No. S146939

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEE SAMUEL CAPERS, Defendant and Appellant.	San Bernardino County Case No. FBA-02684

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE JOHN M. TOMBERLIN

MARY K. McCOMB
State Public Defender

PETER R. SILTEN
State Bar No. 62784
Supervising Deputy State Public Defender

1111 Broadway, 10th Floor
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
silten@ospd.ca.gov

Attorneys for Appellant

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<http://nymag.com/news/crimelaw/68715> [as of March 1, 2017] 3

<http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [as of March 1, 2017 3

Kassin, S. & Wrightsman, L. (Eds.), The Psychology of Evidence and Trial Procedures (1985) Sage Publications, London, pp.76-80 . . . . . 9, 10

McCormick, Evidence (2d ed. Cleary ed. 1972), § 79 at p. 165 19

Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession, (2007) 28 Cardozo L. Rev. 2791 5

Richard A. Leo, *False Confessions: Causes, Consequences, and Implications* (2009) 37 J. Am. Acad. Psychiatry Law 332 . . . . . 4, 9

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEE SAMUEL CAPERS, Defendant and Appellant.	San Bernardino County Sup. Ct. No. FBA-02684

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to those of respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

I.

APPELLANT'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THEY REST ENTIRELY ON HIS UNCORROBORATED STATEMENTS TO THE POLICE AND TO THE MARTINS

A. Introduction

Appellant argued in his opening brief that his convictions and death sentence must be reversed because, as conceded by the prosecutor below, the evidence against appellant rests entirely on his uncorroborated statements to the police and the Martins,[1] statements which appellant has demonstrated lack "substantial independent evidence which would tend to establish the[ir] trustworthiness." (*Opper v. United States* (1954) 348 U.S. 84, 93.)

Respondent contends that appellant's argument fails because all the prosecution needed to do at trial was to prove independent of appellant's uncorroborated statements that a crime was committed, which it did as required by the corpus delicti rule. (RB 19 et seq.)[2]

Respondent also contends that substantial independent evidence corroborates appellant's inculpatory statements. (RB 26-28.)

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[1] During a pretrial proceeding, the prosecutor remarked: "I think probably – the whole case comes down to statements made by the defendant." (2RT 272.) At another hearing, he admitted "This case, we do not have any physical evidence tying this defendant to the case." (3RT 432.)

[2] The following abbreviations are used herein: "RB" refers to respondent's brief; "AOB" refers to appellant's opening brief; "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

Not so on both counts.

B. The Corpus Delicti Rule Fails to Adequately Address Appellant's Argument that His Confession Was Uncorroborated and Unreliable

Respondent's contention that the prosecution's evidence satisfied the corpus delicti rule fails to address appellant's actual challenge to his convictions and death sentence based on the demonstrable unreliability of his uncorroborated statements. Indeed, appellant was careful to distinguish the broad corroboration rule upon which he relied from the narrow corpus delicti rule upon which respondent mistakenly focuses. (AOB 48, fn. 12.)

The corpus delicti rule requires only that

> [i]n every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself — i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]

(*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168–1169.)

The corpus delicti rule does nothing to guard against false confessions to actual crimes, which is the very situation present in appellant's case and a common cause of wrongful convictions.[3]

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[3] The Innocence Project recorded that of 349 DNA exonerations, 28% or approximately 98 involved false confessions, and 37 of the 349 exonerees pled guilty to crimes they did not commit. (<http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [as of March 1, 2017]; see also Robert Kolker, *"I Did It" Why Do People Confess to Crimes They Didn't Commit?* New Yorker (Oct. 3, 2010), <http://nymag.com/news/crimelaw/68715> [as of March 1, 2017] ["In recent years, the use of DNA evidence has allowed experts to identify false

(continued...)

When someone confesses to a crime, the mere proof that a crime was committed, as required by the corpus delicti rule, falls far short of the corroboration needed to reliably determine the person's actual guilt or innocence, or his role in the offense.[4]

Indeed, in the overwhelming majority of cases, like appellant's, the police possess strong evidence that a crime was committed, i.e., the corpus delicti, but that still enables the conviction of innocent persons who have confessed to crimes that have indeed been committed, but not by them. (See, e.g., *People v. LaRosa* (Colo. 2013) 293 P.3d 567; *State v. Mauchley* (Utah 2003) 67 P.3d 477, 483; *State v. Lucas* (1959) 30 N.J. 37, 56,152 A.2d 50, 60.)[5]

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[3](...continued)
confessions in unprecedented and disturbing numbers."].)

And, as noted by Dr. Richard Leo:

Although the number of wrongful convictions continues to mount, the DNA exonerations represent only a small part of the larger problem. For in most criminal cases, there is no DNA evidence available for testing. (Richard A. Leo, *False Confessions: Causes, Consequences, and Implications* (2009) 37 J. Am. Acad. Psychiatry Law 332.)

[4] Examples of persons who have confessed to actual crimes that they did not commit are many. The most notorious include the Lindberg baby kidnaping in 1932 in which more than 200 people confessed to the kidnap and murder of the Lindberg baby; the 1947 killing of Elizabeth Short, who was nicknamed "The Black Dahlia," in which about 60 people confessed to the crime, mostly men, but a few women as well; and more recently the 1996 killing of six-year-old JonBenet Ramsey in which a person by the name of John Mark Karr falsely confessed that he had killed her.

[5] The many shortcomings of the corpus delicti rule have been recognized by a number of states who have abandoned it in favor of a trustworthiness standard. (See, e.g., *State v. Plastow* (S.D. 2015) 873
(continued...)

Thus, it is no answer to appellant's argument that his pretrial statements were too untrustworthy and unreliable to serve as the bases for his conviction and sentence of death for respondent to say that all the prosecution needed to do was to satisfy the requirements of the corpus delicti rule. That rule does nothing to address the gravamen of appellant's argument here.

C. Appellant's Pretrial-Trial Statements are Untrustworthy and Unreliable and Cannot Fairly Serve as a Basis for His Death Sentence

As noted in appellant's opening brief, the *Opper* trustworthiness standard is different from the corpus delicti rule in that it focuses on whether corroborating evidence establishes the trustworthiness or reliability of the confession, whereas the corpus delicti rule focuses on whether corroborating evidence establishes that a crime occurred. (AOB 48, fn. 12; see also *People v. LaRosa*, *supra*, 293 P.3d at p. 573.)

The *Opper* standard requires the prosecution to present "substantial independent evidence which would tend to establish the trustworthiness of the statement." (*Opper v. United States*, *supra*, 348 U.S. at p. 93.). Respondent fails to address appellant's argument that the prosecution

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[5](...continued)
N.W.2d 222, 228-230 [South Dakota]; *People v. LaRosa*, *supra*, 293 P.3d at p. 570 [Colorado]; *State v. Mauchley*, *supra*, 67 P.3d at p. 488 [Utah].) But that standard itself has been criticized as not going far enough in guarding against false confessions. As one commentator noted, the trustworthiness standard is even weaker than the already weak requirement that a confession be corroborated with regard to the corpus delicti rule. (See Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession* (2007) 28 Cardozo L. Rev. 2791, 2805.)

presented insufficient evidence to meet the substantial corroboration standard set forth in *Opper*. Rather, respondent offers the non sequitur that *Opper* does not require separate, independent proof of each element of the crime. (RB 25, citing *People v. Alvarez, supra*, 27 Cal.4th at p. 1169, fn. 3.) Appellant never argued that it did.

Respondent's recitation, moreover, of the evidence purportedly corroborating appellant's admissions is marginal as to guilt, and falls far short of the requirements of *Opper* as to penalty.

In this capital case where the sole evidence of the actual extent of appellant's involvement in the charged crimes was his inconsistent and contradictory pretrial statements much more than those statements is needed to establish the actual extent of his involvement.[6] As noted by the Louisiana Supreme Court, "Such guarantees of trustworthiness are particularly necessary in capital cases where the risk of fabrication or inaccuracy [by the defendant] must be viewed with an eye towards the

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[6] As noted in appellant's opening brief, appellant made a total of 10 statements to the police. In his first six statements, he adamantly denied any involvement in the charged crimes. In his seventh and eighth statements, he admitted entering the T-shirt store and helping Bam-Bam (a.k.a. Carlos Loomis) and Wino (a.k.a. Ruben Romero) force the victims inside the store, but denied taking any part in the actual robbing, shooting or the burning of the two victims. In his ninth statement, he said that he was the one who shot the two victims, that Bam-Bam was the one who poured gasoline on the victims and Wino was the one who "lit them on fire." In his tenth and final statement, appellant changed his story yet again and said that Wino was the one who shot the victims and that he (appellant) was the one who poured gasoline on the victims. However, he denied starting the fire. He said that the match he threw on the gasoline went out; he did not see who actually started the fire. (AOB 35-45, 52-53.)

question to be determined by the trier of fact." (*State v. Brooks* (La. 1995) 648 So.2d 366, 376-377.)

In short, even if appellant's jury were to conclude that he was guilty of the charged crimes because he aided and abetted Bam-Bam and Wino in some fashion by acting as a lookout or by forcing the victims inside the store and no more, the jury could still have spared his life if it believed, consistent with the defense theory, that Bam-Bam and Wino, and not appellant, were the ones responsible for murdering and burning the two victims, and that "[appellant's] participation in the commission of the offense was relatively minor." (11RT 2617; Pen. Code, § 190.3, factor (j);[7] CALJIC No 8.85, factor (j); see *Enmund v. Florida* (1982) 458 U.S. 782 [death sentence disproportionate for aider and abettor who did not "kill,

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[7] Penal Code section 190.3, factor (j) is consistent with the requirement found in Penal Code section 190.2 (d), which requires that

> every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aid, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

Penal Code section 190.2, subdivision (d) was added by Proposition 115 in order to bring California's death penalty statute into conformity with *Tison v. Arizona* (1987) 481 U.S. 137. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 16.)

attempt to kill, or intend that a killing take place or that lethal force will be employed"]; see also *Tison v. Arizona* (1987) 481 U.S. 137.)[8]

In sum, there is no way of knowing with any degree of certainty which of appellant's 10 statements are true and which are false, which were based on personal knowledge and which were based on second-hand information from others. Because the corpus delicti rule does not answer these questions, and the *Opper* trustworthiness test is not satisfied in this case, the death verdict must be reversed as it not supported by sufficient reliable evidence as required by the Eighth and Fourteenth Amendments.

D. Appellant's Inconsistent Statements Fail to Meet the Reliability Demands of the Eighth Amendment and Cannot Be Used as a Basis for the Death Penalty in this Case

Due to the "unique nature of the death penalty," the Eighth Amendment demands "heightened reliability . . . in the determination

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[8] In *Enmund v. Florida*, *supra*, 458 U.S. 782, two people were murdered during the course of a robbery while Enmund was sitting nearby in a car, waiting to help the robbers escape. Enmund was not present during the murders, did not intend that the victims be killed, and had not anticipated that "lethal force would or might be used if necessary to effectuate the robbery or a safe escape." (*Id.* at p. 788.) Both Enmund and his codefendants who had actually committed the murders were sentenced to death. The high Court concluded that a death sentence "is an excessive penalty for the robber who, as such, does not take human life," (*id.* at p. 797), and that the death penalty was a disproportionate penalty for Enmund because he did not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" (*ibid*).

In *Tison v. Arizona*, *supra*, 481 U.S. at p. 158, the high Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."

whether the death penalty is appropriate in a particular case." *(Sumner v. Shuman* (1987) 483 U.S. 66, 72.)

That greater reliability is lacking here because, as noted previously, appellant's death sentence rests entirely on his inconsistent and contradictory pretrial statements, statements which bear many of characteristics of a false confession, which is the height of unreliability.[9]

Psychologists Saul Kassim and Lawrence Wrightsman have identified three psychologically distinct types of false confessions. (Kassin, S. & Wrightsman, L. (Eds.), The Psychology of Evidence and Trial Procedures (1985) Sage Publications, London, pp.76-80 [hereafter Kassim & Wrightsman]; see also Richard A. Leo, *supra*, 37 J. Am Acad. Psychiatry Law at pp. 332-343.)

The first type is voluntary false confessions, which are those offered without prompting or pressure typified by the Lindberg baby and the Black Dahlia cases, noted above. Voluntary false confessions can occur as a result of a pathological need for attention or self-punishment, outright delusions, the perception of tangible gain or the desire to protect someone. (Kassim & Wrightsman, *supra*, at pp. 76-77.)

The second type, compliant false confessions, occur in the context of police interrogation where the suspect falsely admits to the crime in the belief that he or she will gain respite from the isolation, fatigue and fear of

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[9] "A false confession is an admission ('I did it') plus a postadmission narrative (a detailed description of how and why the crime occurred) of a crime that the confessor did not commit." (Richard A. Leo, *False Confessions: Causes, Consequences, and Implications, supra,* 37 J. Am Acad. Psychiatry Law at p. 333.)

the interrogation. Police may threaten dire consequences or promise freedom. (Kassim & Wrightsman, *supra*, at pp. 77-78.)

The third type, internalized false confessions, occurs when innocent suspects who manifest certain personality weaknesses come to believe they actually have committed a crime as a result of highly suggestive or coercive interrogation. This happens most frequently with individuals who have some memory lapse for their behavior at the time of the offense, often due to psychosis or drug intoxication. These suspects are typically young, have been abusing alcohol or drugs and manifest diagnosable mental illness or mental retardation. Law enforcement gets the suspect to believe that they have incriminating evidence. The suspect, who does not really remember what occurred, internalizes the police version of the crime. Individuals who give this type of false confession are highly suggestible. (Kassim & Wrightsman, *supra*, at pp. 78-80.)

As shown in appellant's opening brief, features of all three types of false confessions are present in his case. (See AOB 52-58.) First, appellant was the one who approached the police to admit his complicity in the murders (voluntary false confession). Second, many of his statements were made in order to protect his brother, Anthony Leathem (a.k.a. "Eagle"), who the police repeatedly threatened to arrest if appellant did not confess, and to protect himself from being labeled a snitch in prison (voluntary false confession; compliant false confession). Third, appellant was told by the police that being the lookout on the outside of the store was no different than being the lookout on the inside of the store, "[a]nd being outside really kind of makes you look worse than being inside" (32CT 9228-9229), prompting appellant to say that he was inside the store (compliant false confession). Fourth, appellant repeatedly told his interrogators that he had

not slept in the week preceding the date of the charged crimes and was on alcohol and illicit drugs (methamphetamine, cocaine and marijuana) at the time of the murders, that he was off his prescribed medication for some type of unspecified mental illness, and that his memory of the events was faulty (internalized false confession). Fifth, appellant informed his interrogators at the time he spoke to them that he was on some type of "heavy medication" (internalized false confession). Sixth, after telling his interrogators that he was the one responsible for shooting the victims, he recanted and said that Wino was the one who did the shooting. He also said that he was no longer able to identify the people he knew as Bam-Bam and Wino or any of the people who were with him at the time of the charged crimes (voluntary false confession; compliant false confession; internalized false confession).

Appellant's statements thus exemplify the types of voluntary, compliant and internalized false confessions that have resulted in wrongful convictions and death sentences. His pretrial statements are therefore insufficiently reliable to meet the high court's clearly established Eighth Amendment principles demanding heightened reliability and accuracy in capital proceedings.

E. The Trial Evidence Does Not Sufficiently Corroborate Appellant's Statements

As a fallback position, respondent contends that substantial independent evidence corroborates appellant's inculpatory statements. Respondent points to evidence that appellant knew the caliber of the gun used; that the male victim had been gagged using duct tape; and that the female victim's car had been driven away from the crime scene. (RB 26-27.) But all this establishes is that appellant may have been present at

the scene of the crime when the crime occurred or heard details about the crime from one of the actual perpetrators or from someone else; it does not establish that he was the one who shot the male victim or set fire to the female victim.

Respondent also points to the testimony of prosecution witness Ramon Tirado, a person never mentioned in any of appellant's pretrial statements, who testified that approximately a week before the murders appellant, Eagle and two other people whom Tirado did not know visited him to talk about robbing the T-shirt shop, which was near where he lived. (RB 27.) But Tirado's testimony as to appellant's actual participation in that alleged conversation is both inconsistent and far from convincing.

Tirado testified that Eagle was the one doing all of the talking about the T-shirt store and that appellant was not part of that conversation.

Q: At that time did the defendant say anything to you in regard to the T-shirt shop?

A: Well, he didn't but his brother did.

Q: And the defendant was right there with his brother when that was said?

A: No, he wasn't.

. . . .

Q: Did anybody at that time ask you whether you would participate in the robbery?

A: Yes. His brother [Eagle] did.

Q: Okay and what did you say if anything?

A: I said no.

Q: Did the defendant at that time that he was with his brother and talking to you, did he talk to you about jacking the T-shirt business?

A: No. . . .

(8 RT 1775-1776.) However, when asked about his prior statement to law enforcement, Tirado said that appellant also talked to him about robbing the T-shirt store. (8 RT 1777.)

Again, at best, all Tirado's testimony proves is that appellant played some role in the planning of the robbery of the T-shirt store. It does not prove the extent of his involvement, which is the gravamen of the instant argument.

F. Conclusion

For the reasons set forth here and in appellant's opening brief (see AOB 60), appellant's convictions and sentence of death must be reversed.

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II.

APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT THE TESTIMONY OF AMBER RENTERIA THAT SHE HEARD BAM-BAM ADMIT THAT HE AND WINO HAD ROBBED AND BURNED DOWN A STORE ON MAIN STREET

A. Introduction

As discussed in appellant's opening brief, in support of his defense that he was not the one who actually robbed, shot and set fire to either of the two victims, and that his earlier statements to the police in which he claimed no or limited involvement in the charged crimes were true, appellant called Amber Renteria as a witness. Appellant expected her to confirm two statements she made to Detective Leo Griego in which she said that right after the charged crimes in this case she had overheard Bam-Bam admit to another individual ("Midget") his and Wino's involvement in the robbery and burning down of the t-shirt store. She later retracted that statement.

At appellant's trial, she claimed that her retraction exposed her to criminal liability as a possible accessory after the fact (Pen. Code, § 32), presumably based on the notion that her retraction was made to help Bam-Bam and Wino avoid arrest, prosecution and conviction, and on this basis, she asserted her Fifth Amendment right not to be called as a witness. With some reluctance on its part, the trial court upheld her Fifth Amendment privilege and she was excused.

The trial court was operating on the fact that Renteria had retracted her earlier statement within the three-year statute of limitations for accessory liability when in fact, according to a police report prepared by lead Detective Griego, which is contained in the Clerk's Transcript in this

case, Renteria had actually retracted her earlier statement implicating Bam-Bam and Wino shortly after it was made in a letter she had sent to him. (See 1CT 36.) As such, the statute of limitations had long-expired by the time she was called to testify. Strikingly, neither Griego, who was sitting at the prosecutor's side as his designated lead investigator, nor the prosecutor himself brought this important fact to the court's attention; these were facts which they either knew or should have known about. (See fn. 11, *post.*)

Notwithstanding the fact that the trial court's decision excusing Renteria rests on a false premise, namely, that the timing of Renteria's retraction exposed her to possible liability as an accessory after the fact, and was not well-taken for that reason, Renteria's Fifth Amendment privilege against self-incrimination was also not well-taken, as she faced no possible criminal liability as a result of any of her statements regarding Bam-Bam and Wino. (See AOB 70-74.)

Respondent contends that Renteria had a valid right to invoke her Fifth Amendment privilege against self-incrimination. Respondent also contends that the exclusion of her testimony did not result in a deprivation of appellant's due process right to present a defense because it does not exonerate him. (RB 28.) Not so.

As identified by the attorneys below, including Renteria's attorney, based on her retraction of her earlier statements implicating Bam-Bam and Wino, Renteria faced possible prosecution for giving false information to the police, a possible violation of Penal Code section 148.5, which is a misdemeanor, or possible prosecution for a violation of Penal Code section 32, which is a felony. The statute of limitations for a violation of section 148.5 is one year (Pen. Code, § 802), and, as noted previously, three years for a violation of section 32. (Pen. Code, § 801.)