No 22 - _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BREWER,

Petitioner,

-vs-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

This Court should grant certiorari to decide whether or how *Schad v Arizona,* 501 U.S. 624 (1991), continues to apply following the decisions in *Ramos v. Louisiana,* ___ U.S. ___, 140 S. Ct. 1390 (2020) and *Edwards v Vannoy,* ___ U.S. ___, 141 S. Ct. 1547 (2021).

New York's courts do not require juror unanimity under all circumstances. Is it permissible for a state court to instruct a criminal jury that they "need not be unanimous" regarding whether the defendant acted as principal or accomplice to a crime?

Interested Parties

There are no parties to the proceeding other than those named in the caption of the case. The Monroe County District Attorney's Office (Leah R. Mervine, Esq., *of counsel,* 47 South Fitzhugh Street, Rochester, New York, 14614) has appeared as counsel for the Respondent throughout these proceedings.

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Basis for Jurisdiction

On July 16, 2021, the State of New York, Supreme Court, Appellate Division, Fourth Department issued its decision affirming a judgment of conviction against Petitioner, Robert Brewer. *People v Brewer,* 196 AD3d 1172 (4th Dept 2021). The Fourth Department is one of New York's intermediate appellate courts. The Fourth Department's Memorandum and Order is attached as **Appendix A.**

Mr. Brewer sought discretionary review of the Fourth Department's order. On November 30, 2021, the State of New York Court of Appeals issued a final order denying Petitioner's application for discretionary leave to appeal. The final order is unreported, but it is attached as **Appendix B.**

The instant Petition is submitted within 90 days of the Court of Appeals' Order and has been submitted by first class mail pursuant to Supreme Court Rule 29.2 on February 22, 2022.

Pursuant to 28 USC § 1257(a) and 28 USC § 2101(c), this Court has jurisdiction to review a judgment of a state court that implicates issues of federal constitutional significance

Constitutional, Statutory, and Other Provisions Involved

The Sixth Amendment to the United States Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...". U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

U.S. Const. Amend. XIV.

New York's Penal Law § 125.25(1), entitled "Murder in the second degree", reads in pertinent part: "A person is guilty of murder in the second degree when: (1) with intent to cause the death of another person, he causes the death of such person or of a thrid person...".

New York's Penal Law § 20.00, entitled "Criminal liability for conduct of another", says: "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aides such person to engage in such conduct".

New York's Criminal Jury Instructions, Second Edition, related to "Accessorial Liability" state in pertinent part that, "Your verdict (on each count you consider), whether guilty or not guilty, must be unanimous. In order to find the defendant guilty, however, you need not be unanimous on whether the defendant committed the crime personally, or by acting in concert with another, or both" (**Appendix C**).[1]

[1] None of New York's Criminal Jury Instructions are codified in any statute nor are they adopted by the legislature in any way. Instead, an unelected panel of current and retired judges, and a few lawyers, draft the model charges (*see* nycourts.gov/judges/cji/index/shtml). It is common for New York's appellate courts to instruct the trial courts that, "we strongly recommend that language based upon the pattern jury charge be used" to instruct the jury. *People v. Dotson*, 248 A.D.2d 1004 (4th Dept 1998).

Statement of the Case

A Monroe County, New York Indictment charged Robert Brewer and a co-defendant named William Miller with Murder in the Second Degree. The proof at trial showed that William Miller asked then 18-year-old Robert to come to Rochester and kill a man named Holloway, whom Miller believed was molesting his young nephews. Miller and Brewer traveled from Elmira to Rochester, a distance of about 120 miles, for the purpose of confronting Holloway.

At trial, the prosecution presented two versions of events to support Mr. Brewer's liability for the crime, but only one version of events could have been true. In the first version of events, Brewer brought the gun and agreed to accompany Miller to Rochester so that Brewer could kill Holloway. However, when it came time for Brewer to perform the killing, he could not bring himself to do it. Instead, Miller grabbed the gun out of Brewer's hand and killed Holloway himself.

Mr. Brewer described the event as follows:

> "I then pulled the gun out and pointed it at [Holloway]. He said, 'what are you doing young buck' and turned to go out the front door. I think I told him if he left I would shoot him in the brain. I kept pointing the

> gun at [Holloway] but I couldn't pull the trigger. [William Miller] was telling me to 'shoot him, shoot him', but I couldn't do it. [Miller] then snatched the gun out of my hand and took it. He said 'fuck it I'll do it'. [Holloway] then tried to run out the back door through the kitchen. [Miller] then shot him a bunch of times...".[2]

In this version of events, Brewer was characterized as the "accomplice". A person is an accomplice in New York if he: "he solicits, requests, commands, importunes, or intentionally aids" another person to commit an offense. New York Penal Law § 20.00.

The second version of events was wholly supported by a witness named Kentrell Burks. Burks was Miller's close friend and, although they were not related by blood, Burks and Miller referred to each other as "cousins". In Burks' telling of the story, he was with Brewer and Miller inside of the home where the killing would later occur. Burks said he was walking out of the front door of the house when Holloway arrived. Burks testified that Brewer shot Holloway at point-blank range, as soon as Holloway arrived at the house. Burks confirmed twice in his testimony that

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[2] Notably, when addressing this statement from Mr. Brewer in the context of a procedural motion, the prosecutor argued that Mr. Brewer's statement provided, "...no legal basis or theory whatsoever where we could charge in good faith Murder in the second degree. There was just a total lack of evidence". In his state court appeal, Mr. Brewer argued that the prosecution wedded itself to that theory of liability alone and was estopped from seeking a conviction on any other factual theory.

Holloway was definitely in the living room when he was shot and that Brewer shot Holloway from less than two feet away.

However, Burks' version of events was impossible in light of the objective evidence presented by the medical examiner. Holloway had, indeed, been shot many times, but the medical examiner said that one of the shots cut Holloway's spinal column, which would have immediately paralyzed him. Although Burks said Brewer shot Holloway at the front of the house in the living room, the police actually found Holloway's body in the kitchen, at the rear of the house. The police found six shell casings at the scene: three were on the floor near the stove, one was on the stovetop, one was in a pot on the stove, one was in a pan on the stove, and one was just outside of the kitchen in the dining room.

Even after being shown a police diagram of the scene of the shooting and the placement of Holloway's dead body at the back of the house in the kitchen (not at the front of the house, near in the living room), Burks still refused to admit that the shooting had occurred outside of the living room. Making that admission would mean that Burks had not seen the shooting at all. Burks agreed that he could not see

the kitchen from his place at the front of the house, and the photos of the scene make it obvious that he could not see the kitchen from his vantage point.

In short, the objective evidence makes it clear that Burks did not see the shooting and could not have seen the shooting under the only factual scenario that he described. In fact, Burks told the police and the grand jury that he did not see the shooting.

Under Burks' theory of the crime, Mr. Brewer did not "assist" anyone in committing a homicide. Instead, Brewer committed the homicide on his own and would be characterized as the "principal". In Bruks' telling of the story, Brewer was the one who "cause[d] the death of another", which is the wrongful deed that must underlie a conviction for murder as principal. Under Burks' theory, Miller was the accomplice. Miller was the one who "solicit[ed]" or "requested" Brewer's assistance, which are the wrongful deeds that New York defines as the supporting elements of accomplice liability.

When addressing the subject of jury unanimity, the trial judge delivered New York's standard jury charge on the subject, which reads:

> "Your verdict (on each count you consider), whether guilty or not guilty, must be unanimous. In order to find the defendant guilty, however, *you need not be unanimous* on whether the defendant committed the crime personally, or by acting in concert with another, or both"

See Appendix C (New York CJI 2nd [Accessorial Liability][emphasis added]).

At Mr. Brewer's state court trial, his defense attorney explicitly asked the judge not to deliver an instruction telling the jurors that they, "don't have to be unanimous [as] to principle or accomplice. We would object to that charge being given in the context of this particular case, given the duplicity of the evidence." **Appendix D**.

Mr. Brewer's case was still on direct appeal in state court when this Court decided *Ramos v. Louisiana,* ___ U.S. ___; 140 S. Ct. 1390 (2020). Brewer made two arguments on appeal in connection with the jury unanimity issue. Mr. Brewer argued that New York's jury charge that the jurors "need not be unanimous" violates the 6th Amendment. As discussed in further detail below, Mr. Brewer argued that *Ramos* overruled or undermined *Schad v Arizona,* 501 US 624, 634 (1991), which provides the sole support for New York's case law regarding the non-unanimity

charge. *People v. Mateo*, 2 NY3d 383 (2004). Mr. Brewer also argued that no rational juror could accept Kentrell Burks' testimony and, because the jury charge permitted a non-unanimous verdict, dismissal of the charge was required because of the danger that there was a verdict on less than twelve votes.

The Appellate Division, Fourth Department, rejected Mr. Brewer's arguments and said that, "unlike *Ramos*, defendant here was convicted upon a unanimous verdict." Appendix A.

Mr. Brewer asked the New York State Court of Appeals to review his case to determine whether *Mateo*, which permits non-unanimous verdicts in New York, remains good law following the decision in *Ramos*. The New York Court of Appeals denied Mr. Brewer's request for discretionary review (Appendix B). This Petition followed.

Summary of the Argument

In New York, a case called *People v. Mateo,* 2 NY3d 383 (2004), permits a trial court to charge the jury that they, "need not be unanimous" regarding whether a person commits a wrongful act that either makes him accomplice or, on the other hand, makes him the principal. *Mateo* is the sole case that the New York CJI cites in support of its non-unanimity instruction. *See* Appendix C, footnote 7.

Mateo, in turn, derives all of its support from *Schad v Arizona,* 501 US 624, 634 (1991), a case which has seemingly been overruled or at least called into question by *Ramos* and *Edwards v. Vannoy,* ___ U.S. ___, 141 S. Ct. 1547 (2021). In *Schad,* a plurality of this Court, citing *Apodaca v. Oregon,* 406 U.S. 404 (1972), said that "[a] state criminal defendant... has no federal right to a unanimous jury verdict". *Schad,* 501 US at 634.

This Court should grant certiorari to decide whether *Schad* remains good law in light of *Ramos* and to further define and clarify the requirement for jury unanimity. As discussed below, there was nationwide disagreement on this subject in the years

leading up to the decision in *Schad*, and that disagreement will re-emerge now that *Schad* is no longer on firm footing.

Reasons for Granting the Writ:

State and federal courts disagree on the definition of "unanimity", the circumstances under which unanimity might not be required, and the language that should be used to instruct juries regarding unanimity.

A. Introduction:

This Court should grant certiorari to decide whether or how *Schad* continues to apply following the decision in *Ramos*.

As this Court observed in *Blakely v. Washington*, one of the basic tenets of the juror unanimity rule requires that, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by unanimous suffrage of twelve of his equals and neighbours'..." 542 U.S. 296, 301, (2004); *citing* 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). The requirement for the government to prove the "truth of every accusation" has been established in this country since its founding. *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995) (describing Blackstone's

commentary and Justice Story's early recognition of that component of the right to jury unanimity).

B. This Court Should Grant Certiorari to Consider Whether *Schad v Arizona* Should Be Overruled or Limited

In *Ramos* and *Edwards*, this Court described the many ways in which the post-*Apodaca* line of cases created confusion or ambiguity about the juror unanimity requirement. *See, Ramos*, 140 S. Ct. at 1399, n. 36; *Edwards*, 141 S. Ct. at 1556, n. 4. *Schad v Arizona* was one such case that this Court identified as having contributed to the confusion regarding juror unanimity. *See, Ramos*, 140 S. Ct. at 1399, n. 36 and *Edwards*, 141 S. Ct. at 1556, n. 4.

In *Schad*, the defendant was charged with premeditated murder and felony murder. The trial judge instructed the jurors that they did not have to be unanimous regarding the "theory" under which the defendant was guilty because both crimes were defined as First Degree Murder in Arizona, despite the different *actus reus* for each type of murder. *Schad*, 501 U.S. at 629. Since *Apodaca* did not provide a right to a unanimous verdict in state court, the *Schad* plurality ruled that it could not question

Arizona's state law definitions of the crime and that the case was, "not one of jury unanimity". *Schad*, 501 U.S. at 631.

That rationale made its way into *Mateo*, which is how New York ended up allowing jurors to return a verdict without agreeing on the *actus reus* of certain offenses where the defendant is charged as principal and accomplice. In deciding *Mateo*, New York relied on *Schad* for its conclusion that, "if a State's courts have determined that certain statutory alternatives are are mere means of committing a single offense... we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *Mateo*, 2 N.Y.3d at 407; *citing, Schad*, 501 U.S. at 636.

In New York's view, *Schad* permitted this result whenever there was "moral equivalence between" two differing theories of liability. *Mateo*, 2 NY3d at 407; *citing Schad*, 501 US at 644. Since New York had already decided that there was no moral distinction between accomplice and principal liability (*People v. Rivera*, 84 NY2d 766 [1995]), it relied upon language from *Schad* which said that there was, "no general requirement that the jury reach agreement on the preliminary factual issues which

underlie the verdict." *Mateo*, 2 N.Y.3d at 408; *citing, Schad*, 501 U.S. at 632; *quoting, McKoy v. North Carolina*, 494 U.S. 433, 449 (1990)(Blackmun, J., concurring).

It is important to emphasize that *Schad* is a plurality decision. The language that the Court of Appeals identified as the holding of *Schad* results from the opinion of four Justices. Justice Scalia's concurrence (on a subject unrelated to unanimity) forms the actual rule in *Schad*. *See, Schad*, 501 US at 652 (Scalia, J., concurring). Justice Scalia explicitly said he did not agree with the plurality on the unanimity/due process issue and that he, "might well be with the dissenters in this case". *Schad*, 501 US at 651(Scalia, J., concurring). Justice Scalia expressed concern that, "the plurality provides no satisfactory explanation of why... it is permissible to combine in one count killing in the course of robbery and killing by premeditation", two very different types of wrongful acts. *Schad*, 501 US at 651(Scalia, J., concurring).

Four Justices in *Schad* would have held that the conviction was unconstitutional because it was obtained, "...without knowing that even a single element of either of the ways for proving first-degree murder, except the fact of a killing, has been found by a majority of the jury, let along found *unanimously by the jury...*" *Schad*, 501 US at 655 (White, J., dissenting)(emphasis added). The dissenting

Justices would have held that the verdict was unconstitutional because it allowed a verdict, "without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt." *Schad*, 501 U.S. at 656 (White, J., dissenting). This, of course, is the same problem present in *Brewer*. The trial court did not require the jurors to decide what wrongful deed formed the basis for criminal liability and, as a result, there is no guarantee that the jurors decided anything other than the fact that there was a killing.

The opinion of the four dissenting Justices in *Schad* has now been at least partially vindicated by *Ramos*. This Court should grant certiorari to define and clarify *Schad*.

C. Addressing the Continued Validity of *Schad* Will Allow This Court to Quell a Longstanding Debate and Conflict About Juror Unanimity

When this Court decided *Ramos*, it revived a question of law that had seemingly been put to rest in *Schad v Arizona*, 501 U.S. 624 (1991), regarding whether jurors must agree on the *actus reus* for a crime in certain circumstances. This Court resolved the constitutional question in *Schad* by saying that the Due Process Clause did not require unanimity, and by further holding that, under *Apodaca*, the 6th

Amendment did not compel a different result. Now that it is clear that the 6th Amendment applies to the states, the 6th Amendment question in *Schad* has been revived and should be clarified.

Prior to *Schad,* it was not uncommon to see state and federal courts cite to *United States v. Gipson,* 553 F.2d 453, 454 (5th Cir. 1977), on the subject of juror unanimity. In *Gipson,* the trial court charged the jury that they could deliver a unanimous verdict, "even though there may have been disagreement within the jury" regarding the precise act the defendant took to commit the crime. *Gipson,* 553 F.2d at 453. *Gipson* ruled that the jury charge violated the 6th Amendment and said, "the jury was permitted to convict Gipson even though there may have been significant disagreement among the jurors as to what he did. The instruction was therefore violative of Gipson's right to a unanimous jury verdict." *Gipson,* 553 F2d at 458-459.

The *Gipson* court believed that *In re Winship,* 397 U.S. 358 (1970), implied that result. Nonetheless, *Gipson* also said that, "[a]lthough a federal defendant's right to a unanimous jury verdict is clear, the scope of that right, unfortunately, is not." *Gipson,* 553 F.2d 453 at 456. The *Gipson* court wondered whether the jury was truly unanimous, for example, "if a guilty verdict is returned when all members of the jury

agree that the defendant performed one of the prohibited acts, but disagree as to which of the acts he performed?" *Gipson*, 553 F.2d at 457. That question was unanswered at the time, and *Gipson* noted that the recent decision in *Apodaca* had potentially made the answer to that question less obvious. *Gipson*, 553 F.2d at 456, n.3.

Between 1977 and 1990 (the year before *Schad* was decided), courts nationwide cited *Gipson* well over 100 times. However, many other courts took a different view. For example, *U.S. v Phillips*, 869 F.2d 1361, 1367 (10th Cir. 1988), the court addressed whether, in a forgery case, the jurors had to unanimously agree on whether the defendant "falsely made" or "forged" a check, two factual conclusions that were supported by different wrongful acts. *Phillips* cited to a case note in the Harvard Law Review (which was quoted in a 7th Circuit case) for the conclusion that, "only common sense and intuition can define the specificity with which the jury must describe the defendant's conduct before it convicts." *Phillips*, 869 F.2d at 1366; *citing* Note, *Right to Jury Unanimity on Material Fact Issues*, 91 Harv. L. Rev. 499, 502 (1977) and *United States v. Williams*, 737 F.2d 594, 613 (th Cir. 1984).

The *Phillips* court also said, "[t]o reverse a conviction based purely upon the abstract possibility of juror disagreement as to certain underlying facts would seem to elevate the unanimity requirement to due process of law — a notion clearly rejected by the Supreme Court." *Phillips*, 869 F.2d at 1368. That conclusion from *Phillips* was a direct quote from another 10th Circuit case known as *United States v. McClure*. 734 F.2d 484, 494 (10th Cir. 1984). When *McClure* made that statement it cited, among other cases, the now-overruled decisions in *Apodaca* and *Johnson v Louisiana*, 406 U.S. 356 (1972), indicating that the former rule in *McClure* is no longer good law or stated differently, that *Gipson* correctly defined the 6th Amendment right. Nonetheless, *Phillips* still described nationwide uncertainty and disagreement regarding the application of the juror unanimity rule. *See United States v. Payseno*, 782 F.2d 832, 834 (9th Cir. 1986) (specific unanimity required); *United States v Beros*, 833 F.2d 455 (3d Cir. 1987) (specific unanimity required); *United States v Remington*, 191 F.2d 246, 250 (2d Cir. 1951) (not reversible error to refuse the specific unanimity charge, but the request (was right and should be given if there is a new trial").

Although *Schad* ultimately overruled *Gipson* and endorsed *Phillips'* view, some state courts continue to rely on *Gipson* for guidance on juror unanimity issues. For

example, in *State v. Macchia*, ___ A.2d ____, No. A-5473-17 (App. Div. Oct. 4, 2021), New Jersey's intermediate appellate court cited to *Gipson* for the proposition that unanimity requires, "jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence". *Macchia*, No. A-5473-17, at *26; *citing, Ramos*, 140 S. Ct. at 1396-1397.

Nonetheless, New Jersey's high court recognizes that, "[a]lthough the need for juror unanimity is obvious, exactly how it plays out in individual cases is more complicated." *State v. Frisby*, 174 N.J. 583, 596 (N.J. 2002); *citing, United States v. Peterson*, 768 F2d 64 (2d Cir. 1985) (unanimity not required regarding principal/accomplice liability distinction).

Even while recognizing the complicated nature of the unanimity question, New Jersey still takes precautions to ensure unanimity in particular situations, including when, "there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice." *Frisby*, 174 N.J. at 597. Notably, New Jersey's approach is the exact opposite of New York's. When New Jersey perceives that there is a unanimity problem, "a general unanimity" charge is

insufficient and more explanation is required. When New York perceives that problem, it tells the jurors that they "need not be unanimous." *See* Appendix C.

When New Jersey discussed the need for an instruction beyond the "general unanimity requirement", it cited to *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983), another pre-*Schad* case in which a federal circuit reversed a conviction because there was a "genuine possibility" that a "conviction may occur as a result of different jurors concluding that the defendant committed different acts".

This dispute will continue among the state and federal courts, and this Court should grant certiorari to further define and clarify the unanimity requirement.

D. This Court Should Clarify Whether the 6th Amendment Ever Permits a Court to Tell a Trial Jury that it "Need Not Be Unanimous" Regarding the Truth of Every Accusation Against a Criminal Defendant

As discussed above, various courts have different ways of conceptualizing and handling questions of juror unanimity. There is a long-standing, good faith debate on the subject. Yet, even among the courts that disagree on the extent to which unanimity is required, it is unusual for a court to allow a charge that explicitly tells the jurors that they "need not be unanimous." *See, for example, State v. James*, 698 P.2d

1161, 1163 (Alaska, 1985) (citing to New York's case of *People v Sullivan,* 173 NY 122 [1903] and referring to *Sullivan* as the "landmark case on jury unanimity").

The rule in *Mateo* is arguably a worse rule than the one overruled in *Ramos.* In *Ramos,* even if the jury delivered a 10-2 verdict, one would still know that a super-majority of the jurors agreed on every element of the crime.

Under *Mateo,* there is no such assurance. It is possible that the jurors in Mr. Brewer's case could split 6-6 on which accusation they believed. We would never know if the jurors actually resolved what criminal act formed the predicate for Mr. Brewer's life sentence. This Court has long disallowed six person verdicts in felony trials, unless the jury was unanimous. *Burch v. Louisiana,* 441 U.S. 130 (1979). *Mateo* and *Schad* allow a version of that improper verdict, and this Court should explain whether *Ramos* permits that outcome.

The difference between accomplice and principal liability in Mr. Brewer's case is not a trivial one. Under one version of events, a teenager stopped himself from committing a terrible crime, only to have another person thrust liability upon him by grabbing the gun and completing the act. In a different version of events, one must accept Burks' empirically impossible scenario to conclude that Brewer is a

cold-hearted killer who shot a man at point-blank range. New York permits a jury to cobble together these two weak theories of liability to portray a verdict that, on its surface, appears to be unanimous, but which does not necessarily reflect the conclusion that the statute has proven "the truth of every accusation" against the defendant.

This Court should decide whether or when it is permissible to instruct a trial jury that it "need not be unanimous" regarding the wrongful act underlying a criminal conviction.

Conclusion

For the foregoing reasons, this Court should grant certiorari to review the decision of the New York State Supreme Court, Appellate Division, Fourth Department.

DATED: February 18, 2022
Rochester, New York

Respectfully submitted,

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No 22 - _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BREWER,

Petitioner,

-vs-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for certiorari contains 4,344 words (as calculated using the word-count feature of counsel's word processing program), excluding the parts that are exempted by Supreme Court Rule 33.1(d). I declare under the penalty of perjury that the foregoing is true and correct.

DATED: February 22, 2022

Respectfully submitted,

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APPENDIX "A"

Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Department

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

590

KA 15-01823

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. BREWER, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 22, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 20 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant's conviction stems from his participation in a murder along with two other codefendants. At trial, a witness testified that defendant pointed a gun at the victim and shot him. In defendant's written statement to the police, he admitted that he agreed to kill the victim for one of the codefendants in exchange for a sum of money, that he retrieved his gun from his house and drove from Elmira to Rochester with the codefendants to execute the plan, that he waited with the codefendants for the victim to arrive at a house, and that when the victim arrived, he pointed the gun at him and threatened to "shoot him in the brain." Defendant further stated, however, that he "couldn't pull the trigger" even though a codefendant was telling him to "shoot him, shoot him." That codefendant then "snatched" the gun out of defendant's hand, said "F^{xxx} it I'll do it," and shot the victim multiple times. Defendant was previously convicted of criminal possession of a weapon in the second degree stemming from this incident, which conviction we affirmed (*People v Brewer*, 118 AD3d 1407 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). He was also convicted, after a separate trial, of murder in the second degree stemming from this incident, but we reversed that conviction and

remitted for a new trial on that count of the indictment based on our determination that Supreme Court (Egan, J.) erred in charging the jury with the affirmative defense of renunciation over the objection of defense counsel (*People v Brewer*, 118 AD3d 1409 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

In this appeal, we reject defendant's contention that the People were judicially estopped from proceeding on a theory of accomplice liability inasmuch as "the People neither argued for nor prevailed upon a contrary position in a prior proceeding" (*People v Adam*, 126 AD3d 1169, 1170 [3d Dept 2015], *lv denied* 25 NY3d 911 [2015]). Defendant relies upon statements made by the prosecutor when opposing defendant's request to dismiss the count of intentional murder in the indictment based upon an executed cooperation agreement, the court's denial of which we upheld on the prior appeal from the murder conviction (*Brewer*, 118 AD3d at 1409-1411). Specifically, the prosecutor had indicated that defendant's statement to the police, on its own, would not give the prosecutor a legal basis to charge him with intentional murder under any theory of liability, but that, after obtaining a statement from a witness who said that defendant shot the victim, the prosecutor voided the cooperation agreement on the ground that defendant had provided false information. Thus, the People did not argue or prevail upon a contrary position in the earlier proceeding because the issue whether defendant's statement, if accepted as true, would support a charge of murder on a theory of accomplice liability was irrelevant to the issue before the court and this Court, which was whether the prosecutor had a good faith belief that defendant failed to provide truthful information (*id.* at 1411).

We reject defendant's contention that the court (Affronti, J.) erred in instructing the jury on both principal and accomplice liability. It is well settled that "there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]; *see People v Mateo*, 2 NY3d 383, 406 [2004], *cert denied* 542 US 946 [2004]; *People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]). Thus, the court properly instructed the jurors that, while their verdict needed to be unanimous, they did not need to be unanimous on whether defendant committed the crime personally or by acting in concert with another or others (*see Mateo*, 2 NY3d at 406; CJI2d[NY] Accessorial Liability n 7). Contrary to defendant's contention, the court's instruction was not contrary to *Ramos v Louisiana* (— US —, —, 140 S Ct 1390, 1395-1397 [2020]) inasmuch as, unlike *Ramos*, defendant here was convicted upon a unanimous verdict.

We reject defendant's contention that the evidence is legally insufficient to establish his liability as an accessory. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Pizarro*, 151 AD3d 1678, 1681 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017] [internal quotation marks omitted]; *see* Penal Law § 20.00). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the factfinder could have

reasonably concluded that defendant and the codefendants "jointly planned, prepared for and committed the murder of the victim" (*People v Glanda*, 5 AD3d 945, 949 [3d Dept 2004], *lv denied* 3 NY3d 640 [2004], *reconsideration denied* 3 NY3d 674 [2004], *cert denied* 543 US 1093 [2005]; *see People v Williams*, 179 AD3d 1502, 1502-1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *People v Morris*, 229 AD2d 451, 451 [2d Dept 1996], *lv denied* 88 NY2d 990 [1996]; *see generally People v Cabey*, 85 NY2d 417, 421-422 [1995]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that the court erred in denying his request to admit in evidence the results of his polygraph examination (*see People v Shedrick*, 66 NY2d 1015, 1018 [1985], *rearg denied* 67 NY2d 758 [1986]; *People v Weber*, 40 AD3d 1267, 1267 [3d Dept 2007], *lv denied* 9 NY3d 927 [2007]; *see also People v DeLorenzo*, 45 AD3d 1402, 1402-1403 [4th Dept 2007], *lv denied* 10 NY3d 763 [2008]). We also reject defendant's further contention that his absence from a pretrial appearance denied him his right to be present at a material stage of the criminal proceeding. At the proceeding, the court, the prosecutor, and defense counsel discussed only questions of law regarding the admissibility of defendant's polygraph examination results and the judicial estoppel issue, and thus defendant's presence was not required (*see People v Velasco*, 77 NY2d 469, 472 [1991]; *People v Butler*, 96 AD3d 1367, 1368 [4th Dept 2012], *lv denied* 20 NY3d 931 [2012]; *see generally People v Chisolm*, 85 NY2d 945, 947 [1995]). The facts regarding those issues were uncontested and, contrary to defendant's contention, did not implicate his "peculiar factual knowledge" (*People v Fabricio*, 3 NY3d 402, 406 [2004]).

We agree with defendant, however, that the sentence imposed, an indeterminate term of incarceration of 25 years to life, is unduly harsh and severe. Under the circumstances of this case, including that defendant was 18 years old at the time of the incident, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 20 years to life (*see generally* CPL 470.15 [6] [b]), with the sentence remaining concurrent to the sentence previously imposed on the count of criminal possession of a weapon in the second degree.

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

APPENDIX "B"

Decision of the New York State Court of Appeals

State of New York
Court of Appeals

BEFORE; HON. ROWAN D. WILSON, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

ROBERT D. BREWER,

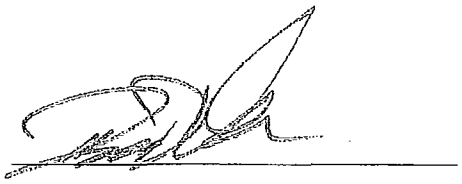
Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: NOV 30 2021



Associate Judge

*Description of Order: Order of the Supreme Court, Appellate Division, Fourth Department, entered July 16, 2021, modifying a judgment of the Supreme Court, Monroe County, rendered September 22, 2015, and as modified, affirming the judgment.

APPENDIX "C"

New York Criminal Jury Instructions: Accessorial Liability and *People v Brewer* Accessorial Liability Charge

Accessorial Liability[1]

Our law recognizes that two or more individuals can act jointly to commit a crime, and that in certain circumstances, each can be held criminally liable for the acts of the other(s). In that situation, those persons can be said to be "acting in concert" with each other.[2]

Our law defines the circumstances under which one person may be criminally liable for the conduct of another. That definition is as follows:

> When one person engages in conduct which constitutes an offense, another is criminally liable for such conduct when, acting with the state of mind required for the commission of that offense, he or she solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.[3]

[NOTE: Add as appropriate [4]*:*

Under that definition, mere presence at the scene of a crime, even with knowledge that the crime is taking place, (or mere association with a perpetrator of a crime,) does not by itself make a defendant criminally liable for that crime.]

In order for the defendant to be held criminally liable for the conduct of another/others which constitutes an offense, you must find beyond a reasonable doubt:

(1) That he/she solicited, requested, commanded, importuned, or intentionally aided that person [or persons] to engage in that conduct, and

(2) That he/she did so with the state of mind required for the commission of the offense.

If it is proven beyond a reasonable doubt that the defendant is criminally liable for the conduct of another, the extent or degree

of the defendant's participation in the crime does not matter. A defendant proven beyond a reasonable doubt to be criminally liable for the conduct of another in the commission of a crime is as guilty of the crime as if the defendant, personally, had committed every act constituting the crime.[5]

The People have the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or by acting in concert with another person, committed each of the remaining elements of the crime.[6]

[Note: Add here and/or where the court instructs the jury on the need for a unanimous verdict:

Your verdict (on each count you consider), whether guilty or not guilty, must be unanimous. In order to find the defendant guilty, however, you need not be unanimous on whether the defendant committed the crime personally, or by acting in concert with another, or both.[7]]

[Note: Add if appropriate:

As you know, the People contend that the defendant acted in concert with a person who is not here on trial.[8] You must not speculate on the present status of that person. You must not draw any inference from his/her absence. And, you must not allow his/her absence to influence your verdict. You are here to determine whether the People have proven beyond a reasonable doubt that the defendant on trial is guilty of a charged crime.

***

NOTE: When this charge is given, it is also necessary to modify the elements of the charged crime(s) to reflect the theory of accessorial liability. The element(s) specifying the prohibited act(s), i.e. the actus reus of the crime, must include language to indicate that the defendant is liable if the prohibited act(s) was performed by the defendant personally or by another person(s) with whom the defendant was acting in concert. The element(s) specifying the culpable mental state requires no modification.

An example of an appropriate modification of a charge for murder in the second degree is as follows:

1. That on or about *(date)*, in the county of *(county)*, the defendant, *(defendant's name)*, personally,[9] or by acting in concert with another person, caused the death of *(specify)*; [10] and

2. That the defendant did so with the intent to cause the death of *(specify)*.

1. This charge has been revised twice. On August 3, 2004, this charge was revised by adding the paragraph to which endnote number 7 applies. On July 29, 2002, the charge was revised to reverse the sequence of the two elements listed in the paragraph beginning, "In order for the defendant to be held criminally liable ...."

2. The term "acting in concert" is included in this charge in order to create a term that can easily be used in the appropriate element of a charged crime to incorporate by reference the definition of accessorial liability. It is the term used in some counties to charge accessorial liability and its use has been accepted by the courts. *E.g., People v. Rivera*, 84 N.Y.2d 766 (1995).

For those who prefer an alternative term that can serve the same objective, we suggest, "accessory," and recommend substituting the following sentence: "In that situation, each person can be said to be an accessory in the commission of the crime."

3. Penal Law § 20.00. The charge substitutes the term "state of mind" for the statutory term: "mental culpability." The former term is a traditional usage and should be more easily understood. If applicable, the jury should, at this point, also be charged on the provision of Penal Law § 20.15. *See People v. Castro*, 55 N.Y.2d 972 (1982).

4. *See, People v. Slacks*, 90 N.Y.2d 850, 851 (1997) (There was no error in the trial court's refusal "to instruct the jury that mere presence at the scene of the crime or association with the perpetrators is insufficient to establish criminal liability, since no reasonable view of the evidence supported such a charge.").

5. If applicable, the jury should, at this point, be charged on the "no defense" provision(s) of Penal Law § 20.05 and/or the "exemption" provision of Penal Law § 20.10.

6. If the term, "accessory," has been used in lieu of "acting in concert," then, the last paragraph of this charge should read:

"The People have the burden of proving beyond a reasonable doubt that the defendant acted with the state of mind required for the commission of the crime, and either personally, or as an accessory of another, committed each of the remaining elements of the crime."

7. The Court of Appeals has held that the jury need not be unanimous on whether the defendant's criminal liability rest upon personal action or accessorial conduct, and the jury can be so instructed where appropriate. *See People v. Mateo*, 2 N.Y.3d 383 (2004) (the Court approved the following instruction: "Your verdict, as I have mentioned before on each of these charges, has to be unanimous. That means that all twelve have to agree upon a verdict. All twelve of you deliberating on a case do not have to agree that the Defendant was the shooter nor do all twelve deliberating on the case have to find that the Defendant was the commander. It is sufficient that all twelve find the Defendant was either the shooter or the commander under Murder in the First Degree.")

8. If you have used the term "accessory," then the first sentence should read:

"As you know, the People contend that the defendant acted as an accessory of a person who is not here on trial."

9. The term, "personally," used in the example is unnecessary if liability is predicated solely on accessorial liability.

10. If the term "accessory" is used in lieu of "acting in concert," then element one would read:

1. That on or about *(date)*, in the county of *(county)*, the defendant, *(defendant's name)*, personally or as an accessory of another caused the death of *(specify)*; and

the crime, does not by itself make a defendant criminally liable for that crime. For the Defendant to be held criminally liable for the conduct of another or others which constitutes an offense or crime, you must find beyond a reasonable doubt that he solicited, requested, importuned or intentionally aided those persons to engage in that conduct, and that he did so with the state of mind required for the commission of the crime. If it is proven beyond a reasonable doubt that the Defendant is criminally liable for the conduct of another or others, the extent or the degree of the Defendant's participation in the crime does not matter. A defendant proven beyond a reasonable doubt to be criminally liable for the conduct of another or others in the commission of the crime is as guilty of the crime as if the Defendant personally had committed every act constituting the crime. The People have the burden of proving beyond a reasonable doubt that the Defendant acted with the state of mind required for the commission of the crime, and either personally or by acting in concert with another or others, committed each of the remaining elements of the crime. And, again, those elements will be submitted momentarily.

Remaining with accessorial liability or accomplice liability, and as you know, as regards your

verdict which must be unanimous -- to find the Defendant guilty regarding accessorial liability, you need not be unanimous on whether he committed the crime personally or by acting in concert with another or others. As you know, ladies and gentlemen, the People contend that the Defendant acted in concert with individuals not here on trial. You must not speculate on the present status of those individuals. You must not draw any inference from their absence, and you must not allow their absence to influence your final verdict. You're here to determine whether the People have proven beyond a reasonable doubt that the Defendant was guilty of the charged crime.

Now, as regards that charged crime, ladies and gentlemen, and your verdict pertaining to it, I will inform you that the allegation that has been lodged against the Defendant charges him with murder in the second degree, in violation of the New York State Penal Law. I now address the definition of that crime and the elements that I just alluded to a moment ago. This crime is known as intentional murder.

Under our law, a person is guilty of murder in the second degree when, with intent to cause the death of another person, he causes the death of such person.

APPENDIX "D"

Excerpt of Jury Trial
(pages 637-640)

And, again, without preempting the attorneys -- and they will have a comment, if necessary -- there was also a request by Mr. Easton as regards the accomplice or accessorial liability instruction under Section 20 of the Penal Law. That the Court will merely be omitting the one word that Mr. Easton asked to be excluded within the definition, and that is the word "commands." I will not instruct the jury, based upon a reasonable view of the evidence, that there was any evidence to support the Court's reference to "commands" within the definition of Section 20. Otherwise, the instruction will remain intact, as required by the Criminal Jury Instructions.

Before hearing any comment, if necessary, from Mr. Easton, I would ask Mr. Bezer if you have any additional requests or exceptions.

MR. BEZER: I do not, Your Honor.

THE COURT: Very well.

Mr. Easton, anything at all in light of my recent ruling?

MR. EASTON: Just very briefly, Your Honor. We did have a charging conference.

THE COURT: Yes.

MR. EASTON: One, for the record, we do object to accessorial liability at all on the basis

that I made the TOD motion.

THE COURT: Very well.

MR. EASTON: We believe the statement doesn't provide it.

THE COURT: I will be instructing the jury, as I have stated, as to accessorial liability.

Next comment?

MR. EASTON: Second is, that particular charge has a paragraph about the mere presence at the scene. We are specifically requesting that paragraph be charged.

THE COURT: That is granted. As I indicated, essentially, word for word will be the instruction, with that one minor word being deleted.

MR. EASTON: Third, there is -- the People have made a request that the portion of the CJI, the accessorial liability referred to colloquy as the Mateo section, that the jurors don't have to be unanimous to principle or accomplice. We would object to that charge being given in the context of this particular case, given the duplicity of the evidence. And if they are at a dispute there, that that indicates a reasonable doubt and we object to that portion of the charge.

THE COURT: I will deny that request and it

will include, namely, the Court's instructions reference to the paragraph that you just indicated, as required, in my opinion, under the accessorial liability section or law.

Anything else?

MR. EASTON: And other than that, I just want the record to be clear, from my evidence end I did not request the full voluntariness instruction given the fact that it wasn't really raised in my cross, and I want the record to be clear on that.

THE COURT: It is clear and I will not be making any reference to that law or reference to voluntariness of the alleged statement or confession by your client. It will not be included.

I believe I have also provided the verdict sheet which, obviously, is very clear to the attorneys. Have I not done that?

MR. BEZER: I have received a copy, Your Honor.

MR. EASTON: I have received a copy, Your Honor, and I have no objection to it.

THE COURT: Thank you. It will just include the one count only, and I will discuss that, with my instructions.

All right. I will have the deputies, if you

would, please, just advise the jury that we will be about ten minutes, approaching the next portion of the trial, and we will back shortly. The Court's in recess.

(There was a recess in the proceeding.)

THE COURT: Regarding the Court's instructions to the jury, are there any additional requests or exceptions by Mr. Bezer?

MR. BEZER: No, Your Honor.

THE COURT: Mr. Easton?

MR. EASTON: No, Your Honor.

THE COURT: Thank you very much.

(Trial Jurors and Alternate Jurors present.)

THE COURT: All right, ladies and gentlemen. As you know, The People of the State of New York have now completed its evidence in this case. I will now inquire of Mr. Easton whether he intends to offer any other evidence, aside from the witness that he called on Friday, on behalf of the Defendant.

MR. EASTON: Your Honor, other than the witness we already called, we rest.

THE COURT: Very well. The Defendant rests, ladies and gentlemen. That means that now, and I will inquire just generally -- any rebuttal to that one witness on behalf of the Defendant?