

<p>DISTRICT COURT OF ADAMS COUNTY  Adams County Justice Center  1100 Judicial Center Drive  Brighton, CO 80601</p>	
<p>THE STATE OF COLORADO</p> <p>Plaintiff</p> <p>v.</p> <p>JOHN CURREN</p> <p>Defendant</p>	<p style="text-align: center;">σ COURT USE ONLY σ</p>
<p>Patrick J. Mulligan  1900 Grant Street, Suite 580  Denver, Colorado 80203</p> <p>Phone Number: (303) 860-8100  FAX Number: (303) 860-8018  E-mail: <a href="mailto:patrickmulligan@qwest.net">patrickmulligan@qwest.net</a>  Attorney Registration # 16981</p> <p>Thomas K. Carberry  149 West Maple Avenue  Denver, Colorado 80223</p> <p>(303) 722-3929 (Telephone)  (303) 733-0723 (Fax)  (303) 929-0067 (Cell)  <a href="mailto:tom@carberrylaw.com">tom@carberrylaw.com</a>  Attorney Registration # 19707</p>	<p>Case Number: 97CR3075</p> <p>Division: E</p> <p>Judge Thomas R. Ensor</p>
<p><b>RULE 35(C) MOTION TO VACATE CONVICTIONS</b></p>	

John Curren, by and through his attorneys Patrick J. Mulligan and Thomas K. Carberry, and pursuant to the United States and Colorado Constitutions and Rule 35(c) of the Colorado Rules of Criminal Procedure, respectfully moves this court for post-conviction relief as described below.

### **STATEMENT OF THE CASE**

Mr. Curren was originally charged with two counts of First Degree Murder—After Deliberation, two counts of First Degree murder—Felony Murder, two counts of Conspiracy to commit murder, and two counts of aggravated robbery. Before trial, the prosecution moved to dismiss the conspiracy counts.

The jury returned verdicts of not guilty as to both counts of First Degree Murder After Deliberation, and one of the aggravated robbery counts. The jury found Mr. Curren guilty of both felony murder counts, as well as one count of aggravated robbery. On April 25, 2002, the trial court imposed consecutive life sentences on the felony murder counts, and a concurrent 24 year sentence on the aggravated robbery count.

On appeal, the Court of Appeals vacated the aggravated robbery count, but left intact the convictions and sentences for both felony murder counts. The Court of Appeals issued its ruling on June 2, 2005. The Colorado Supreme Court eventually denied certiorari on or about May 14, 2006. No petition for writ of certiorari was

filed with the United States Supreme Court. The mandate from the Court of Appeals issued on August 17, 2006.

This motion is timely filed, as there is no statute of limitations for the filing of a motion for post-conviction relief on Class 1 felonies in state court in Colorado. *See*, section 16-5-402. In addition, this motion comes within the one year deadline for federal habeas corpus review. *See, Caspari v. Bohlen*, 114 S. Ct. 948 (1994); 28 U.S.C. section 2254.

### **STATEMENT OF THE FACTS**

There was no physical evidence linking John Curren to the murders of Raul Palma and Leo Hartnett. There were no ballistics, no blood, no fingerprints, and no hair or fiber evidence connecting Mr. Curren to either murder. Instead, the prosecution's case against Mr. Curren consisted almost entirely of the testimony of Dan Sullivan and Kelly Callaway.

Sullivan and Callaway were interested and highly motivated witnesses. The district attorney originally charged Sullivan with the same crimes as charged against Mr. Curren. Thus he faced a potential double life sentence if convicted. Sullivan gave varying accounts as to how the murders took place, depending on when and to whom he was speaking. He claimed to have been present at the time of the murders, but denied participating or assisting in the killing of either victim. He claimed that Mr.

Curren made a comment about a large sum of money in the sock of one of the victims, but denied ever seeing the money himself. Sullivan consistently shifted the blame for the murders, and any attendant robbery, to the other defendants in the case. Sullivan also admitted that he lied many times to investigators in this case and that he did not tell the truth until he received his plea bargain.

Sullivan blamed Mr. Curren, Tom Behymer, Kerry Cournoyer, and Monir Wood for the murders of Palma and Hartnett. In exchange for his cooperation, Sullivan received an extraordinary “sweetheart” deal. Though he pleaded guilty to two counts of aggravated robbery, Sullivan served only eleven (11) months in prison.

Each of the other defendants went to trial separately. Behymer went to trial first and was found not guilty. Mr. Curren was the last to go to trial, and like the remaining defendants, was found guilty of two counts of felony murder.

Kelly Callaway’s testimony was equally suspect. She was involved romantically with Sullivan, and was pregnant with Sullivan’s child at the time of the murders. Even though she lived in her house with her infant child, she testified that she had agreed to the use of her house to handle a drug deal that eventually resulted in the deaths of Hartnett and Palma. Because of her role in the drug deal, she had exposure as a possible accomplice in the murders. Like her boyfriend, however, Callaway denied any participation in the murders. She claimed that she left her home, and that upon her return John Curren and the other defendants were cleaning up her home. She also testified that Mr. Curren made certain inculpatory statements after the episode.

Despite her apparently intimate knowledge of the incident, and despite the fact that the homicides apparently took place in her home, Kelly Callaway was never charged with a crime.

According to Sullivan, he worked as a drug courier for Raul Palma. He testified that sometime in May 1997 he transported about 300 pounds of marihuana to Denver for Palma in a rented Mercury Sable. He testified that Palma and Leo Harnett followed him in a Honda Civic.

Sullivan testified that around Memorial Day, May 26, 1997, Palma had about 75 pounds of marihuana left to sell. On May 26, 1997, Sullivan drove his sister's Honda Accord to the Hooters restaurant on Colorado Boulevard in Denver. Palma and Hartnett drove to the Hooter's in the Honda Civic from Texas. Palma went into the restaurant and a short time later Sullivan saw him come out with Mr. Curren and co-defendant Tom Behymer. Palma told Sullivan to go to the house where he had stored the remaining marihuana and to bring it to Kelly Callaway's house. Sullivan and Hartnett drove in his sister's Honda Accord to pick up the marihuana. Palma, Behymer, and Mr. Curren left in Mr. Curren's car.

After picking up the marihuana, Sullivan and Hartnett drove back to the Hooters and retrieved the Honda Civic. Sullivan drove the Accord and Harnett drove the Civic towards Callaway's house. Before arriving at the house, they stopped at a gas station so Hartnett could call the house to verify that everything was all right.

They then drove in both cars towards the house. Hartnett instructed Sullivan to park the Accord with the marihuana about a block away from the house. Hartnett then drove Sullivan to the house.

According to Sullivan, after Sullivan and Hartnett entered the house, Mr. Curren and his co-defendants, Tom Behymer, Kerry Cournoyer, and Monir Wood, assaulted Hartnett. Sullivan testified that he left the house right after the assault began and started walking back to his sister's Accord. Before he reached the Accord, Behymer drove up in the Civic and told him to follow Behymer back to the house. Sullivan said he drove his sister's Accord into the garage where Wood and Behymer unloaded the marihuana.

Mr. Curren did not testify at trial. The decision not to testify was a controversial one, and is addressed in some detail below. Mr. Curren was found not guilty of First Degree Murder-After Deliberation, but was found guilty of two counts of Felony Murder. The underlying or predicate offense for the felony murder charges was the alleged aggravated robbery of Raul Palma. This charge was also controversial, as the only evidence as to the alleged robbery was Sullivan's testimony that Mr. Curren had made a statement of admission to the robbery. The lack of any corpus delicti for the crime of aggravated robbery is addressed below.

**I. THE CONVICTION FOR AGGRAVATED ROBBERY OF RAUL PALMA CANNOT WITHSTAND THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT BECAUSE THE PROSECUTION PRESENTED NO EVIDENCE OF ANY “CORPUS DELICTI,” BUT RATHER PRESENTED ONLY THE UNCORROBORATED STATEMENTS OF DAN SULLIVAN, WHO TOLD SO MANY LIES HE COULDN’T KEEP THEM STRAIGHT.**

**A. THE LEGAL STANDARD: THE CONSTITUTIONAL GUARANTEE OF THE EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL**

Mr. Curren incorporates the following law for all of the arguments set forth below.

The United States and Colorado Constitutions guarantee the right to counsel to those accused of crimes. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

The right to counsel in a criminal case, to be upheld and enforced in any meaningful way, must include the right to effective assistance of counsel. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16; *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *People v. Norman*, 703 P.2d 1261 (Colo.1985). Effective legal

representation requires that the accused be given “adequate legal assistance.” *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Competent legal representation is thus a critical facet of the due process right to a fair trial. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1555, 71 L.Ed.2d 783 (1982).

The right to effective legal representation means much more than simply having an attorney present during the relevant legal proceedings. *Edmisten v. People*, 176 Colo. 262, 490 P.2d 58 (1971). Effective assistance of counsel is one of criminal defendant’s most fundamental rights, and without such assistance a defendant’s remaining rights “may be seriously impaired.” *People v. O’Neill*, 185 Colo. 202, 523 P.2d 123 (1974).

The accused’s right to effective assistance of counsel requires “the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.” *People v. Jacobs*, 198 Colo. 75, 596 P.2d 1187 (1979). Both the state and federal constitutions thus guarantee to the accused in a criminal case the fundamental constitutional right to effective assistance of counsel from an attorney acting as a diligent and conscientious advocate. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 3052, 80 L.Ed.2d 674 (1984); *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *People v. Davis*, 871 P.2d 769 (Colo. 1994).

The *Cronic* and *Strickland* decisions set forth the standards by which effective and competent legal representation is measured in the criminal arena. As the Court stated in *Cronic*:

Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

466 U.S. at 653-654.

In *Strickland*, 466 U.S. 668, the Court expounded on the critical relationship between the right to effective assistance of counsel and the right to a fair trial:

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

*Id.* at 685.

*Strickland* created the now well-known two prong analysis for review of ineffective assistance claims. The court must first determine whether "in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. To be afforded relief, the accused

must then show that the deficient representation somehow prejudiced the defense.

The Court defined this “prejudice” prong as requiring that the errors of counsel were serious enough to deprive the accused of a fair trial, a “trial whose result is reliable.”

*Id.* at 687. In order to establish the requisite prejudice, the accused need only show that there “is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *People v. Dillon*, 739 P.2d 919, 921 (Colo. App. 1987).

The accused need not demonstrate that he would have been acquitted “but for” the performance of his trial counsel. To the contrary, he must only demonstrate “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694; *see also*, *Davis*, 871 P.2d at 772.

Abundant case law exists that on a direct appeal a defendant has a constitutional right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Stroup v. People*, 656 P.2d 680 (Colo. 1982); *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986), *cert. denied* (1987); *see also* *Penon v. Ohio*, 488 U.S. 75 (1988); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Rodriguez v. United States*, 395 U.S. 327 (1969); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963). The same two-pronged standard from *Strickland* applies to a claim of ineffective assistance of appellate counsel. *People v. Valdez*, 789 P.2d 406 (Colo. 1990) (adopting the Strickland test for appellate counsel).

## **B. THE CHALLENGED ROBBERY CONVICTION**

Court nine of the information charged:

JOHN CURREN, did unlawfully, knowingly and feloniously take a thing of value, to-wit: **jewelry, money and marihuana** from the person and presence of Raul Palma, by the use of force, threats and intimidation and the defendant, and a confederate, during the robbery and during the immediate flight therefrom, was armed with a deadly weapon, to-wit: guns with intent, if resisted, to kill, maim and wound the person robbed and any other person; contrary to the form of the statute in such case and made and provided, and against the peace and dignity of the People of the State of Colorado.

Section 18-4-302 (emphasis supplied).

The jury found Mr. Curren guilty of aggravated robbery against Raul Palma, but not guilty of aggravated robbery against Leo Hartnett.

## **C. CORPUS DELICTI LAW**

In order to defeat a motion for a judgment of acquittal, the prosecution must present a prima facie case of guilt beyond a reasonable doubt. *People v. Montano*, 195 Colo. 420, 578 P.2d 1053 (1978); *see also* Crim. P. 29(a). Proof of the corpus delicti, that is, the fact that the crime occurred, is a necessary element of a prima facie case. *People v. Contreras*, 195 Colo. 80, 575 P.2d 433 (1978). “[A] conviction of crime cannot be upheld where it is based upon the uncorroborated confession of the person accused. There must be evidence of the corpus delicti apart from the statements

contained in the confession.” *Meredith v. People*, 152 Colo. 69, 71, 380 P.2d 227, 228 (1963), *quoting Downey v. People*, 121 Colo. 307, 215 P.2d 892 (1950). “It is also well settled in Colorado law that evidence of opportunity to commit the crime, standing alone, is not sufficient independent evidence to establish the corpus delicti.” *People v. Robson*, 80 P.3d 912 (Colo. App. 2003), *citing Meredith v. People*, 152 Colo. 69, 71, 380 P.2d 227, 227 (1963); *People in the Interest of T.A.O.*, 36 P.3d 180 (Colo.App. 2001).

The “corpus delicti” consists of evidence that the charged crime actually occurred and that the defendant engaged in unlawful conduct in the commission of the crime. *People v. Smith*, 182 Colo. 31, 510 P.2d 893 (1973); *Bruner v. People*, 156 P.2d 111, 113 Colo. 194 (Colo. 1945); *People v. Trujillo*, 860 P.2d 542 (Colo. App. 1992); McCormick on Evidence § 145 (E. Cleary 4th ed. 1992). In *Smith, above*, the Court quoted 1 C. Torcia, Wharton's Criminal Evidence §§ 16, 17 (13th ed. 1972), that at a minimum the principal of corpus delicti requires "(1) An injury which is penally proscribed -- e.g., in an unlawful homicide, a person killed; in larceny, certain property missing; and (2) The unlawfulness of some person's conduct in causing that injury."

In cases involving a confession or admission, for well over a hundred years all courts have required corroborating evidence independent of the defendant's statement. *Giles v. Teasley*, 193 U.S. 146 (U.S. 1904) (“The corpus delicti is wanting and there can be no conviction, when the law does not disclose ‘the bloody deed.’”), *citing Fletcher v. Peck*, 6 Cranch, 87; *Maxwell v. Dow*, 176 U.S. 601; *Dodge v. Woolsey*, 18 How. 374; *United States v. Des Moines*, 142 U.S. 545; *Downes v. Bidwell*, 182 U.S. 254;

*Williams v. Mississippi*, 170 U.S. 222; *Lake County v. Rollins*, 130 U.S. 670); *see also Wong Sun et al. v. United States*, 371 U.S. 471, 489 (U.S. 1963) (“But where the crime involves no tangible corpus delicti, we have said that ‘the corroborative evidence must implicate the accused in order to show that a crime has been committed.’”); *Meredith v. People*, 152 Colo. 69, 71, 380 P.2d 227, 227 (1963) (“The law is well settled . . . that extra-judicial confession without corroboration is not sufficient to sustain a conviction.”); *Bruner v. People*, 113 Colo. 194, 156 P.2d 111 (Colo. 1945); *People v. Gonzales*, 186 Colo. 48, 525 P.2d 1139 (Colo. 1974); *Dougherty v. People*, 1 Colo. 514 (1872); *Roberts v. People*, 11 Colo. 213, 17 P. 637 (1888).

In *Opper v. United States*, the Supreme Court held:

**It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.** Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith v. United States*, post, p. 147. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. **Those facts plus the other**

**evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.**

*Opper v. United States*, 348 U.S. 84, 93 (U.S. 1954) (emphasis supplied).

In *Opper*, the Court provided the reasons for this requirement:

In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, **the self-interest of the accomplice**, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.

*Opper v. United States*, 348 U.S. 84, 89-90 (U.S. 1954) (emphasis supplied); *accord Wong Sun et al. v. United States*, 371 U.S. 471, 489 (U.S. 1963).

The corroborating evidence must be “sufficient to convince the jury that the crime charged is real and not imaginary.” *Hampton v. People*, 146 Colo. 570, 362 P.2d 864 (1961).

#### D. APPLICATION OF CORPUS DELICTI LAW TO THE FACTS

Both trial counsel and appellate counsel provided ineffective assistance of counsel with regard to this issue. Trial counsel provided ineffective assistance of counsel because he failed to raise the issue of the lack of corpus delicti in a motion for judgment of acquittal. Appellate counsel provided ineffective assistance of counsel because he failed to raise this issue on appeal. Competent trial and appellate counsel should have known the law of corpus delicti because it has existed for well over a hundred years. Prejudice exists as to both trial and appellate counsel because, as discussed below, **no corroboration existed** in this case as to the statements of the prosecution witness Dan Sullivan as to the alleged robbery of Raul Palma.

As stated above, count nine alleged robbery of “**jewelry, money and marihuana.**”

The prosecution presented no evidence of any kind that Mr. Palma had jewelry or that Mr. Curren or anyone else robbed Mr. Palma of jewelry. The prosecution did attempt to prove that someone robbed Mr. Hartnett of a watch, but the jury found Mr. Curren not guilty of robbery of Mr. Hartnett.

The only evidence of a robbery of money from Mr. Palma came from the testimony of David Sullivan. The prosecution originally had charged Mr. Sullivan with all the same charges as Mr. Curren and the other co-defendants. Mr. Sullivan made numerous statements to the police, in which, according to his own testimony,

he lied repeatedly. Mr. Sullivan entered into a plea bargain in which he pleaded guilty to two counts of aggravated robbery. He went to prison for eleven months as a result of the plea bargain. Transcript of April 24, 2002 testimony at page 48.

Sullivan testified that Mr. Curren allegedly told Sullivan that Mr. Curren found either \$30,000 or \$40,000 in Raul Palma's sock. No evidence – either direct or circumstantial -- corroborated Sullivan's testimony. Sullivan testified that he never even saw Raul Palma at the alleged scene of the robbery. Not only did Sullivan never see Palma at the scene, he never saw the alleged \$30,000 or \$40,000 dollars that he testified Mr. Curren allegedly stole.

No corroboration of any kind came in at trial to support Sullivan's testimony that Mr. Curren told him the Mr. Curren had stolen money from Palma.

Circumstantially, it made no sense for Raul Palma to have had \$30,000 or \$40,000 on his person when he went to Kelly Callaway's house because Palma went there to sell marihuana, not to buy it. Logically, the seller would expect to get paid for his marihuana. According to Sullivan's testimony, the marihuana had a value of from \$500 to \$1,000 a pound and Palma had about 75 pounds remaining to sell. Taking the smaller figure as the cost, 75 pounds of marihuana would have brought Raul Palma about \$37,500. Rather than bringing \$30,000 to \$40,000 to the house, if Sullivan's testimony was true, Raul Palma expected to leave with \$30,000 to \$40,000.

Not only did it make no sense that Palma had \$30,000 to \$40,000 in his sock, it was practically a physical impossibility. Even if he had the money all in \$100 bills,

\$30,000 would have required 300 bills and \$40,000 would have required 400 bills. Such a stack of bills would have been at least several inches thick. No one could put such a stack in his sock.

No corroborating evidence existed for robbery of marijuana from Raul Palma. All of the evidence showed that Raul Palma had no marijuana when he went to Kelly Callaway's house. All of the evidence showed, if any marijuana actually existed, neither Raul Palma nor Leo Hartnett brought the marijuana into the house where the crime allegedly occurred. If the marijuana existed, according to Sullivan's testimony he left it in his sister's car a long block from the house before Leo Hartnett entered the house. According to Sullivan's testimony, Raul Palma had arrived at the house long before Leo Hartnett and Sullivan arrived.

**E. EVEN IF CORROBORATING EVIDENCE HAD EXISTED FOR ROBBERY OF THE MARIHUANA, IT COULD NOT HAVE BEEN ROBBED FROM THE PERSON AND PRESENCE OF RAUL PALMA BECAUSE SULLIVAN HAD POSSESSION OF THE MARIHUANA IN HIS CAR PARKED FAR AWAY FROM THE HOUSE**

As to robbery of marijuana, the conviction for aggravated robbery of Raul Palma cannot withstand the constitutional requirement of proof beyond a reasonable doubt because no juror could find that Mr. Curren robbed marijuana "from the

person and presence of Raul Palma” because all of the evidence showed that Palma had no marihuana when he went to the house. All the evidence showed that Sullivan had possession of the marihuana in his sister’s Accord parked at least a block from the house. U.S. Const. amends. V, VI, and XIV; Colo. Const. article II, sections 16 and 25, *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993); *Cage v. Louisiana*, 498 U.S. 39 (1990).

The prosecution must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The crime of robbery required the prosecution to prove beyond a reasonable doubt that the defendant took something of value “from the person and presence of Raul Palma.” Sections 18-4-301 and 18-4-302.

The facts presented at trial showed that the marihuana was neither on Mr. Palma’s person nor in his presence. Trial counsel provided ineffective assistance of counsel by failing to raise this issue at the motion for judgment of acquittal. At a minimum, trial counsel should have asked for an instruction to the jury explaining that it could not consider the marihuana in its deliberations as to robbery of Raul Palma.

According to Sullivan’s testimony, Palma left the Hooters Restaurant on Colorado Boulevard and drove with John Curren and Tom Behymer to Kelly Callaway’s house. Leo Hartnett and Sullivan drove in Sullivan’s sister’s Honda Accord to a house on 6<sup>th</sup> Avenue and Sheridan to pick up marijuana to sell to Behymer. Sullivan and Hartnett loaded the marihuana into the trunk of the Accord.

After picking up the marihuana, he and Hartnett returned to the Hooters to pick up Palma's Honda Civic. Sullivan drove the Accord with the marihuana to the vicinity of Kelly Callaway's house. Hartnett drove the Civic to the vicinity of Callaway's house. Sullivan and Hartnett stopped at a gas station to call Callaway's house. They did this because Hartnett wanted to make sure everything was all right at the house. They then drove in separate cars towards Callaway's house. Hartnett instructed Sullivan to park the Accord with the marihuana about a block away. Hartnett and Sullivan then drove to the house in the Civic.

According to Sullivan, when he entered the house he did not see Palma. According to Sullivan, he learned afterward that Palma was dead when Sullivan entered the house. Sullivan testified that after Hartnett entered the house, Mr. Curren and the other co-defendants started assaulting Hartnett. Sullivan testified that he left right after the assault began. According to Sullivan's testimony, Palma was dead before the marihuana even got to the vicinity of Callaway's house.

Clearly, under this scenario no one robbed marihuana "from the person and presence of Raul Palma." Trial counsel provided ineffective assistance of counsel by failing to raise this issue in a judgment of acquittal or to ask for a jury instruction to this effect. Appellate counsel provided ineffective assistance of counsel by failing to raise this issue on appeal.

**II. TRIAL COUNSEL HAD A CONFLICT OF INTEREST AND AS A RESULT PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND VIOLATED MR. CURREN'S FUNDAMENTAL RIGHT TO TESTIFY. MR. CURREN'S CONVICTION MUST THEREFORE BE VACATED.**

**A. THE LEGAL STANDARD: THE CONSTITUTIONAL GUARANTEE TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNHINDERED BY A CONFLICT OF INTEREST**

In addition to the law on ineffective assistance of counsel cited in issue IA, above, Mr. Curren, through counsel, adds the following law on ineffective assistance of counsel and a trial lawyer's actual conflict of interest.

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel unhindered by conflicts of interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 345-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991); *Dunlap v. People*, \_\_\_ P.3d \_\_\_ (Colo. July 2, 2007). Where an actual conflict of interest exists, however, prejudice is presumed, and need not be established by specific reference. *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Dunlap, above*. Ineffective assistance is thus presumed when counsel "actively represented conflicting interests." *Cuyler v. Sullivan*, *supra*; See *Holloway v. Arkansas*, 435 U.S. 475

(1978). This presumption is true even when the "constraints" on counsel are "entirely self-imposed." *See, Cronin*, 466 U.S. at 648, fn. 31.

In this case, Mr. Curren's trial counsel labored under an actual conflict of interest which effectively denied Mr. Curren the right to counsel. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16; *Gideon v. Wainwright*, 372 U.S. 3356, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

In addition, trial counsel failed to provide effective assistance of counsel, and that failure resulted in prejudice to Mr. Curren. Thus, under both standards, Mr. Curren's convictions must be reversed.

**B. AN ACTUAL CONFLICT OF INTEREST EXISTED BETWEEN TRIAL COUNSEL AND MR. CURREN. BECAUSE THE CONFLICT ADVERSELY AFFECTED TRIAL COUNSEL'S PERFORMANCE, MR. CURREN'S CONVICTIONS MUST BE REVERSED.**

Prior to the first trial scheduled for May 24, 1999, Mr. Curren hired private counsel Harvey Steinberg to represent him on the homicide charges in Adams County. Mr. Curren met with Mr. Steinberg several times prior to trial to discuss strategy in the matter.

According to Mr. Curren, at one point prior to trial, Mr. Steinberg recommended that Mr. Curren abscond from the jurisdiction prior to trial. Steinberg's reasoning was that Curren's chance for an acquittal would improve with the passage of time, and the possible loss to the prosecution of witnesses or their memories.

According to Mr. Curren, the advice to abscond was specific in nature. Trial counsel advised Curren that he should flee to a foreign country, specifically recommending Mexico. Counsel urged Mr. Curren to get a job, to pay his bills, and to avoid any violations of the law. Counsel told Mr. Curren to use his real name while in Mexico and to work under his own name. Counsel told Mr. Curren that after some time had passed he should go to the United States Embassy and apply for a passport. Counsel explained to Mr. Curren that the embassy would not have access to American police databases and, therefore, the outstanding warrant for his arrest for failure to appear would not come to the embassy's attention. Counsel indicated that if there were a trial in the future, all of these points would be in Mr. Curren's favor upon his return to Colorado.

Mr. Curren's claim, while extraordinary, is corroborated by a number of witnesses. First, Mr. Curren's neighbor and friend, a writer named Mason Ramsey, was actually present at one of the meetings at which Steinberg counseled Mr. Curren to flee. Ramsey recalled specifics from the meeting, and related his concern regarding the advice to Mr. Curren and his family. Mr. Ramsey recalled that the meeting

occurred on May 20, 1998, the day before the pretrial conference at which Mr. Curren did not appear. Mr. Ramsey's affidavit, describing his recollection of the meeting, is attached hereto as Exhibit A.

In addition, Mr. Curren's mother, Vicki Curren, was present at the same May 20, 1998 meeting in which trial counsel advised Mr. Curren to flee. Ms. Curren was particularly concerned with the advice, as she had posted the bond for her son after his arrest. Ms. Curren asserts that, when she expressed her concern that the bond would be forfeited, trial counsel assured her that he could take care of the problem.

Mr. Curren was eventually arrested in Mexico and extradited back to Colorado to stand trial. Upon his return, Mr. Curren became extremely concerned with the advice rendered by Mr. Steinberg, and with the impact of the advice upon his attorney-client relationship. With these issues in mind, Mr. Curren and his family hired co-counsel Frank Scheitler and his firm to assist Mr. Steinberg with the trial. Mr. Curren's rationale was that a new lawyer was needed to provide unbiased and objective advice. Curren was concerned that Steinberg's earlier advice may have created a conflict of interest, as Steinberg may have been forced to put his own interest above those of his client.

Lawyers from Scheitler and Elio spent hours interviewing Mr. Curren. Lawyers from Scheitler and Elio spoke with a witness, Rob Shelden, who had strong exculpatory information regarding the guilt of Dan Sullivan. Scheitler and Elio sent

trial counsel a letter informing him of the whereabouts of Rob Shelden and explaining that he had vital evidence for the defense. Attached as Exhibit D.

Rob Shelden would have testified that Dan Sullivan and Tom Behymer confessed to him that they had killed Raul Palma and Leo Hartnett and that John Curren was not present. The affidavit of Rob Shelden is attached. Exhibit C. Despite actual knowledge that Shelden had exculpatory evidence, Mr. Steinberg did not interview him and did not subpoena him for trial.

According to Mr. Curren, Mr. Steinberg was initially agreeable to the idea of a second attorney to assist on the case. Over time, however, Mr. Steinberg became increasingly hostile to the idea of participation by Scheitler or his associate, James Ruterbories. Steinberg accused Mr. Scheitler of unethically trying to “steal” his client, and threatened to take action against him. Scheitler responded by noting that the client had asked him to intervene in the case, and that the client should be the one to choose who represented him. Mr. Curren has a series of letters between Steinberg and Scheitler that illustrate the acrimony between the lawyers.

As a substantive example of Mr. Steinberg’s refusal to follow Mr. Curren’s requests, Mr. Curren had given Mr. Steinberg a signed release asking trial counsel to provide a copy of his discovery and other pertinent data to Scheitler and Elio. Exhibit E. Trial counsel refused to honor that release and refused to cooperate with Scheitler and Elio in any way.

Eventually, the disagreement between Scheitler and Steinberg escalated to the point of a shouting match, and Mr. Scheitler withdrew his firm from further representation of Mr. Curren. The result was that Mr. Curren had no professional assistance to act as a “buffer” between himself and Mr. Steinberg. Any concerns Mr. Steinberg may have had over Mr. Curren’s allegations of improper advice could now impact strategy decisions in the case.

In Mr. Curren’s view, this is precisely what happened. With no neutral third party to assist Mr. Curren in evaluating Steinberg’s advice and strategy, Steinberg was able to give advice with his own interest ahead of Mr. Curren’s interest.

According to Mr. Curren, Mr. Steinberg repeatedly advised him not to testify. Steinberg argued that Curren’s testimony would harm the case more than help it, and that inconsistencies in Curren’s earlier statements would leave him vulnerable to cross-examination by the prosecution.

The advice not to testify, however, would also serve another purpose. With Mr. Curren off of the witness stand, the prosecution would be unable to inquire about his flight from the jurisdiction prior to trial. While this may have served Mr. Curren’s interests to some degree, it was even more important to preserving Mr. Steinberg’s interest.

Had Mr. Curren taken the stand, he would have denied involvement in the murders of Palma and Hartnett. He would have denied involvement in any plan to rob or “jack” the victims. He would have rebutted the claims of Sullivan, a highly

motivated and readily impeachable witness, and he would have disputed the claims of Kelly Callaway, whose testimony was riddled with inconsistencies. In short, John Curren's testimony would have rebutted the key allegations against him.

If Mr. Curren had testified, however, there was a risk that his testimony would have implicated his lawyer in at least unethical conduct. If the prosecution had succeeded in raising the issue of his flight from Colorado, Mr. Curren would have responded that his decision was based upon the advice of his attorney. This would have prompted an explosive and irreparable problem at trial, as the defense attorney's credibility and complicity would have been called into question.

Knowing these possibilities, it is difficult to see how Mr. Curren's lawyer could provide him with the objective and unbiased advice to which he was entitled. Even if Mr. Curren's allegations were untrue, the fact that he made them created an actual conflict of interest for trial counsel. Mr. Steinberg was placed in the untenable position of watching out for himself, even as he tried to represent his client. Concern over the impact of Mr. Curren's potential trial testimony upon his credibility and reputation would have affected trial counsel's advice on the issue.

A defendant in a criminal case has a fundamental constitutional right to testify in his own defense under the due process clauses of the United States Constitution, amend. XIV, and the Colorado Constitution, Art. II, § 25; *Brooks v. Tennessee*, 406 U.S. 605, 612, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972); *People v. Myrick*, 638 P.2d 34, 38 (Colo. 1981); *People v. Curtis*, 681 P.2d 504 (Colo. 1984). Because the right to testify is

a fundamental constitutional right, our courts require that the record must establish a knowing, intelligent, and voluntary waiver of that right. *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); *Boykin v. Alabama*, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969).

Whether a Defendant testifies or remains silent is often one of the biggest issues at a trial. In this case, for example, one of the co-defendants, Behymer, was acquitted of all charges. At his trial, Behymer took the stand, and testified that the story by Daniel Sullivan and Kelly Callaway was false. Behymer denied responsibility for either of the murders, and claimed that he played no role in causing either death. The jury found Behymer not guilty. This indicates that the jury believed his version of events over the prosecution's tainted witness, Sullivan.

Mr. Curren acknowledges that each case is different, and that there were no guarantees that he would be acquitted if he had testified. With life in prison on the line, however, there was little to lose by taking the stand. Mr. Curren had always denied killing either of the victims. While Mr. Curren made statements to law enforcement prior to his arrest, the statements were essentially exculpatory. Nothing about the earlier statements would have prevented Curren from taking the stand.

At a hearing on this issue, Mr. Curren will testify that he questioned his attorney's advice, first on the issue of fleeing the jurisdiction, and then on the issue of testifying at trial. Mr. Curren's mother and friend will testify to the same effect.

Counsel for Mr. Curren have consulted with experts in criminal law, and anticipate the presentation of expert witness testimony that based upon the allegations of Mr. Curren, an actual conflict of interest existed, and Mr. Curren was prejudiced as a result.

As noted above, Mr. Curren asserts that the actual conflict in this case was so significant as to effectively deny him counsel. The lawyer he originally hired had a serious and personal conflict which prevented him from serving as an advocate for his client. That lawyer prevented Mr. Curren from receiving representation from the second lawyer, Frank Scheitler, even though Mr. Curren and his family wanted the assistance of Scheitler. Jail visitation records demonstrate that, upon Mr. Curren's return from Mexico, Mr. Steinberg made only two brief visits to the jail — hardly adequate time to prepare a client for a First Degree Murder trial. Under these circumstances, Mr. Curren asserts that that the overall impact of the conflict in this case was to deprive Mr. Curren of the right to counsel. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16; *Gideon v. Wainwright*, 372 U.S. 3356, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Even under the more stringent “actual conflict” standard, however, the conflict in this case was sufficient to warrant reversal of the resulting conviction. Specific case law addressing the current factual scenario is understandably sparse. A handful of appellate cases, however, confirm that under similar circumstances, a finding of an

actual conflict and reversal of the resulting conviction were warranted. *See, e.g., U.S. v. Greig*, 967 F.2d 1018, 1022 -1024 (C.A.5 (Tex.) 1992). In *Greig*, the 5<sup>th</sup> Circuit reviewed an allegation that the defense attorney was engaged in criminal or unethical conduct connected with the defendant. The Court ruled that even the allegation put the attorney in the position of defending himself, while simultaneously attempting to defend his client. The Court ruled that an actual conflict of interest existed, warranting reversal of the conviction. *Id.*

Similarly, the 3<sup>rd</sup> Circuit has ruled that the allegation against defense counsel that he had aided in the destruction of evidence created an actual conflict of interest. *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir.1984); *see also United States v. Cancilla*, 725 F.2d 867 (2d Cir.1984). In each instance, the conflict was sufficient to require reversal of the resulting conviction.

More recently, the 2<sup>nd</sup> Circuit reviewed factual allegations similar to those at issue in the present case. *See, United States v. Levy*, 25 F.3d 146 (2<sup>nd</sup> Cir. 1994). In *Levy*, defense counsel was alleged to have assisted in or advised the defendant's accomplice in his flight from the United States to Israel. In addition, defense counsel had previously represented the accomplice, and was limited in his ability to shift the blame to the accomplice. The 2<sup>nd</sup> Circuit found that an actual conflict of interest existed, requiring reversal of the defendant's conviction. *Levy, supra*, 25 F.3d at 157; *see also*

*United States v. White*, 706 F.2d 506 (5<sup>th</sup> Cir. 1983) (actual conflict when attorneys for defendant were being investigated concerning a prior escape of the defendant).

Further, an actual conflict of interest exists if trial counsel is put in the position of advising his client on the filing of a post-conviction relief. *See, State v. Taylor*, 1 S.W. 3d 610 (Mo. App. 1999). In *Taylor*, the Missouri Court of Appeals ruled that trial counsel's advice to the defendant not to file a post-conviction motion arose because trial counsel "was caught between his obligation to do his best for Taylor and his desire to protect his own reputation and financial interests." *Taylor*, 1 S.W. 3d at 612. The Court ruled that because Taylor had established an actual conflict of interest that adversely affected his attorney's performance, the Court would refuse "to indulge in nice calculations as to the amount of prejudice attributable to the conflict." *Taylor*, at 612, *citing Cuyler v. Sullivan*, *above*.

Where trial counsel has a personal stake in the decision whether to put the defendant on the witness stand, and determines not to do so, an actual conflict of interest exists. *Burnside v. State*, 656 So.2d 241 (Fla. App. 1995). In *Burnside*, the prosecution threatened to call defense counsel to the stand if the defendant testified, based upon evidence that defense counsel had made an offer to trade perjured testimony by the defendant. The Florida appellate court found that an actual conflict of interest arose "any time consideration was given to the question whether Burnside should testify." *Burnside*, *supra* at 244. The defendant's conviction was reversed.

The conflict of interest in the present case is equally compelling. Here, the defendant alleged that his trial counsel specifically advised him to flee the jurisdiction. Upon his arrest and extradition back to Colorado, Mr. Curren was so concerned about the advice of counsel that he hired a new lawyer, Frank Scheitler, to assist in trial preparation. When trial counsel resisted the assistance of the new lawyer, and eventually prevailed in his effort to dismiss Scheitler prior to the trial, the actual conflict of interest between trial counsel and Mr. Curren was apparent. Faced with the prospect of his client being cross-examined on his decision to flee, trial counsel dissuaded Mr. Curren from testifying at trial. As a result, the testimony of Dan Sullivan and Kelly Callaway went largely un-rebutted. Because the actual conflict of interest in this case directly impacted the trial strategy of trial counsel, and caused prejudice to the defendant, Mr. Curren's convictions must be reversed, and his case remanded for a new trial. U.S. Const., Amend. V, VI, XIV; Colo. Const., Art. II, Sec. 16, 18, 25.

**C. TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL, AND MR. CURREN SUFFERED PREJUDICE AS A RESULT.**

In addition to the specific conflict of interest described above, trial counsel failed to provide effective assistance of counsel in numerous other instances at trial. A list of specific errors and omissions by counsel is set forth below. Because

counsel's errors and omissions caused prejudice to Mr. Curren, his convictions must be reversed.

**1. Trial counsel's failure to request a jury instruction on the lesser non-included offense of Accessory to a Crime constituted ineffective assistance of counsel.**

Mr. Steinberg proceeded on a theory of the case that Mr. Curren acted as an accessory after the fact. To support that theory, he called the partial alibi witness, Isabelle Kotnour, to testify that in the evening of May 26, 1997, she stayed with Mr. Curren at his house. She testified that late in the evening Mr. Curren received a phone call, after which he left.

At the time of the trial, Accessory to the crime of First Degree Murder was a class 4 felony. A class 4 felony carried, at the time of the offense in this case, a presumptive range sentence of 2 to 6 years. By contrast, the crime of First Degree Murder, the offense for which Mr. Curren was convicted, carried a mandatory sentence of life in prison with no possibility of parole.

Trial counsel's failure to request an instruction on Accessory prevented the jury from even considering the lesser offense which best fit the facts of the case. The prejudice to Mr. Curren was obvious and overwhelming.

In order to obtain a jury instruction articulating the defendant's theory of defense, or to obtain an instruction for a lesser offense, there need only be a mere

“scintilla” of evidence in support of the theory. *People v. Nunez*, 841 P.2d 261 (Colo. 1992); *People v. Fuller*, 781 P.2d 647 (Colo. 1989); *Lybarger v. People*, 807 P.2d 570 (Colo. 1991) (An instruction embodying the defendant's theory of the case must be given if there is any credible evidence to support it, regardless of how improbable). A request for a lesser non-included offense is tantamount to a request for a theory of the defense instruction and must be given by the trial court if the record contains any evidence to support the theory. *People v. Skinner*, 825 P.2d 1045, 1047 (Colo. App. 1991).

There was evidence at trial from which the jury could have concluded that John Curren had assisted on the cleanup of the crime scene. Any such evidence, involving the cleanup, hiding, or destruction of evidence, would have warranted the instruction for Accessory.

The elements of Accessory are:

1. The Defendant;
2. In the state of Colorado, at or about the date and place charged,
3. Rendered assistance to a person,
4. With the intent to hinder, delay or prevent,
5. The discovery, detection, apprehension, prosecution, conviction, or punishment of such person,
6. For the commission of a crime,

7. Knowing the person being assisted has committed, was suspected of or was wanted for the crime of [First Degree Murder/ Felony Murder].

Section 18-8-105.

Accessory to the crime of first degree murder is a class 4 felony with a presumptive range of from two to six years. Section 18-8-105(3).

At trial, Kelly Callaway testified that Mr. Curren, among others, assisted in the cleanup of her home, and possibly in the disposal of the bodies of the victims. Because the jury was properly instructed that they could believe all or any part of any witness's testimony, the jury could have concluded that Callaway's testimony on this point was credible, while rejecting the testimony of the highly motivated witness Dan Sullivan.

In fact, between the two witnesses, Callaway was the more apparently credible, as she was never charged with the murders, and had not negotiated a special deal to avoid a life sentence. The jury could have credited most of the testimony of Callaway, while rejecting all or a portion of the testimony of Sullivan. Had the jury been properly instructed, the likely result would have been a conviction for Mr. Curren of Accessory, with a prison sentence of 2 to 6 years.

In addition, Isabelle Kotnour, testified that in the evening of May 26, 1997, she stayed at Mr. Curren's house. She testified that late in the evening Mr. Curren received a phone call, after which he left.

The failure to request a jury instruction on a lesser offense has been found to constitute ineffective assistance of counsel. *See, e.g., Wiley v. State*, 183 S.W.3d 317, 330-333 (Tenn. 2006). In *Wiley*, the appellate court ruled that trial counsel's failure to request a jury instruction on the lesser offense of second degree murder constituted ineffective assistance of counsel in two ways. First, as here, it prevented the jury from considering the lesser offense as a possible verdict, causing direct prejudice to the defendant. Second, as here, the failure to request the instruction eliminated the issue from possible appellate review, had the trial court denied the request. In both ways, the defendant suffered prejudice as a result of counsel's decision.

The *Wiley* case is also applicable on another issue. There, defense counsel failed to seek an instruction on self defense, even though the evidence warranted such an instruction. The Tennessee Supreme Court ruled that, combined with counsel's failure to seek an instruction on the lesser offense, the failure constituted ineffective assistance of counsel, requiring reversal of the defendant's conviction. *Wiley, supra* at 330-330.

Similarly, the Illinois Court of Appeals has recently ruled that the failure to raise an available affirmative defense, and to request the appropriate jury instruction, constituted ineffective assistance of counsel. *People v. Sims*, \_\_\_ N.E. 2d \_\_\_, 2007 WL 16623222 (Ill. App. 2007). In *Sims*, trial counsel failed to raise the affirmative defense of compulsion, which was available and applicable in a prosecution for felony murder. The appellate court ruled that the failure was particularly prejudicial where

the defendant was being prosecuted on a complicity theory, and reversed the defendant's conviction.

Mr. Curren's case is similar. There was no physical evidence linking Mr. Curren to the homicides. There were no independent, disinterested witnesses. The testimony of Daniel Sullivan was subject to impeachment on many grounds, including his admitted involvement in the case and his "sweetheart" deal with the prosecution in exchange for his testimony. Under these circumstances, the failure to request an instruction on Accessory to a crime constituted ineffective assistance of counsel, and requires that Mr. Curren's conviction be reversed. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.

Most compelling to this issue of ineffective assistance of counsel is that Mr. Steinberg defended the case on the theory that Mr. Curren acted as an accessory after the fact. The failure to ask for an instruction of accessory after the fact when the defense theory was accessory is per se ineffective assistance of counsel.

**2. Trial counsel's failure to object to the "stock" jury instruction on complicity constituted ineffective assistance of counsel.**

Trial counsel provided ineffective assistance of counsel by failing to object to the stock jury instruction on complicity. The instruction contained an error of constitutional magnitude, because it added the element of knowledge that another

person committed “**all or part of the crime.**” See *People v. Rodriguez*, 914 P.2d 230, 276 (Colo. 1996); *Bogdanov v. People*, 941 P.2d 247 (Colo. 1997).

According to the prosecution theory, Mr. Curren was involved with Thomas Behymer, Monir Wood, and Kerry Cournoyer in causing the deaths of Raul Palma and Leo Hartnett. The only witness to actually implicate Mr. Curren in causing the deaths was Daniel Sullivan.

Sullivan’s testimony, however, was less than clear. Sullivan was unable to say, with specificity, which of the other defendants did what. As a result, Behymer was acquitted at trial. Even Mr. Curren was found not guilty of First Degree Murder – After Deliberation.

On the two counts of Felony Murder, however, the jury found Mr. Curren guilty. With a lack of specific evidence as to Mr. Curren, the jury must have relied on the theory of complicity.

At the time of the trial in this case, the legal doctrine of accomplice liability, or complicity, was set forth section 18-1-603. The statute states:

**Complicity.** A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.

The statute makes no reference to the commission of “all or part of” the crime.

By contrast, the trial court's instruction to the jury on the issue of complicity read as follows:

A person is guilty of an offense committed by another if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:

1. A crime must have been committed.
2. Another person must have committed **all or part of the crime**.
3. The defendant must have had knowledge that the other person intended to commit **all or part of** the crime.
4. The defendant must have had the intent to promote or facilitate the commission of the crime,
5. The defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

(Emphasis added).

The trial court's instruction was based upon the standardized jury instruction on complicity, CJI-Crim. 6:04. The standardized instruction, however, is not consistent with the Colorado statute on complicity. Section 18-1-603. Further, prior to Mr. Curren's trial the Colorado Supreme Court had held that the standard instruction is erroneous. *People v. Rodriguez*, 914 P.2d 230, 276 (Colo. 1996); *Bogdanov v. People*, 941 P.2d 247, *amended*, 955 P.2d 997 (Colo. 1997).

Under the jury instruction on complicity, the jury could have mistakenly concluded that they were required to find Mr. Curren guilty, even if they did not find that he had participated in the beating or killing of the victims. The instruction mandated a finding of guilty, under paragraphs 2 and 3, if the jury found that "(2) Another person committed ***all or part of*** the crime and (3) The defendant must have had knowledge that the other person intended to commit ***all or part of*** the crime." (Emphasis added). The Colorado Supreme Court has held that the "all or part of" language, which does not appear in the statutory definition of complicity, is erroneous. *Rodriguez, supra*, 914 P.2d 230, 276.

This error went directly to the theory of defense of accessory after the fact. Because of the "all or part of" language, the jury had to convict Mr. Curren even though he only participated in the cleanup of Callaway's house after the actual commission of the crime.

At the time of the trial in this case, trial counsel had the benefit of both the *Rodriguez* and *Bogdanov* decisions. Counsel knew, or should have known, that the "all or part of" language had been ruled erroneous. Counsel should have known that the issue was significant here, as the jury could have concluded that the Defendant was guilty of assisting in "part of" the crime by helping either to clean up the crime scene or to help dispose of the bodies of the victims.

In *People v. White*, 182 Colo. 417, 422, 514 P.2d 69 (Colo. 1973), the Court held:

Only through pre-trial preparation can the defendant be assured that facts will be discovered which will disclose potential defenses to a reasonably diligent and competent defense counsel. In the absence of adequate pre-trial investigation -- **both factual and legal** -- knowledgeable preparation for trial is impossible. Without knowledgeable trial preparation, defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client. U.S. Const. amend.VI. Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962). See also Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Lee v Wainwright, 457 F.2d 771 (5th Cir. 1972). **Such conduct constitutes nothing more than a pro forma entry and is a sham and a facade by which counsel misleads both his client and the court.**

(Emphasis supplied).

"Justice cannot be the product of our courts under an adversary system if defense counsel fails to serve as an advocate who is competent and well prepared to represent his client." *People v. White*, 182 Colo. 417, 424, 514 P.2d 69 (Colo. 1973);

*citing* American Bar Association Standards for Criminal Justice Relating to The Defense Function §§ 1.1(a) and 1.1(b).

If the only participation of Mr. Curren was in assisting, post-homicide, in disposing of evidence, he would be guilty only of being an accessory (after the fact) to the crime. (See, Argument 1, above). The erroneous instruction on complicity therefore directly prejudiced Mr. Curren, as it allowed the jury to convict him for felony murder as an accomplice, even if the only evidence of his participation was as an accessory.

Under circumstances remarkably similar to those at hand, the 3<sup>rd</sup> Circuit Court of Appeals has addressed the failure of trial counsel to object to an erroneous jury instruction on complicity, finding ineffective assistance of counsel. *See, Everett v. Beard*, 290 F.3d 500, (C.A.3 (Pa.) 2002). In *Everett*, the Court noted that it was not alone in finding ineffective assistance of counsel for failing to object to an erroneous instruction:

Several other of our sister circuits have granted habeas petitions on the grounds that counsel was ineffective for failing to object to or to propose jury instructions. *See, e.g., Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir.2001) (granting habeas on ineffective assistance grounds due to counsel's failure to object and thus to prompt a curative cautionary jury instruction); *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir.1996) (granting

habeas on ineffective assistance grounds due to counsel's failure to request cautionary instructions on accomplice testimony); *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir.1996) (finding ineffective assistance because counsel failed to request a significant jury instruction); *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir.1995) (finding ineffective assistance due, inter alia, to “failure to propose, or except to, jury instructions”); *Gray v. Lynn*, 6 F.3d 265, 271 (5th Cir.1993) (finding ineffectiveness because counsel failed to object to erroneous jury instructions). Everett's counsel was deficient for not challenging the jury instructions on accomplice liability for first-degree murder. Countless times we have seen lawyers object to instructions on patently flimsy grounds. This was not a flimsy ground.

*Everett v. Beard*, 290 F.3d 500, 514 -516 (C.A.3 (Pa.) 2002) (footnote 5 omitted).

Here, as in *Everett*, the Defendant was convicted of First Degree Murder on a complicity theory. Here, as in *Everett*, trial counsel failed to object to the erroneous jury instruction on complicity, and the failure caused prejudice to the Defendant. Here, as in *Everett*, the Defendant's conviction must be reversed.

The failure to object to the instruction was prejudicial in another way because it failed to preserve the issue for appellate review. Had trial counsel objected in a timely fashion, however, the entire issue would have been preserved. Especially when

viewed in conjunction with the failure to request an instruction on accessory to a crime, counsel's failure to object to the complicity jury instruction caused prejudice to Mr. Curren, and requires that his conviction be reversed. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.

**3. Trial counsel's failure to object to the erroneous jury instruction on felony murder, and failure to object to the admission of co-defendant hearsay, constituted ineffective assistance of counsel.**

**a. Failure to object to the erroneous felony murder instruction**

Trial counsel failed to object to the erroneous jury instruction on felony murder, which incorrectly listed felony murder as the predicate crime for felony murder. The failure to object meant that the issue was not properly "preserved" for appellate review. As a result, the erroneous instruction was reviewed on the more stringent "plain error" standard of review on appeal. This error was significant, and directly prejudiced Mr. Curren on appeal.

Although appellate counsel raised this issue on direct appeal, the Court of Appeals reviewed it under the "plain error" standard because of Mr. Steinberg's failure to object. *People v. John Curren*, 2002CA1144, slip opinion pages 22-27 (Colo. App. June 2, 2005) (unpublished). The Court of Appeals held that "the jury instructions for felony murder did not comport with either the language of the statute

or the pattern jury instructions.” *Id.*, slip opinion at page 25. Appellate counsel argued because the instruction omitted the statutory language of “commits or attempts to commit” and “is committing or attempting to commit,” the instruction allowed the jury to convict him of felony murder even though, according to his theory of defense, he was, at worst, an accessory. *Id.*, slip opinion at 24.

Thus the failure to object to this clearly erroneous instruction on felony murder compounded the error of failing to ask for an instruction and verdict form on accessory after the fact. See argument 1, above.

**b. Failure to object to co-defendant hearsay**

Similarly, trial counsel failed to persist in his objection to the admission of certain hearsay from co-defendants who did not testify at the trial. Counsel initially objected to the admission of such hearsay, and the trial court seemed to have ruled in favor of the defendant. When the prosecution persisted in attempting to present such evidence, however, trial counsel failed to reiterate his earlier objection, and failed to preserve the earlier favorable ruling of the trial court. (See, V26, p25-26)

The result was extremely prejudicial Mr. Curren, as the hearsay linked directly to the question of a supposed robbery, which was the actual predicate felony for the felony murder charges. The failures to object constituted ineffective assistance of counsel, and require that Mr. Curren’s conviction be reversed. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.

The failure to object is a proper basis, in and of itself, for a finding of ineffective assistance of counsel. *See, Vento v. Florida*, 621 So.2d 493 (Fla. App. 1993). The failure to make appropriate trial objections has been held to constitute grounds for a claim of ineffective assistance of counsel in a variety of situations. *See, e.g., Crotts v. Smith*, 93 F.3d 861 (9<sup>th</sup> Cir. 1996); *Mason v. Hanks*, 97 F.3d 887 (7<sup>th</sup> Cir. 1996); *Dickeson v. State*, 843 P.2d 608, 613 (Wy. 1993); *State v. Allen*, 853 P.2d 625, 630 (Id. App. 1993); *In re Wilson*, 3 Cal. 4<sup>th</sup> 945, 838 P.2d 122, 1228-29, 13 Cal. Rptr. 269 (1992); *State v. Walters*, 120 Id. 46, 813 P.2d 857, 867 (1990). *See also In re Neely*, 6 Cal. 4<sup>th</sup> 901, 26 Cal. Rptr. 203 (1993).

Even where a failure to object does not, standing alone, constitute sufficient grounds for setting aside a conviction, such a failure is often corroborative of other instances of deficient performance by defense counsel. *Hester v. United States*, 303 F.2d 47 (10<sup>th</sup> Cir. 1962), *cert. denied* 371 U.S. 847, 83 S.Ct. 80, 9 L.Ed.2d 82 (1962); *State v. McElveen*, 168 Mt. 500, 544 P.2d 820, 824 (1975). Because the failure to object to the felony murder instruction, coupled with the failure to ask for an accessory instruction, clearly prejudiced the Defendant, such failure constituted ineffective assistance of counsel, and requires reversal of the Defendant's conviction. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, Sec. 16, 25.

**4. Trial counsel failed to articulate a clear theory of defense, and failed to present a clear or coherent closing argument.**

Defense counsel in this case attacked the credibility of the two key witnesses for the prosecution, essentially arguing that they were lying. But trial counsel failed to articulate a clear theory of defense. This failure, and the failure to present a clear and coherent closing argument, resulted in a violation of Mr. Curren's right to effective assistance of counsel. Combined with counsel's failure to request a jury instruction on accessory, this constituted ineffective assistance of counsel.

As noted above, the jury could have concluded that Mr. Curren was an accessory after the fact to the murders. Trial counsel's failure to request a jury instruction on this issue is noted separately. In addition to the jury instruction, however, trial counsel had an opportunity and an obligation to articulate and explain the difference between accomplice liability and the lesser degree of liability under the accessory statute.

In addition, trial counsel could have and should have explained why the prosecution witnesses were more likely and more motivated to have committed the murders. Sullivan had been more involved as a courier dealing with both Palma and Hartnett, and was highly motivated to eliminate either or both of them to further his own position within the drug ring.

As Sullivan's girlfriend and the "host" of the gathering that led to the murders, Kelly Callaway was highly and personally motivated to support Sullivan and to exonerate herself. Her testimony was colored by her motivation to herself and to Sullivan, the father of her child.

Calling the two witnesses liars, however, was inadequate as a theory of defense. Explaining the relationships between Callaway and Sullivan, and even more importantly between Sullivan and the two victims, was critical. Eliciting testimony to demonstrate Sullivan's motive not only for lying, but for committing the murders himself, was crucial. *See* argument 4, below. Fleshing out this information in both opening and closing statement is an integral part of trial counsel's job. Trial counsel's failure in this regard constituted ineffective assistance of counsel.

The failure to provide an effective closing argument in this case, along with the failure to articulate a coherent theory of defense, constituted ineffective assistance of counsel. U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, sections 16 and 25; *see, e.g., People v. Dillon*, 739 P.2d 919 (Colo. App. 1987) (abandonment of the theory of defense during closing argument); *Hissick v. Oregon*, 529 P.2d 938 (Or. App. 1974) (failure to point out inconsistencies in testimony during final argument).

**5. Trial counsel's failure to thoroughly investigate, interview, and subpoena the available defense witness Rob Shelden constituted ineffective assistance of counsel.**

Mr. Shelden had relevant, exculpatory evidence, but Mr. Steinberg never interviewed him or subpoenaed him to trial. The failure was significant and resulted in prejudice to Mr. Curren.

Unlike Mr. Steinberg, the Scheitler law firm did speak with Mr. Shelden. In a March 29, 2002 letter, Mr. Scheitler informed Mr. Steinberg of Mr. Shelden's whereabouts. Letter attached as Exhibit D. In the letter, Mr. Scheitler also told Mr. Steinberg that Mr. Curren wanted to have a two to three hour conference with Mr. Steinberg to be brought up to date on the status of trial preparation. That meeting never occurred.

Rob Shelden's testimony would have been relevant, admissible, and exculpatory. Shelden knew all of the suspects in the case, and was particularly familiar with Behymer and Sullivan. Shelden would have testified that around the end of May in 1997, Behymer and Sullivan stopped by to see if Shelden knew where to buy some "weed." Sullivan and Behymer claimed that they were "laying low" in Estes Park. Sullivan's own testimony confirmed Shelden's statement that Sullivan and Behymer visited him in Boulder shortly after the murders.

During the course of the conversation, Sullivan bragged to Shelden that he was making good money transporting marihuana from El Paso to Denver. Sullivan told Shelden that Palma had failed to pay him the full price for one of the deliveries. Sullivan said that Palma had cheated him out of about \$10,000. Sullivan told Shelden that because he felt ripped off he refused to drive the rental car back to Texas. As a result, Palma arranged to come to Denver with Leo Hartnett.

According to Shelden, Sullivan admitted that he was with Behymer, Palma and Hartnett at Kelly Callaway's house. Sullivan admitted that he became upset with Hartnett and killed him with a baseball bat. Sullivan and Behymer then beat and suffocated Palma, and stole money from Palma. Behymer also showed Shelden a watch that he claimed they had taken from Hartnett.

Rob Shelden's testimony was important for a number of reasons. First, the testimony was powerful impeachment evidence for trial counsel to use while cross-examining Sullivan and Callaway. The information would have blunted or reduced the effectiveness of the prosecution's key witnesses.

Assuming that Sullivan denied the statements to Shelden, defense counsel should have then called Shelden to the stand in the defense case. The jury would then have heard directly from Shelden that Sullivan, the star witness for the State, had confessed to the commission of the murders.

Trial counsel knew that Rob Shelden was an important and available defense witness. Despite this knowledge, trial counsel failed to contact or subpoena him for the trial in 2002. The affidavit of Rob Shelden is attached as Exhibit C.

The failure to thoroughly investigate the case and to contact and subpoena Shelden constitutes ineffective assistance of counsel. *See, People v. Herrera*, 188 Colo. 403, 534 P.2d 1199 (1975); *People v. Danley*, 758 P.2d 686 (Colo. App. 1988); *People v. White*, 182 Colo. 417, 421, 514 P.2d 69 (Colo. 1973); *see* ABA Standards for Criminal Justice Relating to the Defense Function 4.1 Duty to Investigate.

The failure to investigate in this case caused significant and direct prejudice to Mr. Curren and requires reversal of his conviction.

**6. Trial counsel provided ineffective assistance of counsel by conducting a woefully inadequate cross-examination of Dan Sullivan.**

Mr. Steinberg conducted a meandering and imprecise cross-examination of Dan Sullivan, the key prosecution witness. Prior to Mr. Curren's trial, co-defendant Behymer had gone to trial represented by Craig Truman. Mr. Truman conducted an extremely effective cross-examination of Sullivan that destroyed his credibility.

Mr. Steinberg had the transcript of the Behymer trial prior to Mr. Curren's trial. Had Steinberg merely read Mr. Truman's questions word for word he would have destroyed Sullivan's credibility.

For example, Mr. Steinberg asked no questions about the possible punishments Sullivan could have received if convicted for first-degree murder. He asked no questions about the possible sentences for Sullivan's guilty plea to two counts of aggravated robbery. Mr. Steinberg didn't even know that Sullivan had gone to prison for 11 months.

Mr. Steinberg's entire cross-examination of the possible penalties took two pages of transcript.

By contrast, Mr. Truman spent thirteen pages of transcript cross-examining Sullivan about possible penalties. Mr. Truman questioned him about the penalties for first-degree murder, for conspiracy to commit aggravated robbery, for aggravated robbery, for conspiracy to commit murder, the effect of crime of violence sentencing, the effect of a violent crime conviction on parole eligibility, penalties for possessing up to 500 pounds of marihuana in Texas, federal penalties for interstate transportation of drugs, federal penalties for transporting drug money, tax evasion for failure to report income to the Internal Revenue Service, and distribution of marihuana.

In addition, Mr. Truman got Mr. Sullivan to admit that he didn't expect to be prosecuted for the above listed crimes and that he hoped for a recommendation of a lenient sentence from the district attorney. In view of the fact that Sullivan only spent 11 months in prison, Mr. Steinberg should have explored, but didn't, all the possible penalties that Sullivan avoided.

The contrast between the cross-examination by Mr. Truman and that by Mr. Steinberg is replete with further examples of Mr. Steinberg's ineffective assistance of counsel due to his lack of preparedness for trial.

**7. Trial counsel provided ineffective assistance of counsel by failing to ask for an instruction on conspiracy to commit aggravated robbery, because conspiracy to commit robbery is not a predicate felony for felony murder.**

Prior to trial, the prosecutor moved to dismiss the conspiracy counts. Mr. Steinberg did not object. At the conclusion of the evidence Mr. Steinberg did not ask for an instruction on conspiracy to commit aggravated robbery. This was ineffective assistance of counsel because conspiracy to commit robbery is not a predicate offense of felony murder.

The felony murder statute, section 18-3-102(1)(b), states:

**18-3-102. Murder in the first degree.** (1) A person commits the crime of murder in the first degree if:

(b) Acting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault as prohibited by section 18-3-402, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403 as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in section 18-3-405(2), or the crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone;

(Emphasis supplied).

The plain language of the statute makes clear that conspiracy to commit robbery does not constitute a predicate act for felony murder.

More than enough evidence existed to justify a conspiracy instruction. *People v. Nunez*, 841 P.2d 261 (Colo. 1992); *People v. Fuller*, 781 P.2d 647 (Colo. 1989); *Lybarger v. People*, 807 P.2d 570 (Colo. 1991) (An instruction embodying the defendant's theory

of the case must be given if there is any credible evidence to support it, regardless of how improbable).

Not only would a conviction for conspiracy to commit aggravated robbery have precluded a conviction for felony murder, it also carried a presumptive range of from two to eight years and an aggravated range of five to sixteen years. Because sufficient evidence existed to justify the instruction and because of the drastic differences in penalties, Mr. Steinberg provided ineffective assistance of counsel by failing to ask for the conspiracy instruction.

**8. The cumulative effect of the numerous errors of counsel combined to deprive Mr. Curren of his constitutional right to effective assistance of counsel.**

Even if any one of several of the errors and deficiencies described above do not require that the convictions and sentence be vacated, the cumulative effect of the deficient performance by counsel deprived Mr. Curren of his right to effective assistance of counsel, and his convictions and sentence must therefore be vacated.

U.S. Const., Amend. VI, XIV; Colo. Const., Art. II, sections 16 and 25; *People v. Gonzales*, 543 P.2d 72 (Colo. App. 1975); *People v. Vera*, 660 N.E.2d 9 (Ill. App. 1996);

*State v. Crislip*, 109 N.M. 351, 785 P.2d 265 (1989); *Dickeson v. State*, 843 P.2d 608 (Wy. 1983).

**III. THE STATUTORY SCHEME BETWEEN THE COMPLICITY STATUTE AND THE CONSPIRACY STATUTE VIOLATES EQUAL PROTECTION BECAUSE NO COGNIZABLE DIFFERENCE EXISTS BETWEEN THE ELEMENTS OF COMPLICITY AND CONSPIRACY, BUT THEY HAVE DRASTICALLY DIFFERENT CONSEQUENCES**

**A. THE LEGAL STANDARD FOR EQUAL PROTECTION**

**1. Basic Equal Protection Law**

The United States and Colorado Constitutions guarantee equal protection of the laws, and require that similarly situated people receive like treatment. U.S. Const. amend. XIV; Colo. Const. art. II, sections 6 & 25; *New York City Transportation Authority v. Beazer*, 440 U.S. 568 (1979); *Bath v. Department of Revenue, Motor Vehicle Division*, 758 P.2d 1381 (Colo. 1988); *Tassian v. People*, 731 P.2d 672 (Colo. 1987); *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

## 2. The Standard of Review -- Strict Scrutiny

Generally, courts review equal protection challenges to statutes under the rational basis test -- whether the statutory classification is reasonably related to a legitimate state interest. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *7250 Corporation v. Board of County Commissioners for Adams County*, 799 P.2d 917, 922 (Colo. 1990).

When, however, the statutory classification implicates a fundamental right, strict scrutiny analysis applies, and the State bears the burden of proving that the classification is necessarily related to a compelling governmental interest. *E.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971); *7250 Corp.*, 799 P.2d at 922.

Here, the statutory classification implicates the fundamental rights to liberty, to the presumption of innocence, and to proof beyond a reasonable doubt. *U.S. Const.* amends. V, VI, & XIV; *Colo. Const.* art. II, sections 3 and 25. The Colorado Constitution expressly establishes the inalienable right to defend one's liberty. *Colo. Const.* art. II, section 3. Therefore, strict scrutiny applies.

### **3. The State Cannot Treat The Less Culpable Accused More Harshly Or With The Same Degree Of Harshness As It Does The More Culpable Accused**

The legislature has the sole power to establish the legal constituents of criminal liability. *See, e.g., Patterson v. New York*, 432 U.S. 197 (1977); *People v. Ledman*, 622 P.2d 534 (Colo. 1981). Colorado courts have the “responsibility to the rational and evenhanded application of the law under our state system of criminal justice.” *Marcy*, 628 P.2d at 73.

In *Marcy*, the Court held that a statutory scheme violate equal protection:

a. “if different statutes proscribe the same criminal conduct with disparate criminal sanctions.” *Id.*, 628 P.2d at 74-75.

b. or where, separate statutes proscribe ostensibly different acts, but offer “no intelligent standard for distinguishing the proscribed conduct.” *Id.*, 628 P.2d at 75.

Although the Court in this section of *Marcy* speaks of “acts”, its earlier discussion of the interaction between *actus reus* and *mens rea* makes clear that the Court was referring to the same “acts” coupled with the same “mental state.” This must be true because the Court in *Marcy* did not state, for example, that a person who kills

another by accident should receive the same punishment as a person who kills intentionally, after deliberation.

Logically, therefore, *Marcy* stands for the proposition that it violates equal protection to punish the less culpable actor with the same severity as the more culpable actor.

#### 4. Analysis of the statutes in question

The complicity statute, section 18-1-603, reads:

A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, **he or she aids, abets, advises, or encourages** the other person **in planning or committing** the offense.

(Emphasis supplied).

“Conviction as a complicitor requires that a crime be committed by another person, that the defendant have knowledge that the other person intended to commit the crime, and that the defendant intentionally aided, abetted, encouraged, or advised the other person in the commission or planning of the crime.” *People v. Fisher*, 904 P.2d 1326 (Colo.App. 1994).

The conspiracy statute, section 18-2-201, reads:

(1) A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he **agrees with another person or persons** that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or **he agrees to aid the other person or persons in the planning or commission of a crime** or of an attempt to commit such crime.

(Emphasis supplied).

The major distinction made in the case law is that a conspiracy requires an agreement. But you cannot aid, abet, advise, or encourage, or plan an offense unless you have agreed.

Although the two statutes have slightly different language, they in essence have identical elements.

- a. Both statutes have the mental element of “intent to promote or facilitate” the commission of the offense.
- b. Both statutes have an act element that in essence requires aiding or abetting the principal.

c. The complicity statute uses the language “aids, abets, advises, or encourages the other person in planning or committing the offense.”

d. The conspiracy statute uses the language “agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.”

The following table illustrates the argument:

Complicity	Conspiracy	NOTES
with the intent to promote or facilitate the commission of the offense	with the intent to promote or facilitate its commission	Same
	he agrees with another person or persons that they, or one or more of them	No "agreement" in complicity, but you can't "aid, abet, or encourage" without "agreeing" -- See, e.g. <i>Salazar v. People</i> , 166 Colo. 508, 445 P.2d 60 (1968).
he or she aids, abets, advises, or encourages the other person in	will engage in conduct which constitutes a crime or an attempt to commit a crime or he	Although the language in these two parts differs, both mean the same thing.

planning or committing the offense.	agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.	
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No rational distinction exists between the two statutes, but they have drastically different consequences, not only in Mr. Curren’s case, but in all criminal cases.

As discussed above in argument II(D)(7), conspiracy to commit aggravated robbery does not constitute a predicate felony for felony murder. By contrast, a complicitor is legally accountable as a principal.

A person convicted as a complicitor suffers the same fate as the principal. In the case of felony murder, a complicitor to the predicate offense aggravated robbery is guilty of felony murder. *People v. Priest*, 672 P.2d 539 (Colo. App. 1983); *People v. Fisher*, 9 P.3d 1189 (Colo. App. 2000).

By contrast, a person convicted of conspiracy to commit aggravated robbery cannot be punished for felony murder, but rather faces punishment in the aggravated range for a class four felony.

Because no rational distinction exists between the two statutes and because of the drastic differences in consequences, the statutory scheme violates equal protection of the laws. The statutory scheme violates both tests articulated in *Marcy*. First, the two statutes “proscribe the same criminal conduct with disparate criminal sanctions.” *Marcy*, 628 P.2d at 74-75. Second, the separate statutes proscribe ostensibly different acts, but offer “no intelligent standard for distinguishing the proscribed conduct.” *Id.*, 628 P.2d at 75.

Trial and appellate counsel provided ineffective assistance of counsel by failing to raise this issue.

## CONCLUSION

For the reasons and authorities set forth above, Mr. Curren respectfully asks this Court to reverse and vacate his convictions. Mr. Curren further notes that the investigation and research of this motion are continuing, and that the motion may be supplemented or amended in the future. Finally, pursuant to the United States and Colorado Constitutions, and rule 35(c) of the Colorado Rules of Criminal Procedure, Mr. Curren requests a hearing on this motion.

Dated: July 18, 2007

Respectfully,

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Thomas K. Carberry # 19707

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Patrick J. Mulligan # 16981

**CERTIFICATE OF SERVICE**

I certify that on July 18, 2007, I filed a copy of this 35(c) motion with the District Attorney by leaving a copy at the Adams County District Court Clerk's Office for placement in the District Attorney's box.

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Thomas K. Carberry # 19707