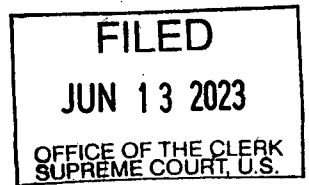


No. 22 - 7905



IN THE
SUPREME COURT OF THE UNITED STATES

Tikisha Upshaw — PETITIONER
(Your Name)

vs.

The People of the State of CA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Court of Appeal, State of CA First Appellate District 5
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tikisha Upshaw
(Your Name)

Post Office Box 1508
(Address)

Chowchilla, CA 93610
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Can a trial court allow unsupported opinion testimony from a police officer, who does not hold a computer science/engineering degree, about novel cell phone location technology that is not established as reliable, as expert witness testimony thus violating Ms. Upshaw's right to due process and a fair trial? Is there a different standard of proof and technical reliability for a criminal trial than for a warrant application? Is a trial court's factual finding that new technology was "used conservatively" relevant to the fact that the level for certainty acceptable for a warrant or to truncate possibilities for an area search is not adequate to conclude that the same person possessed both phones in a relatively large area, therefore outside the scope of inspector Hawke's expertise? Do these errors violate Ms. Upshaw's fifth and fourteenth amendments?

Is a trial court required to give an accomplice instruction to the jury about letters written by a former co-defendant and mailed from the jail to another person with no expectation of privacy? Is there a higher standard of "against interest" for someone on trial for first degree murder than for someone facing a lesser homicide charge, because denying a special circumstance, denying premeditation, or otherwise professing mitigation or justification in order to get the lesser homicide charge may itself be in the declarant's interests, or even the objective? Does admitting this writing under a hearsay exception violate defendant's right to cross-examine the declarant?

Can two accomplices corroborate each other in their testimony against a third defendant? Is more corroboration required for the two accomplice witness statements?

Is a jury required to agree on the grounds for a murder for financial gain special circumstances? Do they have to come to an unanimous verdict about how a defendant intended to profit? Should the trial court make them aware of that obligation with a special instruction on unanimity?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the State Supreme court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was March 15, 2023
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The errors violated Ms. Upshaw's fifth and fourteenth amendment rights to due process and a fair trial.

The errors violated Ms. Upshaw's sixth amendment right to confrontation and her fifth and fourteenth amendment rights to due process and a fair trial.

- Estate of Barabin v. Asten Johnson, Inc. 9th Cir. (2014)
740 F. 3d 457
- Frye v. United States (D.C. Cir. 1923)
293 F. 1013
- Gentry v. Roe (9th Cir. 2003)
320 F. 3d 891
- U.S. v. Evans (N.D. Ill. 2012)
892 F. Supp. 2d 949, 952
- U.S. v. Preston (9th Cir. 2017)
873 F. 3d 829
- U.S. v. Valencia-Lopez (9th Cir. 2020)
971 F. 3d 891
- Chambers v. Mississippi (1973)
410 U.S. 284
- Chapman v. California (1967)
386 U.S. 18
- Crawford v. Washington (2004)
541 U.S. 36
- Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993)
509 U.S. 579
- Gardner v. Florida (1977)
430 U.S. 349

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (CONT. PG 2)

- Hicks v. Oklahoma (1980)
447 U.S. 343
- McCormick v. U.S. (1991)
500 U.S. 257
- Melendez-Diaz v. Massachusetts (2009)
557 U.S. 228
- Ramos v. Louisiana (2020)
590 U.S. —, 140 S. Ct. 1390
- White v. Illinois (1992)
502 U.S. 346
- Williams v. Illinois (2012)
567 U.S. 50
- Williamson v. U.S. (1994)
512 U.S. 594

The trial court abdicated its gatekeeping function under Sargon.

STATEMENT OF THE CASE

On October 18, 2017 the Alameda County District Attorney's Office filed information charging Johnny Wright, Chariott Burks, Wessley Brown, and Tikisha Upshaw with first degree murder (§187, Subd. (a)) of Adam Katami on July 13, 2016 (5CT 1455, 1457-1458). The information further alleged that Mr. Wright and Ms. Upshaw had committed the murder for financial gain (§192.2, Subd. (a)(1)). (5CT 1455, 1457-1458). The information also alleged that on December 22, 2016 Ms. Upshaw had manufactured cannabis extract (Health & Safety Code, §11379.6, Subd. (a)), possessed cannabis for sale (Health & Safety Code, §11359, Subd. (b)), and cultivated cannabis (Health & Safety Code, §11358, subd. (c)). (5CT 1463-1464)

Prior to trial Burks agreed to testify against Wright and Upshaw and to admit to being an accessory after the fact (§32) in return for the dismissal of the remaining charges. (4RT 474-475; 8CT 2311). Brown subsequently admitted being a felon in possession of a firearm and the prosecution dismissed the remaining charges against him. (8CT 2311)

A jury was sworn on December 3, 2019 and on December 5, 2019 the trial court granted Wright's motion to sever his trial from Ms. Upshaw's. She admitted that she had cultivated cannabis and had possessed it for sale (Health & Safety Code, §11358, Subd. (c), 11359, subd. (b)) in return for the dismissal of the manufacturing of cannabis extract charge (Health & Safety Code, §11379.6, Subd. (a)). (9CT 2374-2376, 2378 & 2380).

STATEMENT OF THE CASE

On December 19, 2019 the jury found Ms. Upshaw guilty of first degree murder for financial gain (§187, subd. (a), 192.2, Subd. (a)(1)). (9 RT 2403, 2463-9464.) On June 5, 2020 Ms. Upshaw filed a motion for new trial and on August 20, 2020 the court denied the motion and imposed a sentence of life without the possibility of parole. (9 RT 2527-2569, 2606.)

Ms. Upshaw filed a timely notice of appeal on August 24, 2020. (10CT 2678.) On appeal, appellant raised the same arguments raised herein. On December 22, 2023 the Court of Appeal filed an unpublished opinion, affirming the judgement and finding any errors to be harmless. (See Appendix A.)

Ms. Upshaw filed a timely petition for review in the CA Supreme Court. On March 15, 2023 the court denied the petition without prejudice pending the outcome of People v. Kopp on the issue of fines and denied the petition in all other respects. Ms. Upshaw now petitions this court to certify the case to their dockets.

REASONS FOR GRANTING THE PETITION

This court should grant review to uphold a standard of evidentiary reliability for new technology and establish a test to determine who can justifiably be called an expert versus a user. The trial court admitted location software NELOS. Unlike conventional Cell Site Location Information (CSLI), which can only provide a general area of a cell phone's location based upon its cell tower connections, NELOS provides an estimate longitude and latitude of the phone itself. It generates this data multiple times per hour, even when the phone is not being used, and provides varying degrees of estimate precision, the most precise being likely within 25 meters.

The trial court held a hearing under *People v. Kelly* found that the prosecutor should have called an expert from AT&T to testify to its methodology instead of a law enforcement officer who had only testified about it once before and who a limited understanding of its methodology. NELOS is controversial in criminal matters even according to the trial court, as it is not fully vetted and it absolutely requires a degree of speculation about the significance of the data that is outside the scope of what the Constitution allows in a criminal proceeding. This data and the prosecution team's interpretation of the results relied on one witness allowed to testify as an expert, Oakland Police Inspector Hawke. Hawke has not received a degree in engineering or computer science, has not attended any specialized training sessions at AT&T, and has not received any specialized training in the armed forces that would confer equivalent experience. His familiarity with NELOS is through the OPD, as an investigative tool and to obtain probable cause for warrant applications.

The trial court allowed the NELOS data because Hawke had general experience in mapping Cell Site Location Information (CSLI) and had corroborated some of the NELOS data in this case with other evidence. The trial court conferred the status of an expert witness on Inspector

REASONS FOR GRANTING THE PETITION:

Hawke in violation of the Daubert standard and made a factual finding that NELOS was used "conservatively". (See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579). Because technology, including predictive location services and A.I. guided decision making tools evolves so rapidly, this court interest in, if not an obligation to, regulate who can be credibly called an expert, decide the extent to which someone's familiarity with a different application that has a different technical foundation that is meant to accomplish a related but not identical goal can qualify them as an expert in emerging technology, and to limit the use of predictions or computer generated estimates as affirmative testimony.

It is axiomatic that the standard of proof for a conviction, "beyond a reasonable doubt," is to a virtual moral certainty and much higher than that required for a warrant, "probable cause," itself much more so than the accuracy required to use NELOS as an investigative tool, eliminating search areas by location, time, or other known incompatibility. The standard of reliability to truncate a possibility and exclude a suspect, area, or group is less onerous than the standard to conclusively say that someone was the individual in question or did a thing. Moreover, the data can only support a person's conclusion, which is entirely speculative, cannot be cross examined, and can be used in a chicken-and-egg argument by anyone.

The trial court erred in concluding that NELOS was admissible under Kelly. There was no evidence that it was generally accepted in any scientific field as a reliable method of locating individual cell phones. It has not been mentioned in any reported California decisions, has not been found to be admissible under *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 (*Frye*) or (*Daubert*) in any reported decision from another jurisdiction, and has not been scientifically studied or tested by third parties. Moreover, the law enforcement expert that prosecutor elected to rely upon the Kelly hearing Inspector Hawks, was plainly unqualified to testify to NELOS' general acceptance, as he lacked any formal scientific training and did not understand how NELOS worked (2RT 113-116, 148, 154, 171-172). (*People v. Leahy* (1994) 8 Cal. 4th 587, 608-609; *People v. Brown* (1985) 40 Cal. 3d 512, 533.)

Reasons For Granting The Petition

Relatedly, the court abdicated its gatekeeping function under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal. 4th 747 (*Sargon*) by permitting the prosecutor's expert to rely upon NELOS when he did not understand its methodology and by permitting him to testify, over objection, that the same person had possessed Tikiisha Upshaw's phone and the GoPhone that communicated with Johnny Wright's phone. This testimony was inadmissible under *Sargon* because it went well beyond what the underlying evidence supported. (See *People v. Azcona* (2020) 58 Cal. App. 5th 504, 513 [trial court abused its discretion in admitting testimony that the matching marks from two spent casings demonstrated that they had been fired from the same gun]; *U.S. v. Evans* (N.D. Ill. 2012) 892 F. Supp. 2d 947, 955-956 [expert's estimation of phone location based upon antenna range and overlap was inadmissible because it rested upon calculations and factors that the expert failed to explain]; *U.S. v. Valencia-Lopez* (9th Cir. 2020) 971 F.3d 891, 900 ["It is one thing for a witness... to testify as to the risks to a cartel of using a coerced courier... [b]ut that is a far cry from... essentially testifying that the cartel never does it"].)

The court of appeal concluded appellant failed to demonstrate that these errors violated Ms. Upshaw's federal constitutional rights. (Slip Opn. at p. 9, fn. 9.) The court relied upon the following general principle: "[T]he routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights." (Slip Opn. at p. 9, fn. 9, quoting *People v. Jones* (2013) 57 Cal. 4th 839, 939-940.) The court was mistaken.

The admission of the NELOS evidence and Hawks' testimony that the same person possessed Ms. Upshaw's phone and the GoPhone were not merely routine applications of the evidence code. Instead, these errors violated Ms. Upshaw's Fifth and Fourteenth Amendment rights to due process and a fair trial. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) NELOS provided purportedly precise and highly incriminating evidence by, for example, placing the GoPhone within 25 meters of Ms. Upshaw's house on five separate occasions. But there was no showing that it was scientifically reliable and its proprietary nature, as well as Hawks' lack of scientific experience, precluded cross-examination into how the NELOS hits in this case were even generated. Moreover, there was no reliable evidence to support

REASONS FOR GRANTING THE PETITION

attorney's use of rhetorical device, particularly after he had dedicated so much of his case to it. The court ignored the fact that immediately before making this comment the prosecutor urged the jury to rely upon the NELOS evidence. The jury asked several questions and deliberated approximately 10 hours and 22 minutes over the course of two days. This case was a close one even with the NELOS evidence. The error was not harmless under Watson because there is a distinct possibility of a better outcome. The court of appeals nonetheless should have used the stricter standard of Chapman because it is an issue involving the federal Constitutional rights of the defendant.

The trial admitted the NELOS data, opining in their ruling that the technology was used conservatively and calling it a factual finding. However, conservative usage does nothing to establish general reliability or make the error harmless. Furthermore calling a ruling to admit evidence a factual finding interfered with the state court of appeals willingness to address the issue.

This court should grant review because the shooter's jail letters were hearsay, obviously meant for an audience, and cannot be evaluated by the same standard for a "statement against interests" as an innocent person to overcome the hearsay rule because a lesser homicide charge would be in his interests, comparatively. The trial court violated the defendant's right to confrontation and also failed to give a cautionary instruction about accomplices. A court may see a person's interests differently than they do, but the declarant obviously thought his writings were going to accomplish something for him, especially given that he sent so many, be it mitigation, a lesser sentence or some other objective. The fact that they made Mr. Wright look bad on an objective level is wholly insufficient to overcome the rule against hearsay and the defendant's right to confront witnesses.

The prosecutor verbally moved to admit People's Exhibit 5 - a 36 page exhibit consisting of 11 letters that the shooter Wright had sent to various people while he was in custody in Santa Rita - as declarations against Wright's interest (Evid. Code, § 1230). (5RT 521-531, 10RT 1257-1259; 1CT 219-247.) In these letters, Wright admitted having shot the victim but he provided at least 5 or 6 different accounts of what had occurred. (See People's Exhibit 5 at pp. 2, 6, 13-14, 16-17, 19, 26, 29, 33-35.) Through messages sent through third parties Wright also sought to enlist Burks to support an imperfect self-defense at trial.

Reasons For Granting The Petition

(Id. at pp. 13-14, 35.) Finally, in two letters that he sent to "Cuz" Wright mentioned a female "family member" and a "fly ass chick". (People's Exhibit 5 at pp. 16-17, 29.) The prosecutor asserted both of these women referred to Ms. Upshaw and these letters demonstrated that she had paid Wright to kill Mr. Katami and keep silent about it. (SRT 526, 529-531, 10RT 1258.)

Wright stated in his first letter to "Cuz":

But anyway check this out while I'm out here on a 2 week vacation I run into this fly ass chick right we talk I get the digit we talk after that chick started blowing me up asking me all kinds of personal shit about things she has no reason to know... Next thing I know some nigga call me from chick number I'm like who the fuck are you and why are you calling me?? The nigga started mumbling at a lost for words so I told him latter dude then hung up. Cuz now that pissed me the fuck off, got me feeling disrespected and insulted. I'm like what the Hell!!!.... Cuz I tried my best to calm down fucked around and went for a ride ran across this fool that almost ran me off the road then he started talking shit! Cuz, I snapped! I lost it! Broad daylight in the middle of a 4way stop light filled with traffic. When it was over half a clip was emptied out into the fool face and neck!.... Cuz word need to get to that chick that if I just so happen to need a paid lawyer a donation would be greatly appreciated. Everything is cool for now because I think the public defender lawyer just may work out for me not completely sure just yet. However funds for commissary would help cause the shit they serve here is worse than Memphis county jail damn!

(People's Exhibit 5 at pp. 16-17.)

In his second letter to "Cuz" Wright stated:

I told our family member stop calling me over and over gain but she didn't listen! She even kept calling after I got arrested now they have pulled the phone records of my phone and the victim phone and my lawyer

Reasons For Granting The Petition

has asked me about that number of hers my lawyer has also informed me that the D.A. thinks that someone out here paid me and that's not true. It's just a matter of time they may try to find her so what I'm going to do is tell my lawyer that she a family member that I saw will [sic] I was out there on vacation she told me that this guy was harassing her and then one day he robbed and physically assaulted her and when she told me that I got very upset but she didn't know that I was going to react like I did that all she know! Cuz get on this for me!

(People's Exhibit 5 at pp. 28, 29.)

Acknowledging that it had not read all of Wright's letters, the court nonetheless found them to be nontestimonial declarations against interest and admitted all 11 of them without redaction. (5RT 532; 10RT 1259-1260.) These letters could just as easily be Wright asking his cousin for money, as the motivation and the ensuing incident have nothing to do with the defendant but about his feelings until the second letter until she becomes part of his story. At no point does he say she asked him to do anything or paid him. This witness should have been cross-examined.

Appellant argued on appeal the court abused its discretion in admitting these letters as declarations against interest because most of Wright's statements were not "specifically dis-serving" of his interests and, instead, were either neutral or self-serving attempts to concoct a defense for trial. (See *People v. Leach* (1975) 15 Cal.3d 419, 442-443.) The letters were also completely unreliable and therefore inadmissible under Evidence Code section 1230. (See *People v. Duarte* (2000) 24 Cal.4th 603, 613.) Finally, despite the fact that Wright was clearly an accomplice, the court failed to provide cautionary accomplice instructions as to Wright's letters (CALCRIM No. 335) and failed to modify the single witness instruction (CALCRIM No. 301), as required. (See *People v. Tobias* (2001) 25 Cal.4th 327, 331.)

Sidestepping these issues, the court of appeal concluded that the letters were not hearsay "because they were not admitted for the truth." (Slip Opn. at p. 14) The court was mistaken. The prosecutor conceded that the letters were hearsay but sought to admit them as declarations against interest. The fact that he subsequently argued to the jury that Wright was lying much of the time does not change this.

Reasons For Granting The Petition

Moreover, respondent never asserted that the letters were not hearsay. Instead, respondent conceded that the letters were hearsay but argued that the trial court correctly found them to be declarations against Wright's interest. Because the prosecutor, trial court, and respondent never asserted the letters were not hearsay, it was not for the court of appeal to find the letters to be admissible on this basis for the first time in its opinion. (See *Robey v. Superior Court* (2013) 56 Cal. 4th 1218, 1242; *Neurelis, Inc v. Aquestive Therapeutics, Inc.* (2021) 71 Cal. App. 5th 769, 797 [It is not the role of an appellate court to search the record and make a party's arguments].)

Finally, the court of appeal assumed, without deciding, that the trial court's failure to provide cautionary accomplice instructions as to Wright's letters was harmless. (Slip Opn. at p. 17.) The court made the same assumption with respect to the trial court's failure to instruct the jury that Wright and Burks could not corroborate each other. (Ibid.)

The court of appeal concluded the admission of Wright's letters did not violate Ms. Upshaw's Sixth Amendment right to confrontation because they were not admitted for their truth. (Slip Opn. at p. 15, citing *People v. Thomas* (2012) 53 Cal. 4th 771, 863 ["the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted'"].) As explained above, the letters had been admitted as hearsay so this exception plainly does not apply.

Moreover, Wright's letters were his attempt to concoct an imperfect self-defense or heat of passion defense in preparation for trial and they documented the story that he wanted both Burks and his lawyer to present at his trial. His letters therefore had the "primary purpose of establishing past facts at a future trial." (See *People v. Sanchez* (2016) 63 Cal. 4th 665, 696; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 321 [testimonial statements are "calculated for use essentially in the court"].) Moreover, while Wright did not sign his letters under penalty of perjury, he sent them through the jail mail system where any reasonable person charged with first degree murder would understand that they would be read and preserved for future use at trial. Indeed, his constant "dissembling" demonstrates an awareness of this. The circumstances of the letters creation were therefore sufficiently formal for them to be testimonial. (See *Williams v. Illinois* (2012) 567 U.S. 50, 111, conc. opn. of Thomas, J.)

Finally, even if Wright's letters were not testimonial, their admission, and the trial

Reasons For Granting The Petition

court's failure to provide cautionary accomplice instructions as to them and to instruct the jury that Burks and Wright could not corroborate each other, violated Ms. Upshaw's Fifth and Fourteenth Amendment rights to due process and a fair trial. (See Perry, *supra*, 565 U.S. at pp. 240-241; White, *supra*, 502 U.S. at pp. 363-364.) This is because Wright's letters were very unreliable and the failure to provide cautionary accomplice instructions gave the jury the false impression that the letters could prove any fact without corroboration and that they did not need to be viewed with caution.

The court of appeal found any error in the admission of Wright's letters or the failure to deliver cautionary accomplice instructions as to them to be harmless. (Slip Opn. 16-18.) To the contrary, "[t]his is not a case in which the evidence of guilt was uncontested or overwhelming." (Lacefield, 157 Cal. App. 4th at p. 261.) Instead, it was an entirely circumstantial case and the juror questions and length of deliberations demonstrate its closeness. (See Gay, *supra*, 42 Cal. 4th at p. 1226; Fabert, *supra*, 127 Cal. App. 3d at p. 610.) Regardless of what evidentiary purpose those letters were intended to serve, the error was not harmless because Wright, who took a plea bargain, was known to be the shooter and at the very least, a cautionary instruction is necessary to advise the jury that Wright and Burks cannot corroborate each other. The prosecutor had several conflicting alternate theories, mostly involving very interpretive readings of circumstance and verbiage (that he may or may not have believed the source of), and a cross-examination of the source likely would have persuaded at least one if not all jurors to acquit.

The Sixth Amendment right to a jury trial—as incorporated against the States by the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. (*Ramos v. Louisiana* (2020) 590 U.S. ___, 140 S. Ct. 1390, 1397.) When the evidence establishes several acts that could each constitute a charged offense, the state must either elect which act it is relying upon or the court must instruct the jury that it must unanimously agree on the same act. (*People v. Napols* (2002) 104 Cal. App. 4th 108, 114.)

The prosecutor presented two distinct factual theories to support the murder for financial gain special circumstance: 1) that the murder was committed to benefit Ms.

Reasons For Granting The Petition

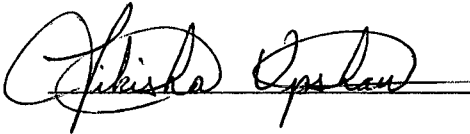
Upshaw; and 2) that Ms. Upshaw paid Mr. Wright to commit the murder. At the prosecutor's request, the court modified CALCRIM No. 720 to describe these two separate theories.

The court of appeal tacitly conceded that the theories were different, but, citing a state case, determined that because Ms. Upshaw's defense to both was the same, that no additional instruction was necessary. The prosecutor explicated to the jury that they could find special circumstances based on either, the court modified the standard instruction to accomodate, and the result is that a jury could find the defendant guilty of the special circumstance without being individually convinced of the group's decision. A special circumstance requires just as much certainty as the underlying crime for a conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 9, 2023