settle was brought to trial, and Williams was not.* To reach its conclusion that the jurors' question applied to *either* Williams or Settle, the trial court had to ignore the critical portion of the jurors' question that limited its inquiry to the person(s) who were charged *but not brought to trial.* The trial court's effort to broaden the scope of the jurors' question was in clear conflict with the evidence and was an abuse of its discretion.

Other questions raised by the jury indicated a pervasive concern and lack of understanding of accomplice-related law. For example, the jurors asked the court: "Can there be aiding and abetting after the crime was committed?" (53 CT 15440.) This jury question makes obvious that the jury did not understand whether *Williams* could be deemed an accomplice if the only act he performed was after the murder, i.e., acting as a "scout," that is, checking to see if anyone on the street noticed the noise.

Factually Settle's role in the crime was significant. After the shooting, Williams "scouted out" the neighborhood at Bryant's request and Settle drove the bodies away. Both of these "after the fact" activities of scouting the neighborhood and driving the bodies away derived solely from Williams's testimony. However, the evidence showed that Settle's involvement *prior* to the murder was substantial, including the fact that he was walking around the house with the shotgun *before* the murder (97 RT 12305-12306), and arguably his role as one of the actual shooters was clear. If the jury determined Settle was present, they also had to have concluded he did far more than drive the bodies away. Therefore, as a matter of logic, the jurors' question could not have been directed towards Settle's status.

The trial court failed to recognize that the jurors' questions and confusion related to Appellant's case, as well as Settle's case, because as noted by Respondent, the court believed the jury was merely having a dispute as to whether there

was sufficient corroboration of evidence against Settle. (RB 388.) The court's belief was unfounded since the jurors' questions did not address the principles of corroboration, but rather were directed specifically at questions relating to the determination of accomplice status.

After raising the questions of Williams's accomplice status based on his actions after the murder, the court correctly explained to the jury that was now deliberating as to Settle's fate that Williams could be an accomplice if he agreed to the act in question before the crime, in order to facilitate the crime. (126 RT 17105I - 17105J) Prior to this answer, the jury did not understand this concept, or it would not have asked the question. Unfortunately, the jury did not ask and the trial court did not clear up the jury's confusion about accomplice status until after Appellant's verdicts were returned. Thus, when deliberating as to Appellant's guilt, the jury was operating under an ignorance of the law and an incorrect belief in what was necessary to determine accomplice status. As such, when deliberating as to Appellant's guilt, the jury may have excluded Williams from the realm of accomplice status based on the erroneous ground that Williams's criminal action took place after the murder.

However, based on the court's response to the jurors' question submitted after Appellant's verdicts were returned, had the jury considered this response during their deliberations of Appellant's culpability, it is likely that at least one juror could have concluded that Williams *was* an accomplice and thereby would have voted to acquit Appellant

When deliberating Appellant's fate, if the jury, based on its failure to understand the law, thought Williams was not an accomplice, corroboration would not have been necessary and the jury could have reached a conclusion of conviction based on Williams's testimony alone. However, further definition and instruction from the court in determining accomplice status changed the scope of the deliberative process during Settle's deliberations. Unlike the deliberations in Appellant's case, during deliberations in Settle's case, the jury now understood that it

could deem Williams an accomplice based on the facts that showed before the murders Williams received (and accepted) instructions to scope out the area and move the car, acts which he accomplished after the murders. With this new understanding, the jury deadlocked as to Settle's guilt.

It was crucial that the jury understand all aspects of Williams's accomplice status when deliberating Appellant's guilt. This is especially true given the lack of corroboration as to Appellant, as acknowledged by the trial court. (108 RT 14456-14457, 14457-14458, 14458.) Because Appellant's jury did not have its understanding of accomplice liability cleared up until after returning a verdict against Appellant, the jury could have convicted Appellant based on the testimony of Williams alone, and only later learned – while deliberating against Settle – that it was mistaken in finding that Williams was not an accomplice. The jury's failure to understand the law during Appellant's deliberations was not limited to its failure to understand the legal elements necessary to establish accomplice status. The jury, after Appellant's verdict and during Settle's deliberations, raised additional questions. These questions related not to whether there was corroboration as to Settle, but to the relationship of reasonable doubt and corroboration, again, an area at the heart of Appellant's defense. Thus, during Appellant's deliberations the jury operated under confusion over the fundamental principle of reasonable doubt. (53 CT 154411, 126 RT 17105M.)

Respondent is incorrect it its assertion that these jury questions related only to corroboration for Settle's guilt and did not relate to the concept of reasonable doubt itself. Two of the questions that the jury had were:

> A defendant cannot be guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence. Doesn't this constitute reasonable doubt if there is no corroboration of same in your mind?
> If you have reasonable doubt, you are required to vote not guilty. Is that the law? (53 CT 15441, 126 RT 17105N.)

Both of these questions clearly illustrate confusion regarding the meaning and role of reasonable doubt. For the jury to proceed with deliberations against Appellant not understanding the principle reflected in this question, allowed the jury to convict Appellant without reaching the "beyond a reasonable doubt" standard required by the Due Process Clause.

Respondent remarks that the jury's question regarding reasonable doubt was not indicative of a general misunderstanding of the law, but only demonstrated that one juror had doubts as to the guilt of Settle. Assuming this is a true statement, it does nothing to ameliorate the injustice suffered by Appellant that occurred when his jury deliberated at a time when they were unsure of a fundamental principle of law, that is, reasonable doubt. If true that it was one juror who was not clear as to the concept of reasonable doubt, irrefutably, that juror did not understand the law when it decided Appellant's fate.

Both the federal and the state constitutions guarantee that a defendant is entitled to be tried by twelve, not eleven, impartial and unprejudiced jurors. Thus, a "conviction cannot stand if even a single juror has been improperly influenced." (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

When, as in this case, the jury questioned the meaning of crucial principles of law, Penal Code section 1138 imposes on the trial court "a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (*People v. Huggins* (2006) 38 Cal.4th 175, 261.)

Respondent further contends that section 1161 (verdict of conviction resulting after jury mistakes the law, court may explain the law and direct the jury to reconsider their verdict) is limited to situations where the verdict itself demonstrates the jury may have mistaken the law. (RB 390.) When there is a good reason to believe that the jury did not understand important and fundamental aspects of the law, as is clear from the jurors' inquiry in this case questioning whether they had to vote not guilty if there was a reasonable doubt, justice would demand that

the curative action of section 1161 not be limited to errors found only in the verdict itself.

Appellant has suffered a terrible injustice by being sentenced to death by a jury who did not express its failure to understand the fundamental concept of reasonable doubt until a few days after rendering a guilty verdict against Appellant.

All courts are invested with inherent powers to do what is needed to achieve justice. Thus, under Code of Civil Procedure section 128, subdivision (a)(8) a court is given the power "to amend and control its process and orders so as to make them conform to law and justice." Subdivision (5) of that section gives a court the power "to control in furtherance of justice... *all* ... persons in *any* manner connected with a judicial proceeding before it, in *every* matter pertaining thereto." Such all inclusive language of "all," "any," and "every" clearly shows a duty on courts to reach a just result by any reasonable means. This Court has stated "We have often recognized the 'inherent powers of the court ... to insure the orderly administration of justice.' [Citations.]" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 266.)

In the normal course of events such a misunderstanding of the law on the part of the jury, the verdict may be the only place where one would see a reflection of its confusion. Normally, the jury is discharged after the verdict, and there is no further communication with the jurors. Even in most multi-defendant and multi-count cases, normally the jury does not return any verdicts until all verdicts are reached, and therefore there would be no possible indication of confusion except for the verdicts. Indeed, in this case, the only reason that partial verdicts were returned was because Juror 77 had medical problems and had to be excused after some verdicts had been reached. This entire procedure was done over the objection of the defense. (125 RT 16895, 16905, 16926-16927, 16928-16929, 16930-16931, 16938-16939-16944.)

Had it not been for the chance event of Juror No. 77 needing medical aid, the deliberations might have continued until verdicts were reached as to all defen-

dants. Had that happened, the jury would not have returned the verdict as to Appellant until after its misunderstanding and confusion over the principles of accomplice status and reasonable doubt had been further defined and corrected by the court. Based on the tenor of the questions, it is very likely that the jury would have reconsidered its decision as to Appellant Smith.

Respondent contends that the result urged by Appellant "would permit reopening deliberations upon a finding that the jurors' *reasons* for voting guilty were incorrect." (RB 390, italics in original), a result that would be in conflict with settled law. Respondent completely misconstrues Appellant's argument. Appellant is not seeking to delve into the reasons *why* the jury voted the way it did. At trial, in making this request, Appellant only sought to make sure that the jury deliberated under a correct understanding of the law. As long as the jury correctly understood the law, which it was obligated to apply, Appellant was not seeking to determine the reasons for the jurors' ultimate decision.

Respondent further contends, "there is nothing in the *verdicts* ... that would indicate the jurors misunderstood the law...," and that Appellant "impermissibly speculate[s]" that the jurors' reasoning was incorrect. (RB at 390, italics in original.) Although there is nothing directly stated in the verdicts, Appellant is not "speculating" that the jurors' reasoning is incorrect. Rather, from the clear tenor of the questions involved there is a strong inference of confusion. When a juror asks a question, it is not speculation to presume that the juror does not know the answer to the question or understand the concepts involved in the answer requested.

Respondent continues by stating that there was nothing demonstrating that the jury misapplied the reasonable doubt or accomplice instructions when deliberating the verdict of the three appealing defendants, but that the questions were an attempt by the jury to break the deadlock as to codefendant Settle. (RBT 390.) Again, the questions the jury raised were questions as to the law; the law that applied equally to all defendants. If the jury were unclear as to the law regarding the

definition of an accomplice, the application of this definition would apply to Appellant's case as well as to Settle's case.

Furthermore, Respondent argues that Settle's case compared to Appellant's case, shows less corroborating evidence linking Settle to the crime. (RB at 390.) Appellant respectfully disagrees. In contrast to the two items cited by Respondent as corroborating evidence against Appellant, namely, the Keith Curry shooting and the telephone calls, the corroborating evidence against Settle was very strong, including but not limited to the following:

Settle predicted the untimely demise of Armstrong, saying that Armstrong would not be around much longer; (81 RT 9278.)

Settle was a narcotics dealer, working for the Bryants; (84 RT 9771-9773.)

Settle attempted to dissuade a witness, Una Distad, from testifying in this case, reflecting a consciousness of guilt; (84 RT 9724-9725, 9734-9735)

One of the Bryant Family's distinct drug houses was in Settle's name; (84 RT 9835, 88 RT 10661-10663, 87 RT 10400-10401, 102 RT 13367-13368.)

Settle admitted supplying the car used in the murder; (122 RT 16542.)

After he was arrested, Settle made an admission that he was the one who "did it;" (104 RT 13360-13361, 13667-13558.) and

Settle's telephone number was in the list of phone numbers found in the Wheeler Avenue residence. (122 RT 16539.) This directly contradicted his testimony that he was not involved in the drug trade, a falsehood from which the jury could draw an inference of a consciousness of guilt.

Furthermore, as argued by Respondent at trial, other corroboration of Settle's guilt included the fact that he committed perjury at trial and that he fled after the crime, both facts from which an inference of guilt could be drawn. (122 RT 16531-16533, 16537-16538.)

In short, there was substantial evidence connecting Settle to the crime itself.

Because Appellant had a compelling interest in having the jury deliberate with a clear and accurate understanding of the law applicable to fundamental principles and crucial issues in the case, the court's refusal to re-open deliberations under section 1161 deprived Appellant of a state right of real substance, thereby violating Appellant's federal and state constitutional rights to trial by jury and due process of law.

Accordingly, the judgment entered below must be reversed.

E. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT AN AIDER AND ABETTOR MAY BE A PRINCIPAL IN THE OFFENSE IF THAT PERSON IS "EQUALLY GUILTY."

The trial court erred in instructing the jury that an aider and abettor may be a principal in the offense if that person is "equally guilty." This instruction had the effect of removing the issue of Williams's status as a principal in the offense from the jury's consideration, thereby depriving Appellant of his right to a trial by jury and to due process of law by lessening the degree of proof required to convict Appellant.

Initially, Respondent contends that this issue is waived because the defense did not object to this instruction when it was given to the jury. (RB 380.) As explained above (*ante*, at p. 33), challenges to jury instructions affecting substantial rights are not waived even if no objection is made at trial. (Penal Code § 1259.)

As explained in Appellant's Opening Brief (AOB at pp. 146-150), Appellant was convicted of two counts of first-degree murder and two counts of second-degree murder.

In addition to the theory espoused by Appellant and the same theory espoused by the prosecution in 1990 (*ante*, at p. 3) that Williams was an actual participant in first-degree murder because of the assistance he gave while the crime was occurring, the jury also could have convicted him of second-degree murder on a "natural and probable" theory because he was engaged in the narcotics business, again a theory with which the prosecution had no dispute. However, if the jury

thought that Williams was only guilty of the second-degree murder, he would have been an accomplice to two of the second-degree murder counts Appellant was convicted of, but not the two counts of first-degree murder. Having been subject to conviction for less serious offenses, he would not be "equally" guilty. Consequently, following instructions to the jury that an aider and abettor may be a principal in the offense if that person is "equally guilty," the jury could believe that Williams was guilty of second-degree murder, but was not an accomplice.

Respondent further argues that even if Williams could be convicted of second-degree murder, the plain meaning of CALJIC No. 3.00 is that direct perpetrators and aiders and abettors are subject to the same criminal liability, and this Court has explained that aiders and abettors are guilty of any foreseeable offense committed by the person he aids and abets. (RB 381.) It is respectfully submitted that this ignores the confusion created by this instruction. Regardless of how this Court explains the correct way to interpret these instructions, taken as a whole, the impact of the instructions as given, is to tell the jury that Williams was not an accomplice unless he was "equally guilty."

Trying to understand the plain meaning of this phrase, a lay juror is likely to understand that if someone is not "equally guilty," i.e., guilty of the identical crimes, he is not aiding and abetting a crime and therefore is not an accomplice. Applying this common sense understanding, a juror could have concluded that Williams was guilty of second-degree murder, but not guilty of first-degree murder, and because Appellant was convicted of both first and second-degree murder, they are not *equally* guilty.

As noted in the Opening Brief (AOB 148-149), the trial court recognized there was no evidence, independent of Williams, connecting Appellant to the crimes, thereby making the correct determination of Williams's status crucial to Appellant's case.

The confusion that this instruction created likely had the effect of lowering the burden of proof, as explained in Appellant's Opening Brief (AOB 149-150.)

Because of the paucity of evidence against Appellant and the crucial role that the issue of accomplice status played, this error cannot be deemed harmless beyond a reasonable doubt, and a reversal of the judgment entered below is required.

F. THE COURT ERRED IN TELLING THE JURY THAT IT COULD CONVICT APPELLANT IF THERE WAS SLIGHT EVIDENCE TO CORROBORATE ACCOMPLICE TESTIMONY

The trial court erred in telling the jury that the evidence needed to corroborate accomplice testimony "is sufficient...even though it is slight and entitled when standing alone, to little consideration." (53 CT 15514.) This improper instruction allowed the jury to convict on a standard lower than the beyond-a-reasonable-doubt standard required for criminal convictions.

Initially, Respondent contends that this issue is waived because the defense did not object to this instruction when it was given to the jury. (RB 378.) This overlooks the well-established principle that challenges to jury instructions affecting substantial rights are not waived even if no objection is made at trial. (Penal Code § 1259, see also *People v. Johnson* (2004) 115 Cal.App.4th 1169, 172.)

Respondent argues that giving this instruction was not error because it is a correct statement of the law. (RB 378, citing *People v. Williams*, *supra*, 16 Cal.4th 635)

In *Williams*, the issue was the sufficiency of the evidence necessary to corroborate the accomplice's testimony. The court found defendant's presence at the murder to be sufficient corroboration. It is true that *Williams* referred to the same instruction, which had been given in that case, with apparent approval. However, for at least two reasons, *Williams* does not provide authority for the use of the instruction in Appellant's case.

First, that approval was implied. The court noted that the instruction was given, although it did not discuss the propriety of that instruction. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute prece-

dents." (*Webster v. Fall* (1925) 266 U.S. 507, 511: quoted in *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127-128, fn. 2; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 415.) Because this was not an issue discussed in *Williams*, the fact that the instruction was mentioned in passing should not be regarded as authority for the correctness of the instruction. The *Williams* Court made a blanket statement regarding the instruction without considering any arguments relating to that instruction being raised in the case, therefore, this Court should not be bound by the unessential dicta of that case on an issue that is actually raised in Appellant's case. (*People v. Seaton* (2001) 26 Cal.4th 598, 653.)

Respondent correctly notes that the federal cases cited by Appellant (*United States v. Gray* (5th Cir. 1980) 626 F.2d 494 and *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254) are not binding on this court. (RB 378.) Nonetheless, federal cases may be persuasive authority, even if not binding. (*People v. Bradley* (1969) 1 Cal.3d 80, 86, 81; *Superbrace, Inc. v. Tidwell* (2004)124 Cal.App.4th 388, 397.) Indeed, even unpublished opinions of the United States District Court may be viewed as persuasive, even if not "precedential" authority. (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777,767, fn. 6.)

As to the merits of the issue, Respondent explains that the federal cases cited by Appellant do not address the instruction given here. It is true that the federal court was not discussing the California instruction, because it was not dealing with a California case. Nonetheless, the principle is applicable. In the federal cases, the jury was told once it found the conspiracy it could convict, with the government needing only to introduce "slight evidence" of a particular defendant's involvement to convict. Here, the jury was told that it could convict if there was slight corroboration. The two situations are analogous. The net result in this case is that if the jury found that Williams was an accomplice, it was allowed to convict with slight evidence. Because accomplice testimony is to be distrusted, this allows for a conviction based partly on untrustworthy evidence combined with slight corroboration. Appellant submits that this does not comport with the reasonable

doubt standard for criminal convictions demanded by the right to due process of law.

Finally, Respondent contends that this instruction only related to "'a collateral factual issue having no direct bearing on any link in the chain of proof of any element' of the charged crimes." (RB 379.) Thus, the issue addressed does not relate to an "element" of the offense. However, the distinction made by Respondent is not of any relevance to the question at hand. As to Appellant Smith, the prosecution's case relied almost exclusively on the testimony of Williams. As explained above, this instruction allowed a conviction based on "suspect plus slight." The fact that this relates to the overall body of evidence that must be present for a conviction, as opposed to the evidence that may relate to one element of the offense, does not change the principal involved and the defect present.

For the foregoing reasons and the reasons explained in Appellant's Opening Brief addressing this issue, Appellant submits that it was error to lower the beyond a reasonable doubt standard required for criminal convictions by telling the jury that the evidence needed to corroborate accomplice testimony was sufficient even if it was "slight." Therefore, the judgment of conviction entered below must be reversed.

G. CONCLUSION

In this case, the issues surrounding Williams and accomplice testimony were crucial to the determination of Appellant's guilt. Even the trial court recognized that Williams's testimony was the only evidence that connected Appellant to the offense. All of the issues discussed above relate to this crucial area. Prior to sentencing Appellant to death, the due process clause of the United States Constitution and the Eighth Amendment requirement of a reliable determination in a capital case, require that the jury be properly instructed as to these crucial areas of the defense and that the jury consider these issues under a correct and proper understanding of the correct law. Misdirecting the jury as to the status of Williams

and Tannis Curry, the failure to have the proper and sufficient type of corroborative evidence, allowing the jury to reach its verdict as to Appellant under a misunderstanding of the correct law, and providing the jury with confusing instructions in this crucial area all served to undermine the federal and state constitutional standards imposed in criminal cases in general, and capital cases in particular.

Therefore, the judgment entered below must be reversed.

II

APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S ERROR IN DENYING A DEFENSE MOTION TO SEVER APPELLANT'S CASE FROM THAT OF CO-DEFENDANT JON SETTLE

After co-defendant Jon Settle exercised his right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, the defense moved to sever defendants' case. It was error for the court to deny the defense's motion to sever.

A. INTRODUCTION

Despite substantial authority cited in Appellant's Opening Brief, Respondent's argument fails to address, in any manner, the dangers inherent in a joint trial when one defendant has exercised the right to represent himself. This is the exact mistake that the trial court made when it also failed to understand the problems inherent in this type of case, a failure which is evident from the trial court's stated belief that pro per rights are not balanced against anything, and that the analysis as to whether a severance should be granted has no relation to whether a defendant is acting pro per. (60 RT 6149-6150.)

In fact, as the cases cited in Appellant's Opening Brief clearly recognize, in a multi-defendant case pro per rights must be balanced against the rights of other defendants who may be adversely affected in a joint trial. The cases cited demonstrate that this *is* a factor for the trial court to consider when making a decision regarding a severance.

Here, the trial court did not even recognize that this situation could pose a problem. Failure to recognize the problems inherent in this type of situation underlines the flaw in both the trial court's handling of the matter below and Respondent's discussion of the case in its brief. Because the court applied the wrong standard and principles to this question, the ruling of the court is not entitled to the deference normally accorded a trial court's evidentiary rulings, since "all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1997) 69 Cal.2d 187, quoted in *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

B. THE SPECIFIC ARGUMENTS OF RESPONDENT.

Respondent notes the trial court's finding that there was no potential for conflict because, according to the trial court, it could not envision how co-defendant Settle could present a defense that the other defendants were guilty but he was not, and the court believed Settle would not be capable of implicating the other defendants while asserting his own innocence. (RB 175.) In fact, Settle did exactly what the court could not foresee. He denied his own guilt and implicated Appellant by describing Appellant's job in the Bryant family business as being someone who bagged cocaine, and he further stated that Appellant was the shooter in this case. (123 RT 16612-16613, 16631.)

As predicted by the defense, Settle was able to achieve this result by failing to follow the rules of evidence and the rules governing attorney conduct. (60 RT 6147-6148.) Settle, by arguing facts not in evidence, improperly presented accusatory information against Appellant to the jury during his final argument, rather than during his testimony. (People v. *Teixeira* (1955) 1369 Cal.2d 136, 147-148; *People* v. *Kirkes* (1952) 39 Cal.2d 719, 723-724.) This is an egregious form of misconduct. Settle's misconduct served to compound the denial of Appellant's fundamental rights, as Appellant was deprived of the opportunity to confront and cross-examine his accuser.

Respondent states that at the time the severance was requested there was no indication that the defenses would be inconsistent. (RB 175.) This is true. However, just as the presence of inconsistent defenses may be a factor in granting a severance, the unusual situation presented by a pro per co-defendant, as discussed in Appellant's Opening Brief, is in itself an indication of the need for a severance, which was ignored by the trial court. Appellant submits that just as it would be error to fail to consider inconsistent factual defenses, so it is error to fail to consider the inherent conflicts present in the situation of a pro per co-defendant, particularly in a capital case.

Respondent cites to the fact that this was an unusual case in terms of size, expense, the number of witness which would have to be recalled, etc. (RB 176.) Though these facts argue in favor of continued consolidation this is only half of the equation to be considered. The other half of the equation that must be considered and which argues in favor of a severance is the inherent problems present in a pro per representation. The error in this case resulted from the fact that the trial court did not even understand the latter half of the equation, and therefore it could not conduct the balancing necessary to adequately resolve the severance issue. Needless to say, one cannot exercise discretion properly by only looking at half of the situation without considering the totality of the equation. A failure of the trial court to consider all factors is a failure to exercise discretion and requires reversal of the determination. (*Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 902, *People v. Rafter* (1974) 41 Cal.App.3d 557, 560)

While typically case size and expense-related considerations argue in favor of a joint trial, this Court has explained that "death is different" from other penalties, and therefore a capital case necessitates greater procedural protections. (*People v. Prieto* (2003) 30 Cal.4th 226 30 Cal. 4th at 263.) Because of the additional dangers presented by the unique problems associated with a pro per capital defendant, the failure to consider these factors is an abuse of discretion.

Respondent notes that there was no renewed request for a severance after Settle's opening statement or after his shenanigans with witness Distad,[3] and therefore Respondent argues that this issue is waived as to those events. (RB 185.)

A waiver should not be found in this case. First, it is well established that the failure to make argument is not waived when it would have been futile to do so. (*People v. Williams* (1997) 16 Cal.4th 153, 255; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433; *People v. Whitt* (1990) 51 Cal.3d 620, 655.) Furthermore, as noted above (*ante*, at p. 33), although a failure to object may hinder a defendant's ability to raise an issue, it does not preclude an appellate court from resolving that issue should it feel the need to do so.

In this case, the trial court previously indicated that it did not believe pro per rights were a matter that could be factored into a decision as to whether a severance should be granted. (*Ante*, at 48.) However, the court was wrong, as this was one of the most important factors arguing in favor of a severance. There is no reason to suspect that at the later date the court would have recognized the mistake of law that it had previously made and consider this crucial fact. Indeed, the court's rulings made clear it was not changing its earlier denial of severance decision. Later, when Settle engaged in other misconduct, severance requests were made to no avail as the court denied all such requests. (123 RT 16634-16635.) Clearly, a renewed request, at the time which Respondent suggests such a request should have been made, would have been futile, and therefore should not be required.

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[3] These shenanigans consisted of Settle asking to be allowed to talk to Ms. Distad, telling the court that he only wanted to tell her that it was all right for her to testify. When he made the request to speak to her, the court specifically told Settle he should not tell her that her statement to the police had been tape recorded, Settle assured the court that he would not do so. Thereafter, Settle went back on his word to the court, and did exactly what the court had told him not to do, i.e. he informed Ms. Distad that her statement to the police had been tape recorded. (84 RT 9724-9725, 9734-9735.)

Furthermore, Appellant contends that this court should not enforce a strict waiver policy. California has a liberal policy in attempting to reach the merits of issues, especially issues of constitutional dimension. Thus, courts have often addressed such constitutional questions in the absence of proper objection below. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Indeed, this case does not involve a failure to make the request, but rather a failure to renew the request.

Additionally, as the facts relating to the contention raised on appeal appear to be undisputed and there would likely be no contrary showing at a new hearing, the appellate court may properly treat the contention solely as a question of law and pass on it accordingly. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) This is particularly true when the new issue is of "considerable public interest" or concerns "important issues of public policy" and has been briefed and argued before the reviewing court. (See, *Wong v. Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 80-81; "[W]hether the [general] rule shall be applied is largely a question of the appellate court's discretion." *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173; *People v. Norwood* (1972) 26 Cal.App.3d 148, 153 ["A matter normally not reviewable upon direct appeal, but which is ... vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal."].)

In a cursory manner, Respondent dismisses Appellant's argument that Settle committed perjury. The sum of Respondent's reply to this argument is that Settle's testimony presented no true conflict with Appellant, and that this issue is a red herring because there was no irreconcilable defense. (RB 190-191.) Unfortunately, Respondent ignores the potential impact and taint that prevarication and perjury are likely to have on the jury. Although the jury was instructed to consider each defendant separately, it should be recognized that this is a legal fiction born of necessity, and therefore the reality of psychological factors should not be summarily dismissed. It has long been recognized that type of distinction is precisely the type of impossible mental process, which Learned Hand described as "mental

gymnastics." (*Nash* v. *United States* (2d Cir. 1932) 54 F.2d 1006, 1007, quoted in *People* v. *May* (1988) 334 44 Cal.3d 309, 329.)

In this case, eleven jurors believed that Settle committed perjury. This is evident from the fact that eleven jurors voted to convict Settle, whereas, if they had believed he was telling the truth when he testified he was not at the Wheeler Avenue house when the murders occurred, they would have instead voted to acquit him. (127RT 17137-17367 53 CT 15443.) It is only possible to believe Settle was guilty if one accepts the premise that his testimony was false. Coming to this conclusion had to leave a bad taste in the jurors' mouths as to criminal defendants, in general. (127 RT 17137-67.)

Further, this issue should not be considered in a vacuum, arriving at a conclusion that Appellant cannot demonstrate prejudice as to this form of misconduct. Rather, this Court should look to Settle's continued and persistent misconduct as a whole and consider the impact of that course of conduct in relation to whether a severance should have been granted and whether Appellant was prejudiced. Thus, this court should consider Settle's perjury in conjunction with his other misconduct, such as arguing facts not in evidence.

Finally, contrary to Respondent's assertion, Settle did present a true conflict with Appellant. Admittedly, there was no conflict in Settle's sworn *testimony*, but conflict did arise when Settle offered to the jury his unsworn testimony in the form of closing *argument.* His unsworn testimony informed the jury about facts truly at odds with Appellant's defense. Because both of these stages involved Settle explaining his case to the jury, they should be viewed in conjunction with each other, rather than separately. Furthermore, as explained in Appellant's Opening Brief (AOB 113-117), Settle engaged in improper argument under *De Luna v. United States* (5th Cir. (1962) 308 F.2d 140, highlighting his decision to testify and represent himself as evidence of his innocence. This was in direct conflict with Appellant who did not testify and was represented by counsel.

Respondent next argues that Appellant did not explain how Settle's misconduct in argument resulted in an unfair trial. (RB 192.) In this regard, Respondent ignores Appellant's explanation that Settle's argument to the jury was not supported by facts in evidence. Moreover, the unsupported statements before the jury were damning to Appellant, such as Settle's claimed "facts" that Appellant shot Brown, and that it was Appellant's job to put the cocaine into packages at the crack house. (123 RT 16612-16613, 16631.) Both of these facts tied Appellant to the Bryant family organization, generally, and to the murder itself, and thereby served to improperly corroborate Williams's testimony. In this case, Settle, acting as his own attorney, was permitted by the court to engage in uncensored misconduct. "[T]o allow an attorney to engage in unprofessional conduct before the jury without a prompt and strong response from the court undermines the judicial process." (*People v. Chong* (1999) 76 Cal.App.4th 232, 244.)

Respondent also contends that any possible misconduct by Settle in argument was cured by the instructions given which informed the jury that what it was hearing was only argument, and not evidence. (RB 192.) This contention is problematic in that the instructions to which Respondent refers are standard instructions given when there is no misconduct. (California Center for Judicial Education and Research (CJER), *CJER Mandatory Criminal Jury Instructions Handbook* (12th ed. 2003), § 2.4 General Instructions for Use in the Guilt Phase of All Criminal Trials) Surely, uncensored misconduct calls for unusual instructions or action beyond the standard ones usually given. In fact, in many different contexts it has been recognized that the instructions of the court may be insufficient to overcome the arguments of counsel or evidence introduced in the case. (*Bruton v United States* (1968) 391 U.S. 123.) Therefore, these instructions should not be viewed as a cure-all, as Respondent urges, for Settle's egregious misconduct.

Finally, in determining this issue this court should examine Settle's misconduct as a whole, rather than parsing each individual act of misconduct and determining whether any one act could have affected Appellant's right to a fair trial.

If each act is segregated, the total impact of his misconduct on Appellant cannot be truly appreciated. As shown with the examples of Settle's perjury and his misconduct in argument, his misconduct was inter-related. Accordingly, he does not implicate Appellant in his sworn testimony, but does so in an unsworn manner while addressing the jury.

Clearly, the trial court did not understand that it could consider Settle's status in making the decision as to whether to sever the cases. Having initially failed to consider proper factors in exercising its discretion, the court was unable to reign in Settle when the defense predictions of misconduct materialized. As a result of the court's failure to properly exercise its discretion, as explained in Appellant's Opening Brief and herein, Appellant was deprived of the right to confront witness, a fair trial, due process of law, the right to counsel, and the right to a reliable capital sentencing determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution.

III

THE TRIAL COURT ERRED IN DENYING A DEFENSE MOTION TO SEVER APPELLANT'S CASE FROM THAT OF THE OTHER APPEALING DEFENDANTS.

The trial court erred in denying a defense motion to sever Appellant's case from that of the other appealing defendants. Respondent disputes the need for a severance, arguing the case against Appellant "was as strong as the cases against Appellants Bryant and Wheeler." (RB 195.) In support, Respondent points to the testimony of Williams, the Keith Curry evidence, and the "highly incriminating telephone records."[4] (RB 195-196.) There are numerous flaws with this hyper-

[4] The characterization of the telephone calls as "highly incriminating" is itself an exaggeration. While the calls clearly connected Appellant to the parties involved, they did not connect him to the crime itself. Because he had other connections to

bolic statement that the case against Appellant was equal to that of the other defendants.

First, concerning the claim that the testimony of Williams and the evidence regarding the phone calls were as incriminating against Wheeler and Bryant as they were against Appellant, a review of the facts dispels Respondent's notion that the cases were equally as strong. In comparing the cases against each defendant for relative strength it is necessary to balance the remaining evidence against Appellant – the Keith Curry shooting incident – in comparison to the abundance of remaining evidence against Wheeler and Bryant in order to determine whether the evidence against Appellant was "as strong" as the case against the others as claimed by Respondent. When that is done, the conclusion is obvious; the case against Appellant was far weaker than the case against Wheeler and Bryant.

Briefly, the evidence connecting Bryant to the offense was extensive, including: Bryant's motive in protecting his family business, Bryant's cryptic admission to Player that he killed Armstrong because of a problem he was having with him; blood found in a car connected to both Bryant and the crime scene; a bullet at the crime scene fired from a gun found at Bryant's house; Bryant's family ties to the business; Bryant's own dealings with Armstrong when Armstrong was in Monterey; Bryant's close association with the Wheeler Avenue house, including his admitted payment for the cages on the drug houses and his possession of the keys to the Wheeler house; Bryant's possession of records relating to the drug business; Armstrong's statements to Greer that Bryant owed him money for a "hit" that Armstrong had done for him, and that he was going to get that money; and a whole host of other evidence tying Bryant to the scene.

Likewise, the evidence against Wheeler was also extensive, including but not limited to: Wheeler's fingerprints found at the murder scene; Wheeler was identified as the shooter; Wheeler owned the same type of gun used to kill Ander-

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all parties independent of the murder, this evidence is not as inculpatory as Respondent would have this court believe.

son; Wheeler admitted selling drugs from the Wheeler Avenue house; and Wheeler possessed an address book with numerous names, numbers, and addresses of people associated with the business.

Indeed, even the evidence against Settle far exceeded the evidence against Appellant. This evidence included: Settle's prediction of Armstrong's death before it happened; Settle was a narcotics dealer, who worked for the Bryants; Settle's name was listed in the Wheeler Avenue kitchen as a contact; Settle attempted to dissuade a witness, Una Distad, from testifying; one of the Bryant's drug houses was in Settle's name, Settle bailed out Appellant after Appellant was arrested, a fact typical of involvement in the Bryant family business, Settle's admission after he was arrested and his perjury at trial are indicators of consciousness of guilt.[5]

In contrast to the plethora of evidence connecting Bryant, Wheeler and Settle to the crime, the only evidence that relates to Appellant was the evidence of the Keith Curry shooting, which, as discussed below, is highly problematic in itself. Indeed, as noted above, even the trial court judge concluded that the case against Appellant was weak and if Williams's testimony was removed, there would be no remaining evidence that could lead to a conclusion that Appellant was involved in the offense. (108 RT 14456-14458.) The trial court did not reach this same conclusion with regard to Bryant, Wheeler or Settle.

The record negates Respondent's response. It is clear that the case against the other defendants was far more extensive than the case against Appellant. Moreover, as explained in Appellant's Opening Brief, and as more fully recounted below (AOB 163-165,*post,* 72-73 the prosecution failed to lay a foundation for the Keith Curry shooting evidence and thus, it was inadmissible against Appellant. Consequently, besides the improper evidence of Williams's testimony, the other evidence (Keith Curry shooting evidence) used by the prosecution against Appellant was legally problematic. Additionally, the Keith Curry shooting evidence was

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[5] For a more complete list of the evidence against the other defendants in relation to the evidence against Appellant, see Appellant's Opening Brief pp. 149-151.

not used to connect Appellant to the crime itself, but to show his relationship to Bryant. Evidence such as Wheeler being actually identified as the shooter was of a far more damning nature than the evidence showing Appellant was an associate of Bryant.

Respondent contends that Appellant provides no authority for his position that the Keith Curry shooting evidence was inadmissible against Appellant. (RB 197.) However, this is a simple matter. It is bedrock law that only relevant evidence is admissible. (Evid. Code § 350.) The trial court ruled that the Keith Curry shooting evidence was not relevant unless it was shown that Bryant knew of the Tannis/Curry affair and was angry about it. (91 RT 11158.) Evidence that met the trial court's foundational standard came in the form of statements made by Tannis Curry to an acquaintance, Gwendolyn Derby. Tannis told Derby that her ex-husband (Bryant) admitted placing the bomb under her boyfriend, Keith Curry's car, and Bryant told her he would do it again until the boyfriend was dead. (101 RT 13097-13098.)

The relevance of the Keith Curry shooting evidence established by Bryant's admission only made a sufficient foundational showing of its relevance to Bryant, and it offered nothing to establish its relevancy as to Appellant. More telling, if Appellant had been tried alone, the Keith Curry shooting evidence could not have been admitted against him because no foundation for that evidence, as it related to Appellant, could be laid. However, when Appellant was tried jointly with Bryant, the jury was instructed that the evidence could be used against both Bryant and Appellant, albeit for the limited purpose of showing intent, identity, motive, and relationship between Smith and Bryant. (91 RT 11313-11314.) This was error because the logical foundation of that evidence had never been established against *Appellant*, and therefore that evidence should not have been considered against him in any manner, just as it would not have been admitted against Appellant had he been tried alone.

Respondent also suggests that Pierre Marshall's testimony was circumstantial evidence that met the court's foundational requirement that Bryant knew of the Tannis/Curry affair and was angry about it, and thus made the Keith Curry shooting evidence relevant. (RB 197.) (91 RT 11158.) In essence, the testimony was that Marshall told Detective Vojtecky that Bryant made remarks to Marshall implying that he (Bryant) was responsible for Keith Curry's condition. (RB 197.)

For several reasons, Marshall's testimony does not provide the necessary foundation that the trial court believed was necessary for the admission of the Keith Curry shooting evidence. The totality of the Marshall evidence was that Marshall was having an affair with Rochele, Jeff Bryant's wife, and co-defendant Stan Bryant made a cryptic remark about "a nigger [that] got paralyzed," who Marshall assumed was Curry." (94 RT 11791.). This evidence *may* show that Bryant injured Keith Curry and was capable of carrying out threats against Marshall. However, it does not show why Bryant had Keith Curry shot, which the trial court believed was a crucial factor in establishing the foundation for admitting the Curry shooting evidence.

Indeed, unlike Bryant's admission to Tannis, the Pierre Marshall evidence was not argued to the jury as evidence of Appellant's alleged role as the Bryant's henchman. However, it now appears that Respondent is attempting to change course and use that evidence for a purpose not urged by the People at trial. In fact, the Marshall evidence typifies the confusion caused by the size of this case, thereby arguing for a severance, *rather* than offering support for the claim that the failure to sever was harmless.

As argued in Appellant's Opening Brief, and as Judge Smith prophetically stated, this case was just too big. (32 RT 3923-3933, 33 RT 3943, 3974-3978, 3796.) As such, this large case ran a great risk and in fact, unduly tainted Appellant's trial with irrelevant evidence. This is made obvious by the fact that Marshall's statement *should not* have been admitted against Appellant. It was a declaration of Bryant, standing on the same grounds as his declarations to Tannis, admitted

through the testimony of Gwendolyn Derby. When Appellant's attorney objected to the introduction of the Bryant/Derby/Tannis statement, the court agreed and limited that evidence to Bryant. (100 RT 13086.) Just as the Bryant/Derby/Tannis conversation was limited to Bryant, so should any evidence introduced be similarly limited when that evidence's relevancy depended on this statement. Here, although the relevancy of the Keith Curry shooting depended on the Bryant/Derby/Tannis conversation, the jury was allowed to consider the Keith Curry shooting against Appellant, even though there was no logical foundation making that evidence admissible.

Marshall's recounting of Bryant's statement regarding Keith Curry is identical in every conceivable way – its hearsay nature and inadmissibility as to Appellant, its impact in proving Bryant's knowledge and motive regarding Keith Curry, its prejudicial impact, and every other possible impact. There is no reason why Appellant's counsel would object to the Bryant/Tannis/Derby statement, but not object to the Bryant/Marshall/Vojtecky statement.

In the context of the issue of the motion to sever, the mountain of evidence that came in because of the joint trial compared to what evidence would have been admissible had Appellant been tried alone must be considered. In that context, it can be seen that had Appellant been tried alone, the case would have been much smaller, much more manageable, and Appellant would not have been burdened by mountains of prejudicial evidence relating only to the other defendants.

Regarding Appellant's claim as to the evidence admitted after he rested, Respondent's sole contention is that Appellant claims that "although he presented no defense, 'extensive' rebuttal triggered by his co-defendants' cases was admitted against him.... Appellant Smith does not indicate what 'extensive' evidence was admitted against him." (RB 199-200.) In fact, Appellant did list some of that evidence in his Opening Brief. (AOB 283.) Briefly this included the testimony of Flowers, which further connected Appellant to Armstrong.

Furthermore, it was not only the prosecution's rebuttal evidence to which Appellant objected. Rather, the objection was to all evidence admitted after the state rested its case-in chief. This includes literally volumes of perjury by Wheeler, Bryant, and Settle. It was not so much the content of that testimony that implicated Appellant rather, it was the fact that the jurors believed these defendants were committing perjury.[6] This created an inevitable guilt by association, as it was likely that the co-defendants' perjury tainted Appellant in the jury's mind by their association of him with the others after months of seeing Appellant sitting at the same table as his co-defendants.

In this regard, in arguing that there was no prejudice to Appellant from the joint trial with Bryant and Wheeler, Respondent downplays the misconduct of the others at trial, limiting its discussion to improper acts of laughing and making noises. (See AOB 136-137.) This conveniently overlooks the constant stream of perjury, excuses, and convenient lapses of memories of Byrant and Wheeler when they testified. Quite simply, the jury believing that the volumes of co-defendant evidence was perjurious, likely led to a negative impact on the jurors. Appellant suffered substantial prejudice by having to share a table with the perjurious co-defendants. It is unreasonable to expect the jury to look at Appellant and be able to separate him from the other defendants who committed such egregious and transparent misconduct.

Had Appellant been tried alone he would never have been associated with such misconduct. Appellant should not be so tarnished because of the State's interest in economics, and if that interest prevails, the court should have, at a minimum, mitigated the prejudicial effect of the misconduct by instructing the jury to not consider evidence against Appellant that was introduced after Appellant rested.

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[6] To be accurate, as to Settle, only 11 of the 12 jurors believed he was committing perjury. (53 CT 15443.)

In response to Appellant's claim that Appellant's shackling was mandated by the presence of the other parties at trial, Respondent, for the most part, relies on the behavior of others to justify the level of security needed. (RB 200.) Respondent's reliance on facts related to the actions of the other parties is problematic because Appellant is entitled to a trial based on his actions. In fact, the only reasons given for the increased security as to Appellant was that he was being tried with Bryant. No fact other than the joint trial and the conduct of others was used to justify the shackling of Appellant.

A defendant clearly has a due process right to a trial based on his own "personal guilt" and "individual culpability." (*United States* v. *Haupt* (1943, 7th Cir.) 136 F.2d 661; *Scales v. United States* (1961) 367 U.S. 203, 224-225.) The use of restraints brands the defendant "as having a violent nature." (*Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586, 588.) Just as one should not be prejudiced by the conduct of co-defendant (*People v. Estrada* (1998) 63 Cal.App.4th 1090), nor should a defendant be branded as dangerous because of security concerns arising from factors related to other defendants.

Regarding the penalty phase instructions as addressed in this argument in Appellant's Opening Brief, Respondent argues that Appellant was not prejudiced by an instruction advising the jury to consider evidence "received during any part" of the trial because the jury had previously been instructed during the guilt to not consider evidence against Appellant when that evidence was not received against Appellant. (RB 201.) Respondent's argument is problematic because the penalty phase instruction about which Appellant is complaining *does not* tell the jury to merely "consider *all* the evidence which was received against Appellant." Such an instruction would, as to Appellant, properly limit the evidence the jury could consider in the penalty phase to evidence which was originally limited to Bryant or Wheeler. Rather, the instruction *given* told the jury that in considering the case against Appellant it could consider "all evidence received."

Knowing generally that different rules apply to the penalty phase, there is no way that the jury would understand that this evidence had a limitation not expressed. Thus, following instructions, the jury could consider evidence "received" against Bryant, and because that evidence was in the class of "all evidence received," it could consider that evidence against Appellant.

Nor is this an irrational reading. In the context of a conspiracy case, when the jury weighs a vast range of evidence in mitigation and aggravation, it may well believe that indicia of Appellant's future dangerousness, to use but one example, may be found in his association with crime families such as the Bryants. Thus, the activities of the Bryants, which did not play a role in Appellant's guilt, may have played a role in their decision as to penalty when the jurors were evaluating the nature of Appellant's criminal associations.

In conclusion, the trial court erred in denying a defense motion to sever Appellant's case from that of the other appealing defendants. Appellant was prejudiced by this ruling due the fact that the evidence against him was substantially weaker than the evidence against the other defendants, the continuous misconduct of the other defendants, the introduction of evidence against Appellant which should not have been admitted had be been tried alone, and the confusion in instructions resulting from the joint trial.

Therefore, the judgment against Appellant should be reversed.

IV

EVIDENCE OF OTHER CRIMINAL ACTS OF APPELLANT AND OTHER PERSONS WERE IMPROPERLY ADMITTED UNDER EVIDENCE CODE SECTIONS 210, 300, 352, AND 1101, AND THE JURY WAS GIVEN ERRONEOUS INSTRUCTIONS ON THE USE OF THAT EVIDENCE

The admission of numerous prior acts of misconduct of Appellant and the other defendants was prejudicial error.

A. POSSESSION OF THE GUN.

Respondent's arguments regarding Appellant's possession of the gun at the time of his arrest are typical of the flawed reasoning used by Respondent to justify the use of "other crimes'" evidence. Simply put, these arguments are not logical. In response to Appellant's argument that Appellant's possession of a gun at the time of his arrest after the chase, a gun which he did not use, was inadmissible, Respondent argues that "the evidence showed the extent Appellant Smith was willing to go to protect the interests of the Bryant organization. In other words, the evidence tended to show Appellant was willing to kill in order to protect the interests of the Bryant organization...." (RB 335.) However, Respondent loses sight of the fact that no claim was ever made that the gun was involved in this case.

It is respectfully submitted that the inference Respondent suggests can be made is not logical. Appellant's mere possession of a firearm does not warrant an inference of a willingness to commit murder at the behest of someone else. Many people possess and carry weapons without a willingness to kill for another person. It is bad public policy to conclude that possession of a gun is evidence of willingness to kill, and bad logic to promote such an inference when the gun at issue is not even used in the crime at issue. Indeed, if any inference can be drawn from Appellant's possession of that particular gun, at that particular time, it would be that when push came to shove, Appellant was *not* willing to use the weapon.

Furthermore, the inference now promoted by Respondent in its brief, that is, that the evidence purportedly showed the extent Appellant was willing to go to protect the interests of the Bryant organization, is a new purpose advanced by the State for admission of this evidence. If this was the proper use of this evidence, the jury should have been instructed accordingly. The fact that this theory was never argued to the trial court or the jury and no such instructions were given demonstrates that this is a newly created rationalization for evidence that clearly had no serious probative value when introduced at trial. In fact, the jury was told

it could use evidence of other crimes to prove motive, intent, identity, and a variety of other factors. The jury was *not* instructed that the evidence could be used to prove either the use now proposed by Respondent nor the relationship of Appellant to Bryant. (122 RT 16393-16395, 53 CT 15488-15489.)

When the prosecution agreed to a limitation of the evidence, it cannot now argue otherwise on appeal, because a court of appeal is limited to deciding whether the jury properly convicted on the evidence before it -- and "properly" means following the limiting instruction given to the jury by the trial court. (*United States v. Arteaga* (9th Cir. 1997) 117 F.3d 388, 397.) Consequently, the prosecution should not be allowed to now argue this new theory as a basis for the admission of the gun possession evidence.

Finally, because this evidence does not reasonably give rise to the inference suggested by Respondent, as discussed in Appellant's Opening Brief (AOB at p. 161.), it violates the Due Process Clause which demands that inferences be based on a rational connection between the fact proved and the fact to be inferred. (*Ulster County Court v. Allen* (1979) 442 U. S. 140, 157.)

B. THE EVIDENCE OF THE CHASE

In a similar argument, Respondent contends that the evidence of an unrelated chase involving Appellant was relevant to show the extent to which Appellant would go to protect Bryant's interests. (RB 335.) It is respectfully submitted that this position is more of a pretense that does not mean anything.

The police were pursuing Appellant because he had recently shot Keith Curry, he had cocaine in his car, and he had a gun that had just been used in a crime. The fact that he was trying to avoid the police under such circumstances demonstrates his willingness to flee for his own reasons, reasons that had nothing to do with protecting Bryant's interests.

To clearly spell out the inferences Respondent is suggesting shows the illogical nature of its arguments. Essentially, Respondent suggests the following illogical inferences:

"Appellant fled from the police to protect Bryant. Therefore, it can be inferred that Appellant would kill for Bryant."

"It is more likely that Appellant would conspire to kill Armstrong because he is the type of person who would engage in a high speed chase to avoid the police and arrest."

"While in possession of drugs Appellant fled from police. Therefore, one can infer a common plan to kill for Bryant."

These are simply not logical inferences.

As it did with the gun possession evidence, Respondent has again offered in its appellate brief a brand new theory of relevancy for the chase evidence. Accordingly, if this was the desired use of the evidence, the jury should have been so instructed. The fact that no such instructions were given, and that this theory was not even mentioned at trial, indicates that this was not the desired use of the evidence when it was introduced in the trial court.

Respondent submits that Appellant has not shown he was prejudiced by admission of this evidence. (RB 335.) Appellant has established sufficient prejudice and Respondent's claim is without merit.

First, and generally, the very reason behind Evidence Code section 1101 is the universal recognition that hearing evidence of a defendant's bad act is likely to improperly influence a jury. Therefore, the evidence must be truly relevant in order to alleviate its misuse by the jury. (See *United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, at p. 424 - "It is bad enough for the jury to be unduly swayed by something that the defendant did; it's totally unacceptable for it to be prejudiced by something he seems to have done but in fact did not do.")

Second, this bad act evidence, if the prosecution's arguments are believed, further connects Appellant to the Bryant family. If Williams is viewed as an accomplice, even if this section 1101 evidence is not technically "corroboration" because it connects Appellant to the parties and does not connect Appellant *to the crime*, it still bolsters Williams's testimony. On the other hand, even if Williams

is not viewed as an accomplice, the jury may have qualms about accepting the word of that particular character at face value. Therefore, this evidence admitted under section 1101 gives credence to Williams in the eyes of the jury, as the jury sees the character evidence as further proof of Appellant's involvement with the Bryants.

Third, as it specifically relates to this case, this show of egregious conduct portrays Appellant in a most despicable light in front of the jury. He is shown as an armed drug-dealer, with no regard for the safety of others. Indeed, the law correctly recognizes the fact that engaging the police in a high-speed chase compounds reckless and dangerous driving. (*People v. McHugh* (2004) 119 Cal.App.4th 202, 209-8-209.) Attempting to escape a crime by means of a high-speed and reckless chase constitutes " 'highly dangerous' " conduct, demonstrates that the defendant has a conscious disregard for human life, and is sufficiently egregious conduct to support a second-degree murder charge if someone is killed as a result of the chase. (*People v. Satchell* (1971) 6 Cal.3d 28, 33-34; *People v. Lima* (2004) 118 Cal.App.4th 259, 265-266; *People v. Fuller* (1978) 86 Cal.App.3d 618, 629.) To tell the jury the facts of this callous and reckless behavior will encourage the jury to want to punish Appellant for past crimes to prevent further threats to public safety. Nor is this a problem about which the jury was unaware. High-speed chases are a prime-time gold mine, with every mile covered by news helicopters and afternoon reporters gasping each time the fleeing car misses another vehicle.

Finally, Respondent contends that in light of the "overwhelming strength of the People's case, which was uncontradicted as to Appellant Smith, because he did not present a defense" there was no reasonable probability of prejudice. (RB 336.)

First, as noted before, this case was far from overwhelming. In the trial court's view, there was no evidence connecting Appellant to the offense apart from the testimony of Williams, testimony that was suspect even it was determined he was not an accomplice. (*Ante*, 20.)

Second it is true the evidence was not "contradicted" in the sense that Appellant did not put on evidence. However, Appellant did have a viable defense and that defense was a legitimate challenge to the prosecution meeting its burden of proving the charges. When a defendant bases his defense on the theory that the People did not prove its case, as is his fundamental right to do so, any "additional evidence" supporting the People's case that was improperly admitted creates another item of evidence which the defense must refute or explain.

Specifically, Appellant's defense was that the testimony of Williams combined with the other evidence offered by the State was insufficient to meet the State's burden of proof. When the jury was allowed to consider the irrelevant bad act evidence of the chase, the drugs, and the gun possession, it was in essence provided with erroneous evidence of Appellant's "identity" as the killer. It thus became necessary for Appellant to refute the irrelevant evidence admitted against him. Appellant was prejudiced by the need to refute evidence that was improperly admitted.

Third, as noted in the Opening Brief (AOB 148-149), the trial court recognized there was no other evidence that connected Appellant to these crimes, apart from the testimony of Williams. Even if he was not an accomplice, Williams was a participant in the narcotics industry, was a former defendant who entered a plea in exchange for this testimony so as to avoid capital charges, was a petty criminal with other criminal activities in his past, and was not the type of witness who inspired great confidence. The other evidence was at best ambiguous, connecting Appellant to the other people in the case. Combined with the lack of physical evidence or eyewitnesses implicating Appellant, it can hardly be said that this was an overwhelming case.

C. THE DRUGS FOUND IN APPELLANT'S POSSESSION

Appellant has argued that the prosecution failed to prove the logical foundation necessary for the admission of evidence of the cocaine found after the chase, because it was not proven that the cocaine was in the cookie-shaped wafer

form that was unique to the Bryant family cocaine, therefore it was not shown that the cocaine was "Bryant family" cocaine, and therefore there was no logical basis for the admission of that evidence. (AOB 168-170.)

In response, Respondent has argued that the cocaine was in half-ounce bindles, one of the ways in which the Bryants sold cocaine, and therefore it can be inferred that this was "Bryant cocaine." Respondent readily admits that the drug packaging was not unique to the Bryant organization. Respondent stated "there may not have been evidence that *only* the Bryant Organization sold drugs in this manner." (RB 335, italics in original.) Despite this recognition, Respondent goes on to make a quantum leap and arguably a nonsensical argument, , reversing positions, by stating that the packaging is "undeniably distinct." (RB 335.)

Essentially, Respondent is arguing that it is sufficient to show the cocaine was Bryant-family cocaine because the drugs were commonly packaged in half-ounce bindles and the Bryants' packaged their drugs in this manner. (RB 334-335.) Respondent claims, that "this distinctive packaging was a perfect match with the cocaine found in Appellant Smith's possession." (RB 335.)

However, the important question is not whether the Bryants packaged their drugs in this manner, but whether *only* the Bryants packaged their drugs in this manner.

By contrast, evidence of the other crack houses could be identified as Byrant family houses because *only* the Bryant family crack houses had certain unique features such as the fortified cage at the front door and a crock-pot and hot oil used as a means of destroying evidence. (83 RT 9643, 9657.) The uniqueness of these crack houses made the evidence of the other crack houses relevant to show Bryant's involvement with the Wheeler Avenue residence, which had similar unique features as the other houses described. Similarly, only if the drugs found in Appellant's possession bore a unique characteristic, can it be said that the logical foundation needed for the evidence was established. Appellant contends

that the uniqueness of the 'Bryants' cocaine" was in the cookie-shaped wafer form of the drug.

As Respondent correctly notes, Detective Lambert testified that the Bryant family always packaged its drugs in grams or half ounces. (85 RT 9960-9967.) However, neither Lambert nor any other officer testified that this was a unique trait to the Bryants, and as admitted by Respondent in its brief, this in fact was not unique to the Bryant organization. (RB 335.) Obviously, because other dealers also sell half-ounce quantities there is nothing to connect this cocaine to the Bryants, and all contrary conclusions must fail.

As shown below, the only reasonable interpretation is that the requisite unique trait of the Bryant organization was the cookie-shaped wafer form, and not the half-ounce packaging.

First, at the hearing on the admissibility of the evidence, the defense argued that it expected there would be testimony that the cocaine found on Appellant was in a half-ounce wafer that was "peculiar" to the *form* in which the Bryant-family cocaine was sold. (emphasis added) (85 RT 10035.) The prosecution did not dispute this statement; nor did the prosecution attempt to stake out a position that the distinctiveness of the Bryant family cocaine did not depend on its cookie-shaped wafer form, but rather it was distinguished by its packaging. Having lulled Appellant and the trial court into believing that this was the fact in issue, the prosecution should be estopped from now asserting for the first time that the uniqueness of the Bryant-family drugs could be established by traits other than its cookie-shaped wafer form.

Second, in allowing the evidence of the drugs, *the trial judge also believed the prosecution would show that the cocaine was unique to the Bryant family because of the cookie-shaped wafer form.* This was made clear during the Curry hearing. After the Curry evidence was admitted on the People's representation that it would eventually establish the relevant foundation, *the trial judge reminded the People that the prosecution had promised to prove that the narcotics were in*

the form of the cookie-shaped wafer, and the court had not yet heard that evidence. (91 RT 11286-11288.) Again, the defense indicated that this had been its understanding. And once again, the prosecution accepted the court's statement and never informed the court or the defense to the contrary. At trial, the prosecution never indicated that in proving the uniqueness of the drugs the People had been referring to the packaging by weight. (9 RT 11299-11300.)

Third, it is a firmly established principle that the proponent bears the burden of establishing the relevance of a proffered piece of evidence. If there is a foundational fact necessary for that relevance, this includes the burden to establish that fact as well. (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1331; *People v. Morrison* (2004) 34 Cal.4th 698, 586.) Applied to this issue, the desired relevance of the cocaine Appellant possessed depended upon it being Bryant-family cocaine. If others used half-ounce packaging, the manner in which the drugs were packaged failed to prove its origin. It is only if this packaging is peculiar to the Bryants that it is possible to use it to trace the cocaine. Therefore, the very relevance of this item depended on that factor.

Testimony did establish that the Byrants packaged their drugs in half-ounce packaging, but there was no testimony showing that this type of packaging was distinct to them. The prosecution's failure to establish this fact resulted in its failure to establish the relevancy of the cocaine evidence. Having failed to establish its relevancy, the evidence was not admissible.

From the foregoing, it is clear that at trial, the necessary foundation for the admissibility of the evidence, that is, that the cocaine found in Appellant's possession was in a form (cookie-shaped wafer) unique to the Bryant organization was not proven. Thus, the evidence of the cocaine was not relevant and therefore should not have been admitted.

Respondent's attempt to change gears and now for the first time argue that the uniqueness was found in the half-ounce packaging and not in the cookie-shaped wafer form of the cocaine must also fail for the reasons cited above.

D. EVIDENCE OF THE CURRY SHOOTING

In Appellant's Opening Brief, he argued that because Bryant's admission to his ex-wife Tannis was not admissible against Appellant, the foundation for the evidence relating to the Curry shooting was not established as to Appellant, and therefore the evidence of the Curry shooting was inadmissible against Appellant. (AOB 163-165.)

Respondent again argues that Appellant has provided no authority for this proposition. (RB 329.) As explained above, it is bedrock law that only relevant evidence is admissible. (*Ante*, at p. 58.) Because the trial court held that there was no probative value of the Curry shooting unless the prosecution established the foundation, the failure to establish that foundation rendered this evidence inadmissible.

Second, it is bedrock law that when evidence is admissible for only one purpose or against only one party, the jury should be instructed not to consider that evidence for another purpose or against another party. Indeed, as Respondent recognizes, the trial court realized that the evidence of the Curry shooting was not admissible against Wheeler or Settle, and therefore the court instructed the jury to only consider the evidence against Appellant and Bryant. (RB 328, 121 RT 11313.)

The proposition Respondent claims is so novel is, in reality, merely the well-recognized evidentiary principle that unless the foundation of the evidence is established as to Appellant, that evidence may not be used against him. The net result of the trial court's ruling on this matter was its determination that the Curry shooting evidence could not be offered unless Bryant's motive for the shooting was shown to the jury. The trial court's foundational ruling regarding the Curry shooting evidence was problematic because the evidence of Bryant's motive for the shooting was only admissible against Bryant and not against Appellant. Nevertheless, the jury was allowed to consider the Curry shooting evidence against Appellant, even though the necessary fact to establish its relevant foundation – Bryant's admission and therefore Bryant's motive- was not to be considered against Appellant. In short, the trial court's ruling allowed the jury to consider the

evidence of the Curry shooting against Appellant in spite of the fact that it bore no relevance to Appellant because the legal foundation for that evidence in relation to Appellant was never proven.

As Respondent notes, prior to the admission of the Keith Curry shooting evidence, the prosecution stated that in addition to the testimony of Tannis, the prosecution would offer the testimony of Pierre Marshall who would testify he dated Rochelle Bryant while Jeff Bryant was in custody, and that he later found out that the Bryants were upset with him about this and the fact that his cousin, "D-Dog," managed to cheat the Bryant's out of narcotics. (91 RT 11260.) The People further offered to show that in an attempt to intimidate Marshall, Bryant went through the shootings that he had been involved in, one of which was the Keith Curry shooting, saying that the "nigger" was paralyzed as a result of the shooting. (91 RT 11261.)

At trial, after Marshall denied making these statements (94 RT 11752), Detective Vojtecky testified he interviewed Marshall regarding the meeting between Marshall and Bryant, and Marshall told Vojtecky that when Marshall sat down at Bryant's table, Bryant began mimicking, holding his hands in a deformed fashion, laughing, and saying, "Remember how that nigger got paralyzed." They then discussed other matters. (94 RT 11753, 11791.) Marshall said he knew that Stan Bryant was talking about Keith Curry. (94 RT 11792.)

The evidence relating to Pierre Marshall was not sufficient to establish the necessary connection of Bryant to the Curry shooting in relation to the case against Appellant for several reasons.

First, as discussed above, (*Ante*, at p. 60), the statement of Bryant to Marshall was hearsay, and should have been limited to Bryant, just as Bryant's statement to Tannis was so limited. (100 RT 13086.)

Second, the Tannis/Derby evidence established a crucial link in a manner that the Marshall/Vojtecky evidence did not. This is because in her statements, Tannis said that her ex-husband (Bryant) planted a bomb underneath Keith

Curry's car and Bryant said he would do it again until her boyfriend (Curry) was dead. (101 RT 13097-13098.) This is precisely the logical foundation for which the trial court was looking: evidence that Bryant was angry at Keith Curry for sleeping with Tannis, and that he was doing something about it.

Similarly, as discussed above, (*Ante*, at p. 59), the Marshall/Vojtecky statement was more vague than the evidence relating to the Keith Curry shooting. It showed Bryant mimicking a paraplegic, but who that paraplegic was and why that person was in that condition was only established through Marshall's speculative assumptions. When Marshall told Detective Vojtecky that he knew Bryant was referring to Keith Curry, it would have been more accurate for him to say that he "assumed" Bryant was talking about Keith Curry. Moreover, even if it can be inferred that the person being mimicked *was* Keith Curry, from the evidence alone it is speculative to conclude the motive was Tannis's infidelity as opposed to some other dispute.

Finally, Respondent argues that if the Keith Curry evidence was admitted improperly, in light of the "overwhelming" nature of the case, any error in admitting the evidence would have been harmless. (RB 332.) Respondent's continued reliance on this exaggerated claim necessitates Appellant to once again note that the only overwhelming evidence related to the fact that Armstrong and the others were murdered. However, once again, as to Appellant, one is reminded of the observations of the trial court that repeatedly held that apart from the evidence of Williams, there was no evidence that connected Appellant to the crime. (*Ante*, at p. 20.) Even if Williams was not an accomplice, he was hardly the type of person warranting great credence.

The improper admission of the Keith Curry shooting and possession of the "Bryant" cocaine was particularly damaging because it tied Appellant to the Bryant organization. In this light, it must be remembered that contrary to the situation with the other defendants, including those who were severed from this case, there

was a striking *absence* of evidence connecting Appellant to the Bryants, except for the fact of his marriage to Bryant's sister-in-law.

In particular, as explained in Appellant's Opening Brief (AOB pp. 76-77), the chart prepared by Detective Dumelle did not depict Appellant as being among the large list of players in the Bryant organization. He was not known to many of the people active in the organization, such as Walton. His name was not on the "ninety-minute" schedule or list of phone numbers found at the Wheeler Avenue address. His picture was not in Wheeler's photo album. None of the witnesses had ever seen him at the drug houses, with the exception of Williams. He was not recognized among the hundreds of pictures seen by witnesses such as Ladell Player, who identified other employees of the organization. He was not on the paper trail of deeds and bills connected to the Bryant family. In short, compared to many other people, there was very little evidence that connected Appellant to the Bryants.

In light of the lack of evidence connecting Appellant to the offense, the prosecution's successful effort to show that Appellant had engaged in a cold-blooded shooting of a former friend (Keith Curry) was incredibly powerful evidence. It defies reality to assume that a jury would hear of an attempted murder and give it no significant weight.

In summary, the evidence necessary to establish the logical foundation, which the trial court demanded was lacking, and therefore should not have been admitted against Appellant. Considering the incredibly harmful nature of this evidence showing that Appellant committed an attempted murder in the past was clearly prejudicial, especially given the lack of evidence connecting Appellant to the murders in this case.

E. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING THE PROPER USE OF EVIDENCE OF OTHER, UNCHARGED CRIMES

The trial court erred in instructing the jury regarding the use of evidence of other uncharged crimes.

Respondent contends that because the defendants did not enter a guilty plea, all the elements of the crime were in issue, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 400 and *People v. Daniels* (1991) 52 Cal.3d 815, 857-858. Respondent further notes that because Bryant did not concede it was a first-degree murder case, intent remained in issue and a part of the case that the People had to prove. (RB 349.)

While it is true intent was an issue, this ignores the language of *Ewoldt*, that in many cases the prejudicial effect of evidence of uncharged acts will "outweigh its probative value, *because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute.*" [Citation]." (*Ewoldt*, at 405-406, italics added.) Similarly, it has been explained that the prosecution has no right to present cumulative evidence that creates a substantial danger of prejudice. (*People v. La Plane* (1979) 88 Cal.App.3d 223, 242.) Indeed, to give the prosecution a trump card which allows for the admission of such evidence merely because it is "in issue" as a result of a plea of not guilty would abrogate the very purpose of both Evidence Code sections 352 and 1101, since the "facts" would always be in issue.

In cases such as this, where victims are shot multiple times at close range, while trapped in a sally port, to allow this type of prior bad act evidence to prove intent would abrogate the principles discussed in *Ewoldt* and inherent in sections 352 and 1101 because, since there is no serious dispute as to that particular issue, other-crimes evidence would be cumulative, leaving only "[T]herefore, it is imperative that the trial court determine specifically what the proffered evidence is

offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (*Ewoldt*, at p. 406.)

Regarding the trial court's failure to properly instruct on evidence of uncharged crimes, Respondent contends Appellant has failed to show how evidence of the other crimes "could have prejudiced his defense (which was non-existent since he did not present one) or made any difference in the verdicts rendered." (RB 350.)

While Appellant did not present an affirmative defense or introduce evidence of an alibi or some other defense, this does not mean he did not "present a defense" or that his defense was "non-existent." It should go without citation that at the core of our criminal justice system is the principle that the State must prove its case beyond a reasonable doubt and Appellant has no obligation to put on any evidence. Appellant's defense was that the state did not prove its case. Indeed, the closer Williams was to being properly viewed as an accomplice, the more compelling Appellant's defense becomes. In light of the arguments presented regarding whether Williams's actions made him an accomplice, combined with the prosecution's advocacy of that position in the early stages of the case, arguably Appellant came close to presenting a *substantial* defense simply based on questioning Williams's status. This is particularly true in light of the trial court's observations regarding the lack of evidence connecting appellant to the crime. (*Ante*, at p. 20.) Indeed, these two facts, Williams's accomplice status and no evidence connecting Appellant to the crime, the positions of the prosecution and trial court, *were* a complete defense.

In such a situation, every item of evidence improperly admitted against Appellant became an additional burden he had to overcome in his effort to show that the State did not prove its case. By way of illustration, using just two pieces of evidence remarked on by Respondent (RB 350), the introduction of evidence that the Bryant Family beat up Francine Smith or that Appellant participated in the sale of cocaine, when the jury had *not* been properly directed on how it should view

that evidence, became another piece in the convoluted jigsaw puzzle that Appellant had to unnecessarily explain away.

Put another way, accepting the principle that jurors are presumed to understand and follow the court instructions (*People v. Hart* (1997) 15 Cal.4th 619, 644; *People v. Arjon* (2004) 119 Cal.App.4th 185, 194), if the jury had been properly instructed that evidence of the Francine Smith beating could not be used against Appellant, it would have resulted in one less piece of damning evidence against Appellant. If the jury had been properly instructed to limit its consideration of the evidence of Appellant's drug sales to that of establishing his relationship to Bryant, he would not have been burdened with a rebuttal to any other improper inferences that the jury may have been tempted to draw.

Conversely, the jury being improperly instructed that it could consider evidence of Appellant's gun possession, discovered after an unrelated reckless, high-speed chase, for the purpose of proving Appellant's intent to kill Armstrong or as part of his common plan to commit the murders in this case, created an additional and an unnecessary burden which Appellant had to overcome.

In a similar vein, Respondent contends that "in view of the abundant and uncontradicted evidence of Appellant Smith's guilt" Appellant does not explain how proper limiting instructions would have affected the trial. (RB 351.) Once again, this position ignores the findings of the trial judge that apart from the testimony of Williams, there was no evidence that connected Appellant to the crimes. Furthermore, because Williams's credibility was subject to substantial impeachment through a showing of his involvement with the Bryant cartel, his continuing life of crime after he fled California, and his self-serving motive to shift the blame to others, it is clearly hyperbolic to claim this testimony was "uncontradicted."

Appellant submits that the testimony of Williams, with its inherent credibility problems, is hardly "abundant and uncontradicted" evidence.

In summary, the trial court erred in failing to correctly instruct the jury as to the proper use of the evidence of uncharged crimes. Therefore the judgment must be reversed.

F. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE KEITH CURRY INCIDENT COULD BE USED TO PROVE IDENTITY.

Appellant has argued that the trial court erred in instructing the jury that it could use evidence of other crimes to prove identity. Respondent responds that the trial court properly instructed the jury on the use of the Keith Curry incident to prove identity, noting several facts which Respondent asserts establish the degree of similarity needed for the use of this evidence to prove identity.

In particular, Respondent refers to the following facts: Appellant and Bryant acted in concert, Appellant was on friendly terms with both Armstrong and Keith Curry and was used as a lure to get close to them, Tannis Curry had a central role in both incidents, and Bryant victimized his ex-wife's lovers. (RB 330.)

Respondent's reliance on the Keith Curry crime facts as a proper use of evidence to prove identity is in error. As explained in Appellant's Opening Brief (AOB at p. 158), differing degrees of similarity are required for different uses of evidence of uncharged acts with the greatest degree of similarity being required to prove identity. (*Ewoldt* at 402-404, *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

An example of the similarities needed to prove identity may be found in *People v. Gray* (2005) 37 Cal.4th 168, where the prosecution noted the similarities between the charged and uncharged offenses. In each offense: (1) the victim was attacked in her home; (2) the crime occurred in the late evening or early morning; (3) the victims included older women; (4) the assailant tied the victim's hands behind her back; (5) the assailant tied the victim's ankles together; (6) the assailant wrapped a towel around the victim's head; (7) the assailant pulled up the victim's nightgown; (8) the assailant beat the victim severely; (9) the assailant engaged in criminal sexual conduct; (10) the assailant left candy wrappers at the crime scene;

(11) the assailant left personal property at the crime scene; (12) the assailant ransacked the bedroom; (13) the assailant took money; and (14) the assailant "made himself at home," watching television. (*Id.* at 203.)

While some of these traits, such as the sexual assault occurring in a victim's home or the taking of money, are admittedly common, other traits, such as the perpetrator binding the ankles, wrists, *and* head of each victim are rare. Additionally, some of the traits, such as leaving behind candy wrappers or making himself at home and watching television while the victim was bound, are highly uncommon. When two crimes occur having all of these traits in common, particularly the rarer traits, such as the candy wrappers and television watching, it may be inferred that the same person committed the two offenses. As explained in of *People v. Balcolm* (1994) 7 Cal.4th 414, "The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom*, *supra*, 7 Cal.4th at 425.)

Here, no such "highly unusual and distinctive" similarities existed. Indeed, some of the facts upon which Respondent relies as supporting an inference of identity are the facts that Bryant acted in concert to victimize people who were involved with his ex-wife Tannis Curry, and that Tannis Curry had a role in the incidents.

Reliance on these facts is problematic. These facts do not support a finding of uniqueness because Bryant acted in concert *with people other than Appellant* in order to victimize people involved with Tannis Curry, and Tannis Curry played a central role in these incidents. Case in point, the prosecution conceded that in the second shooting of Keith Curry or the bombing of his car, incidents in which Bryant acted and in which Tannis Curry played a central role, Appellant *was not* involved at all. As a result, these facts upon which Respondent relies do not posses the required signature-like uniqueness to make them relevant for proving identity. Therefore, these facts do not constitute common facts of a signature-like nature

that would connect the crime to Appellant, as which is required for the use of other crimes evidence to prove identity. (*Ewoldt*, at 403, *Kipp*, at 370.)

The remaining fact relied upon by Respondent is that Appellant was friends with both victims. On its face, this fact is too common to meet the signature-like uniqueness requirement necessary to prove identity. No showing has ever been made that these friendships were such an unusual fact that it would per se qualify for the stringent standard needed to prove identity.

Furthermore, Respondent fails to understand that proving "identity" may be accomplished by a direct inference or by a series of inferences, and these two approaches must be regarded as different for the purposes of Evidence Code section 1101.

For example, there can be a direct and immediate inference of identity when jurors view the evidence of two crimes that bear a strong signature-like similarity. The next step in the chain of logic is for the jurors to conclude that, "[t]herefore, it is likely that the person who committed the first crime also committed the second." Thus, in *People v. Wein* (1958) 50 Cal.2d 383 and *People v. Wein* (1977) 69 Cal.App.3d 79 there are numerous crimes where in each case a person went to the victims' homes in response to advertisements they placed for the sale of an item, and when the perpetrator was in the bedroom looking at the item he told the victims the stem from his wristwatch had fallen off, and when the victims got on their hands and knees to look for the watch stem, the defendant grabbed them from behind, tied their hands and ankles with rope he had brought with him, and raped them.

The court explained that considering the "very distinctive modus operandi" and other similarities, it is logical to conclude that the person who committed the first crimes in the 1950s committed the later crimes in the 1970s. This is the proper use of "identity," in that the facts are so similar one can infer the *identity* of the person who committed the first crime is the same as the person who committed the second.

Similarly, using the facts of *Gray*, *supra*, it would be a proper logical inference for the jury to reason, "It is likely that the rapist who on January 1st, bound an elderly victim, and, after assaulting her, ate candy bars and watched television in her home is the same person who committed the identical act on another victim on January 15th."

A lesser degree of similarity is needed if the purpose of the evidence is to show that the parties merely knew each other and is not used to establish a defendant's "signature" in two different offenses. However, if the indirect inferences are followed to their ultimate conclusion, this also leads to an inference of "identity." For example, if it could be shown that Bryant and Appellant shared an apartment together, this would prove they knew each other.[7] Because it is more likely that one would commit a crime with a roommate than a stranger, this would meet the test of relevancy under Evidence Code section 210 to show that they committed a crime together. However, it could not be used to prove "identity," as that requires a high degree of similarity that would be lacking in such evidence.

In this case it was argued that the fact that Appellant previously shot Keith Curry established his relationship to Bryant as the "family enforcer." The following chain of inference is possible: If Appellant had worked for Bryant in this capacity, it would make it more likely that he had committed this crime with Bryant. Thus, the fact of relationship *can be* used *indirectly*, through a chain of inferences to establish Appellant's "identity" as one of the participants in this crime.

However, showing the "relationship" is not the same as showing "identity" for the purposes of section 1101, as was done at trial. If inferences stemming from the fact of relationship was all that was required to prove identity from the proven facts of the uncharged crime (Keith Curry shooting), this would undermine the rule requiring substantial similarity of the offenses in order to prove identity. The

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[7] Evidence Code section 1101 deals with the use of "a crime, civil wrong, or other act" for this purpose. Therefore, any non-criminal act can qualify for one of these uses under that section.

reason for this is that a much lesser degree of similarity is required to prove relationship than is needed for identity. If a jury is instructed that a "relationship" showing can be used to prove "identity," the situation below, the prior crime that required the lesser showing is boot strapped to meet the most stringent standard required for the second inference of identity. The result would be to abrogate the rule requiring a greater level of similarity for identity. It is only when identity is *limited* to a narrow signature-like meaning, and the only permitted use is the direct inference, that identity becomes a separate use, distinct from the other uses.

Another flaw in Respondent's reasoning is that in seeking similarities between the two crimes Respondent confuses the facts of the crime to be used as section 1101-evidence with the ultimate facts to be proven. Thus, in the facts Respondent believes demonstrate the requisite degree of similarity, Respondent references the fact that Appellant and Bryant acted in concert. What Respondent fails to realize is that as a matter of logic the similarity must be between the proven facts of the crimes, rather than the facts, which are to be eventually inferred.

There was no evidence in the possession of the cocaine or the shooting of Keith Curry acts that show Bryant and Appellant acted in concert. Rather, that fact may or may not be inferred from the fact that Appellant possessed Bryant-cocaine or shot an acquaintance of his, with whom Bryant had a dispute. This is the ultimate inference. However, this is not a fact of these incidents that was proven at trial. Indeed, as noted above, other people acted in concert with Bryant to try to kill Keith Curry. Therefore, this was not a signature-like fact of that crime.

It has been explained that in order to prove a common plan the uncharged act must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (2 Wigmore, Evidence, (Chadbourn rev. ed. 1979) § 304, p. 249); *People v. Ewoldt*,

supra, 7 Cal.4th at 402.) If this type of similarity may not be used to prove common plan, then, a fortiori, it may not be used to prove intent, which requires an even stricter standard of similarity than common plan.

In this case, the court allowed this evidence to prove identity, through a chain of reasoning approach, by telling the jury that the possession of the cocaine proved the relationship of the parties, which, in turn, proved "identity" of Appellant as involved in the murders. Because there was no similarity of the operative facts, as required by the use of other-crimes evidence to prove identity, this is an improper use of prior-crimes evidence to prove identity.

For the foregoing reasons, the use of the Keith Curry offense to prove identity was improper, and the court erred in instructing the jury that it could be used for that fact.

V

THE TRIAL COURT ERRED IN ADMITTING NUMEROUS HEARSAY STATEMENTS WHICH DID NOT QUALIFY UNDER ANY EXCEPTION TO THE HEARSAY RULE.

The trial court erred in admitting numerous inadmissible hearsay statements. The hearsay erroneously admitted included the statements of Andre Armstrong to Francine Smith and Mona Scott, the statements of Ken Gentry and G.T. Fisher, as well as written material purporting to be records related to drug transactions and evidence of "to-send" money forms of Western Union.

A. THESE ISSUES ARE NOT WAIVED BECAUSE OF THE FAILURE OF TRIAL COUNSEL TO OBJECT.

Respondent's first contention is that the issue as to the admissibility of many of the hearsay items is waived because of Appellant's failure to object at trial. The statements to which there was no objection included the following: 1) Kenneth Gentry's statement to Newsom; 2) written material relating to drug trans-

actions; and 3) Western Union records. Respondent argues that the cases cited in Appellant's Opening Brief[8] are of no assistance to Appellant because they only allow for an exception to the waiver rule in cases involving challenges to the voluntariness of a confession or admission of the defendant.

Appellant submits that Respondent's reading of the case law is too narrow. For example, *People v. Matteson* (1964) 61 Cal.2d 466 involved a failure to object to the admission of an involuntary statement, with this Court holding "the introduction of an involuntary confession or admission requires reversal of a judgment of conviction despite defendant's failure to object to its introduction." (*Id.* at 469.) However, at no point did this Court attempt to limit the exception to the waiver rule to only cases involving involuntary statements. Nor do the other cases limit the exception to the waiver rule in the narrow manner suggested by Respondent.

Furthermore, there are other exceptions to the waiver rule that would also allow for this court to resolve this issue in spite of Appellant's trial counsel's failure to raise an objection to the evidence. As noted above (*ante*, at p. 33), although a failure to object may hinder a defendant's ability to raise an issue, it does not preclude an appellate court from resolving that issue should it feel the need to do so.

Also, it has been held that "a defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1999) 15 Cal.4th 269, 276.) Because of the overlap of the hearsay issues presented herein with issues arising under the Fifth Amendment's Confrontation Clause, the failure of trial counsel to object should not preclude this court from addressing these issues.

This Court and other appellate courts have at times addressed such constitutional questions in the absence of proper objection below. (See, e.g., *Hale v. Mor-*

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[8] *People v. Matteson* (1964) 61 Cal.2d 466, 468-469, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478; *People v. Underwood* (1964) 61 Cal.2d 113, 126; *People v. Hinds* (1984) 154 Cal.App.3d 222, 237

gan (1978) 22 C3d 388, 394 ["[A]lthough California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation] . . . ."; *People v. Allen* (1974) 41 CA3d 196, 201, fn. 1 – Court of Appeal reached the merits of a constitutional evidence challenge even though the record showed no objection, because "the constitutional question can properly be raised for the first time on appeal [citation]."]; *People v. Norwood* (1972) 26 CA3d 148, 153 ["A matter normally not reviewable upon direct appeal, but which is . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal."] *Bayside Timber Co. v. Board of Supervisors* (1971) 20 CA3d 1, 5 ["[W]hether the [waiver] rule shall be applied is largely a question of the appellate court's discretion."].)

Finally, another exception to the waiver rule that is applicable here is the exception that provides that an objection may be excused when the issue involved is a pure question of law. (*People v. Brown* (1996) 42 Cal.App.4th 461,475; *People v. Blanco*, *supra*, 10 Cal.4th 1167, 1172.) In this case, many of the hearsay issues presented raise pure issues of law. Because the resolution of the admissibility of many of the statements admitted below would be based on a discussion of pure law, such as the admissibility of Western Union records, this exception would allow for this Court to address the issue without Appellant having objected to the evidence at trail.

As a result, Appellant should not be precluded from raising these issues in this appeal.

B. THE TAPED STATEMENT OF ARMSTRONG

Respondent does not dispute the contention that Armstrong's statement was hearsay and violated Appellant's right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36. Rather, Respondent's sole contention regarding this evidence is that other evidence established the motive for the crimes, and therefore

the admission of Armstrong's statement was harmless. (RB 290-293.) To the contrary, an examination of the evidence relied upon by Respondent demonstrates that absent the taped statement of Armstrong, there was no admissible evidence of the motive for the crimes, a fact which played a critical role in the trial.

In seeking to establish other evidence of the motive, Respondent refers to the fact that Armstrong told other people, namely, Mona Scott and Francine Smith, that the Bryants owed him money. (BR 291.) However, as pointed out in Appellant's Opening Brief (AOB 194), assuming arguendo that the statements to Scott and Smith establish a motive for the crimes as Respondent claims, this evidence was inadmissible hearsay.[9]

The fact that there was no objection to the statements of Scott and Smith is of no consequence and should not preclude Appellant from addressing this issue here. Appellant previously raised a hearsay objection to Armstrong's statements to Detective Harley that addressed the same substance as the statements made to Scott and Smith, i.e. that Bryant owed Armstrong money. The Armstrong statements to Detective Harley were litigated at great length with the trial court ultimately ruling they could be admitted. (73 RT 7973-7979.) The Armstrong statements were admitted prior to the admission of the statements made to Scott and Smith. Thus, prior to the admission of the Scott and Smith statements, the damage had been done in that Armstrong's belief that the Bryants owed him money had already been presented to the jury. There is no reason to believe that the trial court would have reached a different conclusion at a later stage in the trial when the Scott and Smith statements were admitted. Therefore, any objection would have been futile and is therefore excused. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Arias* (1996) 13 Cal. 4th 92, 159.) As such, the issue is not waived, and Appellant may raise this issue at this time.

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[9] Appellant's Opening Brief primarily discussed Armstrong's taped statement. However, the statements to Scott and Smith are listed in the heading as hearsay that was inadmissible under the principles discussed therein.

Respondent is in error when it claims that the Scott and Smith statements suffice as "other evidence" to establish a motive for the crimes. These statements only tend to show that Bryant and Armstrong both believed that Bryant owed Armstrong as a former employee and they do not establish the motive for the crime.

In Armstrong's interview with Detective Harley, Armstrong expressly explained it was his intention to take over the Bryant family's business after he got out of prison. (40 Supp3rdCT 10512-10513, 10521-10522.) The sole fact that Bryant owed something to Armstrong does not establish the motive for the crimes. It is only when the additional fact that Armstrong's intent was to take over the business is coupled with the fact that Bryant owed something to Armstrong that motives for the crime can be raised. The fact that Armstrong intended to take over the Bryant family's business was only proven through his taped interview with Detective Harley; this fact is not found in the statements that Respondent claims are "other evidence" of motive.

Equally troubling, Respondent construes the facts that Bryant sent money to Armstrong and Armstrong's family, and arranged for people to visit Armstrong in prison and paid their expenses as evidence that Armstrong was "squeezing" Bryant, and, in Respondent's view, this was "other evidence" of motive for the crimes. (RB 291.) However, Respondent's interpretation of these facts contradicts the prosecution's theory of the case at trial. At trial, the prosecution's theory was that when Bryant family employees were arrested, the Bryants routinely took care of them and their families. For example, when other Bryant family employees, including David Hodnett and Alonzo Smith, were in custody as a result of their activities on behalf of the Bryant family, Bryant arranged to send money to their wives, Tonia Buckner and Iris Brock. (87RT 10448-104450, 104-10465, 89RT 10907-10909, 11RT 15182-15189.) Respondent's new use of these facts to establish "other evidence" of motive is incredible especially given the fact that

there was no evidence that any of the other people routinely provided for by the Bryants, were "squeezing" the Bryant family.

Thus, the fact that Bryant was sending Armstrong and his relatives money does not prove Armstrong was "squeezing" Bryant. Rather, it only shows that Bryant was living up to his obligations to his employees, as the prosecution claimed at trial. As such, the fact that Bryant was sending money to Armstrong in accordance with the understanding that the prosecution claimed existed among the business and its employees, lends no support for the Respondent's claim of "other evidence" of motive.

Finally, Respondent points to Bryant's statements to Ladell Player that they had a "problem," but they had taken care of it, an apparent reference to the Wheeler Avenue murders, as "other evidence" of motive. In addition to the fact that this statement does nothing to establish a motive for the crimes, these were also hearsay statements admissible only against Bryant, as an admission. In fact, at the time these statements were admitted, the jury was instructed to consider them only in relation to Bryant. (89 RT 10913.) Likewise, in the instructions at the end of the trial, the jury was instructed that admissions by one defendant could only be considered against the defendant making the admission. (122 RT 16398.) Therefore, none of these statements may be considered against Appellant in determining whether there was "other evidence" of motive for the crimes.

As a result of the foregoing, it is clear that absent Armstrong's statement, there was no admissible evidence of the motive for the crimes. In light of the weaknesses in the prosecution's case and lack of corroboration for the testimony of Williams, (*ante*, at pp. 20, 38, 58.) the motive for the crimes played a major role in the trial below. Therefore, the erroneous admission of these statements violated both the hearsay rule and Appellant's right to confront witnesses, prejudicing Appellant, requiring a reversal of the judgment.

C. THE STATEMENT OF WINIFRED FISHER

Respondent contends that this issue is waived because counsel for Appellant withdrew his hearsay objection after the prosecutor explained that Fisher was dead. (RB 272.)

In fact, the record is ambivalent as to whether trial counsel withdrew the objection. After being informed of Mr. Fisher's death, the court asked Appellant's attorney, "Does that massage your doubts or do you wish more?" to which defense counsel replied, "No." Because of the compound nature of the question, it is not clear whether defense counsel was replying "no" to the question of whether the answer "massaged" his "doubts" or whether he wanted more. Thus, defense counsel could have been replying that the answer did not satisfy his doubts and objections as to the admissibility of the evidence. Indeed, at the most it can only be said that defense counsel was not contesting the issue further, submitting on his previously expressed objections. At no time did he "withdraw" his objection, as Respondent suggests.

In addition to the other exception to the waiver rule, discussed in the preceding section, the ambiguity of defense counsel's response raises two further reasons to hold this issue as not waived.

First, any doubts as to the sufficiency of the objection should be resolved in the defendant's favor. "Because the question whether defendant has preserved his right to raise this issue on appeal is close and difficult, we assume he has preserved his right, and proceed to the merits." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183, n. 5; see also *People v. Wattier* (1996) 51 Cal.App.4th 948, 953.) Because the question of whether Appellant withdrew his objection or whether he was simply submitting on the objection as previously made is unclear, this Court should assume Appellant made a sufficient objection and consider this issue.

Secondly, an objection to the admission of evidence is sufficient if it fairly apprises the trial court of the issue it is being called on to decide. In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the

record shows that the trial court understood the issue presented. (*People v. Young* (2005) 34 Cal.4th 1149, 1186; *People v. Scott* (1978) 21 Cal. 3d 284, 290.)

Because defense counsel objected to this evidence on hearsay grounds, thereby apprising the court of the nature of the problem, the court had a duty to correctly decide the issue being presented to it.

VI

THE PROSECUTION COMMITTED VARIOUS ACTS OF MISCONDUCT, VIOLATING APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The prosecution committed numerous acts of misconduct, including making emotional appeals to the jury and factual misrepresentations to the court.

A. THE ISSUE IS NOT WAIVED ON APPEAL.

Respondent argues Appellant has waived his claim of prosecutorial misconduct in the appeals to the emotions of the jury and in misstating the law because Appellant failed to object to the arguments of the prosecution. (RB 424.) However, in addition to the exceptions to the waiver rule discussed above (*ante*, at pp. 85-86), and incorporated herein as a part of this argument, other rules provide exceptions to the waiver rule so that this issue may be raised.

Appellant should not be precluded from raising this issue because it has been held that a prosecutor's remarks which inflame the passions and prejudices of the jury constitute the sort of misconduct that is not curable by admonition, thus eliminating the need for a defense objection in the first place to preserve the issue for appeal. (see e.g. *People v. McGreen* (1980) 107 Cal. App. 3d 504 at 519; *People v. Wagner* (1975) 13 Cal. 3d 612 at 621; *People v. Un Dong* (1895) 106 Cal. 83 at 88; *People v. Duvernay* (1941) 43 Cal.App.2d 823, 828; *United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 666.)

B. APPEAL TO PASSION

Responding to Appellant's arguments that the prosecutor improperly appealed to the jury's passions in his description of the Bryant family and in his comments portraying Armstrong's love of children, Respondent contends that the prosecution did not make an appeal to passion, but rather simply recounted the evidence introduced.

Further, Respondent fails to understand the specific arguments that Appellant is presenting regarding the prosecution's characterization of the Bryant family and its impact on the community. Appellant is not arguing that recounting the details of the organization's structure and scope was improper. Rather, Appellant is arguing that the manner in which this issue was discussed was an improper appeal to the jury's passion. This included comments to the effect that: the organization was "the worst you can imagine," that "they have been getting away with it for years," the repeated statement that this was "as horrible as it gets," the repeated references to the impact on the community; and the importance of the case to "citizens of this county." (122 RT 16430N, 16430T, 16490-16491, 16475-16476, 16554.)

A closer look at these statements, reveal that the prosecution was not asking the jury to convict because of the evidence. It was asking the jury to convict based on anger and passion. For example, the evidence as to the size and scope of the Bryants' business would arguably be relevant to Bryants' motive of trying to defend the business. But arguing that the running of the business was "the worst you can imagine" is a misuse of that evidence because it asks the jury to consider the evidence for an emotional purpose.

Likewise, as is the case with evidence of other bad acts, the fact that the organization has been getting away with crime for years had a tendency to make the jury convict "not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses." (1 Wigmore, Evidence §194.) Thus, the prosecution was not arguing the facts of the past conduct of the Bryants

as it tended to prove the current crime. Rather, it was arguing that the jury should convict because they got away with crimes before and should be convicted now.

Also, arguing the importance of the case to the community is not a comment on the evidence. Rather, it is telling the jury that they should convict for reasons extrinsic to the case, namely the fact that the city is plagued with crime.

Similarly, references to how the victim (Armstrong) liked children are as relevant to the issues of this case as a politician kissing babies during election campaigns. Armstrong's likes and dislikes of children had nothing to do with who committed this crime. Arguing his sterling character as someone who would not hurt children, in a case where a toddler was shot and killed, was bound to create undue sympathy for Armstrong and anger toward the defendants.

C. PRESENTING ARGUMENTS WHICH THE PROSECUTION KNEW HAD NO FACTUAL BASIS

At trial, during various hearings when the admissibility of evidence was being discussed, the prosecution made a series of misrepresentations that were crucial in the determination of whether the disputed evidence would be admitted.

1. ARGUING THE UNIQUE TRAIT OF THE COCAINE FOUND IN APPELLANT'S POSSESSION

The most damaging of these statements was the promise by the prosecution to the court that it would connect the cocaine found in Appellant's possession to the Bryants' cocaine. Influenced by the prosecution's misrepresentations, the court allowed introduction of evidence that tied Appellant to the Bryant family, labeled him a big-time drug dealer, and corroborated aspects of Williams's testimony that Appellant was involved with the Bryant family.

As explained previously (*Ante*, at p. 71 and AOB at p. 155), when discussing the admissibility of the cocaine, the defense asserted that it anticipated the

prosecution would offer testimony that the cocaine found was in a cookie-shaped wafer form that was "peculiar" to the Bryant-family cocaine. (85 RT 10035.) The prosecution did nothing to correct the defense's statement that the prosecution would prove the cocaine was in the peculiar wafer form. Likewise, the trial court later indicated that it had been under the same impression, as made clear from the court's comment that the prosecution had not lived up to its promise to prove that the narcotics were in the form of the cookie-shaped wafer. (91RT 11299-11300.) (see *ante*, at p. 71.)

The prosecution's claim that it would connect the cocaine to the Bryants was a particularly important matter, as this was one of the facts the court considered when ruling on the issue. Nonetheless, the prosecution allowed the trial court to be misled as to what evidence would be presented.

Respondent now argues that the unique trait of the cocaine was the fact that it was packaged in half-ounce bindles, which was how the Bryants packaged their cocaine. (RB 427.) As noted previously (*ante*, at p. 70), this is the first time it has been claimed that this half-ounce packaging was the distinctive trait. Although there was testimony that the Bryants packaged their drugs in half-ounce baggies there was no testimony that it was a unique trait to the Bryants. The prosecution never lived up to its promise to connect Appellant's possession of cocaine to the Bryants' cocaine and it clearly misled the trial court as to what it intended to prove in relation to this crucial matter.

2. ARGUING THAT BROWN WAS KILLED IN THE CAR

At the time that the prosecution argued for admission of the photographs of the bodies of Armstrong and Brown, the prosecution informed the court that the pictures of Brown were relevant and important to the prosecution's case because the prosecution believed that Brown was killed in the car by a gunshot wound to the head as a coup de grace. (75RT 8268.) (see AOB 228-229.) This was mis-

conduct because no such evidence was presented, a fact that the prosecution must have known by the time it presented these arguments.

In response, Respondent claims there was no misrepresentation. In so arguing, Respondent reiterates much of the testimony concerning the scalp found at the Wheeler Avenue address, the testimony of the coroner that this was the result of a shotgun blast to Brown's head, and other testimony relating to the cause of death. (RB 428.) Respondent's argument raises concern, in part, because it omits facts crucial to the issue. Respondent fails to mention any evidence relevant to this disputed claim that Brown was killed in the car. As a result, Respondent cites to no evidence that would back up the representation made by the prosecution at trial. (RB 428.)

Additionally, it is ironic that the evidence to which Respondent now cites in fact proves that both the head wound and the fatal gunshot wounds were inflicted at the Wheeler Avenue address *and not in the car* as the prosecution claimed at trial. Rather than demonstrate that the prosecution did not make misrepresentations to the court, Respondent argues facts that support a finding that the evidence conflicted with the prosecution's representation that it would prove the coup de grace was delivered in the car.

In summary, there was no evidence that would support the prosecution's proffer that Brown was killed in the car, a fact which must have been known to the prosecution when it presented those statements to the trial court and which arguably were made in order to influence the court's ruling on the death-scene photographs admissibility. The presentation of knowingly false facts to the trial court was misconduct. Because the misconduct contributed to the erroneous introduction of gruesome death photographs, Appellant was prejudiced by the impact such photographs would have on the jury.

D. THE USE OF IMPROPER LEGAL ARGUMENTS

Respondent does not dispute the fact that the comments complained of, namely, arguing to the jury an incorrect definition of "accomplice," was, in fact, a misstatement of the law and was misconduct. (AOB 231.) Rather, Respondent's only response is that the court gave admonitions that cured the harm. As previously noted, an admonition is unlikely to cure the type of harm caused by misconduct in argument, because "one `cannot unring a bell,'" (*United States v. Garza* (5th Cir. 1979) 608 F.2d 659, 666, citations omitted.) Furthermore, because the trial court acknowledged that the only evidence that connected Appellant to the offense was the testimony of Williams, as to Appellant, this argument, was particularly harmful because it was directed to perhaps the most crucial issue in the case.

E. PREJUDICE

Respondent's position is that even if there was prosecutorial misconduct it was harmless. Essentially, Respondent claims that the prosecutorial misconduct was cured by instructions to the jury and the by the fact that the evidence was overwhelming. (RB 429-430.)

As previously noted (*ante*, at p. 54), and incorporated herein, instructions to the jury are not a cure-all for prosecutorial misconduct. Furthermore, Respondent's response ignores a portion of the misconduct, i.e. the misrepresentations made to the trial court in arguing for the admission of evidence. Clearly, Respondent's position that instructions to the jury cured the harm is not relevant in evaluating prejudice resulting from the misrepresentations to the court.

More accurately, the prejudice must be determined by evaluating its possible impact on the trial court's rulings. The trial court told the prosecution that it had relied on its representations in allowing evidence of the cocaine to be admitted, and further that the foundation he had been promised, and that the court expected, had not been proven. This is direct and powerful evidence that if the mis-

representations had not been made, it is very likely the court would have ruled differently.

Appellant was prejudiced by the court's ruling because it allowed the prosecution to prove Appellant was a big-time drug dealer, associated with the Bryants, the type of person to engage in reckless and dangerous conduct with no regard for the safety of others, and to be involved in conduct which reflected a cold and depraved heart. This ruling also further bolstered the testimony of Williams to the effect that he saw Appellant at the crack house when Appellant stopped by the house, thereby connecting Appellant to the Bryant business. (96RT 12234.)

In a similar vein, the prosecution's argument that Brown was killed in the car allowed the prosecution to introduce gruesome death pictures, which invariably had a dramatic impact on the jury.

Finally, Respondent's contention that the evidence was overwhelming must again be addressed. There was overwhelming evidence of intent and that the victims were killed. Indeed, there may have been overwhelming evidence as to the other defendants, including Jon Settle. However, the evidence that connected Appellant to the offense was based solely on the testimony of the unsavory James Williams, who, even if arguably was deemed to not be an accomplice, he was not a figure to inspire credibility. Indeed, the evidence against Appellant was so scarce, that that trial court recognized its scarceness. It is respectfully submitted that the evidence against Appellant was a far cry from being overwhelming.

Based on the foregoing, Appellant submits that the prosecutor's actions constituted misconduct, depriving Appellant of his rights as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and his rights as guaranteed by the California State Constitution. The violation of Appellant's state and federal constitutional rights demands that the judgment entered below be reversed.

VII

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING INFLAMMATORY, GRUESOME, AND CUMULATIVE PHOTOGRAPHS OF THE VICTIMS' BODIES

The trial court abused its discretion by admitting inflammatory, gruesome, and cumulative photographs of the victims' bodies. The abuse of discretion stems from the fact that there was no probative value to the photographs, leaving only the prejudicial and emotional impact of gruesome and heart-wrenching images of decomposed bodies and a dead baby.

A. THE PURPORTED USE OF THE PHOTOGRAPHS WAS NOT RELEVANT

Respondent contends that the admission of these photographs was largely a matter of the trial court's discretion. (RB 405.) Whereas this is undeniably true, this principle of law does not relieve an appellate court from examining the evidence and determining whether there was an abuse of discretion. However, as will be explained, in a situation such as this, where the evidence was of such a minimal value, Evidence Code section 352 cannot be used as a shield to protect sloppy and superficial reasoning.

Similarly, Respondent explains that parties are not required to rely on oral testimony, but may introduce physical evidence such as photographs to substantiate the oral testimony. (RB 405, citing various cases including *People v. Pride* (1992) 3 Cal.4th 195, 243; *People v. Price* (1991) 1 Cal.4th 324, 433-435.) The physical evidence used to substantiate oral testimony must have some relevance and is still subject to other rules of evidence, such as section 352. If it does not have additional probative value, all that remains is the emotion generated by the evidence. An example of this may be found in the prosecution's purported justification for allowing the photographs of toddler Chemise. Respondent explains that

the prosecution's theory was that Chemise was cowering at the time she was killed. (RB 406.) Indeed, this corresponds with the coroner's testimony that Chemise was cowering. (75 RT 8291.) Initially, this may appear to be a plausible justification for the use of the photographs. However, when a relevancy inquiry is made the justification no longer appears reasonable. The fact that a victim is afraid is not a relevant fact per se. Unless there is some relevance to this fact, this purported use is of no consequence, leaving only the image of a toddler with multiple gunshot wounds, cowering in fear in front of her shooter. The fact that Chemise was afraid played no significant role in any issue in the case.

Another example of the questionable justification for the photographic evidence was the prosecution's theory that victims Armstrong, Brown, and Anderson had been executed; they were wounded with shotgun blasts and then fatally shot at close range. (RB 406.) In reality, this justification misstates both the prosecution's theory at trial and the evidence introduced to support that theory. The coroner testified Anderson's cause of death was the shotgun wound (75 RT 8306-8307), but he did not express the opinion that Anderson was wounded with the shotgun and then killed in a *coup de grace* by another weapon. Similarly, he testified that the shotgun wounds to Armstrong were fatal. (75 RT 8344-8345.) Finally, regarding the cause of death for Brown, he testified that the shotgun wound to Brown could have been fatal, and he did not know if it killed him immediately, although he also testified that the gunshot wound clearly would have been fatal. (75 RT 8376-8357.) In short, the justification that Respondent now presents to justify the use of these photographs was not the theory argued by the prosecution to the trial court.

Respondent also argues that the photographs showing the decomposition of the victims lying in Lopez Canyon for an extended period of time "factored into the medical examiner's opinions regarding which of the several wounds suffered by each victim were fatal and inflicted at close range." (RB 406.) It is respectfully submitted that the decomposition photographs did not serve this purpose.

Rather, the coroner concluded that the shotgun wound to Armstrong was fatal not because of evidence depicted in the decomposition photographs, but because two of the shotgun pellets pierced his heart. (75 RT 8344-8345, 8347.) Nor did he determine from the decomposition photographs that the weapons were fired at close range. Instead, he determined the range of the wounds by the spread of the bullets, sooting, and similar evidence. (75 RT 8341, 8353.) Thus, the relevance now suggested by Respondent is not based on the evidence presented at trial or the theory of the causes of death argued in the trial court. If a trial court exercises its discretion to admit gruesome photographs because they tend to prove the closeness of the weapon, as Respondent argues, when, in fact, the closeness of the weapon had no relationship to those photographs, and was proven by evidence *other than the photographs*, this constitutes an abuse of discretion.

Other justifications suggested by Respondent are equally irrelevant. For example, Respondent contends that the photographs from Lopez Canyon "were highly probative, because they depicted the victims wearing the clothes they were last seen wearing on the day of the murder," and the photograph of the missing piece of scalp created a link to the Wheeler Avenue house. (RB 406.) There was no issue as to whether Anderson and Brown changed clothes between the time they left the Wheeler Avenue residence and the time they arrived at Lopez Canyon. Indeed, even phrasing the issue in terms of whether they had changed their clothes after the shots at Wheeler Avenue makes the contention sound silly. Also, merely saying that the piece of scalp connects them to the Wheeler Avenue house does not explain the relevance of the other gruesome photographs of abdomens bursting and skulls grinning.

As Respondent notes, the courts have held that "[m]urder is seldom pretty." (RB 407, citing *People v. Priece* (1979) 24 Cal.3d 199, 211.) It is because murder is seldom pretty that the courts have limited this type of evidence. Equally, it is because murder is seldom pretty that the trial court must seriously examine the purported relevance of the evidence against the actual and unnecessary emotional

impact created by that evidence. The proffered use had no relevance, and the desired inference was proven by *other* evidence and had no relationship to the photographs, such as the photographs depicting the closeness of the gunshots, it was error to admit these types of photographs.

Finally, assuming arguendo there was some minimal probative value for this evidence, the evidence was still inadmissible because other evidence had adequately proved any fact to which this evidence may have related. As noted above, the prosecution has no right to present cumulative evidence that creates a substantial danger of prejudice. (*Ante*, at p. 76.) Ironically, as noted throughout this Brief, Respondent has argued that the evidence of guilt was overwhelming. If this were true, there would have been no need to introduce these types of gruesome photographs to prove issues that were of such minimal significance. Thus, if somehow this evidence was relevant to prove intent, for example, the fact that the victims were shot multiple times at close range sufficiently proves that element. The graphic photographs were merely cumulative evidence with no serious additional probative value.

Because this evidence was not relevant, its introduction violated the Due Process Clause, which requires a rational connection between the fact proved, and the fact to be inferred. (*Ulster County Court v. Allen* (1979) 442 U. S. 140, 157; *Leary v. United States* (1969) 395 U.S. 6, 46.) The photographs lacked relevance, and the emotional impact of these types of gruesome photographs violated the Eighth Amendment's requirement of a greater reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334.) (1976) 428 U.S. 280; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

B. PREJUDICE.

Respondent further contends that if there was error in admitting these photographs, the error was harmless for two reasons: First, any potential prejudice

was reduced by the corrective actions of the trial court, including the instructions given and the voir dire conducted. (RB 409.) Secondly, any prejudice was reduced by the fact that there was "overwhelming evidence." (RB 408.)

The instructions given by the court were standard California instructions, and were not sufficient in the face of the exceptionally gruesome photographs of decomposition of eyeballs, maggot-ridden bodies, mummification, and a dead toddler. Because the instructions given were fairly common to all cases, to hold that this type of action is an automatic cure would forever abrogate the rules limiting the use of this type of evidence, as discussed in Appellant's Opening Brief. (AOB at p. 239-241.) In fact, in many different contexts it has been recognized that the instructions of the judge may be insufficient to overcome the evidence introduced in the case. (E.g. see, *Bruton v United States, supra*, 391 U.S. 123.)

Appellant incorporates and adopts herein his response as previously noted, to Respondent's claim that the evidence was "overwhelming." Additionally, as noted in Appellant's Opening Brief (AOB 240), this type of evidence must be analyzed in terms of an "evidentiary mosaic," and because there were ample descriptions of the bodies, and there was no need for clarification or amplification, nor any added probative value, the prejudice outweighs the probative value. (*People v. Smith* (1973) 33 Cal.App.3d 51, 69 - in view of the testimony of the coroner and the other evidence, the court found the photographs to have been far more prejudicial than probative.) Because the evidence was already sufficiently presented on issues relating to these photographs, this tends to prove that it was prejudicial error rather than harmless error. Also, because the evidence against Appellant was slight, avoiding highly charged, emotional photographic evidence was of great importance.

C. CONCLUSION

Because the purported relevance of the death photographs had no probative value, the introduction of these photographs was prejudicial error, requiring the judgment of conviction be reversed.

VIII

THE USE OF THE STUN BELT AND OTHER SECURITY MEASURES EMPLOYED BY THE TRIAL COURT, WITHOUT THE REQUIRED SHOWING OF NECESSITY, INFRINGED ON APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The use of the REACT stun belt and other security measures employed by the trial court, without the required showing of necessity infringed on Appellant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Respondent attempts to justify the use of the stun belt by arguing "Appellant Smith fails to appreciate the seriousness of his violent attack on witness Curry." (RB 501.) According to Respondent, this evidence created an inference that Appellant committed violent acts at the behest of Bryant, and was therefore a danger in the courtroom. (RB 502.)

This argument fails to appreciate the fact that *People v. Mar* (2002) 28 Cal.4th 1201, reaffirmed the rule that the decision to use restraints must be based on specific information relating to security in the particular case, and the mere fact that the defendant is accused of a violent crime is not sufficient to justify the use of restraints. (*Id.* at 1220-1222.) The fact that Appellant shot Keith Curry, was part of the accusation against Appellant that he engaged in violent crimes, for which he was being tried. Under the reasoning of *Mar* this was not a proper basis to justify the use of restraints at trial. In effect, Respondent argues that while charges of violent crimes committed by a defendant cannot be used to justify the

use of restraints, if the prosecution intends to offer evidence of violent acts to back up those charges, the use of restraints would be justified. Obviously, such an exception would swallow the rule.

In Appellant's Opening Brief, Appellant argued that he should have been given the same option that was given to Settle; the trial court offered Settle the option of a leg brace and one free hand. Although the exercise of the right of self-representation cannot be used to lessen other rights of a defendant, a pro per defendant should not gain *additional* rights, beyond those enjoyed by other defendants in the same trial, by reason of that election. Therefore, Appellant should have been given the same options as Settle. (AOB 255.) Respondent argues that because Settle eventually chose to wear the stun belt, he was subject to the same restraint as Appellant. (RB 503.) This misconstrues the nature of Appellant's argument. Appellant is not arguing that he should have been subject to the same restraints *chosen* by Settle. Rather, he should have been given the same *choice* as Settle.

In *Mar, supra*, the court held that in determining what security measure to employ, trial courts should adopt "the least restrictive measure that will satisfy the court's legitimate security concerns." (*Id.* at 1206.) If the leg brace was sufficient security for Settle so that he could be given that option, there was no reason why the leg brace would not have been sufficient for Appellant, and Appellant should have been given the same option. The fact that Settle made his personal choice otherwise does not resolve the issue as to Appellant. To hold that it does, would empower Settle with a veto over Appellant's preference.

Respondent urges that the trial court was concerned over the level of security needed because of Bryant's "violent acts against those who crossed him and that Appellant Smith carried out such acts." (RB 503.) In all cases where violent acts are alleged and violent acts by the defendants are to be proven, the court may have concern. However, as explained above, the nature of the charges alone is not a sufficient reason for forcing the defendant to wear the stun belt. In fact, if the

charges against Bryant and Bryant's past mandated the need for restraints, the trial court was in error for not severing Appellant's case from Bryant based on such evidence. (See AOB Argument III.) The interests of judicial economy as a justification for a joint trial may not be the means to overcome a defendant's fundamental rights. When a joint trial threatens those rights, a severance is mandated. (E.g., see *Bruton v United States*, *supra*, 391 U.S. 123.) If the presence of Bryant as a defendant is the reason why Appellant must be subject to restraints, the answer was to sever his case from Bryant so that Bryant's presence did not negatively affect Appellant's rights.

Respondent further contends that there was nothing in the record to indicate that the use of the stun belt actually affected Appellant. (RB 504) Respondent explains that Settle also wore the stun belt, participated in the trial as his own attorney, and managed to achieve a hung jury. (RB 504.) There are four fallacies with this contention.

First, the fact that Settle managed to achieve a certain level of success does not mean that wearing the stun belt did not affect him. Settle managed to convince one juror that there was a reasonable doubt as to his guilt. It is speculation to assume that he would have done no better under different circumstances, including not having the tensions inherent in wearing a stun belt.

Second, even if the conclusion that the stun belt did not affect Settle could be drawn, the fact that one defendant was not affected by something is not evidence as to whether another defendant was affected.

Third, the impact of the stun belt may be the type of impact that was not observable or provable.

Fourth, Settle's success may have been attributable to factors not related to the stun belt or its impact on him. For example, because Settle was acting as his own attorney, while the other defendants remained silent at the defense table for months on end, the jury saw Settle interacting with the court and counsel. Seeing Settle in a more humane role for the duration of the trial must have influenced at

least some of the jurors, who would be rendering a life or death verdict to Settle. Moreover, other factors, such as the court providing the jurors with clarification as to the definition of an accomplice and concept of reasonable doubt when the jury was deliberating only as to Settle, may very well have been the catalyst that led to Settle's success. (See, AOB Argument I.)

Respondent argues that there was no harm because Appellant did not testify and therefore, there was no damage to his credibility. As noted previously, *Mar* cited the problems inherent in restraints, recognized by *Duran*, including prejudicing the jurors, the "affront to human dignity," and the effect on a defendant's decision to take the stand. (*Mar*, at 1216, quoting *People v. Duran* (1976) 16 Cal.3d 282, 290.) Respondent has not addressed any of these factors.

Respondent also argues that any potential error should be judged under the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818 (reasonable-probability standard of prejudice) because no juror saw the belt. (RB 512-514.) However, the facts of the case suggest otherwise. During voir dire, Prospective Juror No. 191 wrote in her questionnaire that she did see something under the sweater of one of the defendants. (4 CT 1013, 1032.)[10] Additionally, during jury selection, after Prospective Juror 397 was excused the court asked her to approach the bench. The court asked why she had asked in her questionnaire, "Are they [the defendants] wearing special restraints?" Prospective Juror 397 responded that she believed Appellant Smith was moving in an awkward manner. (Clerk's Transcript Supplemental X, 119-120.) Therefore, at least two prospective jurors saw enough to come to the conclusion that Appellant might be wearing a stun belt. In *Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586, the court found that if one juror saw restraints, it is likely that others saw them. too. Applying the *Dyas* analysis to this case, if two jurors came to the conclusion Appellant was wearing special restraints, it is likely that others came to the same conclusion.

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[10] This questionnaire is found in Volume 4 of the Clerk's Transcripts containing the jury questionnaires. This is a separate set of the Clerk's Transcripts.

In *Deck v. Missouri* (2005) 544 U.S. 622, the Supreme Court recently reaffirmed the prohibition of visible restraints on a criminal defendant when there is an insufficient basis for that type of measure. The Court reaffirmed the holding of *Holbrook v. Flynn* (1986) 475 U.S. 560 that shackling is "inherently prejudicial," (*Id.* at 568), a view rooted in the Supreme Court's belief that the practice will often have negative effects that "cannot be shown from a trial transcript." (*Riggins v. Nevada* (1992) 504 U.S. 127, 137.) As a result, *Deck* concluded that when a court, without adequate justification, orders the defendant to wear shackles visible to the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. Rather, the State must prove beyond a reasonable doubt that the shackling did not contribute to the verdict obtained.

Finally, slightly modifying its prior arguments that there was "overwhelming evidence," Respondent contends that there was no prejudice because of the "compelling evidence" of guilt. (RB 513.) Once again, while there was compelling evidence that a crime was committed, as the trial court stated, the evidence connecting Appellant to the offense was solely based on the testimony of Williams, at best an unsavory character, a potential accomplice, a petty criminal, and a member of the drug cartel. Under any standard, this hardly adds up to "compelling evidence" of guilt."

IX

THE PRESENCE OF A HEARING IMPAIRED JUROR DENIED APPELLANT THE RIGHT TO A JURY TRIAL, TO TRIAL COUNSEL, TO A FAIR TRIAL, AND TO A RELIABLE DETERMINATION IN A CAPITAL CASE

Appellant's state and federal constitutional rights were violated when a hearing impaired juror in his case continued to sit as a juror without the benefit of a fully functioning hearing device for the entire trial.

A. THE ISSUE WAS NOT WAIVED

Respondent does not dispute the fact that a hearing impaired juror was allowed to serve without a functioning hearing aid for portions of the trial, but rests its response on a claim of waiver based on trial counsel's failure to object. (RT 418.)

As noted above (*ante*, at 33), although a failure to object may hinder a defendant's ability to raise an issue, it does not preclude an appellate court from resolving that issue should it feel the need to do so. In addition, Appellant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental constitutional rights, including the right to a jury. (A*nte*, at p. 86.)

As explained by the Assembly Judiciary Committee comment following Evidence Code section 353:[11] "Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law." (*People v. Mills* (1978) 81 Cal.App.3d 171, 176.) Thus, an issue is not waived on appeal by the failure to object if the error is so fundamental that it represents a deprivation of the right to due process of law or the right to a jury. (*People v. Menchaca* (1983) 146 Cal.App.3rd 1019 – lack of an interpreter for the defendant at the preliminary hearing.)

Also as explained above, (*ante*, at p. 86), an objection may be excused when a pure question of law is involved. In this case, it is not disputed that the ju-

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[11] Evidence Code Section 353 states:
A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

ror had hearing problems that necessitated a hearing device. Nor is it disputed that at times he either did not have the device or it was not functioning properly. As such, issue addresses a pure question of law – whether the presence of a hearing impaired juror, without a fully functioning hearing aid, deprived Appellant of the right to a jury trial, to trial counsel, to a fair trial, and to a reliable determination in a capital case. For these reasons, trial counsel's failure to object to this issue should not prevent this Court from addressing the issue on its merits at this time.

B. THE MERITS OF THE ISSUE.

Respondent's sole argument regarding the merits of the issue is that it is pure speculation as to whether the jury received less or different information than the other jurors. However, the very fact that the juror needed a hearing aid creates an irrefutable inference that without such a device the juror would not hear everything that was being said. Otherwise, there would have been no need for the juror to have informed the court of the hearing problems, initially, and to request the device in the first place. (72 RT 7947.)

Likewise, when discussing the malfunction of the hearing device, it was the juror who informed the court that he/she was able to read lips. (87 RT 10436.) Obviously, at that stage of trial, during testimony, the juror was reading lips, and the entire purpose of the juror mentioning the fact of his ability to read lips was to ameliorate the situation caused by his hearing impairment, as the juror seemed to think that by informing the trial court of the ability to read lips, this would lessen the negative impact cause by the inability to hear, not realizing the receipt of other and different information actually aggravated the problem. The dangers of lip reading stem from factors inherent within that system of communication. (AOB 271) Rather than speculation, an inference can be drawn that this type of error in communication was, to a certain degree, inevitable. While Appellant cannot point to any specific facts which were missed or distorted by the presence of a hearing impaired juror with a malfunctioning hearing aid, it is simply a denial of reality to

assume that the hearing impaired juror heard the exact things that the other unimpaired jurors heard. However, if specific distortions of testimony are needed it is sufficient to note that without hearing one cannot see the differences between "P" and "B," "T" and "D," "K" and "G," as the difference in those sounds is produced solely by the rate of the expulsion of air, an invisible occurrence.

C. CONCLUSION

For the reasons stated above, one juror could not participate equally with the other jurors. Therefore, Appellant was denied a right to a jury trial, to trial counsel, to a fair trial, and to a reliable determination in a capital case, requiring that, the judgment entered below must be reversed.

X

THE TRIAL COURT ERRED IN TELLING THE JURY THAT THE COST OF THE TRIAL WAS "ASTRONOMICAL."

Because the cost of trial is irrelevant to the guilt or innocence of a defendant, the trial court erred in repeatedly telling the jury that the cost of the trial was "astronomical," thus suggesting that a failure to convict would be a massive waste of public resources.

Respondent's primary contention in this area is that there was no error because the statements, which Appellant has complained about, were not made during deliberations when the jury was deadlocked, but rather prior to the start of testimony and during an early stage of the proceedings. (RB 613-614.) It is respectfully submitted that although *greater* prejudice may have occurred had these instructions been given to a deadlocked jury, the fact that they were given at an early stage does nothing to diminish the harmful effect.

Evidence relating to the cost of a trial has no relevance to a defendant's guilt. (*People v. Barraza* (1979) 23 Cal.3d 675, 684; *People v. Gainer* (1977) 19 Cal.3d 835, 852, fn. 16.) Therefore, this type of information is simply irrelevant

and can play no part in the jury's understanding of the case. If it is error to impress upon the jury the cost of trial, it does not matter when that occurs. Moreover, a jury is expected to remember instructions given at any point in the proceedings. For example, when the court instructed the jury at the end of the guilt phase of the case, the court explained that at the time the certain evidence was introduced the jury had been instructed on the limited use of that evidence, and the jury should only consider that evidence for the purpose for which it was introduced or against the particular defendant against whom it was introduced. (53 CT 15473-15474.). With no reminders as to what those items of evidence were and the limiting instructions given months before, the jury was simply reminded not to consider it for any purpose other than for which it was admitted. Arguably, when a court tells and/or instructs jurors about specific information related to a case that they are a part of, including comments such as the "astronomical" cost of the trial, the jurors will not only remember the remarks but also take them into consideration.

Finally, Respondent contends that if error occurred, the error was harmless because of the overwhelming evidence of Appellant's guilt. (RB 615.) Appellant incorporates and adopts herein his response as previously noted, to Respondent's claim that the evidence was "overwhelming." It is respectfully submitted that the evidence was not overwhelming, and certainly not of a magnitude to overcome the improper and prejudicial remarks by the court to the jurors regarding the enormous cost of Appellant's trial.

XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO LIMIT THE EVIDENCE THAT THE JURY COULD CONSIDER AGAINST HIM TO EVIDENCE PRESENTED IN THE PEOPLE'S CASE IN CHIEF, PRIOR TO THE PEOPLE RESTING

In response to this issue raised by Appellant, Respondent claims the trial court did not error in denying Appellant's request to limit the evidence that the jury could consider against him to evidence presented in the People's case in chief. It is Respondent's position that Appellant has failed to appreciate the nature of a joint trial where the jury considers culpability in light of the totality of the evidence presented in the case. (RB 432-433.)

Yet, it is the very difference between a joint and individual trial that mandates the instruction Appellant has suggested. While the needs of judicial efficiency and economy often times mandate a trial with multiple defendants, those needs should not lessen nor increase the burden which the State and/or defendant would bear had the defendant been tried alone. As it applies to this case, the prosecution had its opportunity to present its evidence against Appellant, which it did, after which Appellant rested. However, by reason of the presence of other defendants, additional evidence was admitted, both by the remaining defendants and the rebuttal of the prosecution. Thus, after basing his defense on the fact that the prosecution did not establish its case against him, and having rested on that defense, evidence subsequently admitted by other defendants and the prosecution's rebuttal added to that evidence essentially resulted in evidence bolstering the prosecution's case against Appellant.

Appellant submits that allowing the jury to consider that evidence deprived Appellant of the right to base his defense solely on the theory that the prosecution did not prove its case. Ironically, Respondent recognizes the fact that had Appellant been tried alone "surely he might be entitled" to the type of instruction re-

quested. (RB 432.) Ignoring the oxymoron inherent in recognizing that Appellant "surely might" be entitled to an instruction, while this would appear to recognize the fact that a defendant is entitled to have the evidence presented in the State's case-in-chief as the sole evidence against him, Respondent fails to recognize the fact that in a trial with no other defendants, the instruction would be both unnecessary and surplusage for the reason that the state would have rested and no more evidence would have come in. Therefore, there would be no need to limit the jury's consideration to the only evidence presented. Thus, it is only in a joint trial where this issue would arise. If Appellant "surely might" be entitled to have this instruction in a trial with no other defendants, the presence of other defendants in a joint trial should not defeat that right.

In summary, Appellant submits that the trial court erred in denying Appellant's request to limit the evidence that the jury could consider against him to evidence presented in the prosecution's case in chief, prior to the prosecution resting.

PENALTY PHASE ARGUMENTS

XII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR UNDER *WITHERSPOON V. STATE OF ILLINOIS.*(1968) 391 U.S. 10 AND *WAINWRIGHT V. WITT* (1985) 469 U.S. 412, VIOLATING APPELLANT'S RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY EXCUSING TWO PROSPECTIVE JURORS FOR CAUSE DESPITE THEIR WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

The trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating Appellant's rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, by excus-

ing two prospective jurors for cause despite their willingness to fairly consider imposing the death penalty.

Respondent contends that the trial court's determination of a prospective juror's true state of mind is binding on an appellate court if supported by substantial evidence. (RB 253.) However, its claim that the state of mind of Prospective Jurors Nos. 52 and 56 was supported by substantial evidence is not accurate, as may be shown from the very facts acknowledged by Respondent. As Respondent recognized, in his questionnaire and/or on voir dire Prospective Juror No. 52 indicated he would not automatically vote for death or a sentence of life without parole; the death penalty bothered him but, he could follow the law, be a fair judge; he was "sure" he could follow the evidence and vote for life without parole or death, and despite his reservations, he could vote for death if he had to. (RB 250-251.)

Irrespective of Prospective Juror No. 52's total answers, to reach its conclusion of "substantial evidence" Respondent ignores the totality of Prospective Juror No. 52's questionnaire and voir dire responses and focuses on just one of his answers to the trial court's voir dire. Respondent's focus is on Prospective Juror No. 52's answer where he indicated his religious beliefs made it difficult to sit in judgment and be a fair judge. (RB 251) However, Respondent's limited reliance on this answer ignores the established principle that because of the seriousness of the penalty, a hesitancy or difficulty in sentencing someone to death is not a sufficient reason to disqualify a potential juror. (People v. Stewart 2004) 33 Cal.4th 425, 446.) As a result, Respondent's focus on just a portion of Prospective Juror No. 52's responses distorts the meaning of the prospective juror's true state of mind.

Similarly, as to Prospective Juror No. 56, from the facts advanced in Respondent's brief, it is clear that although she was not "overjoyed" with being involved in a death penalty case, nevertheless, based on the answers supplied, it was clear that she could put her religious beliefs aside and impose a sentence of death if necessary. In particular, Prospective Juror No. 56 made it clear that after filling

out the questionnaire, when the trial court offered further information and definition regarding the use of aggravating and mitigating circumstances, as often happens with many other prospective jurors, she developed a better understanding of the process and as a result modified her questionnaire remarks. With further instruction from the court she believed her civic duty required her to follow the law and evidence and impose death if necessary, although, understandably, she was still not overjoyed about being a participant in a death case. (RB 254-255.) As noted above, the case law is clear, Prospective Juror No. 56's hesitancy or difficulty in sentencing Appellant to death was not a sufficient reason to disqualify her as a potential juror. (*People v. Stewart* 2004) 33 Cal.4th 425, 446.)

Respondent further contends that the trial court did not abuse its discretion when it excused Prospective Jurors No. 52 and 56, because both had indicated several times that they had serious concerns with capital punishment and expressed, in various forms, the fact that it would be difficult for them to return a death verdict. (RB 251-257.) While these prospective jurors did express such concerns about the death penalty, the bottom line is when they were asked questions about their views they both repeatedly stated that they could, in fact, impose the death penalty, if the law and the facts warranted that decision.

As explained in Appellant's Opening Brief (AOB 294-297.) *Witherspoon* established the principle that merely because a prospective juror has "conscientious scruples against capital punishment," that a prospective juror should not be excused for cause if he or she is able to make it clear that those views would not prevent his or her from making an impartial decision as to the defendant's guilt, and further indicate that he or she could obey their oath to follow the law. (*Id.*, at pp. 512-513, 522.)

Respondent fails to appreciate the principles announced in underlying cases such as *Witherspoon, supra, Wainwright v. Witt supra*, 469 U.S. 412, and *Adams v. Texas* (1980) 448 U.S. 38. These principles support a finding that a juror cannot be excused for merely voicing general, sincerely-felt, concerns about capital pun-

ishment, namely, the juror who voices a general, philosophical opposition, but when asked if he can overcome that view, states that he can and that he would be able to impose the death penalty if the facts demanded such a result.

In this case, Prospective Jurors No. 52 and 56 are precisely the types of juror contemplated by the principles announced in *Witherspoon, Wainwright, and Adams*. Prospective Juror No. 52 repeatedly stated that he could follow the law, be a fair judge, and would not automatically vote for life in prison. He unequivocally informed the court that he believed a juror had to "go by the evidence" when reaching a penalty determination. (66 RT 7018, 7019 7021.) Likewise, Prospective Juror No. 56 indicated on at least three occasions that she could put her feelings aside, be fair, and that she could return a sentence of death if warranted. (65 RT 6746, 6747, 6750.) Although both prospective jurors expressed a concern or reservation about imposing a sentence of death, the totality of their remarks to the court, as noted above, make clear they could do so if the facts and law demanded such a determination. Hence, Prospective Jurors No. 52 and 56 should not have been excused for cause simply because they expressed reservations about capital punishment.

As the United States Supreme Court has noted:

> Culled of all who harbor doubts about the wisdom of capital punishment-of all who would be reluctant to pronounce the extreme penalty-such a jury can speak only for a distinct and dwindling minority. (*Witherspoon*, *supra*, at p. 520)

Based on the foregoing, and the arguments presented in Appellant's Opening Brief (AOB 294-293), Appellant submits that by excusing two prospective jurors for cause despite their willingness to fairly consider imposing the death penalty, the trial court committed reversible error, violating Appellant's state and federal constitutional rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

XIII

THE TRIAL COURT IMPROPERLY COERCED A DEATH VERDICT AFTER THE JURY HAD TWICE DECLARED ITSELF DEADLOCKED AND THEN ERRONEOUSLY SUBSTITUTED AN ALTERNATE WHEN THE JURY COULD NOT POSSIBLY BEGIN ITS PENALTY DELIBERATIONS ANEW, THEREBY VIOLATING APPELLANT'S RIGHTS TO A JURY TRIAL, DUE PROCESS OF LAW, AND A RELIABLE SENTENCING DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION AND THE CALIFORNIA CONSTITUTION

The trial court erred in denying Appellant's request for a mistrial based on the fact that the jury was deadlocked as to a penalty determination for Appellant. The court further erred when it thereafter substituted an alternate juror when it was no longer practicable for the jury to begin its penalty deliberations anew. As a result, Appellant was denied his right to a jury trial and to due process of law.[12]

A. The Unusual Nature Of This Case Render The General Principles Relied On By Respondent To Be Inapplicable.

The main fallacy in Respondent's views regarding both the instructions given to the then-deadlocked jury and the substitution of the juror after the penalty phase verdicts had been reached as to Wheeler, is that Respondent fails to appreciate or discuss the unique nature of this case and the impact of that nature on these two decisions of the trial court. Indeed, when this issue was raised in Appellant's Opening Brief, the argument began with the phrase, "Under the unusual facts of this case..." (AOB 302.)

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[12] Appellant notes that in Appellant's Opening Brief, it is stated that Juror No. 113 had informed the court that he/she had a pre-paid vacation scheduled for June 21st. The correct date for which the vacation was scheduled was July 21st.

In fact, in cases dealing with these issues, the courts have explained that the particular result being reached was arrived at based on the facts of the case, noting that under different facts a different result might be called for. (E.g., *Locks v. Sumner* (9th Cir.1983) 703 F.2d 403, 406; *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976.) Indeed, the law recognizes the twin principles of "When the reason of a rule ceases, so should the rule itself," and "Where the reason is the same, the rule should be the same." (Civ. Code §§ 3510 and 3511.) Consequently, under the unusual facts presented herein, the "normal" rules should not be automatically applied without carefully examining their appropriateness to the specific situation presented by this case. Thus, while Respondent relies on principles of law that may be applicable to most cases, under the individual facts of a particular case, such general rules should not be applied in a rote manner.

The unusual nature of this case stems from multiple facts working in conjunction with each other. First, this was an exceptionally long case, with jury selection beginning on January 25th, six months prior to the jury announcing its deadlock on June 30th. (64 RT 6389, 136 RT 18113.) In fact, the trial lasted so long that one of the jurors still sitting on Appellant's case received a summons to report for jury duty in another case.[13] (135 RT 18128.)

Second, in addition to the length of the case, the fact that the case involved the State seeking the death penalty against four defendants was also highly unusual.

Third, in this context of a "mega-case" the jury had already returned a verdict of death against one of the defendants. In a conspiracy case, it would be natural for jurors to equate the moral culpability of one defendant with his co-conspirator. After a jury is informed of the legal consequences for vicarious liability and aiding and abetting, it may well offend a juror's sense of justice to execute one defendant for the crimes, while letting a co-defendant involved in the same

[13] The juror was excused from further service on other juries.

crimes escape with his life. The fact that the jury is instructed to consider the case against each defendant separately cannot ignore the psychological realities inherent in this type of situation. Indeed, for many years courts have recognized the fact that jurors may be required to perform impossible mental gymnastics in order to follow the instruction, and that when fundamental rights are at stake, the legal fiction must bow to reality. (E.g., *Bruton v. United States*, *supra*, 391 U.S. 123; *Nash v. United States* (2d. Cir. 1932) 54 F.2d 1006, 1007.)

Fourth, although the new juror in theory was "an equal" in the renewed deliberations, in fact, the other jurors had deliberated through the guilt phase, reaching those verdicts, and had spent days already debating penalty. Having reached one death verdict, a new juror entering the scene, when eleven jurors have already argued for days before those eleven agreed to the death verdict, it is clear that the new juror was going to be at a big disadvantage. In this situation, the equality of the jurors is reminiscent of the slogan from George Orwell's *Animal Farm* that "All Animals Are Equal, But Some Animals Are More Equal Than Others."

Finally, this was a case where tempers were frayed, where jurors were arguing over bananas and referring to each other using obscenities. (126 RT 162975-16992 16370-16374.) Thus, the danger of jurors being tempted to rush to finish the job was particularly perilous.

In summary, this was a mega-case, with a natural tendency to equate the culpability of the parties against whom guilty verdicts had been rendered. With tempers flared and no visible light at the end of the tunnel, the jury was under natural pressure to want to resolve the case and go home. In such a situation, the danger of the jury being rushed or coerced was unusually high. Consequently, the facts of this case serve to create an exception to the general rules relied upon by Respondent.

B. The Instructions Given To The Jury, After The Jury Announced It Was Deadlocked, Were Coercive Under The Facts Of This Case

In a conclusory manner, Respondent notes, "the instruction ...did *not* result in a penalty verdict as to appellant Smith and Bryant..." (RB 582, italics in original.) Respondent also remarks that the instructions to which Appellant complains "cannot possibly be considered to have, *in any manner whatsoever*, influenced or coerced the newly constituted jury in reaching penalty verdicts...." (RB 583, italics in original.) It is respectfully submitted that this conclusory and emphatic statement of Respondent is subject to reasonable debate, regardless of the certainty reflected in its rhetorical statement.

In support of its argument Respondent explains that the jury was given the appropriate instructions to begin deliberations anew. (RB 583.) In fact, as noted above, in different contexts it has been recognized that the instructions of the judge may be insufficient to overcome specific problems associated with the case. (E.g. *Bruton v United States*, *supra*, 391 U.S. 123; *De Luna v. United States*, *supra*, 308 F.2d 140, 154 instructions from the court not sufficient when a testifying defendant comments on the silence of a non-testifying codefendant.) Here, the unusual facts of this case, described above, render it impracticable for the new juror to enter into the foray as an equal in deliberations that were beginning, in theory, from scratch.

As noted above, the courts have held that whether a particular charge is impermissibly coercive must be evaluated in light of the totality of the circumstances. (*Locks v. Sumner*, *supra* 703 F.2d 403, 406; *Jimenez v. Myers* (9th Cir. 1993) 40 F.3d 976 *Jiminez v. Myers*, *supra*, 40 F.3d at 979.) Here, the jurors after having served for over six months, were then told by the court that it would not accept their belief that they were hopelessly deadlocked, and the court further instructed that the "*case will take as long as it takes in order for it either to be resolved or for the court to feel that it cannot be resolved.* (138 RT 18727-18728,

italics added.) Appellant asserts that under these facts, the charge in question was undeniably coercive.

Respondent further contends that Appellant's argument regarding the July 18th instructions is a red- herring because the instructions did not lead to a verdict. (RB 582.) However, Respondent's conclusion that the instructions were not coercive merely because a verdict was not immediately forthcoming is not based on substance. The jury obviously remembered previous statements and instructions from the court, and while their reaction may not have been immediate, it is impossible to conclude that prior court statements and instructions were vacated from the jurors' minds in future deliberations, especially given the fact that the court did not instruct the jurors to ignore its prior statements and instructions.

Respondent further attempts to distinguish this case from *Jimenez v. Myers*, *supra*, 40 F.3d 976, cited in Appellant's Opening Brief (AOB pp. 311-313), explaining that unlike *Jimenez,* in this case the trial court "merely stated there was 'potential' for a resolution of the matter given the change in votes from 6-6 to 11-1, unlike *Jimenez where the court* "praised" the jurors for the movement towards a verdict." (RB 587-588.) It is respectfully submitted that this semantic parsing of the trial court's words misses the gist of the trial court's statements, and is a distinction without a difference. Obviously, after the trial court's strong language informing the jury of the importance of reaching a verdict (138 RT 18727-18728), recognizing the "potential" for progress and a resolution of the case can only be regarded as implicit praise.

C. The Improper Substitution of an Alternate Juror 13 Days into Deliberations Contributed to the Coercive Verdict in Violation of Due Process and the Right to a Jury Trial.

Respondent's main argument regarding the propriety of replacing the juror at the late date in trial, after verdicts had been reached as to Wheeler is that Appellant's argument is based on surmise and conjecture as to how a juror would react in that situation, and that this is only speculation. However, when courts resolve

issues of this nature it is often based on how a jury is "likely" to react to specific evidence or instructions. Indeed, at least three times in 2006 this Court has resolved issues based on how it believed a jury was "likely" to react in the particular situation. (*People v. Stanley* (2006) 39 Cal.4th 913, 935; *People v. Ledesma* (2006) 39 Cal.4th 641, 716; *People v. Rogers* (2006) 39 Cal.4th 826, 874.) There was no concrete way for this Court to determine the "likely" manner in which a juror would react in these, or other cases. Rather, such a determination is based on a court's understanding of how people would be expected to act in any situation, combined with this Court's common sense. In fact, as this Court has stated, "When reviewing ambiguous instructions, *we inquire whether the jury was "reasonably likely"* to have construed them in a manner that violates the defendant's rights." (*Ibid.*) Thus, how the jury is likely to act is the proper means of evaluating prejudice. Under the facts of this case it is likely that the jury would act in the manner described by Appellant. Respondent has not explained why the scenarios presented by Appellant are an unreasonable understanding of how people - and jurors – would normally be inclined to act under the facts presented.

Respondent, citing *People v. Maury* (2003) 30 Cal.4th 342, 439-440 and *People v. Waidla* (2000) 22 Cal.4th 690, 725, recites the rule that it is presumed jurors follow the instructions of the court. As previously noted, courts have recognized that in unusual situations, instructions given to a jury may be insufficient to deal with a specific problem. (*Ante*, at p. 54.) Similarly, while this is the correct rule of law that generally applies, it must again be stressed that this was a highly unusual case. Therefore, this Court should evaluate this issue relying on how the jurors likely reacted in this particular situation.

As a result, Appellant submits that under the unusual facts of this case the trial court the court erred when it thereafter substituted in an alternate juror after the death penalty verdict was reached as to Wheeler.

D. Conclusion

For the foregoing reasons, Appellant submits that under the unusual facts of this case, the trial court erred in denying appellant's request for a mistrial based on the fact that the jury was deadlocked, and the court further erred when it thereafter substituted in an alternate juror when it was no longer practicable for the jury to begin its penalty deliberations anew.

XIV

THE TRIAL COURT ERRED IN RULING ON THE AUTOMATIC MOTION UNDER SECTION 190.4 TO MODIFY THE SENTENCE

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

XV

THE PROSECUTOR IMPROPERLY DISPARAGED THE MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Respondent contends the arguments of Appellant regarding the misconduct of the prosecution are waived because Appellant at trial did not make the specific objection raised in the Opening Brief. (RB 555) To the contrary, Appellant did object after the prosecution made the remarks regarding Dr. Hoagland's testimony being a bunch of psychobabble. (137 RT 18487.)

While the objection made in the trial court was not phrased in the exact manner as framed by appellate counsel, the objection was clear enough to appraise the court of the problem with the prosecution's argument. In such situations it has been held that the waiver rule should not preclude an appellate court from reaching the issue. (*People v. Young* (2005) 34 Cal.4th 1149, 1186; *People v. Scott*

(1978) 21 Cal. 3d 284, 290; *People v. Williams* (1970) 9 Cal.App.3d 565.) Furthermore, as noted above (*ante*, at p. 90), if the question as to whether a defendant has preserved his right to raise this issue on appeal is close, an appellant court should we assume the issue is preserved and proceed to the merits of the issue. Additionally, because this issue raises a pure question of law, the requirement of an objection should be excused. (*Ward v. Taggart*, *supra*, 51 Cal.2d 736, 742)

Finally, because appellant did object to this argument and that objection was overruled, there is no reason to believe that the trial court would have sustained similar objections at a later stage in the trial. Therefore, the failure to object to other arguments of the prosecution should be waived as they would have been futile. (*People v. Hill*, *supra*, 17 Cal.4th 800, 820.)

Respondent claims that because of the stipulation that Dr. Hoagland's testimony was being offered as Factor K evidence under section 190.3, it was not denigrating of that evidence for the prosecution to comment on it as only Factor K evidence and argue that it was limited to a consideration of "sympathy." This was improper because it incorrectly implied that Factor K evidence is of lesser value than the other factors listed in section 190.3 which may be considered by the jury. Because there in no authority for the proposition that this evidence is of a lesser value, it is improper to belittle the evidence in this manner, an argument which Respondent fails to address.

XVI

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUEST FOR AN INSTRUCTION ON LINGERING DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A RELIABLE SENTENCING DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Respondent argues that the trial court did not err in refusing the defense request for an instruction on lingering doubt because it has been held that there is no

right to instructions on lingering doubt and that the question was placed before the jury in the arguments of Appellant's counsel. (RB 536-537.)

It has been recognized that arguments of counsel cannot substitute for correct instructions from the court *People v. Rogers* (2006) 39 Cal.4th 826, 869; *Carter v. Kentucky* (1981) 450 U.S. 288, 304.) Therefore, the fact that Appellant's trial attorney was allowed to argue this theory does not negate the need to have the jury hear this principle from the trial court judge.

Furthermore, although the courts have held that there is no constitutional right to a lingering-doubt instruction, this case presents the unusual situation of a trial court judge repeatedly commenting on the lack of evidence connecting Appellant to the crime (*ante*, at p. 20), combined with a jury that announced a deadlock as to the verdict of death, a deadlock that was only overcome after the trial court informed the jury that it would not accept that result until it was convinced that the case could not be resolved and a juror was replaced after a death verdict had been reached as to a co-defendant. (AOB at p. 307.)

In light of the lack of evidence connecting Appellant to the crime and the jury's initial deadlock, it is of unusual importance that the trial court inform the jury as to this undoubtedly correct proposition of law, in order for the jury to have available all of the legal tools necessary to reach a proper resolution of this case.

XVII

THE TRIAL COURT'S ERROR IN PERMITTING THE INTRODUCTION OF NON-STATUTORY AGGRAVATION AT APPELLANT'S PENALTY PHASE DEPRIVED APPELLANT OF RIGHTS UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING SECTIONS OF THE CALIFORNIA CONSTITUTION

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

XVIII

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

XIX

INSTRUCTING THE JURY IN ACCORDANCE WITH CALJIC NO. 8.88 VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

XX

THE PENALTY PHASE INSTRUCTIONS WERE DEFECTIVE AND DEATH-ORIENTED IN THAT THEY FAILED TO PROPERLY DESCRIBE OR DEFINE THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE[14]

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

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[14] The designation of this Argument in the Table of Contents in Appellant's Opening Brief incorrectly lists this Argument as "XXII." The correct designation should be "XXIII."

XXI

CALIFORNIA'S CAPITAL-SENTENCING STATUTE IS UNCONSTITUTIONAL[15]

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

XXII

THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND REQUIRES A REVERSAL OF THE JUDGMENT OF CONVICTION[16]

Because Respondent does not raise any additional arguments necessitating a reply, Appellant relies on his well briefed argument as presented in Argument XVII of his previously filed Appellant's Opening Brief.

XXIII

APPELLANT SMITH JOINS IN ALL ISSUES RAISED BY CO-APPELLANTS WHEELER AND BRYANT WHICH MAY ACCRUE TO APPELLANT SMITH'S BENEFIT[17]

Appellant Smith joins in all issues he did not raise but were raised by co-appellants, Wheeler and Bryant, and which may accrue to Appellant Smith's benefit.

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[15] The designation of this Argument in the Table of Contents in Appellant's Opening Brief incorrectly lists this Argument as "XXIII." The correct designation should be "XXIV."

[16] The designation of this Argument in the Table of Contents in Appellant's Opening Brief incorrectly lists this Argument as "XXIV." The correct designation should be "XXV."

[17] The designation of this Argument in the Table of Contents in Appellant's Opening Brief incorrectly list this Argument as "XXVI." The correct designation should be "XXVII."

(California Rules of Court, Rule 13; *People* v. *Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5; *People* v. *Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the foregoing reasons, the convictions and judgment of death must be reversed.

DATED: January___ 2007

Respectfully submitted,

David H. Goodwin

Attorney for appellant

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 40,826 not including tables, and is within the limits (47,600 words) of California Rules of Court, rule 8.630. Concurrently with the filing of this brief, counsel for appellant is filing a request to file an oversized brief.

David H. Goodwin
Attorney for appellant

PROOF OF SERVICE BY MAIL (C.C.P. SEC. 1013.A, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579

On January , 2007, I served the within **APPELLANT DONALD SMITH'S REPLY BRIEF** on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles , California
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I declare under penalty of perjury that the foregoing is true and correct.

David H. Goodwin