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INCONSISTENT PROSECUTION

Note: This draft does not address particular procedural hurdles that would need to be overcome in order to raise this claim now. This draft was not prepared by a licensed attorney.

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AUTHORITIES CITED

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Gregg v. Georgia, 428 U.S. 153, 187 (1976)

Ford v. Wainwright, 477 U.S. 399, 411 (1986)

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Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)

United States ex rel. Crist v. Lane, 745 F.2d 476, 482 (7th Cir. 1984)

Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985)

Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988)

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Nichols v. Scott, 69 F.3d 1255, 1265 & n. 17, 1273-74 (5th Cir. 1995)

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INCONSISTENT PROSECUTION

1. As the United States Supreme Court has observed "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (citations omitted). Furthermore, when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976). This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411 (1986).

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, our system of justice must go "to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (emphasis added).

I. THE STATE MAY NOT PURSUE INCONSISTENT THEORIES OF THE CRIME AGAINST THE CO-DEFENDANTS IN A CASE.

[*Note—some of this authority is only persuasive, not binding]

2. The fundamental principles discussed above apply with particular force to issues that implicate the truth-seeking function of a trial, including the State's choice of which theory of the crime to pursue against each of the co-defendants. "The essence of due process is fundamental fairness..." United States ex rel. Crist v. Lane, 745 F.2d 476, 482 (7th Cir. 1984). That prosecutors should conduct themselves in a manner which is fundamentally fair, is not simply a talisman, the rote incantation of which forgives its subsequent violation. Indeed, the *Cannons of Ethics* of the American Bar Association Code of Professional Responsibility proved that "[a] government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." EC 7-14.

3. In Drake v. Kemp, the prosecution sought to apply different theories of the crime in the separate trials of two co-defendants:

> [The co-defendant] Campbell told essentially the same story in both trials, i.e. that Drake and only Drake was the murderer. In Campbell's trial, however, the prosecutor attacked the story as unbelievable and argued that Drake was merely the one who "cased" the barbershop. Having destroyed Campbell's credibility in that trial and secured one death penalty, he then called Campbell as the state's principal witness in Drake's trial in order to obtain a second one.

Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985)(Clark, J. specially concurring)

4. However, this type of tactic is simply unfair. As Judge Clark noted in his special concurrence in Drake, "[i]t is the duty of the prosecutor not only to convict but to seek justice. He has the responsibility to guard the rights of the accused as well as those

of society at large. This is so because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly.'" Drake, 762 F.2d at 1478 (Clark, J. specially concurring)(citations omitted)

5. Judge Clark went on to note:

> the Supreme Court [has] made clear that...[t]he prosecutor has a duty not only to refrain from soliciting false evidence but also a constitutional duty to correct false evidence that he does not intentionally elicit....The conclusion [from the inconsistent theories] seems inescapable that the prosecutor obtained Henry Drake's conviction [and death sentence] through the use of testimony he did not believe; bringing this case under the logical ...framework of [the Supreme Court case law]. As the state habeas judge recognized, the prosecution's theories of the same crime in two different trials...are totally inconsistent. This flip flopping of theories of the offense was inherently unfair.

Id. at 1478-79.

6. Similarly in Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988), the Court condemned the use of inconsistent theories, since "[t]he state had the option of presenting the jury with a number of theories of criminal liability. It chose to present the jury with [one] theory and ...failed to present the [other], despite the fact that it clearly could have done so." Id. at 1409. Both due process and principles of double jeopardy allow that "[t]he state ha[ve] its opportunity to put its best proof and theories of criminality before the jury [but] it is not entitled to a second chance." Id. at 1409. See also Tibbs v. Florida, 457 U.S. 31, 41, 102 S.Ct. 2211, 2218, 72 L.Ed. 2d (1982)(the Double Jeopardy clause "forbids a second trial for the purpose of affording the prosecution from another opportunity to supply evidence which it failed to muster in the first proceeding").

7. There is also the legal doctrine of collateral estoppel, which is

incorporated into constitutional notions of due process and fair play. See e.g., Salcedo v. State, 258 Ga. 870 (1989); Buck v. Maschner, 878 F.2d 344, 346 (10th Cir. 1989). Collateral estoppel is properly invoked "if the issue in the subsequent proceeding is identical to the one involved in the prior action [and] the issue is actually litigated..." Williams v. Bennett, 689 F.2d 1370, 1381 (11th Cir. 1982); State v. Brooks, 541 So.2d 801, 810 (La. 1989); see also Jordan v. McKenna, 573 So.2d 1371, 1375 (Miss. 1990)("[W]here a question of fact is actually litigated and determined by a valid and final judgment, that determination is conclusive ..[against the party against whom it was made] in a subsequent suit on a different cause of action").

8. Collateral estoppel does not merely bar relitigation of certain facts and theories--"it may bar prosecution **or argumentation** of facts..." Ferenc v. Dugger, 867 F.2d 1301, 1303 (11th Cir. 1989)(emphasis supplied). See also Nichols v. Collins, 802 F. Supp. 66 (S.D. Tex. 1992) (finding "blatant misconduct by the prosecutor [that] violated doctrines of judicial estoppel, collateral estoppel, due process, and the duty to seek justice" where the state convicted two persons as the trigger man in a one-shot crime, "unfairly convict[ing] two different men of firing that single bullet"; two people can be convicted for one crime "as long as law and physics provide for such"), habeas corpus denied sub nom. Nichols v. Scott, 69 F.3d 1255, 1265 & n. 17, 1273-74 (5th Cir. 1995)

9. Other courts have recognized that there may be "a situation where the prosecutor has adopted such a fundamental inconsistent position in the separate trials of two conspirators that basic fairness might require the trial court to permit exposure of the inconsistent positions. State v. Wingo, 457 S.2d 1159, 1166 (La. 1984). Vol 26 P138 in

FACTS

Perry was not charged or convicted under the law of parties. The state presented only one theory under which Perry could be convicted of capital murder: if the jury found beyond a reasonable doubt that Perry intentionally caused the death of Sandra Stotler by shooting Sandra Stotler with a firearm in the course of committing or attempting to commit a burglary of a habitation. The jury so found.

In Burkett's subsequent trial, the state put forward seven possible theories under which the Burkett jury could convict. Of these seven, three theories required the Burkett jury to find that Burkett "intentionally or knowingly caused the death of Sandra Stotler by shooting Sandra Stotler with a deadly weapon, to wit, a firearm." The Burkett jury returned a verdict finding Burkett guilty of capital murder as charged in the indictment.

The state's theory at Perry's trial and subsequent theories at Burkett's trial were inconsistent and mutually exclusive, not merely alternative. Both Perry and Burkett could not personally be the trigger-man in a single-perpetrator shooting according to the laws of physics. Yet, the state proposed exactly that when it offered the Burkett jury the opportunity—not once, but three times—to convict Burkett of the very same single-perpetrator shooting that the state presented to the Perry jury as being perpetrated by Perry alone beyond a reasonable doubt. No evidence on the record indicates both Perry and Burkett shot Sandra Stotler simultaneously. The state may not convict—or attempt to convict—two men of firing the same bullet. By affording the Burkett jury the opportunity to convict Burkett of personally shooting Sandra Stotler, the state repudiated its prior position that Perry shot Sandra Stotler. If the prosecutor could in good faith argue to the Burkett jury that Burkett in fact personally shot Sandra Stotler, then the conclusion that

Perry's previous conviction and resulting death sentence for the very same act rested on arguments and evidence the prosecutor did not in face believe—or no longer believed—is inescapable. The flip-flopping of theories of the offense is inherently unfair. The state's inconsistent theories in the trials of Perry and Burkett violated Perry's fundamental due process rights under the Fifth Amendment and Fourteenth Amendment [assert additional violations here.]

It should not count against Perry that the stat chose to prosecute him first and Jason second. No matter which defendant was tried first, the fact remains that the state adopted inconsistent and mutually exclusive theories of the case, undermining the reliability of Perry's conviction. The policy/spirit of collateral estoppel is...

[*Note---- this is very rough and totally incomplete]

V 26 p 162 Prosecutor argues there is no requirement that jury pick a single application paragraph and decide if it is this one or that one. "*Once they get in the jury room, they can pick any one they wish.*"

The judge in Perry's trial charged the jury as follows:

> **"Now if you find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas, the defendant, Michael James Perry, did intentionally cause the death of an individual, namely Sandra Stotler, by shooting Sandra Stotler with a firearm** and Michael James Perry was then and there in the course of committing or attempting to commit the offense of burglary of habitation, then you will find Michael James Perry guilty of capital murder. If you do not so find or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder and next proceed to consider whether the defendant is guilty of the lesser included offense of murder. Now, if you find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas, the defendant, Michael James Perry, did intentionally or knowingly cause the death of an individual, namely Sandra Stotler, by shooting Sandra Stotler with a firearm, then you will find the defendant guilty of the lesser included offense of murder. If you do not so find if you have a reasonable doubt thereof, you will find the defendant not guilty."

Perry Trial Transcript Vol. 19 p 13-14 (emphasis added)

The judge in Jason's trial charged the jury as follows:

> "Now [1] **if you find from the evidence beyond a reasonable doubt that on or about October the 24th, 2001 in Montgomery County, Texas the defendant Jason Aaron Burkett did then and there intentionally or knowingly cause the death of Sandra Stotler with a deadly weapon, to wit, a firearm,** and you further find from the evidence beyond a reasonable doubt that on or about October the 24th, 2001 in Montgomery County, Texas and pursuant to the same scheme or course of conduct the defendant Jason Aaron Burkett did then and there intentionally or knowingly cause the death of James Adam Stotler or Arnold Jeremy Richardson by shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm, or [2] if you find from the evidence beyond a reasonable doubt that on or about October the 24th, 2001 in Montgomery County, Texas, Michael James Perry did then and there intentionally or knowingly cause the death of Sandra Stotler by shooting Sandra Sotler with a deadly weapon, to wit, a firearm, and you further find from the evidence beyond a reasonable doubt that the defendant Jason Aaron Burkett acting with intent to promote or assist the commission of the foregoing offense by Michael James Perry solicited, encouraged, directed, aided or attempted to aid Michael James Perry to commit the offense and you further find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas and pursuant to the same scheme or course of conduct the defendant Jason Aaron Burkett did then and there intentionally or knowingly cause the death of James Adam Sotler or Arnold Jeremy Richardson b shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm, or [3] **if you find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas the defendant Jason Aaron Burkett did then and there intentionally or knowingly cause the death of Sandra Stotler by shooting Sandra Stotler with a deadly weapon, to wit, a firearm,** and you further find from the evidence beyond a reasonable doubt that on or about October the 24th, 2001, in Montgomery County, Texas, and pursuant to the same scheme or course of conduct that Michael James Perry did then and there intentionally or knowingly cause the death of James Adam Stotler or Arnold Jeremy Richardson by shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm, and you further find from the evidence beuond a reasonable doubt that the defendant Jason Aaron Burkett acting with intent to promote or assist the commission of the foregoing offense by Michael James Perry solicited, encouraged, directed, aided or attempted to aid Michael James Perry to commit the offense, or [4] if you find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas, that Michael James Perry did then and there intentionally or knowingly cause the death of Sandra Stotler by shooting Sandra Stotler with a deadly weapon, to wit, a firearm, and you further find from the evidence beyond a reasonable doubt that on or about

October 24th, 2001, in Montgomery County, Texas pursuant to the same scheme or course of conduct that James -- that Michael James Perry did then and there intentionally or knowingly cause the death of James Adam Stotler or Arnold Jeremy Richardson by shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm and you further find from the evidence beyond a reasonable doubt that the defendant Jason Aaron Burkett acting with intent to promote or assist the commission of the foregoing offenses by Michael James Perry, namely the shooting deaths of Sandra Stotler and James Adam Stotler or Arnold Jeremy Richardson, did solicit, encourage, direct, aid or attempt to aid Michael James Perry to commit the offenses, or [5] if you find from the evidence beyond a reasonable doubt that on or about October the 24th, 2001, in Montgomery County, Texas, the defendant James Aaron Burkett conspired with Michael James Perry to commit robbery and that Michael James Perry did then and there intentionally or knowingly cause the death of Sandra Stotler by shooting Sandra Stotler with a deadly weapon, to wit, a firearm, and you further find from the evidence beyond a reasonable doubt that on or about October 24th, 2001 in Montgomery County, Texas and pursuant to the same scheme or course of conduct Michael James Perry did then and there intentionally or knowingly cause the death of James Adam Stotler or Arnold Jeremy Richardson by shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm, and you further find that the said shooting of Sandra Stotler and James Adam Stotler or Arnold Jeremy Richardson by Michael James Perry was done in furtherance of the conspiracy to commit robbery and should have been anticipated as a result of the carrying out of the conspiracy, or [6] if you find from the evidence beyond a reasonable doubt that on or about October 24th, 2001 in Montgomery County, Texas the defendant Jason Aaron Burkett conspired with Michael James Perry to commit robbery **and the defendant James Aaron Burkett did then and there intentionally or knowingly cause the death of Sandra Stotler by shooting Sandra Stotler with a deadly weapon, to wit, a firearm**, and you further find from the evidence beyond a reasonable doubt that on or about October 24th 2001, in Montgomery County, Texas, and pursuant to the same scheme or course of conduct Michael James Perry did then and there intentionally or knowingly cause the death of James Adam Stotler or Arnold Jeremy Richardson by shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm, and you further find that the said shooting of Sandra Stotler by the defendant and the said shooting of James Adam Stotler or Arnold Jeremy Richardson by Michael Perry -- Michael James Perry was done in furtherance of the conspiracy to commit robbery and should have been anticipated as a result of the carrying out of the conspiracy, [7] or if you find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas the defendant Jason Aaron Burkett conspired with Michael James Perry to commit robbery and that Michael James Perry did then and there intentionally or knowingly cause the death of Sandra Stotler by shooting Sandra Stotler with a deadly weapon, to wit, a firearm, and that you further find from the evidence beyond a reasonable doubt that on or about October 24th, 2001, in Montgomery County, Texas, and pursuant to the

same scheme or course of conduct the defendant Jason Aaron Burkett did then and there intentionally or knowingly cause the death of James Adam Stotler or Arnold Jeremy Richardson by shooting James Adam Stotler or Arnold Jeremy Richardson with a deadly weapon, to wit, a firearm, and you further find that the said shooting of Sandra Stotler by Michael James Perry and the said shooting of James Adam Stotler or Arnold Jeremy Richardson by the defendant Jason Aaron Burkett was done in furtherance of the conspiracy to commit robbery and should have been anticipated as a result of the carrying out of the conspiracy, then you will find the defendant, Jason Aaron Burkett guilty of capital murder as charged in the indictment. If you do not so find or if you have a reasonable doubt thereof, you will find the defendant not guilty."

Burkett Trial Transcript Vol. 27 p. 8-13 (emphasis and numerals added)

NOTES ON ADDITIONAL SUPPORT TO BE INCORPORATED:
[*Note—these are cut and pasted from various cases and briefs. The citations have not been checked for accuracy or as to whether they are still good law. This is just a starting point for additional research]

A Prosecutor's Use of Inconsistent Theories for the Same Crime in Different Trials Violates the Due Process Clause of the Fourteenth Amendment

Due process protects the accused from actions that violate "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." United States v. Lovasco, 431 U.S. 783, 790 (1977) (citations omitted). The requirement of "fundamental fairness" is a core value "embodied in the Due Process Clause of the Fourteenth Amendment." In Re Winship, 397 U.S. 358, 369 (1970) (Harlan J., concurring). Prosecutors serve a unique role in assuring that an accused receives "fair play and decency" in the judicial process. As opposed to being "an ordinary party to a controversy," it is the prosecutor who serves as a critical "representative" of the "sovereignty," which has the "obligation to govern impartially." Berger v. United States, 295 U.S. 78, 88 (1935). "In a criminal prosecution," the prosecutor's role "is not that it shall win a case, but that justice shall be done." Id. "It is as much his [or her] duty to refrain from improper methods calculated to *4 produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. (emphasis added)

Inconsistent statements by a prosecutor falls within this same class of improprieties because it demeans the reliability of the *6 judicial process. [FN4] Mutually exclusive prosecutorial theories advanced against co-defendants in separate trials are every bit as much of a threat to the "fundamental fairness" of the criminal process as false testimony, and are, essentially, tantamount to improper argument and the introduction of false evidence.

The holding by the Sixth Circuit majority of this case, that it violates due process for a prosecutor to advance inconsistent irreconcilable theories, is not an aberration, as other jurisdictions have endorsed this position. See Stumpf v. Mitchell, 367 F.3d 594, 611 (6th Cir. 2004) (discussing sister circuits that have held the same or similar conduct a violation of due process). In endorsing the position of two prior decisions, the lower court stated.

The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice...The State cannot divide and conquer in this manner. Such actions reduce criminal trials to mere

gamesmanship and rob them of their supposed search for the truth.
*7 Id. at 612-613 (citing Thompson v. Calderon, 120 F.3d 1045, 1059 (8th Cir. 2000); quoting Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring)).

B. A Prosecutor's Use of Inconsistent Theories for the Culpability of More than One Defendant for the Same Crime Violates Due Process Because It Disregards the Prosecutor's Duty to Seek Justice and Truth

The Supreme Court of California recently held a prosecutor's use of inconsistent and irreconcilable theories was a due process violation. The Court noted how this prosecutorial conduct is "inconsistent with the principles of public prosecution." In re Sakarias, 2005 WL 486783 *13 (March 3, 2005). The Sakarias Court states that "[a] criminal prosecutor's function 'is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.' " Id. at *13. (quoting United States v. Kattar 840 F.2d 118, 127 (1st Cir. 1988)).

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." ABA Model Rules of Professional Conduct, Rule 3.8 Comment 1 (1983), see also ABA Standards for Criminal Justice, Prosecution Function § 3-1.2 (1992). This prosecutorial duty is founded in both ethical [FN5] *8 and legal standards. The concept stems from the idea that a prosecutor is a representative of the sovereign whose obligation it is to govern impartially. Berger v. U.S. 295 U.S. 78, 88 (1935). As a representative of the sovereign, the prosecutor has a duty to use restraint and prosecute cases fairly. ABA Model Code of Professional Responsibility EC 7-13 (1981); Ohio Rules of Court: Code of Professional Responsibility EC 7-13 (2002). [FN6]

Prosecutors, as "ministers of justice," have the obligation to seek truth. As stated in Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J. concurring), "[t]he State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment." Regardless of the evidence against the accused, a prosecutor has an overriding duty of fairness. State v. Sha, 292 Minn. 182, 185 (1972).

Prosecutors have obligations beyond those of most lawyers, who are clearly prohibited from knowingly making false statements of fact to the court (ABA Model Rules of Professional Conduct, Rule 3.3 (2003)), and are prohibited from allowing false evidence to be presented that misleads the court. (ABA Model Rules of Professional Conduct, Rule 3.3 *9 Comments 2, 5 (2003)). Not only are lawyers prohibited from bringing forward evidence that may appear to be false, but they must have a basis in fact for any actions they bring or defend. ABA Model Rules of Professional Conduct, Rule 3.1 (2003).

C. Due Process Necessitates Reliability at Sentencing Which is Precluded When the Government Advances Irreconcilable Inconsistent Theories for More than One Defendant for the Same Crime

Punishment premised upon inconsistent prosecutorial theories fails to provide accuracy in sentencing, an essential *10 aspect of assuring constitutional compliance with due process. This is particularly important when the sentence is death.

"[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg v. Georgia, 428 U.S. 153, 190 (1976). "It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner." Id. at 189. (emphasis added). This Court has held that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. This principle of "guided discretion," intended to produce accuracy in sentencing, is thwarted when a prosecutor is allowed to present factually inconsistent theories of a crime.

Caldwell v. Mississippi, 472 U.S. 320, 340 (1985); see also Alcorta v. Texas, 355 U.S. 28, 31 (1957) (finding a due process violation when a prosecutor uses testimony that gives a "false impression" that may affect the imposition of a death sentence).

The prosecutor's materially inconsistent position at Wesley's trial necessarily rendered Stumpf's plea and sentence unreliable. The failure to correct this inconsistency violated Stumpf's due process rights.

When a prosecutor embraces a theory at an accomplice's trial that directly contradicts the basis for the conviction and sentence of the first defendant, the conviction and sentence of the first defendant are rendered unreliable. More particularly, a prosecutor violates due process when he presents and vouches for evidence in the second trial that repudiates the evidentiary basis for the first conviction. See Green v. Georgia, 442 U.S. 95 (1979); Miller v. Pate, 386 U.S. 1 (1967). Absent that evidentiary basis, a reviewing court can no longer trust that the conviction is reliable. More significantly, in a death penalty case, an uncorrected inconsistent theory presents a post-sentencing event that renders the sentencing determination itself unreliable. See Johnson v. Mississippi, 486 U.S. 578

(1988).

Just as with these fact patterns, a prosecutor's ability to maintain verdicts based on materially inconsistent theories undermines the truth-finding process. When the prosecutor *32 attempts to maintain two convictions despite the fact that the core evidence presented in support of the first defendant's conviction or death sentence is wholly irreconcilable with the core evidence used against a second defendant charged with the same crime, he offends the truth-finding process. Allowing both verdicts to stand contradicts the principal goals of convicting the guilty and freeing the innocent and severely undermines the basic fairness of criminal trials.

In Berger v. United States, 295 U.S. at 88, this Court firmly stated that a prosecutor is the representative not of an ordinary party to a controversy but of a sovereignty ... whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*33 Certainly when a prosecutor seeks to maintain a verdict that he has deemed to be false in another proceeding, he does not fulfill his constitutional duty to refrain from improper methods of producing a conviction. Without being required to correct a verdict, a prosecutor would be free to let stand a material deception on the courts. Napue v. Illinois, 360 U.S. 264, 269 (1959) (requiring a prosecutor to correct false testimony even when the testimony is not solicited); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (condemning the deliberate deception of the court). Furthermore, such a rule would authorize prosecutors to abandon their ethical duty to "seek justice, not merely to convict." Model Code of Professional Responsibility EC 7-13. A prosecutor who knows he has no duty to correct an inconsistent verdict will not be discouraged from obtaining other convictions, though he knows both defendants cannot be simultaneously guilty. In

short, preventing prosecutors from maintaining inconsistent prosecutions is necessary to prevent criminal trials from becoming "a game in which the State's function is to outwit and entrap its quarry" rather than a search for the truth. Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

The rule against inconsistent theories applies with equal force to death sentences. See Bullington v. Missouri, 451 U.S. 430, 446 (1981) (stating that a capital sentencing hearing is like a trial on the question of guilt or innocence because the prosecution has "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts"); Green, 442 U.S. at 97 (Court troubled by use of hearsay rules to further an inconsistent theory during a capital sentencing hearing). As this Court has repeatedly stated, the Constitution requires heightened reliability for the death penalty determination. See, e.g., Johnson v. Mississippi, 486 U.S. 578, 584 (1988); Turner v. Murray, 476 U.S. 28, 35-36 (1986); California v. Ramos, 463 U.S. 992, 998 (1983). If a prosecutor's newly discovered evidence is materially inconsistent with the *34 evidence previously presented to secure a death sentence, that sentence does not meet this Court's standard of reliability, and it must be corrected.

The legal principle that post-sentence events can render a death sentence constitutionally unreliable is firmly rooted in this Court's decisions. In Johnson v. Mississippi, 486 U.S. 578, 582 (1988), one of the defendant's prior felonies that formed the basis for an aggravating factor was invalidated after the death sentence was imposed. Thus, this Court held that the defendant was entitled to a new sentencing hearing because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Id. at 590. Furthermore, the evidence of the conviction **prejudiced** the defendant because the prosecutor "repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances." Id. at 586. Like the reversal of the New York conviction in Johnson, a prosecutor's total repudiation of an earlier theory renders the evidence from the first case "materially inaccurate." This creates an impermissible risk that a defendant has been sentenced to death arbitrarily, and this

Court's precedent dictates that the defendant is entitled to a new sentencing hearing. This rule against inconsistent theories does not necessarily mean that a prosecutor must select a version of the facts and thereby become forever bound by that version of events. Where the evidence is ambiguous regarding a material fact, the prosecutor certainly acts within constitutional bounds by asserting the ambiguity to a fact-finder. The prosecutor may not, however, manipulate the ambiguous evidence to obtain multiple convictions. Furthermore, a prosecutor's hands are not tied in the event that he discovers new evidence that is inconsistent with his theory in the original case. **Indeed, the prosecutor may use that evidence to secure a second verdict. In doing so, however, he is deemed to believe that the new evidence is reliable** (in light of the earlier inconsistent evidence and the *35 prosecutor's constitutional duty to refrain from knowingly presenting false evidence). In that case, where the prosecutor has wholly repudiated the theory upon which he secured the earlier verdict, the first defendant is entitled to a due process inquiry to ensure that the result of his proceeding is a correct and just one. See Mooney, 294 U.S. at 113 (rejecting the State's argument that it was "not required to afford any corrective judicial process to remedy the alleged wrong."); see also Thompson v. Calderon, 120 F.3d 1045, 1071 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("In the case of mutually inconsistent verdicts, ... I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts.").

The Sixth Circuit properly decided to apply the same standard of review applied in other cases involving due process violations based upon a potentially tainted truth-finding process. (Pet. App. at 45a). Kyles v. Whitley, 514 U.S. 419, 434 (1995); Bagley, 473 U.S. at 682. Under this standard, a court inquires whether there is a reasonable probability that, had the evidence been presented, the outcome of the proceeding would have been different. As this Court explained in Kyles, 514 U.S. at 434, this standard does not require a defendant to demonstrate that the evidence would have resulted in a complete acquittal. Nor does this standard inquire into whether the remaining evidence

would have been sufficient to sustain the verdict. Id. at 434-35. Instead, the question is "whether in [the] absence [of the evidence] he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 434. Thus, a reasonable probability is shown when the evidence "undermines confidence in the outcome of the trial." Id. Where a defendant's conviction or death sentence is based on evidence and argument that conflicts with the evidence and argument used by the prosecutor to secure the conviction of a second defendant, a court should be required to inquire whether the outcome of the first defendant's trial has been ***36** undermined by the material inconsistency. If so, then the defendant is entitled to a new sentencing hearing or trial.

First, Petitioner reduces the issue to "some species of 'actual innocence' claim" in the mold of Herrera v. Collins, 506 U.S. 390 (1993). (Pet. Br. at 42). However, these claims differ markedly. In Herrera, this Court held that a defendant's claim of actual innocence was not cognizable in federal habeas absent an independent constitutional violation. Id. at 393. In an inconsistent theories case, however, the aggrieved defendant's claim is not that he is actually innocent of the crime. Instead, the claim is that if the defendant's verdict is allowed to stand, the prosecutor will have obtained two convictions on wholly inconsistent theories in violation of the Due Process Clause. The State's interest in finality - which compelled this Court's decision in Herrera, 506 U.S. at 417; see also id. at 426 (O'Connor, J., concurring) - is simply non-existent when it is the prosecutor who obtains new evidence and, finding it reliable, uses it to convict a second defendant on a theory that is irreconcilable with the first defendant's conviction.

When a prosecutor presents evidence at a criminal trial, that evidence is more constitutionally significant than evidence brought forth by a defendant to support a post-trial claim of actual innocence. First, when a prosecutor presents evidence at a trial, the fact-finder will not view with the same degree of skepticism that will greet evidence presented by a defendant on Death Row protesting his innocence. See id. at 423 (O'Connor, concurring) ("It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him."). Also, when the prosecutor introduces evidence

against a defendant, that evidence is subject to the scrutiny of opposing counsel and a finder of fact and thus, he puts the credibility of the State behind that position. See *37 United States v. Young, 470 U.S. 1, 18 (1985) (recognizing that "the prosecutor's opinion carries with it the imprimatur of the government"). In addition, the prosecutor has a constitutional duty to refrain from knowingly introducing false testimony and to correct testimony learned to be false, Napue, 360 U.S. 264, 269 (1959); Mooney, 294 U.S. 103, 112 (1935), as well as a number of ethical duties to promote the search for the truth. See Bennett L. Gershman, The Prosecutor's Duty to the Truth, 14 Geo. J. Legal Ethics 309, 313 (2001). Thus, this Court's decision in Herrera presents no hurdle to the due process claim asserted in this case.

Petitioner also applies the incorrect standard of review for due process violations by arguing simply that Stumpf could have been convicted of aggravated murder and sentenced to death, even under his version of the events. (Pet. Br. at 36). This argument, however, does not follow the "reasonable probability" standard for assessing due process violations. In Kyles, 514 U.S. at 434-35, this Court affirmed that a defendant "need not demonstrate after discounting the [excluded evidence], there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." This standard was similarly described in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) (emphasis added), in which this Court held, "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Therefore, as this Court has indicated, it is irrelevant whether a defendant could have been convicted and sentenced to death anyway. See, e.g., Strickler v. Greene, 527 U.S. 263, 289-90 (1999); Bagley, 473 U.S. at 682.

523 U.S. 538, 566 (1998). But see Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) (prosecution's theories not inconsistent because both defendants could have been

convicted under the law of parties).

As described above, once a court finds that the prosecutor has presented materially inconsistent positions, it should then consider the prejudice resulting from the inconsistency. Specifically, the court should evaluate whether there is a reasonable probability that the results of the first trial and sentencing hearing would have been different if the State had utilized the same theory and evidence it employed in the second trial and sentencing hearing.

There is a reasonable probability that Stumpf would not have been sentenced to death. In fact, nationwide statistics indicate that the death penalty is rarely imposed when the defendant does not actually kill the victim. See Death Row U.S.A., Sept. 1, 1999, at 20 (showing that only 2.8 percent of all persons executed in the United States between 1976 and 1999 were not the "triggerman" in the crime); Enmund v. Florida, 458 U.S. 782, 795 (1982) (noting a study concluding that only 5.5 *47 percent of the persons sentenced to death at the time "did not participate in the fatal assault of the victim").

As this Court recognized in Lockett v. Ohio, 438 U.S. 586, 608 (1984), in which the defendant did not kill the victim, the degree of participation in an offense is precisely the type of evidence that can justify a sentence less than death. See also Skipper v. South Carolina, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (stating that the death penalty is less justified for defendants who played a relatively less significant role in the murder). As I see it, Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant. Stumpf's position was anticipated by Justice STEVENS's observation 10 years ago that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens," and that "the heightened need for reliability in capital cases only underscores the gravity of those questions ... ." *Jacobs v. Scott*, 513 U.S. 1067, 1070, 115 S.Ct. 711, 130 L.Ed.2d 618 (1995) (citation and

internal quotation marks omitted). Justice STEVENS's statement in turn echoed the more general one expressed by Justice Sutherland in *190 *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), that the State's interest in winning some point in a given case is transcended by its interest "that justice shall be done." Ultimately, Stumpf's argument appears to be that sustaining a death sentence in circumstances like those here results in a sentencing system that invites the death penalty "to be ... wantonly and ... freakishly imposed." *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)) (internal quotation marks omitted)).