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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALPHONSO RAY WILSON, JR.

Defendant and Appellant.

A129064

(Solano County  
Super. Ct. No. VCR187924)

**I. INTRODUCTION**

Defendant Alphonso Wilson was found guilty of two counts of first degree murder (Pen. Code, § 187, subd. (a)),<sup>1</sup> with the special circumstance that the murders were committed during a robbery and that there was more than one murder. Wilson was sentenced to state prison for consecutive terms of life without possibility of parole.<sup>2</sup>

On appeal, Wilson argues that the trial court erred when it restricted his access to unpublished materials related to an interview he gave regarding the crime to a newspaper reporter, and also by excluding him and his counsel from the court's in camera review of the reporter's unpublished materials. He also argues the trial court erred in denying a defense motion to strike the reporter's direct examination testimony because of restrictions placed on the cross-examination of the reporter regarding these unpublished

<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise noted.

<sup>2</sup> The jury did not make a true finding as to the allegation that Wilson himself discharged a firearm with regard to Caldera's murder and could not reach a unanimous verdict as to this enhancement with regard to the Werder murder.

materials. He further contends the trial court erred when it precluded his counsel from arguing that the murders were not committed during the course of the robbery but were, in fact, committed out of fear of the victims in general.

Finally, he argues, and the People concede, that the trial court erred by failing to instruct the jury *sua sponte* that when a defendant is prosecuted for murder on an aiding and abetting theory, a murder special circumstance can be found only when the defendant acts with the intent to kill.

With the exception of the trial court's failure to instruct the jury *sua sponte* as to the aiding and abetting theory, we affirm the judgment.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. *The Robbery and Murders***

On January 17, 2007, the police found the bodies of two men, James Werder and Manuel Caldera. Several months later, and after being given *Miranda* warnings, defendant was interviewed by San Joaquin Deputy Sheriff Kevin Ming and Vallejo Detective Steven Cheatham. Defendant first denied any involvement in the killings, but ultimately confessed that he and another man, Charles Camper, had robbed Caldera and Werder. He told the police that, during the robbery, Camper killed Caldera and Werder.

Wilson told the police officers that Werder and Caldera operated an ice cream truck business. They also grew and sold marijuana. Wilson and Camper,<sup>3</sup> lived with Werder and Caldera. Wilson was 18, and had been in special education for “a little bit of ADD” since the third grade. Wilson had been friends with Camper for several years, but dropped the friendship because Camper was involved with gangs. However, when he needed a place to stay, Wilson stayed with Camper for about three months, and they became friends again.

After Wilson met Werder and Caldera, the two men told him that they “got a little job for you [Wilson] I want you to do.” Werder and Caldera asked him to work in their

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<sup>3</sup> Charles Camper was found shot to death in the Sacramento-San Joaquin Delta prior to Wilson's trial.

ice cream truck business and Wilson agreed. Wilson didn't know until he got to their house that they "had a weed lab there." He described his reaction to this discovery as follows: "And so I'm in the house like man, I have to stay here with you guys? And they was like, 'Yeah.' Then I was like, 'With all this stuff downstairs'? I'm like that's gonna be hard but I was making a little side . . . a little side money. . . . [¶] [b]y working the ice cream truck, I was into stuff like that." He didn't smoke marijuana and he didn't want to be around it. Camper didn't immediately move into the house because he was 17, and Werder and Caldera needed someone who was 18.

Wilson moved in with the victims in October and Camper joined him in November, after he turned 18; Wilson was with Manuel Caldera "all the time." Camper, on the other hand, had a warrant out for his arrest, so he stayed in the house and "watch[ed] the weed lab . . . ." Wilson had his own bedroom and Camper slept on the couch next to Caldera. James Werder did not live at the house. Wilson liked going to parties, and went occasionally. If he had to go somewhere, he would call Manuel Caldera ("T"), who would come and pick him up and take him where he needed to go.

Wilson never had any problems with Caldera or Werder. He did describe to the detectives how, on one occasion Werder "body slammed" him when he wasn't listening to him. Although Wilson respected Werder for doing this, he didn't want to be around him. Wilson was never threatened at the house, never stole anything, and was never accused of anything. The two men "had so much trust in me."

Wilson got paid for driving the ice cream truck, but Camper did not. "He [Camper] really wasn't catching on how to grow the weed when they got mad at him. Talking about they wanted to kick him out. He [Camper] didn't want to go." The money Wilson earned selling ice cream was often left on the table in the house for him to spend for his expenses. It was his practice to call Caldera first and asked him for permission to do so.

Camper had "go[t] in and out of arguments" with Caldera and Werder. Wilson told the detectives that neither Caldera nor Werder had threatened to kill Camper. Nor had they threatened to kill Wilson. Wilson also told the police detectives that "If they

[Werder and Caldera] would have threatened [Camper] then I would have gone, I'm cool. . . . [¶] . . . I would have said I can't work this ice cream business[ and] . . . [¶] . . . I would've left." The victims did threaten Camper when he first "came in." They thought Camper was sneaky and told him that "if he ever pull something we're gonna shoot you."

Wilson had seen Caldera shoot people on two occasions. Camper told defendant that he wished he'd been there. According to Wilson, Camper told him "my finger trigger happy. I'm ready to kill anybody. . . . [¶] . . . he like so I'm gonna die anyway. . . . [¶] . . . He don't care if he got it. He never trying to change his lifestyle."

Asked again about his relationship with the victims, Wilson again said he was not afraid of them and denied that they had threatened to kill him. He did not think they would kill Camper if he had stolen money from them because he "would be upset," and they would not be able to hide the crime.

It was Wilson's plan to rob Caldera and Werder, and he told Camper " 'we might have to take 'em out.' " Camper "was like, 'All right.' So then I was thinking like I don't know though, should you do it or not? Cause you know? I don't know. I—I was kind of telling him, it ain't right. And I was thinking man, that's it for you if you pull the trigger. And I think he was gonna do it. I thought he was just bullshitting me, man."

Wilson told the police officer that he felt like "getting out of this gang 'cuz what if the police come and kick the door down? We got a—they got all this stuff and it don't feel right. I was like, 'I'm ready to take the money.' But I was kind of thinking like, I'm gonna wait until they gone and I take they money. And then I'll just never come back to the Vallejo um, the older guy won't kill me." He was afraid of the victims.

Wilson and Camper's plan was that Camper would hold Caldera and Werder at gunpoint, and Wilson would take the money. Camper took a gun out of Caldera's truck before they entered the house. He told Wilson: " 'Are you sure you want to take the money?' . . . Then he [Camper] was like, 'I'm gonna have to kill 'em.' Then I'm thinking like—thinking like no let's just take the money, he's like 'I'm gonna have to do it.' And that's when he hit me with that my finger trigger is itchy."

At some point before this, Caldera and Werder took Camper with them to deliver some marijuana to a customer. They told Camper, “we know you got a warrant, but come on . . . you can go out this time.” Camper was happy to go. When they came back, Wilson began “thinking like man, I feel like a hostage up in here. I’m like man, I can take the money and just be cool. I don’t even have to kill nobody . . . .”

On January 15, 2007, Wilson and Camper entered the house. Wilson went to the table where the money was located. “I’m like—am gonna take the money. And then I was like damn, I kept thinking in my head. I don’t think we should kill ‘em.” Wilson told the police that “basically I didn’t want to plan out a murder. I wanted to just take the money and—and get out.” He wanted Camper to point the gun at the victims, frighten them, so he could “grab the money and we leave.” However, after they entered the house, Camper shot and killed Werder and Caldera. Wilson watched Camper shoot both men “[a]nd I was like fuck. I was like you weren’t supposed to kill him.”

Both men fled to Washington State. When he eventually returned to California, Wilson was arrested.

At trial, A.P. testified that in January 2007, when she was 15 years old, defendant was her boyfriend. Sometime in mid-January, defendant came to A.P.’s school to pick her up. He was driving a silver BMW. They drove around for a while, then switched to a Chevy Tahoe and then back to the silver BMW.<sup>4</sup> She was aware that defendant was living in a house with two men and he was helping them harvest marijuana. She believed that defendant and Camper “were in some kind of gang . . . .” Defendant told her that the situation in the house had become extremely dangerous for him and for Camper. He told her that the victims “had threatened both Charles [Camper] and [Wilson] to kill them if they tried to leave . . . .”

Defendant told her that he and Camper had been involved in the murder. He told her that he had taken a lot of money from the victims. She wasn’t sure if the murders were gang-related or simply financially-related. She remembered telling a police

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<sup>4</sup> Caldera owned both a Chevy Tahoe and a silver BMW.

detective after the murders of Caldera and Werder that defendant told her that Camper “had to kill” the victims because they were in a gang. Defendant told her that Camper had killed the victims because he (Camper) “was in a situation where he felt it was kill or be killed . . . .”

**B. *Wilson’s Interview with Vallejo Times Reporter, J.M. Brown***

While he was incarcerated, Wilson agreed to participate in an interview with Vallejo Times Herald reporter J. M. Brown. Brown wrote an article for the Times Herald regarding this interview. The article, *I Am Not a Killer*, was published in the newspaper on March 11, 2007.

In the article, which was not admitted into evidence but came in through Brown’s testimony regarding its accuracy, Wilson admitted that he had bragged to his friends about being the killer, but when Brown asked him about it, he said that he had not killed Caldera or Werder. He remembered telling friends that he had killed Caldera and Werder “for all this money” He told Brown that the original plan with Camper was simply to steal the cash and the truck, not to kill the men. The men were his friends, in fact. Camper, however, was afraid that Caldera and Werder would seek revenge for the robbery, which is why he shot them. Wilson did not feel the killings of Caldera and Werder were his fault.

**D. *The Verdict***

The jury found Wilson guilty of two counts of first degree murder, found true the special circumstance allegations that each murder was committed during a robbery and that there was more than one murder, found not true the allegation that Wilson personally used a firearm to murder Caldera, and made no finding as to the allegation that Wilson personally used a firearm to murder Werder.

This timely appeal followed.

### III. DISCUSSION

#### A. *Orders Regarding Reporter Shield Law*

Defendant argues that judges who presided over his preliminary examination and trial erred in ruling on issues the first trial judge who presided over this matter, Judge Getty, had already decided.

##### 1. *Judge Getty's Order Denying Vallejo Times Herald's Motion to Quash*

Prior to the preliminary examination, the People subpoenaed Vallejo Times Herald reporter J.M. Brown to testify at the preliminary examination about an article he wrote after he interviewed Wilson. Both the Times Herald and Brown moved to quash the subpoena, arguing that under the California shield law (Cal. Const., art. I, § 2(b); Evid. Code, § 1070) (shield law), Brown could refuse to testify about any unpublished information related to his interview with Wilson and nevertheless be entitled to immunity from contempt.

All parties ultimately agreed that Brown would testify, without any objection under the shield law, as to the accuracy of “the information that falls within the quotation marks” in the article.

The Times Herald also argued that the shield law gave Brown immunity from prosecution as to information in the article that paraphrased Wilson’s statements rather than directly quoted them. The Times Herald further contended that, as the trial court put it, “unpublished information that doesn’t appear whatsoever in the four corners of the article, but [is] known to the reporter through his investigatory efforts” would fall under the shield law as unpublished information.<sup>5</sup> At this point, the attorney for the Times Herald informed the court that she was uncertain as to whether there were any notes related to the interview.

The hearing was continued to allow further argument. On September 21, 2007, Judge Getty held that any of defendant’s statements that appeared in quotes in the article,

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<sup>5</sup> Defense counsel did not file a subpoena seeking this unpublished information, but the parties agreed that the court would also rule on whether this information would come within the shield law as it applied to a defense request.

as well as those paraphrased in the article were published materials and, therefore, Brown had no immunity from prosecution should he refuse to testify about them.

As to the defense's ability to cross-examine Brown on unpublished matters related to the interview, the court found that "there has been sufficient offer of proof by [the defense attorney] that the release of the unpublished materials to the defense would reasonably possibly assist in the defense especially given the inculpatory statements that have been reported." Therefore, the court denied the motion to quash.

The court elaborated briefly on its decision noting that "sitting here today, all I would order disclosed, which is why I'm not certain we need an in camera review, is his notes, any audiotape between him and Mr. Wilson and there really is nothing else for me to disclose. It will only come up when he is questioned on the stand."<sup>6</sup> The court went on to state that it was uncertain whether "Mr. Brown is requesting an in camera review for the purpose of the disclosure of the unpublished information." However, no such review was requested and the court's denial of the motion to quash was memorialized in Judge Getty's order of September 21, 2007.

## **2. *Judge Harrison's Order Granting Vallejo Times Herald's Motion to Quash***

At this point, the case's path took a significant turn. On October 3, 2007, the public defender was relieved as defense counsel because of a conflict. A new attorney, John Coffey, was appointed to represent Wilson. At that time, the court specified that Brown "is still under subpoena."

Shortly afterwards, Judge Getty was reassigned and, therefore, did not preside over the preliminary examination.

A second judge, Judge Smith, continued the preliminary examination to December 14, 2007. A third judge, Judge Harrison, was then assigned to the case and the

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<sup>6</sup> The court emphasized that its order was not directed to "any other confidential sources, such as "some source reported about some conversation with a police department person" and, accordingly, did not approve the release of that kind of material.

preliminary examination was continued once again, this time to January 2008. A fourth judge, Judge Kinnicutt, presided over the trial.

On January 18, 2008, prior to the preliminary examination, the Times Herald and Brown filed “evidentiary objections” to anticipated questions. These “objections” restated the arguments Judge Getty had previously rejected when she denied the motion to quash. Among the areas characterized as objectionable were “[q]uestions about the content of defendant’s statements to Mr. Brown,” questions about the “flow of” conversation between Mr. Brown and defendant and/or how long the defendant spoke about each matter raised, questions about defendant’s comprehension of the charges against him and/or the questions posed by Mr. Brown, “[q]uestions about defendant’s general demeanor, mental state and related matters,” and any “[r]equest to Mr. Brown to produce unpublished notes.”

At the preliminary examination, Brown refused to answer the People’s questions regarding anything other than the fact that he had written the statements found in the article. Asked about paraphrases of certain statements made by defendant, Brown refused to testify. Accordingly, the court (now Judge Harrison) held him in contempt. Brown then agreed to, and did, answer the People’s questions regarding his paraphrases of statements in the article.

On cross-examination, defense counsel began to question Brown on issues related to the newspaper article. The Times Herald and Brown contended Brown would refuse answer questions about unpublished information related to the interview and was, under the shield law, entitled to immunity from contempt.

At this point, defense counsel became aware that Brown had notes regarding the interview. Defense counsel then requested that the court hold an in camera hearing to determine whether these notes contained any information that would assist in Wilson’s defense. Defense counsel was asked to make a showing that the notes could possibly assist in Wilson’s defense. Defense counsel argued that because Brown did not remember the content of the notes, the notes were the best evidence of the interview, the newspaper article was hearsay, and he had no way to cross-examine Brown on the

accuracy of the article as confirmed by his notes. The court agreed that the fact there were notes of the interview indicated there was a possibility that the notes might shed light on the accuracy of the article. The court concluded that, “in and of itself, [the notes] could, as a possibility, assist the defense.”

Judge Harrison then held an in camera review of the notes, from which he excluded defense counsel. Defense counsel objected to this exclusion. After reviewing Brown’s notes, the court held that there was nothing in the notes that justified disclosure to the defense and “that the reporter’s privilege and shield law still applies.”

At the preliminary hearing, defense counsel sought to examine Brown on issues regarding statements made by Wilson during the interview that were not recorded in the article, and questions, including follow-up questions, Brown might have asked Wilson during the interview. Counsel also sought information about Wilson’s demeanor during the interview. The court sustained objections to these questions under the shield law.

At the end of the preliminary hearing, the defense moved to have Brown’s testimony stricken on the ground that the application of the shield law had denied him the right to cross-examine Brown and thus was a denial of Wilson’s due process rights. This motion was denied.

### **3. *Judge Kinnicutt’s Order Granting Vallejo Times Herald’s Motion to Quash***

On February 5, 2009, before the fourth judge to preside over this matter, Judge Kinnicutt, the Times Herald filed the same motion to quash the prosecution subpoena of Brown it had earlier filed. Judge Kinnicutt granted the motion to quash and the objections to anticipated questions regarding unpublished information concerning Brown’s interview.

### **B. *Waiver***

Although Wilson now challenges the fact that multiple decisions on the same issue were improperly made by the trial court judges presiding over this matter, at no point during the preliminary examination or during the trial itself, did he object to Judges Harrison and Kinnicutt ruling on the same issues Judge Getty had previously heard.

Accordingly, Wilson has waived his objection on appeal to this procedural issue. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

However, we consider the merits of his contention in anticipation of any ineffective assistance of counsel argument and conclude that, even if he had not waived this issue, there would still be no error because Judge Harrison's ruling on the motion to quash was not an abuse of discretion.

**C. *Power of Trial Court to Rule on Issue Already Decided by Another Trial Court in Same Matter***

In general, "the power of one judge to vacate an order made by another judge is limited. [Citation.] This principle is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice. 'If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. To affirm the action taken in this case would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking.' "

(*In re Alberto* (2002) 102 Cal.App.4th 421, 427, citing *Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588.)

Here, Judge Getty denied the Times Herald's motion to quash the People's subpoena of Brown in its entirety, including that portion of the subpoena that requested Brown's notes. If the Times Herald believed this ruling was incorrect, the newspaper's remedy was to seek appellate review of Judge Getty's order. Instead, it raised this matter a second time before a different judge presiding over the case and presented additional information to support its motion to quash, information that was available to it when it filed its original motion to quash. The Times Herald's failure to present this information at the hearing before Judge Getty did not entitle it to seek another ruling on the same issue from a different judge. It was error, therefore, for Judge Harrison to rule on this matter after it had already been decided. Similarly, it was error for Judge Kinnicutt to do the same.

The People contend that Judge Harrison’s ruling was, in fact, consistent with that of Judge Getty because the latter’s order contemplated that there would be a later proceeding involving an in camera review of Brown’s notes. However, as we have earlier noted, Judge Getty asked whether Brown wished such an in camera review and, hearing no such request, she ruled without holding one.

Ordinarily, the remedy for this error would be to reverse Judge Harrison’s ruling. However, we “ ‘cannot *reverse* a trial court’s ruling which correctly follows the law merely because it disagrees with an earlier, incorrect ruling.’ ” (*In re Alberto, supra*, 102 Cal.App.4th at p. 431.) Accordingly, we proceed to the issue of whether Judge Harrison was correct in, essentially, granting the Times-Herald’s motion to quash. To do so, we now consider whether, under the shield law, Brown was entitled to immunity from contempt for refusing to provide his interview notes to the defense.

#### **D. *Shield Law: General Principles***

Under the shield law, neither a media organization such as the Times-Herald nor an employee, such as Brown, may be held in contempt for refusing to comply with a subpoena that requires it to “ ‘disclose any *unpublished information* obtained or prepared in gathering, receiving or processing of information for communication to the public.’ ” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 796 (*Delaney*)). “Unpublished information’ includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated . . . .” Notes and tapes are among the information the shield law characterizes as “unpublished information.” (*Id.* at p. 799.) Further, the shield law “provides an immunity from being adjudged in contempt; *it does not create a privilege.*”<sup>7</sup> (*Id.* at p. 797, fn. 6.)

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<sup>7</sup> At the preliminary hearing, the trial court mistakenly described the shield law as creating an “absolute privilege” against disclosure of unpublished materials. This is incorrect. The shield law does not, in fact, create an absolute privilege. It simply gives immunity from contempt to a media organization when it refuses to answer questions regarding unpublished material, an immunity that can be overcome upon a proper showing under the law. (*Delaney, supra*, 50 Cal.3d at p. 797, fn. 6.)

As the proponents of the motion to quash, the Times-Herald and Brown bore the initial burden of proof (*Delaney, supra*, 50 Cal.3d at p. 807, fn. 20), which was that they were required to show that “all the requirements of the shield law have been met.” (*Ibid.*) The shield law provides a reporter with immunity from contempt when the reporter refuses to disclose “any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.” The law defines “unpublished information” as that which “includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated . . . .” (Cal. Const., art. I, § 2(b).) In short, the reporter’s prima facie case in this matter comes down to two questions: Was the information obtained during the news gathering process and is the information “unpublished”?<sup>8</sup>

*Delaney* is instructive in demonstrating how this prima facie case is made. In that case, the defendant sought testimony from two reporters about their observations of his arrest and search. The reporters conceded that the information, of which the defendant himself was the source, was not confidential. The question facing the *Delaney* court, therefore, was whether the shield law’s definition of “unpublished information” includes a reporter’s “unpublished, nonconfidential eyewitness observations of an occurrence in a public place.” (*Delaney, supra*, 50 Cal.3d at p. 797.)

The court’s response to this issue was simple and instructive: the shield law, on its face, applies to “any unpublished information.” (*Delaney, supra*, 50 Cal.3d at p. 798.) The word *any* “means without limit and no matter what kind.” (*Ibid.*) The court, therefore, rejected the argument that the “clear and unambiguous” language of the shield law could be construed to limit “unpublished information” to only that which was obtained in confidence. To do so, it said, “would be to read the word ‘any’ out of the section.” (*Ibid.*) The court held, therefore, that the shield law applies to “any”

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<sup>8</sup> Defendant does not dispute the fact that the information at issue here was obtained while the reporter was engaged in gathering the news.

unpublished information including the non-confidential information sought by the defendant. (*Ibid.*)

Although when a defendant is the source of the information sought, the information cannot be considered confidential, *Delaney* makes clear that this non-confidential information, like confidential information, falls within the scope of the shield law, which broadly applies to “any” unpublished information. Here, of course, the information obtained by the reporter was not confidential, in that defendant himself was the source of the information. As in *Delaney*, this does not mean the information falls outside the scope of the shield law. As *Delaney* makes clear, the law applies broadly to “any” unpublished information, which would include the reporter’s notes of his interview with defendant in this case. (See also *People v. Vasco* (2005) 131 Cal.App.4th 137, 152-156 [shield law applicable to conversations between defendant and reporter].)

However, even if a reporter makes a prima facie case that the shield law applies to the material sought, “the shield law’s protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial.” (*Delaney, supra*, 50 Cal.3d at p. 805.) The *Delaney* court held that “to overcome a prima facie showing by a newsperson that he is entitled to withhold information under the shield law, a criminal defendant must show a *reasonable possibility* the information will *materially assist* his defense. A criminal defendant is not required to show that the information goes to the heart of his case.” (*Id.* at p. 808, emphasis added.)<sup>9</sup>

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<sup>9</sup> The *Delaney* court made “clear how the threshold requirement must be applied in practice. First, the burden is on the criminal defendant to make the required showing. (*Hallissy v. Superior Court* [(1988)] 200 Cal.App.3d 1038, 1048, disapproved on other grounds in *Delaney, supra*, 50 Cal. 3d at p. 789.) Second, the defendant’s showing need not be detailed or specific, but it must rest on more than mere speculation. Third, the defendant need not show a reasonable possibility the information will lead *to his exoneration*. He need show only a reasonable possibility the information will *materially assist his defense*. The distinction between exoneration and assisting the defense is significant. ‘Exoneration’ means ‘the removal of a burden, charge, responsibility, or duty.’ (Black’s Law Dict. (5th ed. 1979) p. 516, col. 2.) Stated more simply, in criminal

As we have earlier noted, Judge Getty and Judge Harrison had before them different descriptions of the materials at issue and, therefore, reached different conclusions regarding the motion to quash. Wilson had not, and never did, subpoena the reporter. Nevertheless, Judge Getty assumed that the materials sought were notes and any observations the reporter made about the circumstances of the interview, although she had no specific understanding of the contents of this information. Judge Getty reasoned that because the newspaper article involved “inculpatory” matters, information about the circumstances of the interview would reasonably probably materially assist the defense. Having found that the threshold question had been answered in Wilson’s favor, Judge Getty then went on to the third stage of the shield law analysis, which we describe briefly at a later point in this opinion. As we have said, Judge Harrison’s consideration of the threshold question differed from Judge Getty’s in an important respect: he had before him, in camera, the notes the reporter took during his interview with defendant.

Once Brown and the newspaper met their initial burden, the burden then shifted to Wilson “to make the showing required to overcome the shield law.” To “overcome a prima facie showing by a newsperson that he is entitled to withhold information under the shield law, a criminal defendant must show a *reasonable possibility* the information will materially assist his defense. A criminal defendant is not required to show that the information goes to the heart of his case.” (*Delaney, supra*, 50 Cal.3d at p. 808.) Rather, the evidence must be “likely helpful evidence.” This is so because “’[t]he need to develop *all relevant facts* in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be

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proceedings, ‘exoneration’ is generally understood to mean an acquittal or dismissal of charges. Evidence, however, may be critical to a defense even if it will not lead to exoneration. For example, evidence may establish an ‘imperfect defense,’ a lesser included offense, a lesser related offense, or a lesser degree of the same crime; impeach the credibility of a prosecution witness; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination. A criminal defendant’s constitutional right to a fair trial includes these aspects of his defense.” (*Delaney, supra*, 50 Cal.3d at p. 809.)

founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of *all the facts*, within the framework of the rules of evidence.’ ”<sup>10</sup> (*Ibid.*)

Wilson, therefore, was required to show a reasonable possibility the information he sought would materially assist his defense. He was not required to make a “detailed or specific” showing, but his showing “must rest on more than mere speculation.” (*Delaney, supra*, 50 Cal.3d at p. 809.) Nor was he required to show “a reasonable possibility the information will lead to *his exoneration*.” (*Ibid.*)

In reviewing Judge Harrison’s order quashing the subpoena on the grounds that defendant had failed to meet this threshold burden, we note that the parties agree that the abuse of discretion standard of review applies to the question of whether Judges Harrison and Kinnicutt erred in granting the motion to quash. They are correct. In another case involving the shield law, *People v. Ramos* (2004) 34 Cal.4th 494, 527 (*Ramos*), the court was called upon to consider whether the trial court had properly ruled that a newspaper reporter’s notes of an interview with a defendant were protected under the shield law because the court found that the evidence contained in the notes would not have materially assisted the defendant. The court found that “defendant has failed to meet *Delaney’s* threshold test, and we find no abuse of discretion in the trial court’s use of the shield law in protecting [the reporter]’s notes.”

“ ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]’ ” (*Uriarte v. United States Pipe & Foundry Co.* (1986) 51 Cal.App.4th 780, 790, italics omitted.) Accordingly, we will disturb the trial court’s

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<sup>10</sup> The People appeared to understand this concept when they pointed out that “I don’t think the burden on the defense is very high. I think they just have to show it’s relevant and it could help them. I don’t think the burden is that tough. My personal feeling in reading the cases is that the defendant should be given pretty wide leeway in their cross.”

ruling only insofar as it is “arbitrary, whimsical, or capricious.” (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 736.)

In the absence of specific information about the contents of the notes, Judge Getty had before her a strong argument that, in general, the reporter’s notes were the most useful way to examine the accuracy of the newspaper article and therefore would materially assist in his defense. Judge Harrison, however, reached a very different conclusion based on an in camera review of the notes to which defendant sought access. These notes, of course, were never reviewed by Judge Getty. Judge Harrison’s review revealed that the notes would not add anything helpful to Wilson’s defense and, therefore, he found that Wilson had failed to meet his threshold burden of showing that the notes would materially assist in his defense.

As we have said, Judge Harrison’s consideration of the threshold question differed from Judge Getty’s in an important respect: he had before him, in camera, the notes the reporter took during his interview with defendant. Similarly, in *Ramos, supra*, 34 Cal.4th at p. 527, the trial court conducted an in camera review of a reporter’s notes and concluded that they would not materially assist the defense and, therefore did not meet the shield law’s threshold burden. The *Ramos* court held that the trial court’s ruling was not an abuse of discretion because “the record does not suggest the notes contain anything of substance that the jury had not already heard.” (*Ibid.*) We have reviewed the record in this matter, including the in camera proceedings and Brown’s testimony therein regarding his notes. Here, as in *Ramos*, the record reveals that the notes contained nothing useful to the defense. Accordingly, we conclude that Judge Harrison correctly found that defendant had failed to meet the threshold burden of showing that the notes would materially assist his defense. Therefore, his order granting the motion to quash was not an abuse of discretion.

At this point, having found that defendant had failed to meet the threshold showing, Judge Harrison’s inquiry was at an end and he properly granted the motion to

quash the defense request for the notes.<sup>11</sup> Therefore, for the purposes of considering any potential argument that defendant’s counsel was ineffective because he did not object to the court’s consideration of the motion to quash a second and third time, we find that even if defendant had made such an objection it would have been unavailing because Judge Harrison’s ruling on this issue was well within the exercise of his discretion.

**E. *The In Camera Proceeding***

Wilson argues that his and his counsel’s exclusion from the in camera proceeding denied him his constitutional right to be present and to assistance of counsel. He also contends that this error is structural because it resulted in the complete deprivation of counsel at the preliminary hearing. We do not agree.

First, Wilson is incorrect when he characterizes the procedure in this case as one in which the court acted as an advocate. Our review of the record indicates that Judge Harrison solicited, listened to, and understood the defense theory and properly acted in an impartial manner.

Second, although the issue of whether an in camera review of materials from which a party is excluded violates the shield law has not been clearly addressed by any court, in our view had Wilson and his counsel been present at the in camera hearing, he

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<sup>11</sup> In contrast, Judge Getty found that defendant had met the required threshold showing. When a court finds that a defendant has met the threshold requirement that the materials he seeks would materially assist his defense, “[t]he trial court must then consider the importance of protecting the unpublished information. [Citation.] This determination may properly be characterized as a balancing of the defendant’s and newsperson’s respective, perhaps conflicting, interests.” (*Delaney, supra*, 50 Cal.3d at p. 809.) Four factors go into making this determination. First, “(a) Whether the unpublished information is confidential or sensitive,” (*Id.* at p. 810, italics omitted), “(b) The interests sought to be protected by the shield law” (*Ibid.*, italics omitted); “(c) The importance of the information to the criminal defendant” and “(d) Whether there is an alternative source for the unpublished information.” (*Id.* at p. 811, italics omitted.) Judge Getty found that none of these factors weighed against ordering the reporter to disclose the requested information and her analysis of these factors is not an issue on appeal.

would have raised the same issues to which he had already alerted the trial court before the in camera hearing.

Third, because the notes contained nothing the court was obliged to order disclosed, Wilson's exclusion from the in camera hearing resulted in no prejudice under either *People v. Watson* (1956) 46 Cal.2d 818 or *Chapman v. California* (1967) 386 U.S. 18 because nothing would have been served by permitting Wilson to participate in the court's review of the notes. Similarly, in *Ramos, supra*, 34 Cal.4th at p. 527, the defendant argued that “trial court’s decision to hold an in camera hearing excluding both defendant and his counsel denied him his constitutional right to be present and to assistance of counsel.” The defendant also claimed that application of the shield law denied him his right to the “ ‘entirety of the interview,’ thwarting his ability to present a defense and obtain a fair trial.” The *Ramos* court found that “[d]efendant again fails to show how the in camera proceeding or the protection of the unpublished notes in any way negatively influenced his ability to present a defense or receive assistance from counsel, or in any way changed his defense or the context of [defendant’s] testimony. [Citation.]” (*Ibid.*) Similarly, here, defendant has made no such showing (nor do we find any from our review of the notes in camera) that if counsel had the opportunity to question Brown about the notes, there was anything in them that would have been useful to Wilson. Finally, to the extent the defense sought to cross-examine Brown on matters outside the notes themselves in an effort to cast doubt on the accuracy of his article, arguably implicating a right to cross-examination that overcome the shield law’s protection (see *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 737-738), such examination could not have been availing in light of Brown’s lack of recollection of the details of the interview.

#### **F. Motion to Strike**

Wilson moved to strike Brown’s testimony on direct examination because he was not permitted to cross-examine Brown using the notes. The court denied this motion and Wilson now argues that the court’s ruling violated his federal constitutional right to confrontation. We disagree.

First, as we have previously concluded, the court acted within its discretion when it granted the motion to quash. The motion to strike was based on the same argument made in the motion to quash, namely that Brown should have been held in contempt for refusing to provide the defense with the notes. Therefore, just as the court was within its discretion to grant the motion to quash, it was also within its discretion to deny the motion to strike. Because, under the shield law, the reporter's notes were not available to Wilson during his cross-examination of Brown, the court's ruling did not violate his right to confrontation. Second, any error by the court would have been harmless beyond a reasonable doubt because, as noted above, Brown's notes did not contain any information material to Wilson's defense. Had defense counsel been permitted to cross-examine Brown using them, this cross-examination would not have changed the outcome of the trial.

**G. *Restrictions on Defense Closing Argument***

Wilson argues that the trial court erred when it sustained prosecution objections to statements made in his closing argument that related to his theory that Camper killed Caldera and Werder not in the commission of the robbery, but because he was fearful of the two men. He argues that these rulings violated his rights to effective assistance of counsel and to present a defense. We disagree.

Although Wilson has a federal constitutional right to have his counsel present at closing argument, the trial court has "broad discretion" to limit counsel's closing arguments in scope and duration. (*People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1184-1185.) The court's first and third rulings sustaining objections to defense counsel's argument regarding Camper and Wilson's fear of Caldera did not prevent him from arguing this theory. As defense counsel told the jury, "the reason this happened was because they had been threatened to be killed, they were fearful, so Mr. Camper shot them, and then they took the money and ran." On the second occasion the trial court sustained the People's objection to defense counsel's argument, defense counsel

nevertheless informed the jury that there was a possibility that Caldera was a man who was himself violent and made Wilson fearful.<sup>12</sup>

The third objection during argument was to defense counsel's argument that Wilson was lying to the police during his interview. However, as with the other two objections, counsel nevertheless made his point. Thus, he told the jury that "he [Wilson] wanted to avoid 25 to life. What can he say that will stop him from getting 25 to life. Is he lying? Of course he's lying. He's trying to say whatever he can to get out of 25 to life." The statement to which the court sustained an objection on the ground that it was not supported by the evidence was very similar to the one the jury heard.<sup>13</sup>

The trial court's rulings were well within its power to control the proceedings. Although the court struck certain statements by defense counsel, it did not prevent him from presenting a defense to the jury. We find no error.

#### **H. *Aiding and Abetting Instruction***

Wilson argues that the trial court erred because it did not give a sua sponte instruction that in order to find the special circumstance of more than one murder, the jury must also find that the accomplice defendant had the intent to kill. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117-1118.) We agree. The People concede this point and, therefore, the finding of the special circumstance of more than one murder must be reversed.

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<sup>12</sup> Defense counsel told the jury "Why do you think that surveillance system was there? Was it because they were going to watch for the police to come? Perhaps. But you heard evidence that Mr. Caldera—one of the things he did was he went and ripped off other drug dealers. [¶] Do you think it's reasonable that perhaps he was fearful of others coming after him? You heard Mr. Wilson talk about being with him when he shot a couple other people."

<sup>13</sup> The People's motion to strike was directed to this defense argument: "Don't you think that after hearing all of that from the officers, Mr. Wilson got to thinking, maybe my best way to get out of 25 to life is to tell them that story that they just repeated to me over and over again."

#### IV. DISPOSITION

With the exception of the finding of special circumstance of more than one murder, which is reversed, the judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.