SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

SUPREME COURT
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APPEAL FROM THE SUPERIOR COURT COUNTY OF LOS ANGELES

Honorable, Charles E. Horan, Judge

APPELLANT LEROY WHEELER'S REPLY BRIEF

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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.

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 18,073, not including tables, and thus is within the limits (47,600 words) of California Rules of Court, rule 8.630, subdivision (b).

ARGUMENT

I. THE TRIAL COURT FAILED TO SEVER APPELLANT WHEELER'S CASE FROM THAT OF HIS CODEFENDANTS[1]

This complex multi-defendant case resulted in the presentation of evidence that unduly tainted Appellant Wheeler's trial with a mountain of irrelevant evidence that came in because of the joint trial. That evidence dwarfs what evidence would have been admissible had Appellant been tried alone. 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.[2]

A. THE RELEVANT LAW

Respondent contends, "A 'classic case' for joint trial is presented when defendants are charged with common crimes involving common events and victims." (RB at p. 179, citing *People v. Cleveland* (2004) 32 Cal.4th 704, 726 [11 Cal.Rptr.3d 236].) Yet, respondent acknowledges as he must, this Court in *Cleveland* affirmed "[s]eparate trials may be necessary if a codefendant has made an incriminating confession, association with codefendants may be prejudicial, evidence on multiple counts may cause confusion, there may be conflicting defenses, or a codefendant may give exonerating testimony at a separate trial."

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1 Respondent's Brief designates this as their Argument III.

2 In respondent's recitation of the procedural history on this issue, respondent pulls from a pretrial motion to sever prepared by counsel for Appellant Bryant that stated "co-defendant Wheeler allegedly made a confession that he was the person who had shot two year old Chemise English and her mother, in the red car." (RB at p. 174, citing CT 14115-14116.) The motion proffers as support a "review of the extrajudicial statements that the prosecution will seek to admit into evidence." (CT 14115.) This is the only reference to this purported confession that appears in the record on appeal. It should play no part in the consideration of any issue raised in Appellant Wheeler's appeal.

(RB at p. 180, citing *id.* at p. 726.) All but the fifth of these four exceptions are present in Appellant Wheeler's case.

However, respondent focuses solely on the fourth of those exceptions, where there may be conflicting defenses, and argues "antagonistic defenses alone do not compel severance." (RB at p. 180, citing *People v. Coffman* (2004) 34 Cal.4th 1, 40-42 [17 Cal.Rptr.3d 710]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1286 [18 Cal.Rptr.2d 796]; *People v. Hardy* (1992) 2 Cal.4th 86, 168 [5 Cal.Rptr.2d 796].) Indeed, in *Cummings* and *Hardy*, only the fourth of these exceptions was present.[3] (*Ibid.*) In *Coffman*, this Court found in essence that the defenses were not conflicting. (*Coffman* at p. 42.)

Respondent acknowledges that reversal is appropriate where, because of consolidation, "a gross unfairness has occurred such as to deprive the defendant of a fair trial." (RB at p. 181, citing *Cleveland, supra,* at p. 726.) A defendant clearly has a due process right to a trial based on his own "personal guilt" and individual culpability. (*Scales v. United States* (1961) 367 U.S. 203, 224-225 [6 L.Ed.2d 782, 81 S.Ct. 1469]; *United States* v. *Haupt* (7th Cir. 1943) 136 F.2d 661, 671-674.)

B. THE TRIAL COURT ERRED IN ITS FAILURE TO SEVER APPELLANT WHEELER'S CASE FROM CODEFENDANT SETTLE

As detailed in appellants' opening briefs, pro per Codefendant Settle repeatedly told the court that his defense would be antagonistic to his codefendants'. Yet, as respondent acknowledges, the court perceived no cause for concern (not "the slightest hint") from Settle's warnings. (RB at p. 176, 60RT 6149.) Thereafter, at a time most damaging to Appellant Wheeler's defense and after Codefendant Settle had already rested his defense, Settle delivered the

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[3] In *Cummings* dual juries were employed to avoid problems from the additional exception where extrajudicial statements are present. (*Cummings* at pp. 1286-1287.)

defense he promised aided by the court's improper acquiescence. This is also the topic of Appellant Wheeler's Argument II, below.

Respondent now repeatedly suggests a simplistic test to prove that Settle's defense was not antagonistic to Appellant Wheeler's defense. Respondent argues that Settle's defense was that he (Settle) was not at the crime scene and did not know about the murders, he did not place any appellant at the crime scene. Thus, respondent concludes that Settle's defense was not irreconcilable with any other appellants' defense. (RB at pp. 182, 190, 194.) Notably, respondent's position is not consistent with the prosecutor below who repeatedly pointed out the value of Settle's testimony to the prosecution's case against Appellants Bryant and Wheeler. (122RT 16526-16527, 16531, 16542.)

Respondent attempts to recast Appellant Wheeler's claim to a challenge that it was the order of presentation of the defendants' defenses that warranted severance. (RB at p. 193.) However, that is not appellant's claim. The claim is that the trial court permitted Codefendant Settle to manipulate the trial process to his advantage and at the expense of his codefendants. As discussed in Argument II of Appellant Wheeler's Opening Brief, Codefendant Settle repeatedly assured the court that he had rested and would not testify and then waited until all parties had presented their cases. Once their defenses had all been displayed, Codefendant Settle wove a tale that extricated him from culpability while directly refuting the defenses of Appellants Wheeler and Bryant. Respondent fails to address this point. This was doubly damaging to Appellant Wheeler, since the jury likely associated his guilt with that of Appellant Bryant, as discussed in Argument I, C, 3, of Appellant Wheeler's Opening Brief.

The subterfuge Codefendant Settle employed was calculated to obstruct justice in his case while tipping the scales of justice against his codefendants. A defense does not get more antagonistic than that.

Alternatively, respondent offers that even if the trial court abused its discretion in denying severance, Appellant Wheeler has not demonstrated a reasonable probability of a more favorable outcome had severance been granted. (RB at p. 182.) In support, respondent cites only the testimony of James Williams, an accomplice and a former codefendant charged with the identical offenses appellants faced and testifying under the protection of immunity. Respondent relies solely upon their Argument XI that "compelling other evidence corroborated Williams's testimony and convincingly established each appellant's guilt." (RB at p. 183.) Appellant Wheeler, in turn, relies upon and incorporates herein his Argument III of his Opening Brief that there was constitutionally insufficient evidence to corroborate Williams' testimony.

Respondent also argues that Appellant Wheeler's trial counsel's failure to renew his severance motion on the ground that the three items of evidence admitted against only Settle prejudiced appellant has waived this ground of the severance issue on appeal. (RB at p. 185.) There are many reasons that a waiver should not be found in this case. Any effort to renew the motion would have been futile. (*People v. Williams* (1997) 16 Cal.4th 153, 255 [66 Cal.Rptr.2d 123]; *People v. Whitt* (1990) 51 Cal.3d 620, 655, fn. 27 [274 Cal.Rptr. 252]; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433, fn. 1 [105 Cal.Rptr. 504].) California courts often examine constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved (here Penal Code[4] section 1098), the asserted error fundamentally affects the validity of the judgment (certainly present here), important issues of public policy are at issue (*Hale v. Morgan* (1978) 22 Cal.3d 388, 395 [149 Cal.Rptr. 375]) or when the error may have adversely affected the defendant's right to a fair trial (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [72 Cal.Rptr.2d 656]), all factors here.

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4 All references are to this code unless otherwise noted.

In addition, the fact that a state court may legitimately refuse to hear tardily based constitutional challenges does not mean that the state court is obliged as a matter of federal law to refrain from reaching the federal constitutional questions. (*Orr v. Orr* (1979) 440 U.S. 268, 275, fn. 4 [59 L.Ed.2d 306, 99 S.Ct. 1102].) Furthermore, 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 [336 P.2d 534].)

Moreover, a failure to object does not preclude an appellate court from resolving that issue should it feel the need to do so. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [69 Cal.Rptr.2d 917].) "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." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 153 [103 Cal.Rptr. 7].)

Additionally, this case does not involve a failure to make the request, but rather a failure to renew the request.

C. THE TRIAL COURT ERRED IN ITS FAILURE TO SEVER APPELLANT WHEELER'S CASE FROM THAT OF HIS CODEFENDANTS

In addressing the relative strength of the cases against appellants, respondent grossly overstates the evidence that Appellant Wheeler played any role in the commission of the felonies. (RB at p. 195.) On this issue as well, respondent cites to and has only the testimony of James Williams to support the arguments. Williams is an accomplice and former codefendant charged with the identical offenses appellants faced and who testified under the protection of immunity. Appellant Wheeler, in turn, again relies upon and incorporates herein his Argument III of his Opening Brief that there was constitutionally insufficient evidence to corroborate Williams' testimony.

Respondent does not address any of the nine pages of facts from Appellant Wheeler's Opening Brief (pp. 140-148) that demonstrate that he was the least likely of the Wheeler Avenue staff to have been present at the house at the time of the shooting, let alone involved in the shooting. Had his case been severed from his codefendants', the scope of his trial would have been vastly different. Evidence about the organization's founders and principal lieutenants' six year reign of terror on the community of Pacoima and Lake View Terrace would have been irrelevant to the prosecution's case against Appellant Wheeler as would the multiple attempts on the life of Mr. Curry, the paramour of Appellant Bryant. Regarding the latter, Appellant Bryant had acknowledged his responsibility for the attacks on Mr. Curry that provided evidence of the sway that Appellant Bryant had over Coappellant Smith and, by analogy, Appellant Wheeler. (CT3 10552-10533, RT 10263-10264, 10912-10916.) It also provided an additional motive for the homicides as an illustration of the steps Bryant would take with paramours of his former wife, Mr. Curry as well as the victim, Andre Armstrong.

Appellant Wheeler's complaint that his defense was inconsistent with Appellant Bryant's defense is only one element of this claim. Respondent does not address or acknowledge the description and analysis of pertinent facts from Appellant Wheeler's Opening Brief (pp. 132-139) that helped to construct the aura of guilt that hung over him as a result of the prosecution's case against his codefendants marking him "as an obviously bad man" with the suggestion "that his guilt [was] a foregone conclusion" (*Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636) by his association with his codefendants and the Bryant Organization and the sway that Appellant Bryant had over his associates.

In Appellant Wheeler's Opening Brief it was argued that a further illustration of the prejudice to Appellant Wheeler by being tried with three codefendants was the extraordinary security precautions taken by the court

because of the number of defendants and that these would not have been necessary had Appellant Wheeler been tried alone. Respondent provides no response, but instead limits its response to an argument not made that no security measures would have been necessary if Appellant Wheeler had been tried separately. (RB at p. 200.)

D. APPELLANT WHEELER WAS DENIED A FAIR TRIAL AND DUE PROCESS BY FORCING HIM TO BE TRIED WITH HIS CODEFENDANTS

A multiplicity of factors grossly prejudiced Appellant Wheeler by forcing him to be tried with appellants and Codefendant Settle. Appellant Bryant had made incriminating statements that by implication suggested his sway over Appellant Wheeler and provided an explanation for why the latter would have participated in the homicides. Appellant Wheeler's case as a bit player in the organization could not stand on its own merits in the minds of jurors who would be ready to believe that birds of a feather are flocked together. (*People v. Massie* (1967) 66 Cal.2d 899, 917 [59 Cal.Rptr. 733]; *Krulewitch* v. *United States* (1949) 336 U.S. 440, 454 [93 L. Ed. 790, 69 S. Ct. 716], Jackson, J., concurring.) Appellant Wheeler's defense was inconsistent with that of his codefendants and particularly that of Codefendant Settle. (*United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 904; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1080-1081; *United States v. Holcomb* (5th Cir. 1986) 797 F.2d 1320, 1324.) And, there was the confusion resulting from evidence on multiple counts and, particularly, the need for the jury to repeatedly segregate evidence admissible only against one or more codefendants when often that evidence was so prejudicial that its segregation could not be reasonably expected. Certainly, collectively these factors necessitated that Appellant Wheeler be tried separately. (*People v. Cleveland, supra,* 32 Cal.4th 704, 726.)

On this record, the compelling conclusion is that Appellant Wheeler has been denied due process and a fair trial in violation of his rights under the Fifth,

Eighth, and Fourteenth Amendments and requiring reversal of his convictions and judgment of death. (*People v. Mendoza* (2000) 24 Cal.4th 130,162 [99 Cal.Rptr.2d 485]; *People v. Arias* (1996)13 Cal.4th 92, 127 [51 Cal.Rptr.2d 770].)

II. THE TRIAL COURT FAILED TO CONTROL THE ORDER OF THE TRIAL AND IMPROPERLY ACQUIESCED TO CODEFENDANT SETTLE'S REQUEST TO TESTIFY AFTER SETTLE HAD RESTED HIS DEFENSE[5]

Without the assistance of counsel, co-defendant Settle essentially took this case over in a way that deeply prejudiced Appellant Wheeler. Settle engaged in gamesmanship with the court and his codefendants that the trial court failed to control under the mistaken belief that it had no power or authority to preclude him from testifying, despite the fact that Settle had rested his case and repeatedly assured the court that he did not intend to testify unless Appellant Bryant, whose defense followed Settle's, somehow raised issues "that would make [Settle] want to testify." (110RT 14787-14788.) Bryant did not, yet the court still permitted Settle to testify and directly refute Appellant Wheeler's defense that he (Appellant Wheeler) was not working for the Organization on the day of the homicides and was home with his family. The trial court agreed that there was no question that Settle's earlier purported indecision on whether to testify was a premeditated subterfuge. (117RT 15800-15801.)

B. The Relevant Law

Respondent has elected not to address any of the seven pages of authority provided in Appellant Wheeler's opening brief (pp. 161-167) that there are limits on the trial court's discretion to deviate from the statutorily set normal order of trial and that a defendant's constitutional right to testify is not absolute and must bow to accommodate other legitimate interests in the criminal trial process.

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5 Respondent's Brief designates this as their Argument XXIII.

Apparently, respondent, in a state of denial, believes that such a discussion is unnecessary because although the trial court stated that "it had no authority to preclude a defendant from testifying in the guilt phase," the trial court nonetheless was aware of its power. (RB at pp. 488-489.) Yet, respondent can only cite to the trial court's statement that it would not have permitted Settle to reopen his case had argument to the jury commenced. (110RT 14786, RB at p. 488.) Respondent ignores the repeated statements by the trial court that Settle's right to testify was absolute; the court could not refuse him; the court could not prevent him; and the court did not have the authority to preclude him from testifying. (110RT 14774-14775, 14805, 116RT 15473.)

Respondent offers a test found in *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520 [28 Cal.Rptr.2d 758] for evaluating whether a trial court abuses its discretion in denying a request to reopen a case and present additional evidence. (RB at p. 486.) But this case does not involve a mere abuse of discretion issue. The trial court did not know that it had the power, let alone the obligation, to exercise discretion and prevent Codefendant Settle from manipulating the proceedings to his advantage at the expense of his codefendants. (110RT 14774-14775, 14805, 116RT 15473.) Second, here this is not a case where a request to reopen has been denied. This *is* a case where one defendant was permitted to manipulate the proceedings and trample over the rights of his codefendants.

In any event, even the application of the factors applied in the context before the court in *Funes* dictate that Codefendant Settle's request to testify after he had rested his case should have been denied. Those factors are: (1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence. First, Settle had rested his defense. Bryant's defense followed and

did not raise any evidence that would have further inculpated Settle to warrant Settle's rebuttal. Second, Settle's ultimate testimony presented no evidence that he had not been fully aware of when he made his election not to testify. Third, the very purpose of Settle's gamesmanship was to garner undue emphasis with the jury by providing a last minute account that inculpated both Appellants Wheeler and Bryant while exculpating himself. The trial court acknowledged that it was premeditated subterfuge. (117RT 15800-15801.) Fourth, the evidence was extraordinarily significant. That is why Settle saved it to drop on all of the parties after his codefendants had displayed their defenses. Respondent's retort that Settle "did not place any of the other defendants at the crime scene or directly implicate any of them in the murders" is too simplistic to require response. (RB at pp. 487-488.) Respondent's efforts to downplay the impact of Settle's last minute account is, once again, not consistent with their counterpart below who repeatedly pointed out the value of Settle's testimony to the prosecution's case against Appellants Bryant and Wheeler. (122RT 16526-16527, 16531, 16542.)

The trial court's acquiescence to Codefendant Settle's late testimony produced a trial that was fundamentally unfair, and the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-307 [113 L.Ed.2d 302, 111 S.Ct. 1246] [the *Chapman*[6] standard applies to "ordinary trial errors" implicating the federal constitution].) As one of the prosecutors observed during jury argument, with Codefendant Settle's testimony, the jury did not need Williams' testimony. (122RT 16501.) The prosecutor repeatedly pointed out the value of Settle's testimony to the prosecution's case against Appellants Bryant and Wheeler. (122RT 16526-16527, 16531, 16542.)

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

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

Appellant further asserts that the trial court's error in failing to sever appellant's case from that of codefendant Settle's (see Argument I, above, incorporated by reference herein), coupled with the trial court's failure to make good on its promises to control the conduct of trial so as to protect appellant's constitutional rights, considered together, violated appellant's rights to a fair trial and due process of law. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [40 L.Ed.2d 431, 94 S.Ct. 1868] [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].) Reversal is required.

III. APPELLANT'S CONVICTIONS ARE UNCONSTITUTIONAL AS THEY ARE IMPERMISSIBLY BASED ON INSUFFICIENT EVIDENCE, AS THEY ARE SUPPORTED SOLELY BY THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE, THE RESULT OF THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT WILLIAMS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THAT HIS TESTIMONY REQUIRED CORROBORATION AND THE TRIAL COURT'S REFUSAL TO ORDER THE JURY TO RECONSIDER THEIR VERDICT WHEN IT BECAME CLEAR THAT THEY HAD NOT UNDERSTOOD THEIR INSTRUCTIONS[7] [8]

Appellant's conviction must be reversed because of several related errors arising from the introduction of accomplice testimony, including: 1) Failure to

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7 Respondent's Brief designates this as their Argument XI.

8 This response to Respondent's Brief draws substantially from the efforts on behalf of Appellant Smith, in the latter's Reply Brief, Argument I.

instruct the jury that Williams was an accomplice; 2) The denial of the motion of acquittal pursuant to section 1118.1 as a result of the lack of corroboration for accomplice testimony; 3) 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.

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 Wheeler's convictions must be reversed because there was insufficient evidence to corroborate James Williams' testimony. Accordingly, the court should have informed the jury that Williams was an accomplice. However, the trial court applied 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 Williams *was* an accomplice—and in itself, this remarkable change in positions is itself an error. (*Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 877 [28 Cal.Rptr.2d 758]; 9 Witkin, California Procedure (4th ed. 1997), Appeal, § 399, 451-452.)

In 1990, the prosecution adamantly argued that Williams' 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 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 task 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. (23CT 6643, People's Response to Defendant William Gene Settle's Motion to Set Aside Information Pursuant to Penal Code Section 995.)

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., supra,* 57 Cal.App.4th 871, 877; 9 Witkin, California Procedure, *supra,* 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 [25 Cal.Rptr.3d 265].) 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, 611-613.)

A prosecutor's first obligation is to serve truth. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1181 [22 Cal.Rptr.2d 545].) 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 v. Mitchell, supra,* at p. 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 [91 Cal.Rptr.2d 1]; *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 at pp. 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 at p. 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' accomplice status only from the testimony of Williams, accepting that at face value. (See RB at p. 360 – "as the trial court recognized,

Williams's testimony did not permit the 'clear and undisputed' inference that he was an accomplice..." and 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 Appellant Wheeler's Opening Brief at pp. 190-191.) The court should look to all evidence relating to the issue in order to accurately determine Williams' status, and not merely accept the testimony of a person receiving immunity in exchange for that testimony at face value. The first error the trial court committed was in applying the wrong standard and thus, basing its ruling solely on Williams' 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 at pp. 360-363.) This reasoning ignores Williams' admission that at the point in time when he saw the victims arrive and the preparations being made inside for their arrival he knew someone was going to die.[9] (People's exh. 207, p. 4, 111RT 14914-14915.) Yet, he continued to execute his part in the plan.

In regard to Williams' above admission, respondent attempts to rewrite its history. (RB at p. 363.) The admission was made during Williams' interview by Deputy District Attorneys McCormick and Seki, and District Attorney Investigator William Duncan on January 25, 1993, as recounted in detail in Appellant Wheeler's Opening Brief at pp. 172-174, and incorporated herein, and was detailed in Duncan's first report, People's exhibit 207, page 4. (111RT 14905, 14907, 14914-14915.) Respondent does not refute that recitation of the facts of

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[9] Respondent's suggestion that Williams' failure to mention "murder" is dispositive requires no response. (RB at p. 362.) Equally unavailing is respondent's reliance on Williams' statement that he "wasn't *exactly* sure" what was going to happen. (RB at p. 362, 97RT 12321-12322, emphasis added.)

the genesis of Williams' admission and the subsequent history leading to and resulting in Investigator Duncan's second report.

Investigator Duncan's second report does not explicitly or impliedly change anything in his first report. In fact, it opens with the statement that it was adding information that McCormick had convinced Duncan that the latter's first report omitted. (111RT 14919-14920, People's exh. 208, p. 1.) Both reports state that Williams did not believe that Bryant would kill anyone in the house. The second report added that Williams had no idea Bryant and the others were going to kill anyone. Neither of these statements identified at what point in time Williams held these beliefs, i.e., when he first arrived at the house for his shift, after he heard the gunshot in the back of the house, after he received his instructions, or when he buzzed Bryant out through the front door. However, Williams' statement that he believed someone was going to die was directly tied to the point in time when the victims arrived, preparations were being made inside, and Bryant asked the others if they were ready. (People's exh. 207, p. 4, 111RT 14914-14915.) Thus, there is no conflict in this evidence. Any uncertainty that Williams had had about what Bryant would or would not do was earlier in the afternoon before the swarm of culminating factors emerged that led to only one reasonable conclusion, someone was going to die there and then or after being transported somewhere else.

Respondent's reasoning that Williams "had no reason to suspect" the violence that awaited the victims' arrival also ignores the fact that Williams knew he was a part of one of the "biggest most violent drug organizations" in the city (122RT 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. (23CT 6643.) Given the facts presented, it is illogical to now argue 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 (97RT 12305-12306, 12311, 12331), but not know that a murder is being planned.

Respondent further argues that Williams' 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' 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 at p. 361.)

For several reasons respondent's argument makes little sense. 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. 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 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 [12 Cal.Rptr. 604], citing numerous authorities.) 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 type of 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. (75RT 8288-8289, 8299, 8302-8303, 8346, 76RT 8386.) Therefore, Williams' 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 may have been in error as to how the bodies were removed from the scene. (RB at p. 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 accomplice[10], the prosecution also believed that Williams' 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 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' lack of complete knowledge of all the details involved in the homicides 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 at p. 362.) The flaw in this reasoning is readily apparent. Williams heard the gunshots and screaming while he was walking out of the house, thus, by the time that 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

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[10] This is the position argued by the People, noted in Part A, 1, above, of this Argument. (23CT 6643.)

the plan, following the boss' directions, checking out the neighborhood, and moving the car in which the bodies were moved.

Indeed, respondent, quoting the jury instructions given, offers 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 at p. 362.) The fact that someone else may have done other acts to further the crime does not mean that Williams was uninvolved. His acts of moving the car in which the bodies were transported and 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 which made him believe "something" was going to happen. These facts included armed men test firing a weapon 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. (97RT 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 in the crimes for which appellant was convicted. To now deny that Williams is an accomplice as a matter of law ignores his active participation in the murders, while they were occurring.

3. WILLIAMS WAS ALSO A PRINCIPAL IN THE MURDERS AS AN AIDER AND ABETTOR IN THE NARCOTICS BUSINESS

Respondent does not dispute the rule that a principal in the target offense of narcotics sales can be liable as an accomplice for murder under the natural and probable consequences doctrine. (RB at pp. 363-364, see Appellant Wheeler's Opening Brief at pp. 192-193.)

Respondent acknowledges Williams was a member of the Bryant family organization, offering that he was the most junior member of the organization, and that "he arrived 'the same way as always' for his regular shift" at the Wheeler Street residence" and "watched television, waiting for a customer to arrive." (RB at p. 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 at p. 364.) Apart from respondent's self-contradiction of recognizing Williams' 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 (Appellant Wheeler's Opening Brief at pp. 24-40), it is obvious 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 were no food items or cooking utensils in

the cabinets, and there were no clothes in the houses. (78RT 8655, 83RT 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, 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 (122RT 16430P-16430T), was not only to the customers but 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 is 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 at p. 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, as Johnson and Newbill were also charged 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. (17CT 4744-4745, 23CT 6629-6637, 24CT 6741-6747.) As 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." (23CT 6634.) Likewise, the prosecution further 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. (23CT 6636.)

As with Johnson and Newbill, Williams was engaged in the narcotics business with the Bryant family. Furthermore, it must be noted that Bryant gave Williams a silver .45 for when he was working at the house, telling him he was to be armed when he answered the door. (96RT 12235-12236.) Thus, Williams was knowingly engaging in the business of the cartel, knowing its members are armed, and having a gun himself.

Unlike Johnson and Newbill, Williams was actually working out of the Wheeler Avenue residence until he left the building as the crimes were happening. As such, he was readily criminally liable for murder as a reasonably foreseeable result of participating in the narcotics cartel.

4. OTHER THEORIES OF MURDER

Respondent contends that since appellants were not convicted under a felony murder theory for second-degree murder (based on participation in drug sales), Williams cannot be an accomplice to second-degree murder on a felony murder theory. (RB at p. 364.)

There are two flaws to respondent's take on this issue. First, Williams' 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 result of the natural and probable consequences rule for aiding and abetting the narcotics cartel. Williams' culpability is dependent on the same theory as any of the appellants—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 on a *theory* of vicarious liability, even though he never fired a gun, Williams was liable for murder regardless of the theory used to reach that result.

In any event, as noted in Parts A, 1 and 2, above, Williams was also an accomplice because he followed directions and actually aided in the murders. His culpability as a result of his participation in the drug trade is an additional theory of his liability and for his accomplice status. 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 affirmed, the result would be a finding that Williams acted as an accomplice and his testimony had to be corroborated.

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 at pp. 365-366.) As to Appellant Wheeler, respondent argues corroboration of Williams' testimony can be found in a proffered list of factors. (RB at pp. 369-370.)

Respondent's argument is flawed for two reasons: First, none of these factors are the type of evidence that could be deemed sufficient corroboration because they do not connect Appellant Wheeler to the crime. 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 fails to do. (§ 1111.)

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

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 [293 P. 32].) The requirement that the corroborative evidence connect the defendant to the crime is not a matter of judicial construction or interpretation, but is 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, 455-456 [271 P. 478].)

The fact that any of the factors cited by respondent may be evidence that has a tendency in reason to make it more likely that appellant committed the crimes, section 1111 requires more than that. By its very language, it requires that the corroborative evidence actually "connect the defendant with the commission of the offense." (§ 1111.)

Section 1111 requires *more* than the fact that the evidence provides merely a suspicion of the defendant's guilt. That "is firmly embedded in our law." (*People v. Kempley, supra,* at pp. 455-456.) "'[C]orroborative evidence is

insufficient when it merely casts a grave suspicion upon the accused.'" (*Id.* at p. 456.)

A reviewing court must eliminate from consideration the accomplice testimony and then determine whether the corroborative evidence has a substantial connection *to the crime.* (*Id* 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*, at pp. 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 [38 Cal.Rptr. 890].)

Thus, appellant's visit to Jeff Bryant on the day after the murders, appellant's participation in the sale of Bryant's Hyundai, the newspaper articles found in appellant's apartment, appellant's fingerprints found in the Wheeler Avenue house, his refusal to provide a handwriting exemplar or evidence indicating his handwriting, and the telephone records all provide corroboration of his association with other people involved in the homicides and his involvement in the sale of narcotics, but do not specifically connect him to the murders.

Two important principles underlie the necessity of having the 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 [76 Cal.Rptr.2d 239] (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.)

Among the factors cited by respondent is the gun found in Appellant Wheeler's apartment that respondent offers was "the same type of gun used to kill Chemise." (RB at p. 370, citing RT 11017-11020, 11219-11220, 13141-13145.) Yet, respondent's record citations do not support the point. The most that can be said is that the .357 caliber handgun found in appellant's apartment *may* have shared a single similarity with the weapon or weapons used during the murders; it *may* have been the same caliber as the gun used to kill Chemise. The three copper jacketed rounds that were found on the floorboard and rear seat area of car where Chemise had been shot were *either* .38 or .357 caliber. (77RT 8674, 8678-8680, 101RT 13141-13145.) Thus, there was nothing to distinguish the handgun found in the apartment from the millions of other .38 or .357 caliber weapons existent that may have been the murder weapon. By contrast, a .45 caliber shell casing recovered from the crime scene was found to have been fired from a Colt .45 caliber automatic revolver (People's exh. 152) found at Appellant Bryant's residence. (100RT 12913-12916, 101RT 13170-13172.) Contrast also *People v. Trujillo* (1948) 32 Cal.2d 105 [194 P.2d 681] where in addition to the fact that the bullet that killed the victim could have come from the gun which the defendant admittedly had in his possession prior to the crime, physical evidence from the crime scene was seen in the defendant's room and fiber found on his clothes tended to prove that his clothing had come in contact with pieces of apparel from the victim. (*Id.* at p. 111.)

Appellant Wheeler's fingerprints found at the scene, cited as a factor by respondent, merely placed him at the house at some time prior to the homicides, and thus is not a factor sufficient to corroborate Williams' testimony. (See *People v. Robinson, supra,* 61 Cal.2d at p. 400.) The fingerprints of many other 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 people were originally defendants in this case, and Johnson and Newbill were charged with the murders and were eligible for the death penalty. Thus, while Williams did not connect them to the crime itself, there was evidence connecting them to the scene of the crime and to the other parties involved, especially to Bryant. If Williams thought that he needed to give up another person to obtain immunity, all he would have to do would be to name any or all of these people.

Regarding the telephone records, another factor cited by respondent, the fact that Appellant Wheeler was in contact with the people involved in the crimes was not sufficient, *without the testimony of Williams*, for the jury to conclude that Appellant was involved. Citing *People v. Bunyard* (1988) 45 Cal.3d 1189 [249 Cal.Rptr. 71] and *People v. Heishman* (1988) 45 Cal.3d 147 [246 Cal.Rptr. 673], respondent explains that this Court has held that 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 this holding that would appear to be contrary to the statutory language requiring that the 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 p. 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 [5 L.Ed. 257]:

> It is a maxim not to 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. (*Id.* at p. 399.)

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 [69 L.Ed. 411, 45 S.Ct. 148], quoted in *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn. 2 [89 Cal.Rptr. 601].)

Similarly, in *People v. Heishman, supra,* 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 p. 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 pp. 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 the defendant's 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, 400 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 Wheeler 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 and his fingerprints at the scene. Appellant Wheeler conceded that he was employed by the organization at the Wheeler Avenue house. It certainly is not surprising to find that appellant made phone calls to all of the phone numbers in question and that his prints were found at the house. Consequently, these facts do not connect him to this particular crime, but only to other people involved, and is therefore not corroborative evidence under California case law. (See *People v. Robinson, supra,* 61 Cal.2d at p. 400.)

Finally, respondent offers as a corroborating factor the descriptions of the male who shot into and/or drove off in the red Toyota containing three of the

victims. Those descriptions were provided by three neighbors, Lucila Esteban, Manuel Contreras, and Jennifer Daniel. Respondent asserts that the descriptions fit Appellant Wheeler. Yet, the only similarity respondent can cite to is the fact they saw "a Black male" (RB at p. 369), a characteristic not particularly unique.

Respondent does not refute any of the dissimilarities between those descriptions and appellant's age and appearance; facts detailed in Appellant Wheeler's Opening Brief (pages 141-145). It is apparent that the descriptions provided by the neighbors as readily fit the appearance of two other members of the Wheeler Avenue staff, Lamont Gillon (as depicted in his photograph, People's exh. 113, number 10 [88RT 10539-10544]), Williams lifelong best friend (96RT 12115, 12117-12118, 12120, 12131, 12139, 98RT 12663-12664), on the 3:00 p.m. to 11:00 p.m. shift, and Anthony Arceneaux (as depicted in his photograph, People's exh. 113, number 9, and exh. 122 [88RT 10539-10544, 89RT 10745]) who covered for the others when they were off (85RT 9959-9960, 9965-9966 86RT 10160-10161; 96RT 12130-12132, 12138-12139, 12141, 12145-12146, 12240.)

Even though Jennifer Daniel had been unable to identify anyone for seven years and had described the driver of the Toyota as between the ages of 25 and 30 (94RT 11886-11887), after her identification of Appellant Bryant as that driver, respondent asserts that she "continually repeated that the driver ... was the person depicted in photograph number 2 of People's Exhibit 113—appellant Wheeler." (RB at p. 369.) Respondent does not dispute that she also testified that she was positive that Appellant Bryant was the driver. (94RT 11893-11894.)

Ms. Daniel's much belated and suspect photo-identification of Appellant Wheeler as the driver of the Toyota, particularly in light of her in-court identification of Appellant Bryant as that driver, provided inherently insubstantial corroboration. (See, e.g., *People v. Reyes* (1974) 12 Cal.3d 486, 498-499 [116

Cal.Rptr. 217], witnesses identification contradicted by three other disinterested witnesses.) This Court in *People v. Cuevas* (1995) 12 Cal.4th 252 [48 Cal.Rptr.2d 135] confirmed a list of circumstances that can bolster the probative value of out-of-court identification (*Id.* at p. 267); circumstances that are notably absent in appellant's case. First, the witness' prior familiarity with the defendant; in appellant's case the witness had none. (*Ibid.*) Second, the level of detail given by the witness in the out-of-court identification. (*Ibid.*) Here Ms. Daniels provided only two details; he was skinny and 18 to 30 years old (94RT 11858-11859, 11886-11887.) As noted above, the three neighbors' descriptions as readily fit two other members of the organization, Lamont Gillon and Anthony Arceneaux. Third, whether there was a viable explanation for the witness' inability to identify the defendant during the trial. Once again, there was no viable explanation; in fact Ms. Daniel thought the person she saw was Appellant Bryant. (88RT 10539-10544, RT 9411862-11865, 11875-11876, 11892-11893, 95RT 11922, 11939-11943, 11951-11953, 11959, 104RT 13711-13712.)

This Court in *Cuevas* also acknowledged the factors relevant to reliability of eyewitness identification set forth in CALJIC number 2.92 (5th ed. 1988). (*Ibid.*) First here among those factors is the extent to which the defendant either fits or does not fit the description of the perpetrator. Here the two details provided by Ms Daniel did not even distinguish the perpetrator from other organization members who could well have been present, let alone from any other non-portly Black male from adolescence to 30 years of age. Second is the witness' capacity to make an identification; third is the witness' ability to identify the alleged perpetrator in a photographic or physical lineup; and fourth is the period of time between the criminal act and the witness identification. Here Ms. Daniels had been unable to make any identification for seven years, and then her ultimate identification was made under very suspect circumstances.

In summary, none of the factors relied upon by respondent are individually or collectively up to the task of corroborating Williams' testimony.

2. OTHER CONSEQUENCES OF ACCOMPLICE STATUS

The second flaw of respondent's argument that failure to instruct that Williams was an accomplice as a matter of law was harmless is that the argument 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' 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. (See RB at p. 358.) Thus, had the jury been properly informed to view Williams' 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' testimony could not be trusted; and (2) only "slight" corroboration of his testimony was presented. A juror could have concluded that based on a totality of this evidence a reasonable doubt as to Appellant Wheeler's guilt existed.

Further, if the jury had been appropriately instructed that Williams was an accomplice, a juror could have concluded that Williams' testimony was suspect and the remaining evidence did not tie Appellant Wheeler to the offenses. Had Appellant's jurors been cautioned to consider Williams' 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 court-informed basis upon which to properly scrutinize his testimony. This failure alone made it more likely

that the jury would view Williams' 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. CONCLUSION

In this case, the issues surrounding Williams and accomplice testimony were crucial to the determination of appellant's guilt. 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, the failure to have the proper and sufficient type of corroborative evidence, and allowing the jury to reach its verdict as to Appellant under a misunderstanding of the correct law (the subject of Appellant Wheeler's Argument VIII) all undermine the constitutional standards imposed in criminal cases in general, and capital cases in particular.

Therefore, the judgment entered below must be reversed.

The result here effectively lightened the state's burden of proof and violated appellant's constitutional right to federal due process. (*Carella v. California* (1989) 491 U.S. 263 [105 L.Ed.2d 218, 109 S.Ct. 2419].) Furthermore, misapplication of a state law that leads to a deprivation of a liberty interest, here that no conviction shall be had on uncorroborated accomplice testimony (§ 1111), may violate the Due Process Clause of the 14th Amendment to the federal

constitution. (*Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.; *Vitek v. Jones* (1980) 445 U.S. 480 [63 L.Ed.2d 552, 100 S.Ct. 1254].)

In addition, the court's failure to properly instruct the jury has arbitrarily denied appellant's application of this state's own domestic rules in violation of Fourteenth Amendment due process principles. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; *People v. Marshall* (1996) 13 Cal.4th 799, 850-851 [55 Cal.Rptr.2d 347].) This too was reversible error. (*People v. Robinson, supra* (1964) 61 Cal.2d 373, 394; *People v. Zapien* (1993) 4 Cal.4th 929, 982 [17 Cal.Rptr.2d 122].)

IV. THE EXTRAORDINARY SECURITY PRECAUTIONS EMPLOYED THAT INCLUDED STRAPPING APPELLANT TO A STUN BELT THROUGHOUT THE TRIAL IMPROPERLY PREJUDICED APPELLANT[11] [12]

Extraordinary security precautions taken throughout appellants' trial employed by the trial court, without the required showing of necessity, infringed on Appellant Wheeler's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825 [18 Cal.Rptr.2d 586] [error to impose restraints without a prior on-the-record determination of the need for it].)

Respondent is mistaken in his belief that Appellant Wheeler "appears to acknowledge that the trial court did not abuse its discretion by ordering [some form of] physical restraints...." (RB at p. 503.) Not so. Appellant Wheeler

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11 Respondent's Brief designates this as their Argument XXIV.

12 This response to Respondent's Brief draws substantially from the efforts on behalf of Appellant Smith, in the latter's Reply Brief, Argument VIII.

objected below to any form of restraint.[13] (63RT 6346, Appellant Wheeler's Opening Brief at p. 216.) Counsel for appellant noted that appellant had been in the courthouse for a number of years and had presented no problem to the court staff or its personnel. (61RT 6202-6203, Appellant Wheeler's Opening Brief at p. 215.) Counsel pointed out and the court agreed that the acts of violence while in custody attributed to appellant were mere allegations, and there had been no convictions. (63RT 6377, Appellant Wheeler's Opening Brief at p. 218.)

"The need for restraints must be shown in each case by evidence of non-conforming behavior, such as violence, disruption of the courtroom, a history of escapes, or evidence of an intention to escape." (*People v. Jackson, supra,* 14 Cal.App.4th 1818, 1825-1826, relying on *People v. Duran* (1976) 16 Cal.3d 282 [127 Cal.Rptr. 618].) Due process requires that the use of restraints be imposed only as a last resort. (*Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 728; accord *People v. Sheldon* (1989) 48 Cal.3d 935, 945 [258 Cal.Rptr. 242]; *People v. Jackson, supra,* at pp. 1826-1827.) International law also prohibits the degrading treatment of persons in custody and requires that restraints be removed when the prisoner appears before a judicial or administrative authority.[14] (*Standard Minimum Rules for the Treatment of Prisoners* (*SMR*), Article 33.)[15]

People v. Mar (2002) 28 Cal.4th 1201 [124 Cal.Rptr.2d 161], reaffirmed the rule that the decision to use restraints must be based on specific information

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13 Appellant Wheeler also raised the issues raised herein in this Argument IV of his Opening Brief as well as in his motion for a new trial. (CT 16111, 16113-16114.)

14 International law and international agreements of the Untied States are law of the Untied States. (*U.S. Constitution, Article VI, Clause 2*; *The Paqueste Habana* (1990) 175 U.S. 677, 700 [].)

15 In *Estelle v. Gamble* (1976) 429 U.S. 97, 104, fn. 8, 106 [50 L.Ed.2d 251, 97 S.Ct. 285], the United States Supreme Court found "evolving standards of decency" measured in part by reference to customary international law norms and to the *SMR.*

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 pp. 1220-1222.) 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.

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 at p. 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 Appellant Wheeler's Opening Brief, Argument I.) 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* (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620].) 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 Wheeler's rights.

Respondent further contends that there was nothing in the record to indicate that the use of the stun belt actually affected Appellant Wheeler. (RB at p. 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 at p. 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 month 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, may very well have been the catalyst that led to Settle's success. (See, Appellant Wheeler's Opening Brief, Arguments I and VIII.)

Respondent offers that "there is no evidence in the record that any juror observed the REACT belt on any appellant at any time." (RB at p. 504.) However, the facts of the case suggest otherwise. During voir dire, one of the prospective jurors wrote in her questionnaire that she did see something under the sweater of one of the defendants. (4CT 1032.) 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, 120.) Therefore, at least two prospective jurors saw enough to come to the conclusion that appellant might be wearing a stun belt. If one juror saw restraints, it is likely that others saw them too. (*Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586.)

In *Deck v. Missouri* (2005) 544 U.S. 622 [161 L.Ed.2d 953, 125 S.Ct. 2007], 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, 568 [89 L.Ed.2d 525, 106 S.Ct. 1340] that shackling is "inherently prejudicial," (*id.* at p. 635), 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" (*ibid.*, quoting *Riggins v. Nevada* (1992) 504 U.S. 127, 137 [118 L.Ed.2d 479, 112 S.Ct. 1810].) As a result, the Court in *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. (*Id.* at p. 635.)

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 at p. 513.) Once again, while there was compelling evidence that a crime was committed, the evidence connecting Appellant Wheeler to the offense was solely based on the testimony of Williams, at best an unsavory character, an accomplice, a petty criminal, and a

member of the drug cartel. Under any standard, this hardly adds up to "compelling evidence" of guilt.

The cumulative impact of the extraordinary security precautions as well as forcing appellant to wear the stun belt affected Appellant Wheeler's presumption of innocence, deprived him of his right to an impartial jury, a fair trial, and so infected the trial with unfairness as to make his resulting convictions a denial of due process. As a result, his confinement and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

V. THE PROSECUTOR ASSERTED FACTS IN HIS ARGUMENT TO THE JURY THAT HE KNEW OR SHOULD HAVE KNOWN WERE FALSE, COMMITTING FLAGRANT PROSECUTORIAL MISCONDUCT THAT IMPROPERLY CAST DOUBT ON A KEY ELEMENT OF APPELLANT'S DEFENSE, AND THE TRIAL COURT IMPROPERLY REJECTED THE PROFFERED CURE FOR THE ERROR[16]

The prosecutor falsely asserted during his opening argument that there were unsupportable holes in the defense's case; yet these purported holes the prosecutor knew or should have known did not exist. As a result of this improper debasement of Appellant Wheeler's defense, his confinement and sentence are illegal and unconstitutional under federal constitutional law and the due process clause of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Respondent does not dispute that the prosecutor knew or should have known the facts were false, but offers that the prosecutor was merely commenting on the state of the evidence. In support of this sophistry, respondent cites *People v. Brown* (2003) 31 Cal.4th 518, 554 [3 Cal.Rptr.3d 145]; *People v. Boyette* (2003)

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16 Respondent's Brief designates this as their Argument XVI.

29 Cal.4th 381, 434 [127 Cal.Rptr.2d 544]; and *People v. Mincey* (1992) 2 Cal.4th 408, 446 [6 Cal.Rptr.2d 822]. Notably, none of these authorities involve instances where the prosecutor knew or should have known the facts being asserted were false. (*Ibid.*)

In respondent's efforts to dispel the clear prejudice that flowed from the prosecutor's false factual assertions, respondent relies solely upon the length of the trial, arguing that the prosecutor's remarks were in comparison relatively brief and insignificant. (RB at p. 430.) They may have been brief, but they certainly were not insignificant. Appellant was 19 years old at the time of the offenses. (106RT 13912.) Of the four employees of the Wheeler Avenue house, he was the least likely one of the staff to have been present at the house at the time of the shooting.[17]

Appellant's short-term employment and low status in the organization was detailed in his Opening Brief at pages 125 through 131. Briefly summarized, he was by far the youngest of the jointly-tried defendants; he had only joined the organization in February 1988, six months before the homicides; his status was so low that he was not even included in the prosecution's organizational chart for the organization; and his immediate supervisor described appellant's relationship to the organization as a person who "wasn't shit;" he was stupid. He had never been arrested during any of the numerous busts of the organization's sales outlets; his

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[17] The Wheeler Avenue house was normally staffed as follows:

- Williams on the 7:00 a.m. to 3:00 p.m. shift,
- Lamont Gillon on the 3:00 p.m. to 11:00 p.m. shift,
- Appellant Wheeler on the 11:00 p.m. to 7:00 a.m. shift, and
- Anthony Arceneaux covered for the others when they were off.

(85RT 9959-9960, 9965-9966, 86RT 10160-10161, 96RT 12130-12132, 12138-12139, 12141, 12145-12146, 12240.) Detective Vojtecky testified that on the day of the homicides, Mr. Arceneaux was scheduled to work the 3:00 p.m. to 11:00 p.m. shift. (89RT 10753, 10761.)

name was not associated with the title to or utilities for any of those outlets; and the telephone traffic attributed to him was de minimis compared to that of his codefendants. Respondent does not refute any of these facts.

This defense supported the inference that such a bit player would not have been entrusted to participate in these multiple murders. The prosecutor's false innuendo went to the heart of this defense. The defense was premised on the fact that appellant had earlier been in juvenile custody and thus he could not have been a member of Bryant's organization until his release in November 1987. (106RT 13914-13917.) The prosecutor implied that the defense was contrived and could have been readily substantiated if evidence of his juvenile incarceration existed. The trial court compounded the error by refusing each of the reasonable solutions proffered by defense counsel.[18]

Mr. Davidson's successful effort to undermine appellant's defense so infected the trial with unfairness as to make Appellant Wheeler's resulting convictions a denial of due process (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 106 S.Ct. 2464]) and a violation of appellant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant's convictions must be reversed.

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[18] Defense counsel requested that the court alternatively declare a mistrial as to Appellant Wheeler, advise the jury that Appellant Wheeler had been in custody during the period in question, or permit the defense to introduce the evidentiary support. (124RT 16691-16696.)

VI. THE PROSECUTION WAS IMPROPERLY PERMITTED TO DEVELOP ARMSTRONG'S BLACKMAIL OF THE BRYANTS AND THEREBY THE PROSECUTION'S THEORY FOR THE MOTIVE FOR THE HOMICIDES BY DEPRIVING APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO CONFRONT THEIR ACCUSER[19] [20]

As reflected in the Statement of the Facts of appellants' and respondent's briefs, half of the prosecution's case was crafted to establish a motive for the homicides. That story largely centered upon law enforcement's account of what they learned from Andre Armstrong during his in-custody 1983 interrogation. Respondent does not contest the contention that Armstrong's statement was hearsay and violated Appellant's right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354]. Rather, respondent limits its response to an argument that other evidence established the motive for the crimes, and therefore the admission of Armstrong's statement was harmless. (RB at pp. 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 for a motive for the crimes, a theme that dominated much of the trial. (See Appellant Wheeler's Opening Brief at pp. 6-40.)

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. (RB at p. 291.) However, even if such a debt was equivalent to what the prosecution garnered from Armstrong's inadmissible interview, such statements to Scott and Smith were themselves inadmissible hearsay.

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[19] Respondent's Brief designates this as their Argument VIII, D.

[20] This response to Respondent's Brief draws substantially from the efforts on behalf of Appellant Smith, in the latter's Reply Brief, Argument V.

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. (73RT 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, supra,* 17 Cal.4th 800, 820; *People v. Arias, supra,* 13 Cal. 4th 92, 159.) As such, the issue is not waived.

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 money as a former employee. They do not convey the animosity and disdain that Armstrong held toward the Bryants nor his intention to "squeeze them" as was apparent from the content of Detective Harley's interview of Armstrong. (40CT3 10512.) Thus, their statements do not establish the motive for the crime.

In a related vein, respondent cites the evidence that Bryant sent money to Armstrong and Armstrong's family and arranged for people to visit Armstrong in prison, paying their expenses, as "other evidence" of motive for the crimes. (RB

at p. 291.) However, this evidence was merely consistent with the prosecution's theory at trial that when Bryant family employees were arrested, the Bryants routinely took care of them and their families. For example, when employees 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, 113RT 15182-15189.) Once again, this evidence adds little to nothing to a theory for the motive.

Finally, Respondent points to the Bryant's statement 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, it was also a hearsay statement admissible only against Bryant, as an admission. In fact, at the time this statement was admitted, the jury was instructed to consider it only in relation to Bryant. (89RT 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. (122RT 16398.) Therefore, this statement may not be considered against Appellant Wheeler in determining whether there was other evidence of motive for the crimes.

As a result of the foregoing, without Armstrong's inadmissible statement, it is clear there was no admissible evidence of the motive for the crimes. The motive provided the prosecution's link to Appellant Bryant which in turn provided the prosecution's link to Appellant Wheeler, as the prosecution's purported protégé of Bryant. The motive played a major role in the trial below, as evidenced by the predominant role in played in Mr. Davidson's opening argument to the jury. (RT 16430L-M, O, 16431, 16446, 16456.) Without this evidence of motive, the reason or reasons for the homicides becomes an anomaly. The likelihood of Appellant

Bryant's presence and participation is substantially lessened. With the weakening of this latter link, comes even the greater attenuation of the likelihood of Appellant Wheeler's presence and participation. On this record, the prosecution cannot demonstrate that this error was harmless beyond a reasonable doubt (*Chapman* v. *California, supra,* 386 U.S. 18) and Appellant Wheeler's convictions must be reversed (*Crawford, supra.*)

VII. THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE[21]

Respondent begins by arguing that Appellants Wheeler and Bryant waived this claim by not objecting to the instruction below. (RB at p. 446.) However, an appellate court has the statutory authority to review any jury instruction even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby. (§ 1259, *People v. Toro* (1989) 47 Cal.3d 966, 977 [254 Cal.Rptr. 811].) In any event, California courts often examine constitutional issues raised for the first time on appeal, especially when the asserted error fundamentally affects the validity of the judgment, important issues of public policy are at issue (*Hale v. Morgan, supra,* 22 Cal.3d 388, 395), or when the error may have adversely affected the defendant's right to a fair trial (*People v. Hill, supra,* 17 Cal.4th 800, 843, fn. 8), all factors here.

There are many other reasons that a waiver should not be found in this case, among them those detailed at pages 5 through 6, above, and incorporated herein.

Otherwise, appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

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21 Respondent's Brief designates this as their Argument XX.

VIII. THE TRIAL COURT IMPROPERLY REFUSED TO ORDER THE JURY TO RECONSIDER THEIR VERDICT WHEN IT BECAME CLEAR THAT THEY HAD NOT UNDERSTOOD THEIR INSTRUCTIONS[22] [23]

After the jury had returned their guilty verdicts against appellants, but prior to reaching any decision regarding Codefendant Settle, the jury submitted seven questions to the court that in them demonstrated 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 Wheeler, and reflected that they had mistaken the law and their role in determining appellant's guilt or innocence. Twice during the court's interchange with the jury regarding their questions, counsel for Appellant Smith moved to reopen the deliberations on the five charged counts since the jury had demonstrated that they misunderstood the law and the instructions that had been provided. Yet, the trial court without further discussion immediately rejected both requests. (126RT 17105e, 17105cc.) This was error.

Respondent begins by arguing that Appellants Wheeler and Bryant waived this claim by not objecting or joining Appellant Smith's request. (RB at p. 384, 389.) In light of the court's immediate response to counsel for Appellant Smith, it is clear that any further effort on the part of Appellant Wheeler would have been futile. (*People v. Williams, supra,* 16 Cal.4th 153, 255; *People v. Whitt, supra,* 51 Cal.3d 620, 655, fn. 27; *People v. Sandoval, supra,* 87 Cal.App.4th 1425, 1433, fn. 1.)

In any event, California courts often examine constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved (here section 1161[24]), the asserted error fundamentally affects the validity

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22 Respondent's Brief designates this as their Argument XI, E.

23 This response to Respondent's Brief draws substantially from the efforts on behalf of Appellant Smith, in the latter's Reply Brief, Argument I, E.

24 Section 1161 provides:

of the judgment, important issues of public policy are at issue (*Hale v. Morgan; supra,* 22 Cal.3d 388, 395), or when the error may have adversely affected the defendant's right to a fair trial (*People v. Hill, supra,* 17 Cal.4th 800, 843, fn. 8), all factors here.

There are many other reasons that a waiver should not be found in this case, among them those detailed at pages 5 through 6, above, and incorporated herein.

As explained in Appellant Wheeler's Opening Brief (pp. 263-264), 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 at pp. 389-390.) 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?" (53CT 15439, emphasis added.) The trial court determined that this question addressed either Williams or Settle's role in the crimes. (RB at p. 386.) Not so. The jurors' question *cannot* be directed to Settle, *because Settle was brought to trial, and*

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

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.

Collectively the 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?" (53CT 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., backing the car into the garage or acting as a "scout," that is, checking to see if anyone on the street noticed the noise.

The trial court failed to recognize that the jurors' questions and confusion related to appellants' 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 at p. 388.) The court's belief was unfounded for a number of reasons. The content of the jurors' questions were equally applicable to the resolution of Appellant Wheeler's criminal liability. No evidence was provided that Settle acted as an accomplice; he was either present and a shooter or he was not. And, in regard to the jury's fourth question inquiring whether there can be aiding and abetting after the crime was committed, there was no evidence that Settle's participation occurred only after the crime was committed, although that was the prosecution's theory for Williams' involvement.

After raising the question of Williams' accomplice status based on his actions after the murder, the court correctly explained to the jury that Williams could be an accomplice if he agreed to the act in question before the crime, in

order to facilitate the crime. (126RT 17105I -17105J.) It is apparent from their question that prior to this answer one or more members of the jury did not understand this concept. 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 Wheeler's guilt, one or more members of the jury were operating under an ignorance of the law 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' contribution to the murders took place after one or more of the murders even though he was a party to the murders before their execution.

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 one or more jurors would have concluded that Williams *was* an accomplice and his testimony was not adequately corroborated 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 its verdicts premised on Williams' testimony alone. Further definition and instruction from the court in determining accomplice status changed the scope of the deliberative process during their deliberations on Settle's fate. Unlike the deliberations in appellant's case, the jury finally understood that it could deem Williams an accomplice based on his acts before the murders when Williams received (and accepted) instructions to scope out the area and move the car. With this new understanding, the jury deadlocked as to Settle's guilt.

It was crucial that the jury understand all aspects determinative of whether Williams was an accomplice when deliberating appellant's guilt. 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 about the role of reasonable doubt in the determination of guilt and corroboration of accomplice testimony,[25] again, an area at the heart of appellant's defense. Thus, during appellant's deliberations the jury operated under confusion over these fundamental principles. (53CT 154411, 126RT 17105M.) Respondent's attempt to characterize these jury questions as relating only to corroboration is completely without support. Both of these questions clearly involve confusion regarding the meaning and role of reasonable doubt. For the jury to proceed with deliberations against Appellant Wheeler not understanding these fundamental principles required by the Due Process Clause in itself requires reversal of appellant's convictions.

Respondent remarks that the jury's question regarding reasonable doubt was not indicative of a general misunderstanding of the law, but only

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25 The two questions (six and seven) that the jury raised 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? (53CT 15441, 126RT 17105N.)

demonstrated that one juror had doubts as to the guilt of Settle. First, questions six and seven are not innately specific to Settle; their content equally encompassed resolution of Appellant Wheeler's criminal liability. Second, even if the misunderstanding involved a single juror, it does nothing to ameliorate the injustice suffered by Appellant Wheeler that occurred when that single member of his jury was not clear as to the concept of reasonable doubt when that juror 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 [66 Cal.Rptr.2d 454].)

When, as in this case, the jury questioned the meaning of crucial principles of law, section 1138[26] 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 [41 Cal.Rptr.3d 593].)

Respondent further contends that section 1161 is limited to situations where the verdict itself demonstrates the jury may have mistaken the law. (RB at p. 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' inquiries in this case, justice demands that the curative action of section 1161 not be so limited. Appellant has suffered a fundamental injustice by being convicted of murder and subsequently sentenced to death by a jury whose 12 members did not all

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[26] Section 1138 provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

understand the fundamental concept of reasonable doubt until a few days after rendering a guilty verdict against him.

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 [279 Cal.Rptr. 576].)

In the normal course of events, the verdict may be the only place where one would see a reflection of the jury's confusion or misunderstanding of the law. 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. (125RT 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

defendants. Had that happened, the jury would not have returned the verdict as to Appellant Wheeler 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 Wheeler.

Respondent contends that the result urged by appellant "would permit reopening deliberations upon a finding that the jurors' *reasons* for voting guilty were incorrect," a result that would be in conflict with settled law. (RB at p. 390, italics in original.) Respondent attempts to recast 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, the defense 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, appellants were not seeking to determine the reasons for the jurors' ultimate decision.

Respondent further contends that "there is nothing in the *verdicts* ...that would indicate that the jurors had misunderstood the law...." and that appellant "impermissibly speculate[s]" that the juror's reasoning was incorrect. (RB at p. 390, italics in original.) It is true that there is nothing in the verdicts themselves. However, 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. (RB at

p. 390.) Again, the questions the jury raised were questions as to the law; the law that applied equally to all defendants. If the jury was 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.

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 right to trial by jury and due process of law.

Prosecution pursued on a juror or jurors' lack of understanding of the reasonable doubt standard and the very principles upon which the prosecution's case of guilt was constructed so infected the trial with unfairness as to make the resulting conviction the result of the denial of due process, and deprived the sentencing determination of the reliability the Eighth Amendment requires.

This error is "structural" as it defies harmless error analysis, and thus is subject to automatic reversal. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L.Ed.2d 182, 113 S.Ct. 2078] [defective reasonable-doubt instruction]; *Tumey v. Ohio* (1927) 273 U.S. 510 [71 L.Ed. 749, 47 S.Ct. 437] [biased trial judge]; *Gideon v. Wainwright* (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792] [complete denial of counsel]; *Vasquez v. Hillery* (1986) 474 U.S. 254 [88 L.Ed.2d 598, 106 S.Ct. 617] [racial discrimination in selection of grand jury]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [79 L.Ed.2d 122, 104 S.Ct. 944] [denial of self-representation at trial]; *Waller v. Georgia* (1984) 467 U.S. 39 [81 L.Ed.2d 31, 104 S.Ct. 2210] [denial of public trial].) The U.S. Supreme Court explained that these cases contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante, supra,* 499 U.S. 279, 310.) Such errors "infect the entire trial process," (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 630 [123 L.Ed.2d 353, 113 S.Ct. 1710]),

and "necessarily render a trial fundamentally unfair." (*Rose v. Clark* (1986) 478 U.S. 570, 577 [92 L.Ed.2d 460, 106 S.Ct. 3101].) Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." (*Id.* at pp. 577- 578.)

Accordingly, reversal of Appellant Wheeler's convictions and death sentence is required.

IX. THE CUMULATIVE AND INTER-RELATED GUILT PHASE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF APPELLANT'S TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, MANDATING REVERSAL

Respondent has not provided any response to this argument and appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

X. THE USE OF SIX UNADJUDICATED OFFENSES AS EVIDENCE IN AGGRAVATION VIOLATED APPELLANT'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS[27]

In a one paragraph response to this argument, Respondent argues that this issue is waived by the absence of any record below of an objection on this ground. (RB at p. 515.) There are many reasons that a waiver should not be found in this case, among them those detailed at pages 5 through 6, above, and incorporated herein.

Respondent offers that appellant has not provided any reason for this Court to depart from its prior rulings on the issue in *People v. Young* (2005) 34 Cal.4th 1149, 1207-1208 [24 Cal.Rptr.3d 112] and *People v. Williams, supra,* 16 Cal.4th

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27 Respondent's Brief designates this as their Argument XXV.

153, 236.) (RB at p. 515.) Yet, respondent does not discuss, let alone take issue with, the two pages of authorities from other states and federal jurisdictions that support the conclusion that the use of inadmissible evidence of unadjudicated crimes in the penalty phase of a defendant's trial is inherently flawed and does not comport with the Eighth and Fourteenth Amendments' mandate of accuracy and reliability. (Appellant Wheeler's Opening Brief, at pp. 277-278.)

Respondent does not dispute, let alone contest, that appellant was prejudiced by the introduction of the six unadjudicated crimes as factors in aggravation.

Appellant's death sentence should be vacated.

XI. THE TRIAL COURT'S DENIAL OF DEFENSE REQUESTED APPLICABLE AND ESSENTIAL JURY INSTRUCTIONS COUPLED WITH OTHER ERRONEOUS AND INADEQUATE INSTRUCTIONS, RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

A. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER DEFENSE OBJECTION THAT SYMPATHY FOR APPELLANT'S FAMILY COULD NOT BE CONSIDERED AS A FACTOR IN MITIGATION[28]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

B. CALJIC 8.88 AS GIVEN IS IMPERMISSIBLY VAGUE AND AMBIGUOUS[29]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

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[28] Respondent's Brief designates this as their Argument XXIX, D, first paragraph.

[29] Respondent's Brief designates this as their Argument XXIX, A, at pages 538-542.

C. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT NO MITIGATION IS NECESSARY TO REJECT A SENTENCE OF DEATH[30]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

D. THE REFUSAL OF THE DEFENSE REQUEST THAT THE JURY BE INSTRUCTED THAT A SINGLE MITIGATING FACTOR MAY OUTWEIGH MULTIPLE AGGRAVATING FACTORS IMPERMISSIBLY CONVEYED TO THE JURY THAT MULTIPLE FACTORS IN MITIGATION WERE REQUIRED TO AVOID A DEATH VERDICT[31]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

E. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION AS MITIGATION THAT APPELLANT'S ACCOMPLICE RECEIVED A MORE LENIENT SENTENCE[32]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

F. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THEY MUST PRESUME THAT THE ELECTED SENTENCE WOULD BE CARRIED OUT[33]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

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30 Respondent's Brief designates this as their Argument XXIX, A, at pages 542-544; and B, at page 552-553.

31 Respondent's Brief designates this as their Argument XXIX, A, at pages 542-544; and B, at page 553.

32 Respondent's Brief designates this as their Argument XXIX, B, at page 553.

33 Respondent's Brief designates this as their Argument XXIX, B, at page 553.

XII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

A. THE DEATH PENALTY STATUTE IS INVALID BECAUSE IT FAILS TO NARROW ELIGIBILITY FOR THE DEATH PENALTY[34]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

B. THE DEATH PENALTY STATUTE IS INVALID AS APPLIED BECAUSE IT ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE UNITED STATES CONSTITUTION[35]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

C. THE DEATH PENALTY STATUTE UNCONSTITUTIONALLY PERMITS UNBOUNDED PROSECUTORIAL DISCRETION

Respondent has not provided any response to this argument and appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

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[34] Respondent's Brief designates this as their Argument XXXV, A, at pages 616-617.

[35] Respondent's Brief designates this as their Argument XXXV, B, at pages 617-618.

D. The Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the United States Constitution[36]

E. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants which Are Afforded to Non-capital Defendants[37]

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and as a Result Violates the United States Constitution[38]

XIII. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND APPELLANT'S CONVICTIONS AND PENALTY MUST BE SET ASIDE[39]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

XIV. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT AND PENALTY PHASES OF TRIAL COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO[40]

Appellant relies upon his argument from the Opening Brief and has nothing further to add on this issue.

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36 Respondent's Brief designates Appellant Wheeler's Parts *1* through *5* as their Argument XXXV, C, 1, at pp. 618-620; Part *6*, as their Argument XXXV, C, 2, at p. 620; Part *7*, as their Argument XXXV, C, 3, at p. 621; Part *8*, as their Argument XXXV, C, 4, at p. 621; Part *9*, as their Argument XXXV, C, 5, at pp. 622-623; Part *6*, as their Argument XXXV, C, 6, at pp. 623-624; and Part *10*, as their Argument XXIX, A, at p. 543.

37 Respondent's Brief designates this as their Argument XXXV, D.

38 Respondent's Brief designates this as their Argument XXXV, E.

39 Respondent's Brief designates this as their Argument XXXV, E.

40 Respondent's Brief designates this as their Argument XXXVI.

XV. APPELLANT WHEELER JOINS THOSE ARGUMENTS OF COAPPELLANTS THAT MAY BENEFIT HIM

Appellant was tried and convicted with Appellants Stanley Bryant and Donald Franklin Smith. Their appeals have been joined in this direct appeal. Appellant Wheeler hereby joins in those arguments of his coappellants that may benefit him. (California Rules of Court, Rule 13; *People* v. *Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5 [172 Cal.Rptr. 445]; *People* v. *Smith* (1970) 4 Cal.App.3d 41, 44 [84 Cal.Rptr. 229].)

CONCLUSION

For the foregoing reasons, appellant's convictions and death sentence must be reversed.

Dated April 19, 2007

Respectfully submitted,

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CASE NUMBER: S049596

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served APPELLANT LEROY WHEELER'S REPLY BRIEF by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

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County of Los Angeles
For delivery to the Hon.
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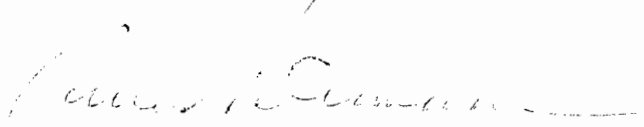
I declare under penalty of perjury that the foregoing is true and correct. Executed on April 21, 2007, at Ojai, California.



Conrad Petermann