NO. 77444-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FROST,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ King Co prosecutor Andrea Vitalich containing a copy of the document to which this declaration is attached.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name — Done in Seattle, WA — Date 11-13-06

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A. ISSUES DISCUSSED IN SUPPLEMENTAL BRIEF

1. Whether the trial court's restriction on defense counsel's closing argument deprived petitioner of his constitutional right to counsel?

2. Whether the error is structural requiring reversal regardless of prejudice?

3. Whether petitioner was nonetheless prejudiced by the court's restriction?

B. SUPPLEMENTAL STATEMENT OF FACTS

Petitioner Joshua Frost, together with co-defendants Alexander Shelton and Matthew Williams, was charged with a series of crimes occurring in April 2003. Shelton and Williams pled to three of the charged crimes before trial and received sentences of 20 and 25 years, respectively. Brief of Appellant (BOA), at 6 n.3-4. Frost, who went to trial, was ultimately convicted of six counts of robbery, one count of burglary, two counts of assault, and one count of attempted robbery as well as numerous accompanying firearm enhancements for his alleged participation. CP 236-46. He received a sentence of over 50 years. CP 236-46.

The state's theory of the case was that Frost directly participated in counts 1 and 2 and was an accomplice as the get-away driver in all other counts. 9RP 119-121; 14RP 151. The defense theory of the case was

twofold: whatever Frost's involvement, it did not rise to the level of an accomplice; and regardless, he was forced to act under duress. 13RP 52; 14RP 127-28.

While discussing the jury instructions in Frost's case, the court opined, based on this Court's opinion in State v. Riker,[1] that the duress defense "requires the defendant to admit the elements of the crime before it can be raised." 14RP 125. In the court's opinion, Frost had admitted complicity to every charge with the exception of the assaults and the defense therefore applied to all charges except those.[2] 14RP 125. Confused by the court's ruling, defense counsel inquired whether the court was requiring him "to explain to the jury that we admit all the elements of the all the offenses charged?" 14RP 125. The court reiterated that defense counsel could not argue duress as to the assault charges:

> No, I am saying to the extent you argue they apply the duress instruction you need to be careful that they not apply it to the assault in the second degree charges. Are you following me as to the assault in the second degree charges? He didn't do it and if he did he was under duress.

RP 126.

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[1] State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994).

[2] The court indicated it would inform the jury that the duress defense did not apply to the assaults. RP 125. The court's instructions to the jury have not been transcribed. RP 147. The instruction itself did not indicate any such restriction. CP 186.

In response, the prosecutor argued that the defense should not be allowed to argue that the state failed to prove accomplice liability and duress at the same time for any of the offenses. 14RP 126. Despite defense counsel's protestations, the court agreed and ruled that if the defense argued the state had not proved accomplice liability, the duress instruction would be removed from the jury's consideration. 14RP 126.

In closing, the prosecutor argued extensively as to why all elements of the offenses were proven beyond a reasonable doubt. 147-160. The prosecutor argued that because Frost "admitted that he knew what was going on," he was an accomplice.

> Well, the defendant has admitted that he knew what was going on. He knew that they were going to these stores, all of them, to commit robbery. He knew they were armed and he knew that was the plan. Keep in mind to be an accomplice doesn't mean that had he not been there it would be impossible to commit the crime. That is not what it means. Just like we talked about in jury selection, if I wipe the sweat off the brow of a friend who is beating someone, he might not need me to do that, he may be doing fine, but if I do it and I know it is helping him, then I am an accomplice.

14RP 152.

The prosecutor argued that even if Frost did not know that the various individuals would be assaulted, Frost was nonetheless an accomplice because he knew about the robberies and ran the risk that something might go wrong.

> Well, the fact is with Mr. Kim you can't sit there and say you are a party to armed robbery, a robbery in which your accomplices are going into a store, carrying firearms, and when something goes wrong and someone ends up being shot, well, I had no idea that was going to happen. That is part of the crime. You don't go into a store with a firearm. That is the risk of bringing a firearm into a store or into anyplace in committing these crimes. He will try and say he didn't know. But he can't. He knew, he knew this was part of it going in.

RP 156.

The second half of the prosecutor's argument addressed the duress defense in general, not as relating to specific crimes. 14RP 160-170. As argued by the prosecutor: "Mr. Frost is guilty of all of these crimes. He was never under duress." 14RP 170.

Hamstrung by the court's ruling, defense counsel began closing argument by admitting Frost's complicity, but arguing that he was an unwilling participant:

> It is possible for an accomplice to be an unwilling accomplice and still be criminally liable. That is possible to do. You don't have to be a willing participant, you can be an unwilling participant. But if you are trapped into it by genuine fear then you are not criminally liable. Now that is the are as to did you are that is the duress. [Sic.] Mr. Frost was trapped into this and it is not pretty but it is a fact.

14RP 171; see also 14 RP 175, 181.

Defense counsel also conceded that it could not carry its burden of proving duress as to the Gapp offenses: "Even though Joshua Frost was,

nevertheless, trapped in the situation, we concede that since he went in the house with the others we are pretty sure you will find him guilty." RP 172.

Defense counsel did argue that Frost had no complicity in the Ronnie's Market or 7/Eleven store assaults. RP 176-77, 189.

Briefly, the evidence presented at trial showed the following.

1. Gapp Incident (Counts 1[3] and 2[4])

Lloyd Gapp and Verna Gapp were accosted at gunpoint by masked men in their home on the evening of April 9, 2003. 9RP 133-34, 137, 144-45. In a subsequent statement to police, Frost stated that Williams told him he needed money and asked whether Frost knew of anyone who kept money in their home. Ex 70, at 4. Knowing that the Gapps kept money in a safe in their home, Frost admitted he showed Williams the location of the Gapps' residence, "and then.....it just happened." Ex 70, at 6. Williams entered first followed by Shelton then Frost. Ex 70, at 11. Williams was the only one who was armed and also the one who kicked Lloyd. Ex 70, at 12, 17. To Frost, the kick "was like a knife in me." Ex 70, at 17.

[3] First degree robbery of Lloyd Gapp while armed with a firearm. CP 1-11.

[4] First degree burglary of Gapp residence. CP 1-11.

Fearful of Williams, who was a gang member, Frost followed Williams' order to put the money in a bag after Williams directed Lloyd at gunpoint to open the safe. Ex 70, at 12, 23. Frost was horrified by Williams' rough treatment of the Gapps. Ex 70, at 16-17.

2. Taco Time Incident (Counts 3[5] and 11[6])

Taco Time employees Joseph Summerson and Andrea Rangel were robbed at gunpoint by two men wearing bandanas on the evening of April 12, 2003. Their descriptions of the suspects were consistent with those of Williams and Shelton. 5RP 91; Ex 62, at 9; see also BOA, at n.22. Frost later admitted to police he was the "getaway driver." Ex 62, at 4.

3. T & A Video Store Incident (Count 12[7])

Clerk Hannah Wiley was robbed at gunpoint by three men wearing bandanas, as she was preparing to close the video store at about midnight on April 18, 2003. 10RP 13. Frost gave a statement to police indicating that Williams, Shelton, and another individual named Jason Defoe went into the store while Frost waited in the car. Ex 72, at 4. Frost admitted

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[5] First degree robbery of Joseph Summersen while armed with a firearm. CP 1-11, 21-27, 39-45.

[6] Attempted first degree robbery of Andrea Rangel while armed with a firearm. CP 21-27, 39-45.

[7] First degree robbery of Hanna Wiley while armed with a firearm. CP 21-27, 39-45.

that he and Defoe cased the store earlier in the evening. Id. Frost stated that his participation was under duress. Williams threatened that if he did not cooperate, he would kill Frost's brother. Ex 72, at 4.

4. 7/Eleven Store Incident (Counts 6,[8] 7,[9] 8,[10] and 9[11])

7/Eleven store owner Neil Nyjar and his employee Satdnam Randhawa were robbed by two armed men in the early morning hours of April 17, 2003. 10RP 41-50. During the robbery, Kurt Sears and his friend, Annette Palu pulled up to get sodas. One of the robbers came out of the store, pointed a gun at Palu, then pointed it at Sears and asked if he wanted "to have a good day or a bad day." 10RP 64. When Palu said, "we are leaving," the man said, "okay, go, get the hell out of here." 10RP 65. Sears calmly drove away. 10RP 65. Although Palu was "[s]cared to death," Sears did not feel threatened. To him, it was clear the men did not intend to physically harm anyone. 10RP 68, 76.

Frost later told police he was forced to pull over and wait while Williams went into the store. Ex 70, at 33. He was parked in an area that

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[8] First degree robbery of Neil Nyjar while armed with a firearm. CP 12-15.

[9] Second degree assault of Kurt Sears while armed with a firearm. CP 21-27, 39-45. Frost was acquitted of this count. CP 210-14.

[10] Second degree assault of Annette Palu while armed with a firearm. CP 21-27, 39-45.

[11] First degree robbery of Satdnam Randhawa while armed with a firearm. CP 21-27, 39-45.

could not be seen from inside the store. 14RP 61. He did not try to "get out of this situation" because he was afraid of Williams. Ex 70, at 47.

5. Ronnie's Market Incident (Counts 4[12] and 10[13])

On April 17, 2003, Ronnie's Market manager Huor Long was working at the market with his older cousin, Heng Chen. 10RP 89. Long was working in back but came out front after hearing loud noises. 10RP 90.

Long saw a tall, white man wearing a mask carrying a gun who instructed him to lie down.[14] 10RP 90. Long heard another voice from the front counter where the cash register is located. 10RP 91. Several minutes later, Long heard a shot. 10RP 91. When the unknown men left, Long got up to help his cousin. Cheng had been shot in the palm of his hand. 10RP 91.

Frost told police he was not sure who shot Cheng, because he was waiting in the car at the time, but news reports indicated it "was the black man, which would have been Fatal." Ex 62, at 9. "Fatal" is Williams' nickname. 11RP 30.

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[12] First degree robbery of Heng Chen while armed with a firearm. CP 1-11.

[13] Second degree assault of Heng Chen while armed with a firearm. CP 21-27, 39-45.

[14] Frost is 5 foot, 8 inches tall, and weights 275 pounds. CP 260-63.

C. SUPPLEMENTAL ARGUMENT

PETITIONER WAS DEPRIVED OF HIS RIGHT TO COUNSEL BY THE COURT'S RULING PREVENTING DEFENSE COUNSEL FROM ARGUING THE STATE FAILED TO PROVE ALL ELEMENTS OF THE OFFENSES.

The Sixth Amendment provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The constitutional right to be represented by counsel includes the right of counsel to argue the case to the jury. Seattle v. Erickson, 55 Wash. 675, 677, 104 P. 1128 (1909);[15] Annot., Prejudicial Effect of Trial Court's Denial, or Equivalent, of Counsel's Right to Argue Case, 38 A.L.R.2d 1396 (1954); see also State v. Woolfolk, 95 Wn. App. 541, 547, 977 P.2d 1 (1999). Closing argument is perhaps the most important aspect of advocacy in our adversarial criminal justice system. See Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). For the defense, it is "the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Id. The right to closing argument has always been regarded as one of the

[15] In Erickson, this Court held it was not an abuse of discretion for the trial court to limit closing argument in what was a simple case to 15 minutes. Erickson, 55 Wash. at 677. This case is of a far different breed, however, as Frost's counsel was prohibited from arguing his client's innocence. See e.g. State v. Shedoudy, 45 N.M. 516, 523, 118 P.2d 280 (New Mexico 1941) (in a prosecution for taking away personal property worth more than $100, trial court's ruling restricting counsel from arguing that the value of $100 or more had not been established was reversible error; under the New Mexico constitution, the right to representation is violated when counsel is denied the right to argue an issue of fact that must be decided by the jury).

greatest value, not only to the accused, but to the due administration of justice, and any limitation of it which has seemed to deprive the accused of a full and fair hearing has generally been held error entitling the defendant to a new trial. State v. Mayo, 42 Wash. 540, 548-49, 85 P. 251 (1906).

The constitutional right of a defendant to be heard through counsel necessarily includes his right to have counsel make a proper argument on the evidence and the applicable law in his favor, "however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right." Herring v. New York, 422 U.S. at 860 (quoting Yopps v. State, 228 Md. 204, 207, 178 A. 2d 879, 881 (1962)).

The trial court here held that Frost had waived any argument that the state failed to prove its case – with the exception of the assaults – by virtue of his duress defense and certain language in this Court's opinion in Riker, 123 Wn.2d 251. In Riker, this Court stated, "a defense of duress admits that the defendant committed the unlawful act, but pleads an excuse for doing so." Riker, 123 Wn.2d at 367-68. But this statement should not be taken out of context. It was made while this Court was discussing the nature of the duress defense and while contrasting it with

other defenses such as self-defense or alibi, for example, which negate a particular element of the charged offense. Riker, 123 Wn.2d at 367-68.

Neither this Court in Riker nor any other court has held that by raising a duress defense, a defendant waives any and all challenges to the state's constitutional duty to prove every element of the charged offense beyond a reasonable doubt. Such a holding would violate due process. See e.g. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (due process requires the state to prove every fact necessary to constitute the charged crime beyond a reasonable doubt). As interpreted by the trial court and Division One of the Court of Appeals, Riker would prevent a defendant who presents an unsuccessful duress defense from challenging the charged crime. Indeed, that is what happened here. Accordingly, the Riker decision simply recognizes that when considering the legitimacy of a duress claim, the criminal conduct is assumed.

In support of the lower court's interpretation of Riker, the state may cite to this Court's decision in State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003), which contains similar language as found in Riker. At issue in that case was whether defense counsel was ineffective in

failing to propose a duress instruction for a burglary charge.[16] Mannering, 150 Wn.2d at 286. Because there was no evidence Mannering was in immediate harm, however, this Court concluded she would not have been entitled to the instruction in the first place. Mannering, at 286. Additionally, however, this Court also held that defense counsel's decision not to propose the instruction was strategic because "Mannering would have had to admit all the elements of the underlying crimes." Id. This portion of the decision is arguably dicta. See e.g. United States v. Kent, 157 Wn.2d 545, 139 P.3d 1091 (2006) (discussing dicta).

To the extent the language is not dicta, however, it does not square with other decisions of this Court, specifically those decisions discussing the defense of unwitting possession, which is treated in the same manner as duress. See e.g. City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000) (comparing unwitting possession to duress); State v. Hundley, 126 Wn.2d 418, 419, 895 P.2d 403 (1995) (noting that Riker's analysis is likely applicable to the defense of unwitting possession). For instance, this Court has held the unwitting possession defense does not improperly shift the burden of proof because the state must still prove its case.

> The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute – the nature of the substance and the fact of

[16] Mannering was also charged with attempted murder, a crime for which this Court ruled duress does not apply. Mannering, 150 Wn.2d at 285.

> possession. Defendants can then prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime. It does not improperly shift the burden of proof.

State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (citations omitted); see also State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (once state establishes possession, the defendant may raise the affirmative defense that the possession was unwilling or lawful).

Nor does the language from Mannering sit squarely with recent precedent of the United States Supreme Court. Dixon v. United States, __ U.S. __, 126 S. Ct. 2436, 2441-2442, 165 L. Ed. 2d 299 (2006). There, the United States Supreme Court considered the defense of duress and held it was not unconstitutional to require the defendant to prove the defense by a preponderance of the evidence. It did not improperly shift the burden of proof to the defense since the state maintained its burden to prove all the elements of the offense. Dixon v. United States, __ U.S. __, 126 S. Ct. 2436, 2441-2442, 165 L. Ed. 2d 299 (2006).

Interestingly, the court pointed out that "the existence of duress normally does not controvert any of the elements of the offense itself." Dixon, 126 S. Ct. at 2441-42. The court obviously did not rule out the possibility, however, inherently recognizing that there will be such cases. Frost's is one such case.

Frost's is not a simple case in which he was charged with one offense, admitted guilt, but claimed he did it under threat of death from some third party. Frost was charged as an accomplice for multiple incidents, each involving multiple charges. Under Washington law, an accomplice is not necessarily criminally liable for all the criminal acts of his co-defendants. Washington does not adhere to the "in for a dime in for a dollar" train of thought.

> The language of the accomplice liability statute establishes a mens rea requirement of "knowledge" of "the crime." RCW 9A.08.020(3)(a). The statute's history, derived from the Model Penal Code, establishes that "the crime" means the charged offense. The comment to the Model Penal Code § 2.06(3)(a), which is identical to RCW 9A.08.020(3)(a), requires the accomplice to "have the purpose to promote or facilitate the particular conduct that forms the basis for the charge" and states, "he will not be liable for conduct that does not fall within this purpose." MODEL PENAL CODE § 2.06 cmt. 6(b) (1985) (emphasis added). The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has "knowledge," the mens rea of RCW 9A.08.020.

In the Matter of Domingo, 155 Wn.2d 356, 510-11, 119 P.3d 816 (2005) (footnote omitted).

Accordingly, although Frost admitted some participation and knowledge, there was an argument to be made that the state failed to prove Frost participated in each of his co-defendants' criminal acts with a desire to bring them about or make them succeed – as required to establish

accomplice liability. As a result of the court's ruling, Frost was deprived of his right to argue the state had not proved his case and in fact was forced to admit all the elements of all the charged offenses – except the assaults.

Although defense counsel was not precluded from arguing reasonable doubt as the assaults, the court's restriction on defense counsel's closing nevertheless hindered counsel's ability to do so. The state's theory of culpability was that because Frost was an accomplice to the robberies, he ran the risk of the assaults. But defense counsel was not allowed to argue against accomplice liability as to the robberies. Had he been allowed to make the argument that the state failed to prove Frost acted with a desire to bring them about, the jury may have agreed and found him not guilty of being an accomplice to some or all of the robberies. If he was not an accomplice to the robberies, he did not therefore run the risk of the corresponding assaults. Accordingly, the court's ruling precluding any reasonable doubt argument as to the duress-applicable offenses necessarily affected counsel's ability to argue against the assault offenses as well. The court's ruling deprived Frost of his right to counsel on all charges.

The error is akin to a faulty reasonable doubt instruction and should be considered structural. See e.g. Sullivan v. Louisiana, 508 U.S.

275, 113 S. Ct. 2078 (1993). In Sullivan, the Supreme Court ruled that a constitutionally deficient reasonable doubt instruction may never be harmless error – regardless of how credible or overwhelming the state's evidence:

> Since...there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman[17] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. ...The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan v. Louisiana, 508 U.S. at 280 (emphasis in original).

As a result of the trial court's ruling, Frost was forced to admit complicity and argue only that he acted under duress. As in Sullivan, the jury therefore was not required to find whether the state proved all the elements of the offenses beyond a reasonable doubt. Because Frost was forced to admit guilt, the jury merely had to determine whether Frost

[17] Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (reversal due to constitutional error not required where state could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained).

proved duress. Just as there was not a guilty-beyond-a-reasonable-doubt verdict in Sullivan, there was neither one in Frost's case.

In a more recent case, the Supreme Court similarly found the denial of the right to counsel of one's choice is structural error. United States v. Gonzales-Lopez, __ U.S. __, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The Court explained that the right to counsel of one's choosing is so basic an element of the right to a fair trial, that its denial may not be considered harmless:

> [The Sixth Amendment] commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause....In sum, the right at stake is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."

Gonzales-Lopez, 126 S. Ct. at 2562.

Just as the right to counsel of one's choosing is a "basic element" of a fair trial guaranteed by the Sixth Amendment, so too is the right to closing argument for the defense. Herring v. New York, 422 U.S. at 858 ("There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial") (emphasis

added). Under the reasoning of Gonzales-Lopez, its deprivation is erroneous and no additional showing of prejudice is required to make the violation complete.

Regardless, however, Frost was prejudiced by the violation. To establish accomplice liability, the state must prove Frost had the purpose to promote or facilitate each of his co-defendant's crimes. Considering the multitude of charges for each incident, Frost's attorney would have had a good argument that although Frost acted with knowledge he was promoting or facilitating one such crime, he did not act with knowledge he was promoting or facilitating another. For instance, regarding the Gapp incident, counsel could have argued that Frost had the purpose to burglarize the residence, but not rob Lloyd Gapp. Such an argument would have been consistent with Frost's statement to police. Likewise, counsel could have argued that although Frost was the getaway driver for the Taco Time and 7/Eleven store incidents, he did not act with knowledge that Williams and Shelton would additionally rob the store's employees such as Andrea Rangel at Taco Time and Satdnam Randhawa at 7/Eleven. Defense counsel may have thought of other arguments had he not been hamstrung by the court's ruling. In short, the state cannot establish beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained. This Court should therefore reverse Frost's

convictions. Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) (reversal required unless state can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained).

D. CONCLUSION

Because Frost was denied his right to counsel, this Court should reverse his convictions.

Dated this 13th day of November, 2006.

Respectfully submitted,

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