NO. 18-_____

In the Supreme Court of the United States

SHANKER PATEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the State of California, Second District Court of Appeals

PETITION FOR WRIT OF CERTIORARI

COREY EVAN PARKER, ESQ.
COUNSEL OF RECORD
LAW OFFICE OF COREY EVAN PARKER
1230 ROSECRANS AVE, SUITE 300
MANHATTAN BEACH, CA 90266
(424) 456-3193
COREY@COREYEVANPARKERLAW.COM

MAY 13, 2019

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Where in sixteen States, including California, whence this present case arises, the law requires corroboration of an accomplice's testimony to sustain a conviction, and

When no physical evidence connects a defendant to the crime and the evidence of the defendant's guilt beyond a reasonable doubt is supplied solely by circumstantial evidence, by the trial testimony of an accomplice, and by the out-of-court statements made by another accomplice, and

When the defendant requests that the trial court give to the jury a cautionary instruction about the care with which the jury should face accomplice corroboration,

THE QUESTION HERE PRESENTED IS:

Whether a trial court violates the jury trial guarantees of the Sixth Amendment and U.S. Const. art. III, § 2, cl. 3 by refusing to grant a defendant's request that the court instruct the jury that the evidence of accomplices ought to be received with suspicion and with the very greatest care and caution and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. *See, e.g., Crawford v. United States*, 212 U.S. 183, 204 (1909).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

JUDICIAL RULES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

OPINION BELOW

The Court of Appeal of the State of California, Second Appellate District, Division Eight, issued its unpublished opinion on November 14, 2018. *See* App. 1. A timely petition for review was denied without comment or opinion by the Supreme Court of California, *en banc*, on February 13, 2019. *See* App.45a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. Art. III. § 2, cl. 3**

  "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"

- **U.S. Const. amend. VI**

  "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial . . . by an impartial jury. . . . "

INTRODUCTION

Twenty-one years after the 1991 murder of Usha Patel, her husband, petitioner Shanker Patel, was arrested for the crime. Mr. Patel was prosecuted on a murder-for-hire theory. The jury did not reach a verdict in defendant's first trial. In the second, the jury convicted him of first degree murder (Pen. Code, § 187, subd. (a)) and found lying-in-wait special circumstances to be true (§ 190.2, subd. (a)(15)). The trial court sentenced defendant to life in prison without the possibility of parole. No physical evidence connected defendant to Usha's murder. Evidence of defendant's guilt beyond a reasonable doubt was supplied by circumstantial evidence and the trial testimony of accomplice Medina and out-of-court statements by accomplice Garcia.

Petitioner Patel here contends that in states like California, where a person can be convicted of a crime on the testimony of an accomplice only when corroborated by evidence tending to connect the defendant to the commission of the crime, it is an abridgement of the jury trial guarantees of U.S. Const. art. III, § 2, cl. 3 and the Sixth Amendment for a trial court to refuse to give a cautionary instruction when a defendant requests it, the cautionary instruction being one to the effect that the evidence of an accomplice should be received by the jury with "great caution." (Hereafter we will refer to such an instruction as the "cautionary instruction.")

While California's statutory law prohibiting convictions based solely on uncorroborated accom-

plice testimony is only a state law rule and is not required by the federal Constitution or federal law (*see Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000)), petitioner contends that in the absence of a cautionary instruction when a defendant requests it, an accomplice's testimony should be deemed to be not properly corroborated, thus resulting in abridgement of the jury trial guarantees of U.S. Const. art. III, § 2, cl. 3 and the Sixth Amendment. Stated differently, petitioner contends that when a trial court refuses to give the cautionary instruction when a defendant requests it, a constitutional violation occurs because of a lack of proper corroboration.

While acknowledging that states differ on the question whether such a cautionary instruction is required whenever an accomplice testifies, or is required only when such testimony is uncorroborated, or is required only when requested by the defendant, or is left to the discretion of the trial judge, this Court should grant certiorari and declare that notwithstanding this diversity of approaches, some measure of protection should in all cases be provided to the defendant—ensuring that, in all appropriate cases, the jury is instructed to consider accomplice testimony with an appropriate amount of skepticism—while also leaving to the jury its usual role as the trier-of-fact and assessor of witness credibility.

Consistent with the dictates of the jury trial guarantees of U.S. Const. art. III, § 2, cl. 3 and the Sixth Amendment—guarantees made applicable to the States by operation of the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 149-150 (1968)—and fitting into this Court's jury trial guarantee

jurisprudence—*e.g.*, *Cool v. United States*, 409 U.S. 100 (1972); *Washington v. Texas*, 388 U.S. 14 (1967)—the State of California, out of which this present case arises, like some other states, requires corroboration of an accomplice's testimony before a person charged with a crime can be convicted. Cal. Penal Code Ann. § 1111 (1985); *see also* Ala. Code § 12-21-222 (1986); Alaska Stat. § 12.45.020 (1984); Ark. Code Ann. § 16-89-111(e)(1) (1977); Ga. Code Ann. § 24-4-8 (1995); Idaho Code § 19-2117 (1979); Minn. Stat. § 634.04 (1983); Mont. Code Ann. § 46-16-213 (1985); Nev. Rev. Stat. § 175.291 (1985); N.D. Cent. Code Ann. § 29-21-14 (1974); Okla. St., Tit. 22, § 742 (1969); Ore. Rev. Stat. § 136.440 (1984); S. D. Codified Laws § 23A-22-8 (1979).

In this murder case, Michael Garcia committed the murder and Stanley Medina was the alleged middleman between Garcia and petitioner Shanker Patel. Garcia and Medina were, as a matter of law, accomplices in the murder-for-hire crime with which Patel was charged and of which he was convicted.

No physical evidence connected Patel to the murder. Evidence of guilt was supplied by circumstantial evidence, the out-of-court statements by accomplice Garcia and the trial testimony of accomplice Medina.

Because California law requires corroboration of an accomplice's testimony to sustain a conviction, *People v. Garton* (2018) 4 Cal.5th 485, petitioner Patel here contends that in a state where the law otherwise requires corroboration of an accomplice's testimony to sustain a conviction, a criminal defendant has a right under the jury trial guarantees of the Sixth Amend-

ment and U.S. Const. art. III, § 2, cl. 3 to demand that a trial judge instruct the jury that the evidence of accomplices ought to be received with suspicion and with the very greatest care and caution and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. *See, e.g., Crawford v. United States*, 212 U.S. 183, 204 (1909).

Petitioner requested such an instruction but the trial court refused it, the trial court failing also even to instruct the jury that the testimony elicited from Medina required corroboration.

STATEMENT OF THE CASE

A. In States Where a Person Can Be Convicted of a Crime on the Testimony of an Accomplice Only When Corroborated by Evidence Tending to Connect the Defendant to the Commission of the Crime, It Is an Abridgement of the Jury Trial Guarantees of the Sixth Amendment and U.S. Const. Art. III, § 2, Cl. 3 for a Trial Court to Refuse to Give a Cautionary Instruction When a Defendant Requests It

The common law rule is that an accused may be convicted upon the uncorroborated testimony of an accomplice. In many of the states, including the State of California, this common law rule has been abrogated by statute, requiring corroboration of the testimony of an accomplice before a person charged with a crime can be convicted. 16 C.J. 698; Cal. Penal Code Ann.

§ 1111 (1985); *see also* Ala. Code § 12-21-222 (1986); Alaska Stat. § 12.45.020 (1984); Ark. Code Ann. § 16-89-111(e)(1) (1977); Ga. Code Ann. § 24-4-8 (1995); Idaho Code § 19-2117 (1979); Minn. Stat. § 634.04 (1983); Mont. Code Ann. § 46-16-213 (1985); Nev. Rev. Stat. § 175.291 (1985); N. D. Cent. Code Ann. § 29-21-14 (1974); Okla. St., Tit. 22, § 742 (1969); Ore. Rev. Stat. § 136.440 (1984); S.D. Codified Laws § 23A-22-8 (1979).

Even in some states that still follow the common law rule, when a conviction is sought on the testimony of accomplices, it has been held that a defendant is entitled to have the court charge the jury that the evidence of an accomplice should be received by the jury with "great caution." *See, e.g., Varum v. State* (1939) 137 Fla. 438; *Bacon v. State*, 22 Fla. 51 (1889); *Shiver v. State*, 41 Fla. 631 (1899); *Myers v. State*, 43 Fla. 500 (1901); *McCoy v. State*, 112 A.3d 239 at 268 (Del. 2015) (stating "that a trial court must give a[n] . . . instruction to the jury any time an accomplice witness testifies"); *People v. Cobb*, 97 Ill. 2d 465, 455 N.E.2d 31, 35, 74 Ill. Dec. 1 (Ill. 1983) (stating defendant is "entitled" to an accomplice witness instruction and finding error where it is not given); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121, 139 (Neb. 2001) ("It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error.").

Some states require such an instruction only when requested by the defendant. *See Fields v. United States*, 396 A.2d 522, 526 (D.C. 1978) ("When a witness has

a strong motivation to lie, the trial court's failure to give a cautioning instruction when requested is reversible error. . . . The failure to give an accomplice instruction, however, is not plain error when the testimony of the accomplice is corroborated by other evidence"), *disagreed with on other grounds by Dorman v. United States*, 491 A.2d 455 (D.C. 1984); *People v. Young*, 472 Mich. 130, 693 N.W.2d 801 at 807-08 (Mich. 2005) (holding that the jury instruction must be requested by defendant and that an appellate court must conduct harmless error analysis on a rejected accomplice credibility instruction); *State v. Adams*, 194 N.J. 186, 943 A.2d 851 at 864 (N.J. 2008) ("[B]ecause of the inherent conflict in [an accomplice's] testimony, a defendant has a right, upon request, to a specific jury instruction that the evidence of an accomplice is to be carefully scrutinized and assessed in the context of his specific interest in the proceeding") (internal quotations omitted); *State v. Rowsey*, 343 N.C. 603, 472 S.E.2d 903, 911 (N.C. 1996) ("An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of an accomplice should be carefully scrutinized") (*quoting State v. Harris*, 290 N.C. 681, 228 S.E.2d 437, 447 (N.C. 1976)); *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97, 103, 103 n.14 (W. Va. 2009) (stating that the "instruction is required when an accomplice to the crime testifies for the State," but only when requested by the defendant).

And in some states the decision whether to give such an instruction is left to the discretion of the trial judge. *See State v. Moore*, 293 Conn. 781, 981 A.2d 1030 at 1059-60 (Conn. 2009) (indicating that the

defendant is entitled to an instruction on the credibility of accomplice witnesses when "[t]he conditions of character and interest most inconsistent with a credible witness" exist); *Dennis v. State*, 817 So.2d 741 at 751 (Fla. 2002) (not providing the instruction "was not fundamental error which would justify reversing the jury's verdict. It is discretionary") (*quoting Boykin v. State*, 257 So.2d 251, 252 (Fla. 1971), *vacated in part on other grounds by Boykin v. Florida*, 408 U.S. 940, 92 S.Ct. 2876, 33 L.Ed.2d 763 (1972)); *State v. Okumura*, 78 Haw. 383, 894 P.2d 80, at 105 (Haw. 1995) (holding "that in some cases in which the testimony of an accomplice substantially aids the prosecution's proof, a trial court may act properly within its discretion if it refuses or otherwise fails to give an accomplice witness instruction"); *State v. Hughes*, 943 So.2d 1047, 1051 (La. 2006) (stating that "the jury should be instructed to treat the [accomplice's] testimony with great caution," but that "[w]hen the accomplice's testimony is materially corroborated by other evidence, such language is not required"); *State v. Johnson*, 434 A.2d 532, 537 (Me. 1981) (indicating the "failure to give [a] cautionary instruction [is] not obvious error when not requested and not automatic error, even if requested"); *State v. Guzman*, 2004 UT App 211, 95 P.3d 302, 312 (Utah App. 2004) (explaining that "a cautionary instruction may be given if the accomplice testimony is 'uncorroborated' and shall be given if the trial judge finds the accomplice testimony 'self-contradictory, uncertain or improbable'") (*quoting* Utah Code Ann. § 77-17-7(2)); *Vlahos v. State*, 2003 WY 103, 75 P.3d 628, 639 (Wyo. 2003) (indicating that no "clear precedent in Wyoming require[s] cautionary instructions on accomplice testimony"); *Commonwealth*

of the Northern Mariana Islands v. Muna, 2016 MP 10, ¶¶ 14-16 (2016) (holding that trial courts are not required to issue accomplice witness instruction sua sponte, though it is unclear whether the defendant is entitled to the instruction if requested).

But even at common law, trial courts were very cautious in their application of the rule; frequently, without warrant of law, modifying it in actual practice. In Vol. 2 of the Bishop's Crim. Proc. 2nd Ed., Sec. 1169, in commenting on the common law rule, that author says:

> Under the common law, the mere uncorroborated testimony of an accomplice will, if beyond a reasonable doubt it satisfies the jury, who are the sole judge of the evidence, sustain a verdict of guilty. But so manifest is the danger of convicting men on evidence from a source confessedly corrupt, and delivered by the witness to shield himself from merited punishment, that the judges, while explaining to the jury their right to convict on it alone, by way of caution advise them not to return a verdict of guilty unless it is corroborated by evidence from a purer source. Yet they are not as of law required to give this advice.

Petitioner Patel here contends that in states where a person can be convicted of a crime on the testimony of an accomplice only when corroborated by evidence tending to connect the defendant to the commission of the crime, it is an abridgement of the jury trial guarantees of U.S. Const. art. III, § 2, cl. 3 and the Sixth Amendment for a trial court to refuse

to give the cautionary instruction when a defendant requests it.

To clarify petitioner's contention and place it in context, it is helpful to state what is not petitioner's contention. Of course, this Court long ago held that an appellate court can sustain a conviction based solely on the uncorroborated testimony of an accomplice. *Caminetti v. United States*, 242 U.S. 470, 495-96 (1917) ("This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial courts."). And of course appellate judges may not decide the credibility of an accomplice who testifies as a government witness. Accordingly, courts of appeals must accept accomplice testimony as truthful and in the light most favorable to the prosecution. Such evidence is admissible even when uncontradicted evidence at trial has demonstrated that the co-conspirator or accomplice witness was a criminal of the vilest character or had been promised immunity or leniency for testifying as a government witness.

And in *Bouaily v. United States*, 483 U.S. 171 (1987) this Court reasoned that presumptively unreliable co-conspirator statements "may become quite probative when corroborated by other evidence." *Id.* at 180. This same analysis may well apply to an accomplice's testimony.

And this Court has held that "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." *Caminetti*, *supra*, 242 U.S. 470, 495; *see United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("The uncorrobo-

rated testimony of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face."). "When we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions." *United States v. Augenblick*, 393 U.S. 348, 352 (1969).

Therefore, the requirement of California Penal Code § 1111 that "'a conviction cannot be had upon the testimony of an accomplice unless it be corroborated' is a matter of state law, which does not implicate a federal constitutional right" and, for example, in the federal courts, cannot be the basis of federal habeas relief. *Barco v. Tilton*, 694 F.Supp.2d 1122, 1136 (C.D. Cal. 2010).

Indeed, as the Ninth Circuit has explained, California's statutory law prohibiting convictions based solely on uncorroborated accomplice testimony is only a state law rule: it is not required by Constitution or federal law. *See Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000).

However, petitioner's contention in this Court is not grounded, per se, in the state law requirement that accomplice testimony be corroborated. Rather, it is founded on the premise that in the absence of a cautionary instruction when a defendant requests it, an accomplice's testimony should be deemed to be not properly corroborated, thus resulting in abridgement of the jury trial guarantees of U.S. Const. art. III, § 2, cl. 3 and the Sixth Amendment. Stated differently, petitioner contends that when a trial court refuses to give the cautionary instruction when a defendant requests it, a constitutional violation occurs because of a lack of proper corroboration.

Comparison can be made to *Takacs v. Engle*, 768 F.2d 122 (6th Cir. 1985) and *United States v. Fritts*, 505 F.2d 168 (9th Cir. 1974). In *Takacs*, 768 F.2d at 127 the court noted that "[i]f uncorroborated accomplice testimony is sufficient to support a conviction under the Constitution, there can be no constitutional right to instruct the jury that it must find corroboration for an accomplice's testimony." And in *Fritts*, 505 F.2d at 169, the court held on direct review that trial court's failure sua sponte give a cautionary instruction on accomplice testimony did not warrant reversal.

But unlike in *Takacs* and *Fritts*, petitioner here contends that corroborated accomplice testimony may be sufficient to support a conviction only when a trial court gives the cautionary instruction when a defendant requests it and a trial court's failure to give a requested cautionary instruction on accomplice testimony does indeed warrant reversal.

The danger of prejudicial impact on a jury is manifest when an accomplice testifies against an accused in exchange for a prosecutor's promise of leniency. An accomplice is liable for prosecution for the crime charged against the defendant. He or she is usually testifying in the hope of receiving lesser punishment. Thus, "[ilt is in his interest not only to implicate others but to minimize his own role and exaggerate the roles of his co-conspirators." Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990). Because of an accomplice's first-hand knowledge of the details of the criminal conduct charged, his or her testimony concerning the role played by the accused may appear quite believable, and its veracity can

only be challenged by another accomplice. *Id.* at 786-87.

As stated in *Turner v. Louisiana*, 379 U.S. 466, at 472-473 (1965), "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Thus, it is urged that only when a trial court gives the cautionary instruction when a defendant requests it should accomplice testimony be deemed to be properly corroborated and only when a trial court accedes to a defendant's request for a cautionary instruction on accomplice testimony does a conviction merit escape from reversal.

B. Evidence of an Accomplice Should Be Received with Great Caution and Scrutinized with Great Care and the Lack of an Instruction to That Effect Is Unjust

An accomplice's testimony should "be regarded with great suspicion and caution" because an accomplice is "admittedly contaminated with guilt" and may turn State's evidence "to gratify his malice or to shield himself from punishment." *Brown v. State*, 281 Md. 241 at 244 (1977) (*quoting Watson*, 208 Md. at 217).[1]

---

[1] *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. Crim. L. Rev. 737 at 765-84 (2016) (discussing inherent, structural, and societal risks of accomplice testimony); Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*,

Indeed, "the evidence of an accomplice is universally received with caution and weighed and scrutinized with great care." *Brown*, 281 Md. at 243 (*quoting Luery v. State*, 116 Md. 284, 292, 81 A. 681 (1911)).

Even those jurisdictions that allow conviction on the uncorroborated testimony of an accomplice express the same concern about the unreliability of that testimony. *E.g., People v. Gomez*, 189 Colo. 91, 537 P.2d 297, 300 (Colo. 1975); *State v. Moore*, 293 Conn. 781, 981 A.2d 1030, 1059 (Conn. 2009); *Brooks v. State*, 40 A.3d 346, 350 (Del. 2012) (requiring a jury instruction stating "the testimony of an alleged accomplice should be examined . . . with more care and caution than" that of other witnesses); *Bryan v. United States*, 836 A.2d 581, 584 n.3 (D.C. 2003) (Glickman, J., concurring) (collecting cases for the proposition that accomplice testimony is presump-tively unreliable); *Dennis v. State*, 817 So.2d 741, 751 (Fla. 2002) (discussing a jury instruction that directs jurors to "use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime"); *State v. Okumura*, 78 Haw. 383, 894 P.2d 80, 103-04 (Haw. 1995), *abrogated on other grounds by State v. Cabagbag*, 127 Haw. 302, 277 P.3d 1027, 1038-39 (Haw. 2012); *People v. McLaurin*, 184 Ill. 2d 58, 703 N.E.2d 11, 21, 234 Ill. Dec. 399 (Ill. 1998); *Brown v. State*, 671 N.E.2d 401, 410 (Ind. 1996) (indicating "the danger of convictions resulting from purchased testimony") (*quoting Tidwell v. State*, 644 N.E.2d 557, 560 (Ind. 1994)); *State v. McLaughlin*, 485 P.2d 1360, 1364, 207 Kan. 594 (Kan. 1971)

---

100 Yale L.J. 785, 786-87 (1990) (discussing why accomplice-witness testimony should "be afforded special scrutiny").

(quoting favorably the trial court's jury instruction that accomplice testimony "should be received with great caution"); *State v. Prince*, 211 So.3d 481, 503 (La. Ct. App.), *writ denied*, 211 So.3d 481 (La. 2017) & 237 So.3d 1190 (La. 2018), petition for cert. filed, (No. 17-9016), ___ U.S.L.W. ___ (May 22, 2018); *State v. Jewell*, 285 A.2d 847, 851 (Me. 1972); *People v. Young*, 472 Mich. 130, 693 N.W.2d 801, 804 (Mich. 2005); *Williams v. State*, 32 So.3d 486, 490 (Miss. 2010); *State v. West*, 112 N.H. 317, 295 A.2d 457, 458 (N.H. 1972); *State v. Adams*, 194 N.J. 186, 943 A.2d 851, 864 (N.J. 2008); *State v. Sarracino*, 1998-NMSC 022, 125 N.M. 511, 964 P.2d 72, 77-78 (N.M. 1998); *State v. Morston*, 336 N.C. 381, 445 S.E.2d 1, 12 (N.C. 1994) (quoting the pattern jury instruction with approval); *Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997, 1014 (Pa. 2007); *State v. Padilla*, 427 P.3d 542, 2018 UT App 108, ¶ 13 (2018) (*quoting* Utah Code Ann. § 77-17-7); *State v. Briggs*, 152 Vt. 531, 568 A.2d 779, 784 (Vt. 1989) (*quoting* the trial court's jury instruction with approval); *Via v. Commonwealth*, 288 Va. 114, 762 S.E.2d 88, 88-89 (Va. 2014); *State v. Harris*, 102 Wn.2d 148, 685 P.2d 584, 586-87 (Wash. 1984), *overruled in part on other grounds by State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (Wash. 1991); *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423, 426-27 (W. Va. 1980); *Linse v. State*, 93 Wis. 2d 163, 286 N.W.2d 554, 558 (Wis. 1980) ("[A]ccomplice testimony should be weighed with greater caution than the testimony of other witnesses"); *Phillips v. State*, 553 P.2d 1037, 1040 (Wyo. 1976); *Caminetti, supra*, 242 U.S. 470, 495, (indicating that "it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to

require corroborating testimony before giving credence to such evidence").

But, as exemplified by the facts of this case, a rule that accomplice testimony may be deemed to be properly corroborated only when a trial court gives the cautionary instruction when requested by a defendant strikes the best balance between the potential dangers of accomplice testimony and its potential value. *Turner v. State*, 294 Md. 416 (1982) (indicating the purpose of the rule is to balance the risk of incarcerating defendants based on untrustworthy testimony with the need to leverage those "intimately connected with the crime" as sources of evidence).

The goal of requiring corroboration is to prevent the conviction of a criminal defendant based on testimony that is inherently unreliable. The validity and importance of that goal is unquestionable. And a rule requiring the giving of a cautionary instruction when requested by a defendant is well-suited to accomplishing that goal—in other words, it effectively furthers the goals of assuring that convictions occur only in those cases in which evidence of guilt is reliable while distinguishing from cases in which it is not. Under such a rule, a factfinder's consideration of evidence she or he might conclude is highly unreliable in a given case can be cautioned against in that case, while in a different case the same fact-finder may be permitted to weigh a much lesser quantum of much more suspect evidence, but in both cases be left to fulfill the role of sole trier of the credibility of the witnesses, while cautioned about the need to treat accomplice testimony with due suspicion. *See* Roth,

Informant Witnesses, 53 AM. Crim. L. Rev. at 760-61 (discussing the "anemic corroboration requirements" in those jurisdictions that do require corroboration of accomplice testimony).

It is the jury's role "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "A basic principle of a criminal jury trial . . . is that the jury is the judge of the facts. A corollary is that it is 'the province of the jury' to determine the credibility of the witnesses who provide evidence about those facts." *Fallin v. State*, 460 Md. 130, 188 A.3d 988, 2018 Md. LEXIS 375, 2018 WL 3410022, at *1 (July 12, 2018) (*quoting Bohnert v. State*, 312 Md. 266, 277, 539 A.2d 657 (1988)); *see also Brown v. State*, 368 Md. 320, 328, 793 A.2d 561 (2002) ("[T]here have been numerous cases confirming that in jury trials the credibility of witnesses is a jury issue.").

In *Cool v. United States*, 409 U.S. 100 (1972), this Court ruled on the constitutionality of a jury instruction regarding the reliability of an accomplice's testimony where that testimony tended to exculpate the defendant. In *Cool*, the trial court had instructed the jury to disregard the accomplice's testimony that exculpated the defendant of counterfeit charges unless the jurors found that the accomplice's testimony was true beyond a reasonable doubt. After first defining the word "accomplice" and warning that an accomplice's testimony is "open to suspicion," the trial judge had made the following statement: "However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass

upon the credibility thereof. If the testimony carries conviction and you are convinced it is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source." This court held such instruction violated the Sixth Amendment.

On the other side of the same coin petitioner here argues that it is likewise a violation of the Sixth Amendment for a trial judge to refuse to give a cautionary instruction in a State where the law otherwise requires corroboration of an accomplice's testimony to sustain a conviction, for a criminal defendant should be considered to have a right under the jury trial guarantees of the Sixth Amendment and U.S. Const. art. III, § 2, cl. 3 to demand that a trial judge instruct the jury that the evidence of accomplices that tends to incriminate a defendant ought to be received with suspicion and with the very greatest care and caution and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.

In *Crawford v. United States*, 212 U.S. 183, 204, (1909), overruled by statute on an unrelated point in *United States v. Wood*, 299 U.S. 123, 132 (1936), this Court stated that when an alleged accomplice testifies, his confession that "incriminates himself together with defendant . . . ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under

the same rules governing other and apparently credible witnesses." *Id.* at 204.[2]

Courts must be "mindful of the respective roles of the court and the jury; it is the jury's task, not the court's, to measure the weight of evidence and to judge the credibility of witnesses." *Dawson v. State*, 329 Md. 275, 281, 619 A.2d 111 (1993). The accomplice

---

[2] This court applied this principle to the Sixth Amendment in *Douglas v. Alabama*, 380 U.S. 415 (1965), holding that the admission of a nontestifying accomplice's confession, which shifted responsibility and implicated the defendant as the triggerman, "plainly denied [the defendant] the right of cross-examination secured by the Confrontation Clause." *Id.* at 419. And this court reaffirmed *Douglas* in *Lee v. Illinois*, 476 U.S. 530 (1986), explaining that the holding in *Douglas* "was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." 476 U.S. at 541. This is so because

> The truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. . . . 'Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.'" *Ibid.* (quoting *Bruton v. United States*, 391 U.S. 123 at 141 (1968) (White, J., dissenting)).
>
> Indeed, even the dissenting Justices in *Lee* agreed that "accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant" but instead are likely to be attempts to minimize the declarant's culpability. 476 U.S. at 552-553 (Blackmun, J., dissenting).

corroboration rule is an exception to that ordinary division of roles that runs contrary to "a modern trend towards removing evidentiary disabilities and permitting the jury to weigh all of the available evidence." Derek J. T. Adler, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1205 (1987); *see also* 2 Wigmore, *Evidence* § 488, at 647 (Little, Brown & Co. 1979) (opining that the common law rules on witness qualification "were highly restrictive," but "came to be recognized as illiberal and unnecessary in many instances").

California and fifteen other states have adopted some form of the accomplice corroboration rule by statute. *See People v. Whalen*, 56 Cal.4th 1 (2013) (*citing* Cal. Penal Code § 1111), *disapproved of on other grounds by People v. Romero*, 62 Cal.4th 1 (2015); *see also McGowan v. State*, 990 So.2d 931, 987 (Ala. Crim. App. 2003) (*citing* Ala. Code § 12-21-222); *M.H. v. State*, 382 P.3d 1201, 1205 (Alaska Ct. App. 2016) (*citing* Alaska Stat. § 12.45.020); *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676, 688 (Ark. 2006) (*citing* Ark. Code Ann. § 16-89-111(e)(1) (A));*Robinson v. State*, 303 Ga. 321, 812 S.E.2d 232, 235 (Ga. 2018) (*citing* Ga. Code Ann. § 24-14-8); *State v. Lankford*, 162 Idaho 477, 399 P.3d 804, 834 (Idaho 2017) (*citing* Idaho Code § 19-2117); *State v. Barnes*, 791 N.W.2d 817, 823 (Iowa 2010) (*citing* Iowa R. Crim. P. 2.21(3)); *Commonwealth v. Resende*, 476 Mass. 141, 65 N.E.3d 1148, 1158 (Mass. 2017) (*citing* Mass. Gen. Laws ch. 233, § 201); *State v. Horst*, 880 N.W.2d 24, 37 (Minn. 2016) (*citing* Minn. Stat. § 634.04); *State v. Kills on Top*, 243 Mont. 56, 793 P.2d 1273, 1294 (Mont. 1990) (*citing* Mont. Code Ann. § 46-16-213); *Evans v. State*,

113 Nev. 885, 944 P.2d 253, 257 (Nev. 1997) (*citing* Nev. Rev. Stat. § 175.291); *People v. Davis*, 28 N.Y.3d 294, 44 N.Y.S.3d 358, 66 N.E.3d 1076, 1082 (N.Y. 2016) (*citing* N.Y. Crim. Proc. Law § 60.22); *State v. Reddig*, 2016 ND 39, 876 N.W.2d 34, 36 (N.D. 2016) (*citing* N.D. Cent. Code § 29-21-14); *Postelle v. State*, 2011 OK CR 30, 267 P.3d 114, 126 (Okla. Crim. App. 2011) (*citing* Okla. Stat. tit. 22, § 742); *State v. Washington*, 355 Ore. 612, 330 P.3d 596, 604 (Or. 2014) (*citing* Or. Rev. Stat. § 136.440); *State v. Dunkelberger*, 2018 SD 22, 909 N.W.2d 398, 400 (S.D. 2018) (*citing* S.D. Codified Laws § 23A-22-8); *Smith v. State*, 436 S.W.3d 353, 369 (Tex. Crim. App. 2014) (*citing* Tex. Code Crim. Proc. Ann. art. 38.14).

Maryland, in *Luery v. State*, 116 Ms. 284, 292 (1911), and Tennessee, in *State v. Hawkins*, 519 S.W.3d 1, 58 (Tenn. 2017), impose the accomplice corroboration requirement as a judicially-imposed rule.

The rest of the states, plus the federal courts and the District of Columbia, follow the traditional common law rule, which does not require corroboration. *State v. Johnson*, 178 Conn. App. 490, 179 A.3d 780, 786 (Conn. App. 2017); *Brooks v. State,* 40 A.3d 346 at 350 (Del. 2012); *Ali v. United States*, 581 A.2d 368, 377 n.17 (D.C. 1990); *Smith v. State*, 507 So.2d 788, 790 (Fla. D. Ct. App. 1987); *People v. Nitti*, 8 Ill. 2d 136, 133 N.E.2d 12, 13 (Ill. 1956); *Lowery v. State*, 547 N.E.2d 1046, 1053 (Ind. 1989); *State v. Bey*, 217 Kan. 251, 535 P.2d 881, 888 (Kan. 1975); *State v. Kyles*, 233 So.3d 150, 157-58 (La. Ct. App. 2016); *State v. Reardon*, 486 A.2d 112, 119 (Me. 1984); *People v. Lemmon*, 456 Mich. 625, 576 N.W.2d 129, 137 n.22 (Mich. 1998); *Jones v. State*, 203 So.3d 600, 607 (Miss.

2016); *State v. Sistrunk*, 414 S.W.3d 592, 598 (Mo. Ct. App. 2013); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85, 90 (Neb. 1986); *State v. Thresher*, 122 N.H. 63, 442 A.2d 578, 582 (N.H. 1982); *State v. Spruill*, 16 N.J. 73, 106 A.2d 278, 280-82 (N.J. 1954); *State v. Montoya*, 2016-NMCA-098, 384 P.3d 1114, 1121 (N.M. App. 2016); *State v. Keller*, 297 N.C. 674, 256 S.E.2d 710, 714 (N.C. 1979); *State v. O'Dell*, 45 Ohio St. 3d 140, 543 N.E.2d 1220, 1225 (Ohio 1989); *Commonwealth v. Brown*, 617 Pa. 107, 52 A.3d 1139, 1165 (Pa. 2012); *State v. Pona*, 66 A.3d 454, 471 (R.I. 2013); *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746, 749 (S.C. 1971); *State v. Dana*, 59 Vt. 614, 10 A. 727, 729 (Vt. 1887); *Johnson v. Commonwealth*, 224 Va. 525, 298 S.E.2d 99, 101 (Va. 1982); *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 at 426 (1980); *Linse v. State*, 93 Wis.2d 163, 286 N.W.2d 554 (1980); *Adams v. State*, 2003 WY 152, 79 P.3d 526, 529, 532 (Wyo. 2003); *Caminetti*, *supra*, 242 U.S. at 495.

The states that do not follow the accomplice corroboration rule have taken different approaches to the problem of the unreliability of accomplice testimony. Some that previously followed the rule have revoked it or limited it to certain types of cases. Four states have revoked the rule: Arizona, *State v. Edwards*, 136 Ariz. 177, 665 P.2d 59, 67 (Ariz. 1983); Kansas, *McLaughlin*, *supra*, 485 P.2d at 1363-64; Kentucky, *Martin v. Commonwealth*, 409 S.W.3d 340, 344 n.1 (Ky. 2013); and Utah, *Padilla*, *supra*, 2018 UT App. 108 at ¶ 13, 427 P.3d 542.

Other jurisdictions allow juries to convict on the uncorroborated testimony of an accomplice as long as the testimony is not inherently incredible. *See McCoy*

v. State, 112 A.3d 239, 267 (Del. 2015) ("[I]n the rare case where there is an irreconcilable conflict in the State's evidence concerning the defendant's guilt, such as would preclude a conviction beyond a reasonable doubt, the trial court must remove the case from the jury's consideration and grant a motion for judgment of acquittal"); *Kyles*, *supra*, 233 So.3d at 157-58 (allowing conviction on uncorroborated accomplice testimony "provided the testimony is not incredible or otherwise insubstantial on its face"); *Jones*, *supra*, 203 So.3d at 606 (Miss. 2016) ("[T]he uncorroborated testimony of an accomplice may be sufficient to convict an accused" if it is not "unreasonable, self-contradictory or substantially impeached") (*quoting Osborne v. State*, 54 So.3d 841, 846 (Miss. 2011)); *State v. Tressler*, 503 S.W.2d 13, 17 (Mo. 1973) (defendant may be convicted on uncorroborated testimony of an accomplice unless it is "so lacking in probative force as not to amount to substantial evidence") (*quoting State v. Powell*, 433 S.W.2d 33, 34 (Mo. 1968)); *Brown*, *supra*, 52 A.3d at 1165 (Pa. 2012) (jury can convict on the uncorroborated testimony of an accomplice "except in those exceptional instances . . . where the evidence is so patently unreliable that the jury was forced to engage in surmise and conjecture in arriving at a verdict based upon that evidence"); *Rohl v. State*, 64 Wis. 2d 443, 219 N.W.2d 385, 389 (Wis. 1974) (stating that the uncorroborated testimony of an accomplice is "competent evidence upon which to base a verdict of guilty if it is of such a nature that it is entitled to belief and the jury believes it") (*quoting Sparkman v. State*, 27 Wis. 2d 92, 133 N.W.2d 776, 778 (Wis. 1965)); *Muna*, *supra*, 2016 MP 10, ¶ 14 (2016) ("[A] conviction may be based solely upon an accomplice's

uncorroborated testimony, provided the testimony is not inherently implausible") (internal quotation omitted).

A handful of states allow the testimony of one accomplice to corroborate that of another. *Pittman v. State*, 300 Ga. 894, 799 S.E.2d 215, 218 (Ga. 2017); *State v. Tyler*, 50 Ohio St. 3d 24, 553 N.E.2d 576, 589 (Ohio 1990), *superseded by state constitutional amendment on other grounds as recognized by State v. Smith*, 80 Ohio St. 3d 89, 1997-Ohio 355, 684 N.E.2d 668, 683 n.4 (Ohio 1997); *see also People v. Bowers*, 801 P.2d 511, 524 (Colo. 1990) (allowing corroboration by another accomplice for purposes of avoiding jury instruction on uncorroborated accomplice testimony); *State v. Little*, 174 So.3d 1219, 1227 (La. Ct. App. 2015) (*same*); *State v. Klein*, 243 Ore. App. 1, 258 P.3d 528, 534 (Or. 2011) (holding that an accomplice's out-of-court statements can corroborate that accomplice's or another accomplice's in-court testimony).

In an accommodation that is at least arguably consistent with the deference generally afforded to juries to assess credibility, several states allow conviction based on the uncorroborated testimony of an accomplice but either require or permit the trial court to instruct the jury as to its inherent unreliability. These courts diverge as to whether such an instruction is required whenever an accomplice testifies,[3] required only when such testimony is uncorrob-

---

[3] *See McCoy*, 112 A.3d at 268 (stating "that a trial court must give a[n] . . . instruction to the jury any time an accomplice witness testifies"); *People v. Cobb*, 97 Ill. 2d 465, 455 N.E.2d 31, 35, 74 Ill. Dec. 1 (Ill. 1983) (stating defendant is "entitled" to an accomplice witness instruction and finding error where it is not

orated,[4] left to the discretion of the trial judge,[5] or required only when requested by the defendant. *See*

---

given); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121, 139 (Neb. 2001) ("It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error").

[4] *See People v. Petschow*, 119 P.3d 495, 504-05 (Colo. App. 2004); *Williams, supra*, 32 So.3d at 491 (Miss. 2010) ("[F]or a defendant to be entitled to a cautionary jury instruction, it is only necessary that the accomplice's testimony be uncorroborated"); *Commonwealth v. Wholaver*, 177 A.3d 136, 165 (Pa. 2018) (indicating "that the corrupt and polluted source instruction pertains only to the uncorroborated testimony of an accomplice") (internal quotations omitted); *Holloman v. Commonwealth*, 65 Va. App. 147, 775 S.E.2d 434, 448 (Va. App. 2015) ("Although . . . a trial court must warn the jury against the danger of convicting upon [an accomplice's] uncorroborated testimony[,] where [such] testimony is corroborated, it is not error to refuse a cautionary instruction") (internal quotations and citation omitted); *State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294, 307 (Wash. 2002) ("Cautionary instructions must be given where the testimony of an accomplice is uncorroborated"); *Linse*, *supra*, 286 N.W.2d at 558 ("[I]t is error to deny a request for an accomplice instruction only where the accomplice's testimony is totally uncorroborated").

[5] *See Moore*, 981 A.2d at 1059-60 (indicating that the defendant is entitled to an instruction on the credibility of accomplice witnesses when "[t]he conditions of character and interest most inconsistent with a credible witness" exist); *Dennis*, 817 So.2d at 751 (not providing the instruction "was not fundamental error which would justify reversing the jury's verdict. It is discretionary") (*quoting Boykin v. State*, 257 So.2d 251, 252 (Fla. 1971), *vacated in part on other grounds by Boykin v. Florida*, 408 U.S. 940, 92 S.Ct. 2876, 33 L.Ed.2d 763 (1972)); *Okumura*, 894 P.2d at 105 (holding "that in some cases in which the testimony of an accomplice substantially aids the prosecution's proof, a trial court may act properly within its discretion if it

Fields v. United States, 396 A.2d 522, 526 (D.C. 1978) ("When a witness has a strong motivation to lie, the trial court's failure to give a cautioning instruction when requested is reversible error. . . . The failure to give an accomplice instruction, however, is not plain error when the testimony of the accomplice is corroborated by other evidence"), *disagreed with on other grounds by Dorman v. United States*, 491 A.2d 455 (D.C. 1984); *Young*, 693 N.W.2d at 807-08 (holding that the jury instruction must be requested by defendant and that an appellate court must conduct harmless error analysis on a rejected accomplice credibility instruction); *Adams*, 943 A.2d at 864 ("[B]ecause of the inherent conflict in [an accomplice's] testimony, a defendant has a right, upon request, to a specific jury instruction that the

---

refuses or otherwise fails to give an accomplice witness instruction"); *State v. Hughes*, 943 So.2d 1047, 1051 (La. 2006) (stating that "the jury should be instructed to treat the [accomplice's] testimony with great caution," but that "[w]hen the accomplice's testimony is materially corroborated by other evidence, such language is not required"); *State v. Johnson*, 434 A.2d 532, 537 (Me. 1981) (indicating the "failure to give [a] cautionary instruction [is] not obvious error when not requested and not automatic error, even if requested"); *State v. Guzman*, 2004 UT App 211, 95 P.3d 302, 312 (Utah App. 2004) (explaining that "a cautionary instruction may be given if the accomplice testimony is 'uncorroborated' and shall be given if the trial judge finds the accomplice testimony 'self-contradictory, uncertain or improbable'") (quoting Utah Code Ann. § 77-17-7(2)); *Vlahos v. State*, 2003 WY 103, 75 P.3d 628, 639 (Wyo. 2003) (indicating that no "clear precedent in Wyoming require[s] cautionary instructions on accomplice testimony"); *Muna*, 2016 MP 10 at ¶ 14-16 (holding that trial courts are not required to issue accomplice witness instruction sua sponte, though it is unclear whether the defendant is entitled to the instruction if requested).

evidence of an accomplice is to be carefully scrutinized and assessed in the context of his specific interest in the proceeding") (internal quotations omitted); *State v. Rowsey*, 343 N.C. 603, 472 S.E.2d 903, 911 (N.C. 1996) ("An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of an accomplice should be carefully scrutinized") (*quoting State v. Harris*, 290 N.C. 681, 228 S.E.2d 437, 447 (N.C. 1976)); *State ex rel. Franklin v. McBride*, 226 W. Va. 375, 701 S.E.2d 97, 103, 103 n.14 (W.Va. 2009) (stating that the "instruction is required when an accomplice to the crime testifies for the State," but only when requested by the defendant).

All of these approaches provide some measure of protection to the defendant—by ensuring that, in appropriate cases, the jury is instructed to consider accomplice testimony with an appropriate amount of skepticism—while also leaving to the jury its usual role as the trier-of-fact and assessor of witness credibility.

Thus, petitioner here contends that in a state like California, where the law requires corroboration of an accomplice's testimony to sustain a conviction, a criminal defendant—against whom no physical evidence connects the defendant to the crime and evidence of the defendant's guilt beyond a reasonable doubt is supplied by circumstantial evidence, by the trial testimony of an accomplice, and by the out-of-court statements made by another accomplice—should be held to have a right under the jury trial guarantees of the Sixth Amendment and U.S. Const. art. III, § 2,

cl. 3 to demand that a trial judge instruct the jury that the evidence of accomplices ought to be received with suspicion and with the very greatest care and caution and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. *See, e.g.*, *Crawford v. United States*, 212 U.S. 183, 204 (1909).

REASONS FOR GRANTING THE PETITION

Model jury instructions in three states that do not employ the accomplice corroboration rule nonetheless themselves, by those instructions, further the goal of helping to prevent the conviction of a criminal defendant based on testimony that is inherently unreliable are those of Colorado, Connecticut, and Michigan. In Colorado, the model instruction provides:

> The prosecution has presented a witness who claims to have been a participant with the defendant in the crime charged. There is no evidence other than the testimony of this witness which tends to establish the participation of the defendant in the crime.
>
> While you may convict upon this testimony alone, you should act upon it with great caution. Give it careful examination in the light of other evidence in the case. You are not to convict upon this testimony alone, unless you are convinced beyond a reasonable doubt that it is true.

Model Criminal Jury Instructions Committee of the Colorado Supreme Court, *Colorado Jury Instructions—Criminal*, D:05 (2017) (excerpt).

In Connecticut the model instruction provides:

> In weighing the testimony of an accomplice, who is a self-confessed criminal, you must consider that fact. All else being equal, it may be that you would not believe a person who has committed a crime such as this, involving moral wrong, as readily as you would believe a person of good character. The amount of moral wrong involved in the participation of the witness in the crime should be weighed. Also, in weighing the testimony of an accomplice who has not yet been sentenced or whose case has not yet been disposed of, or who has not been charged with offenses of which the state has evidence, you should keep in mind that he may, in his own mind, be looking for or hoping for some favorable treatment in the sentence or disposition of his own case, and that, therefore, he may have such an interest in the outcome of this case that his testimony may have been colored by that fact. Therefore, the jury must look with particular care at the testimony of an accomplice and scrutinize it very carefully before you accept it.
>
> On the other hand, there are many offenses that are of such a character that the only persons capable of giving useful testimony are those who are themselves implicated in

> the crime. Each accomplice's testimony is an admission by him against his own natural interest in not incriminating himself; and, therefore, it may itself be evidence of his testimony' reliability.
>
> It is for you, the jury, to decide what credibility you will give to a witness who has admitted his involvement in criminal wrongdoing —whether you will believe or disbelieve the testimony of a person who, by his own admission, has committed the crime(s) charged by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you.

Connecticut Judicial Branch, Criminal Jury Instructions, § 3.10 (4th ed. 2017) (excerpt).

And in Michigan, the model instruction provides:

> (1) You should examine an accomplice's testimony closely and be very careful about accepting it.
>
> (2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.
>
> (3) When you decide whether you believe an accomplice, consider the following:

(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

(b) Has the accomplice been offered a reward or been promised anything that might lead [him/her] to give false testimony? [State what the evidence has shown. Enumerate or define reward.]

(c) Has the accomplice been promised that [he/she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his/her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

The Michigan Supreme Court Committee on Model Criminal Jury Instructions, *Michigan Model Criminal Jury Instructions*, 5.6 (1991) (excerpt).

In Maryland, where the accomplice corroboration requirement is a judicially-imposed rule, the Maryland State Bar Association's Criminal Pattern Jury Instruction 3:11A covering the accomplice corroboration rule, includes a modest warning regarding the reliability of accomplice testimony: "If you find that

the testimony of (name) has been corroborated, you may consider it, but you should do so with caution and give it the weight you believe it deserves." A trial court must give the instruction if it is requested and there is "some evidence" to support it. *Coleman-Fuller v. State*, 192 Md. App. 577, 592-94, 995 A.2d 985 (2010); *see also Gaskins v. State*, 7 Md. App. 99, 104-06, 253 A.2d 759 (1969) (finding reversible error where trial court declined the defendant's request for an accomplice-witness jury instruction).

Petitioner Patel submits that this Court should grant certiorari to rule that in a state like California, where the law requires corroboration of an accomplice's testimony to sustain a conviction, a criminal defendant—against whom no physical evidence connects the defendant to the crime and evidence of the defendant's guilt beyond a reasonable doubt is supplied by circumstantial evidence, by the trial testimony of an accomplice, and by the out-of-court statements made by another accomplice—should be held to have a right under the jury trial guarantees of the Sixth Amendment and U.S. Const. art. III, § 2, cl. 3 to demand that a trial judge instruct the jury that the evidence of accomplices ought to be received with suspicion and with the very greatest care and caution and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. *See, e.g.*, *Crawford v. United States*, 212 U.S. 183, 204 (1909).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

COREY EVAN PARKER
COUNSEL OF RECORD
LAW OFFICE OF COREY EVAN PARKER
1230 ROSECRANS AVE, SUITE 300
MANHATTAN BEACH, CA 90266
(424) 456-3193
COREY@COREYEVANPARKERLAW.COM

MAY 13, 2019