No. 14-95

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK GLEBE, Superintendent,
Stafford Creek Corrections Center,
Petitioner,

- v. -

JOSHUA JAMES FROST,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent Joshua James Frost, through counsel, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari in forma pauperis. Respondent was represented on appeal by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted

September 29, 2014

By_____
ERIK B. LEVIN

Counsel for Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. The Sixth Amendment Right to Present Proper Argument in Summation

In *Herring v. New York*, this Court recognized the Sixth Amendment "'right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and applicable law in his favor[.]'" 422 U.S. 853, 860 (1975) (quoting *Yopp v. State*, 178 A.2d 879, 881 (Md. 1962)). This Court struck down a New York statute empowering judges to deny summation in bench trials because the statute violated the Sixth Amendment by unreasonably restricting defense counsel's vital role in the adversarial factfinding process.

Herring recognized the fundamental right to present proper argument in summation, and did not limit this legal principle to bench trials or to the complete denial of any summation. *Id.* at 858-61. *Herring* made clear that the Sixth Amendment left the trial judge "'no discretion'" to deny the accused the right to make a proper argument, *id*. at 860 (quoting *Yopp*, 178 A.2d at 881), while acknowledging that a trial judge retained latitude to limit summation to a reasonable time and ensure that summation did not "stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." *Id.* at 862.

Herring identified the "right to be heard in summation of the evidence

from the point of view most favorable" to the defendant as vital to the framework of the adversarial criminal trial. *Id.* at 864. "In a criminal trial . . . no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id*. at 862.

The right to present proper argument in summation is essential to due process because "closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* (citing *In re Winship*, 397 U.S. 358 (1970)). Due process requires the prosecution to prove all elements of the crime beyond a reasonable doubt, *see Winship*, 397 U.S. at 361, and guarantees the defendant "the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

Herring found denying a proper argument was *per se* reversible error because "[t]here is no way to know whether . . . appropriate arguments in summation might have affected the ultimate judgment in this case." *Id.* at 864. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n.4 (2006) ("[H]ere, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.") (citations omitted). Accordingly,

this Court consistently treats *Herring* violations as structural error. *See Bell v. Cone*, 535 U.S. 685, 696 (2002); *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984).

II. The Trial Court Barred Mr. Frost From Challenging the Sufficiency of the Evidence in Summation

Mr. Frost was charged with participating in five armed robberies. The prosecutor's theory turned entirely on Mr. Frost being an accessory to the charged offenses. *State v. Frost*, 161 P.3d 361, 368 (Wash. 2007) (*"Frost I"*); Respondent's Appendix ("Resp. App.") 4a, 6a-7a. Mr. Frost was not alleged to have carried a firearm in any of the instances; he acted primarily as a driver, and remained in the car during four of the five robberies. *Frost I*, 161 P.3d at 364.[1] His defense was that there was insufficient evidence to prove he participated in his accomplices' criminal acts with adequate knowledge of promotion or facilitation, and to the extent that he was involved, he was under duress. *Id.* at 364. The Washington Supreme Court noted the evidentiary basis for Mr. Frost's reasonable doubt argument was "best illustrated by the

[1] The State erroneously suggests that Mr. Frost was armed and a principal during the second robbery. *See* Pet. at 4 ("They next robbed a fast-food restaurant armed with guns.") (citing *Frost I*, 161 P.3d at 364). The Washington Supreme Court correctly reported that Mr. Frost "acted as the driver" for that offense and there was no evidence he was armed. *Frost I*, 161 P.3d at 364. This was the prosecution's theory at trial. *See* Resp. App. 6a-7a.

robberies in which Frost was only a driver and remained in the car." *Id.* at 368-9.

Prior to summation, the prosecution moved to preclude Mr. Frost's reasonable doubt argument: "My concern is we are going to see him get up in closing and argue, first of all, we haven't proved accomplice liability for any of them and then saying duress." Pet. App. 146a.

The trial court ordered Mr. Frost to concede guilt to preserve his duress defense: "You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other . . . . You must admit the elements of the offense have been proved before you can use the duress offense[.]" Pet. App. 146a. Accordingly, Mr. Frost's counsel conceded guilt during summation. *See* Pet. App. 150a-151a, 153a-154a, 157a, 161a-162a.

The prosecution capitalized on these concessions, arguing that "noticeably absent" from the defense summation was any discussion of the relevant law. "There is a reason for that[,]" the prosecution told the jury, "[b]ecause if [defense counsel] had pointed you to the law and pointed to the elements of the offenses and he pointed to the firearm instruction and made his argument you would realize that his argument is phoney [sic], his arguments don't match up with what the law is and that is really what we are

here for." Resp. App. 3a.

The jury convicted Mr. Frost, and because the individuals he was alleged to have assisted carried firearms during the offenses, Mr. Frost was sentenced to nearly 55 years in prison, 44 years of which were mandatory firearm enhancements.

III. Washington State Proceedings

On direct appeal, the Washington Supreme Court unanimously concluded that the trial court erred in precluding Mr. Frost's legally-available and factually-supported reasonable doubt argument. The trial court error violated the "Sixth Amendment right to have counsel make argument to the jury," *Frost I*, 161 P.3d at 367 (citing *Herring*, 422 U.S. 853); *id.* at 371 (Sanders J., dissenting), and "lessened the State's burden [of proof]," *id.* at 368, a violation of the Fourteenth Amendment "due process requirement that the State prove each element of a charged offense beyond a reasonable doubt." *Id.* at 367 (citing *Winship*, 397 U.S. 358).

The state supreme court found there was a legal and evidentiary basis "for counsel to argue that the State failed to prove Mr. Frost participated in each of his accomplices' criminal acts with adequate knowledge or promotion or facilitation[.]" *Id.* at 368-9. The trial court erred by misinterpreting state

law to require the defendant to concede guilt before presenting a duress defense. *Id.* at 365 ("We hold the trial court erroneously interpreted our decision in [*State v.*] *Riker*[, 869 P.2d 43 (Wash. 1994),] and, based on that erroneous interpretation unduly limited the scope of Frost's counsel's closing argument, thus abusing its discretion."). The Washington Supreme Court held this error was of a constitutional magnitude, and not an exercise of the trial court's "latitude in controlling the duration and limiting the scope of closing summations." *Herring*, 422 U.S. at 862 (quoted in *Frost I*, 161 P.3d at 365). A bare majority of the court, however, ignored *Herring*'s admonition that "[t]here is no way to know whether . . . appropriate arguments in summation might have affected the ultimate judgment[,]" *Herring*, 422 U.S. at 863, and concluded it was "equipped to assess whether the trial court's mistake . . . affected the outcome of this case" and found the error harmless. *Frost I*, 161 P.3d at 370.

IV. Federal Habeas Proceedings

Mr. Frost filed a petition for writ of habeas corpus in federal district court challenging the Washington Supreme Court's decision to apply harmless error as an unreasonable application of *Herring* and *Winship*. The district court denied the writ, but certified the issues for appeal. After a split panel of the

Ninth Circuit affirmed the denial of relief, *Frost v. Van Boening*, 692 F.3d 924 (9th Cir. 2012), Mr. Frost sought *en banc* review.

The Ninth Circuit, sitting *en banc*, agreed with the Washington Supreme Court's conclusion that the trial court had violated *Herring* and *Winship*, but held that it was unreasonable on the unique facts of this case—including the state court finding that the error lowered the prosecution's burden of proof—to conclude these constitutional violations were trial errors subject to harmlessness review. *Frost v. Van Boening*, 757 F.3d 910, 914-15, 917 (9th Cir. 2014) (*"Frost II"*); *see id.* at 917 ("a defendant cannot constitutionally be tried using a lesser burden of proof") (citing *Winship*, 397 U.S. at 364-5).

The Ninth Circuit cited *Herring*'s admonition that no matter how "'open and shut'" the case may seem, "there are 'cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict.' 'And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.'" *Id.* at 916 (quoting *Herring*, 422 U.S. at 863).

The Ninth Circuit then noted that it was "[f]or these reasons we have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error." *Frost II*, 757 F.3d at 916 (citing *United States v.*

Miguel, 338 F.3d 995, 1000-03 (9th Cir. 2003), and *Conde v. Henry,* 198 F.3d 734, 739 (9th Cir. 2000)). The court noted that its decisions "do not constitute 'clearly established Federal law' for the purpose of 28 U.S.C. § 2254(d)(1)[.]" *Id.* at 916, n.1.

REASONS FOR DENYING THE WRIT

This case is unworthy of *certiorari* for four reasons. First, this case is unlikely to provide any definitive guidance on when less-than-complete denials of the right to present summation are subject to harmless error because of the restricted habeas corpus inquiry. Second, the State cannot identify any circuit conflict on when less-than-complete denials of summation are subject to harmless error. Third, this case presents no important issue of federal law because it is well-settled that courts may not base their conclusion that federal law is clearly established on circuit precedent, and the Ninth Circuit followed this proscription. Finally, the petition, at root, seeks error correction, which is not a basis for granting *certiorari*, particularly in this case, where the state's argument lacks any merit.

I. This Case Is a Poor Vehicle for Assessing Under What Circumstances Less-Than-Complete Denials of the Right to Present Summation Are Subject to Harmless Error.

The State does not raise in its Question Presented whether and under what circumstances less-than-complete denials of summation are subject to harmless error. Instead, it focuses exclusively on the habeas corpus issue: whether it is "clearly established" that the type of error here is structural. Given the restricted focus of this analysis, it is exceedingly unlikely that this Court would be able to issue a definitive holding that would provide guidance on this issue in the non-habeas context. Nor is it necessary, since the error is rare—as evidenced by the dearth of lower court decisions considering it—and there is a general consensus about how to evaluate its effects.

II. There is No Circuit Split on Whether Less-Than-Complete Denials of Summation Are Subject to Harmless Error.

The precise type of *Herring* error here—precluding defense counsel from arguing insufficient evidence under circumstances where state law allows him to do so—is different and more egregious than the other types of denials at issue in the cases from lower courts that the State cites. Indeed, the State identifies no other case involving exactly this type of *Herring* error—one that by the state court's own admission, lessened the prosecution's burden of proof across the board, not just on one element.

The cases the State cites reaffirm the line *Herring* drew and the Ninth Circuit followed: trial courts have discretion "in controlling the duration and limiting the scope of closing summations[,]'" but no authority to deny "closing argument on a legitimate defense theory." *Frost II*, 757 F.3d at 915 (quoting *Herring*, 422 U.S. at 862).

1. *Richardson v. Bowersox*, 188 F.3d 973 (8th Cir. 1999), Pet. at 24, relied on *Herring* to limit summation to arguments that lacked an evidentiary basis. *Id.* at 979-80 (quoting *Herring*, 422 U.S. at 862). *Richardson* concluded that the trial court limitation was proper because misrepresenting facts in summation was prohibited and might confuse the jury. *Id.* at 980 (quoting *United States v. Sawyer*, 443 F.2d 712, 713-14 (D.C. Cir. 1971)). Moreover, the trial court had permitted the defendant "to argue extensively during closing argument that he did not participate in the [homicides,]" *id.* at 980, and therefore, even if it were error to limit summation to facts in evidence, the court concluded there would be no "manifest injustice[.]" *Id. Richardson* is therefore in line with the Ninth Circuit's conclusion that there is no *Herring* error unless the court completely precludes a legitimate defense theory. *See Frost II*, 757 F.3d at 918 (total preclusion of an argument is constitutional error "which *Herring* instructs is structural error. . . . Absent *Herring* error there is no error

at all or trial error subject to a harmlessness inquiry.").

The remaining circuit cases the State cites, Pet. at 24-26, similarly apply harmless error to summation limitations that fall short of complete preemption of a legitimate defense theory and do not lower the state's burden of proof.[2] Harmless error review this context is entirely consistent with the Ninth Circuit opinion below. *See Frost II*, 757 F.3d at 915.

In contrast, the Washington Supreme Court found that precluding Mr. Frost's entire reasonable doubt argument *did* lower the prosecution's burden of proof. *Frost I*, 161 P.3d at 368 ("By preventing counsel from arguing this point [reasonable doubt] in closing, the trial court lessened the State's

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[2] *See United States v. Wilcox*, 487 F.3d 1163, 1173 (8th Cir. 2007) (barring defense summation argument that suppressed forensic evidence did not exist was harmless where the trial court did not preclude defendant from presenting his defense theory); *United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) (affirming preclusion of portions of the defense closing argument that included "objectionable factual assertions that certain things not offered in evidence do not in fact exist" as an appropriate exercise of discretion and noting the restriction did not "distort and effectively lower the burden of proof") (citing *Herring*, 422 U.S. 853) (internal quotations omitted); *United States v. Blanche*, 149 F.3d 763, 769 (8th Cir. 1998) (affirming trial court order barring summation on portions of the interview videotape not in evidence, and in the alternative, it was harmless error because the defense did refer to the videotape despite the trial court order); *United States v. Poindexter*, 942 F.2d 354, 359-60 (6th Cir. 1991) (trial court barred comments on the absence of a particular type of forensic evidence, but did not bar the defense from arguing insufficient evidence to convict); *United States v. Davis*, 557 F.2d 1239, 1244 (8th Cir. 1977) (even if trial court erred in limiting the scope of summation, it was harmless because the court permitted counsel to argue his theory of defense and "did not instruct the jury to disregard the argument").

burden"). The State has never challenged the Washington Supreme Court's finding below, and in the interests of comity and federalism, it is entitled to deference. *Cf. Williams v. Taylor*, 529 U.S. 420, 436 (2000) (noting "AEDPA's purpose to further the principles of comity, finality, and federalism.").

The State also contends *Frost II* conflicts with a pre-*Herring* case, *United States v. DeLoach,* 504 F.2d 185 (D.C. Cir. 1974), in which the trial court barred defense counsel from arguing in summation what the court considered factual misrepresentations, but otherwise permitted him to challenge the sufficiency of the evidence. The D.C. Circuit reversed under harmless error after concluding the defense was arguing inferences based on evidence, not misstating facts in evidence. *Id.* at 120-22. *Frost II* does not conflict with *DeLoach*, it simply addresses an issue not raised in *DeLoach*—whether completely precluding any challenge to the sufficiency of the evidence (when state law permits such an argument) is structural error under *Herring*.

2. The State's attempts to create a split between the Ninth Circuit's opinion and state courts is equally unavailing. *See* Pet. at 17 (citing *Lemos v. Texas*, 130 S.W.3d 888 (Tex. 2004), and *Nelson v. Indiana*, 792 N.E.2d 588 (Ind. Ct. App. 2003)). In *Lemos v. Texas*, the trial court erroneously precluded the defense from arguing in summation that the defendant's blood alcohol

concentration could have risen during the two-hour period between the car accident and the blood alcohol test, but permitted him to argue "there was no evidence of what it [Lemos's blood alcohol content] had been at the time of the crash." 130 S.W.3d at 890, 892. And in *Nelson v. Indiana*, the trial court erroneously barred defense counsel from challenging the reliability of forensic testing during his summation, but permitted him to argue the "*poorly tested evidence*" was an insufficient basis to convict. 792 N.E.2d at 594 (emphasis in original). Neither *Lemos* nor *Nelson* involve the "absolute preemption of . . . [a] factually supported, legally available defense theor[y]." *Frost II*, 757 F.3d at 918.

3. While the State cannot identify any case that conflicts with the Ninth Circuit opinion, it ignores those that adopt the very same interpretation of *Herring*. In a strikingly similar case, *Herdt v. Wyoming*, 816 P.2d 1299 (Wyo. 1991), the Wyoming Supreme Court held that precluding the defendant from arguing consent in addition to reasonable doubt in a sexual assault trial "deprived appellant of his fundamental right to present closing argument" as set forth in *Herring*, and "[s]uch deprivation is legally presumed to result in prejudice." *Id.* at 1302.

And in *Connecticut v. Arline*, 223 Conn. 52 (1992), the Connecticut

Supreme Court held it was *per se* reversible error to deny the defendant his federal Sixth Amendment right to "full and fair participation" in the trial by depriving him of "any opportunity to argue the motive for bias of the state's chief witness" where it was "the linchpin of the reasonable doubt defense" and precluding it was tantamount to denying the defense altogether. *Id.* at 64. Looking to *Herring*, *Arline* held that "the right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue," but also "when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts and evidence . . . . [and] the prohibited argument bears directly on the defendant's theory of the case." *Id.* at 64 (citations omitted). A "per se rule of automatic reversal more properly vindicates the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." *Id.* at 65. (citations omitted).

III. The Ninth Circuit Did Not Rely on Circuit Precedent as Clearly Established Law.

The State does not identify any real issue of habeas corpus law at stake in this case. It does not argue that granting *certiorari* is necessary to resolve any issue concerning what exactly "clearly established" means. Instead, it claims that the Ninth Circuit relied on its own precedent to define clearly

established federal law in violation of this Court's directive in *White v. Woodall*, 134 S.Ct. 1697, 1702, n.2 (2014). This claim is not worthy of *certiorari* because this Court has already settled that circuit law may not form the basis of habeas corpus relief. And more importantly, the State's argument is contrived.

The Ninth Circuit did not rely on its own precedent to refine *Herring's* principle into a rule this Court has not announced, or to assess the merits of Mr. Frost's habeas corpus claim. *Marshall v. Rodgers*, 133 S.Ct. 1446, 1450 (2013) (per curiam) (citation omitted); *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012). The court even noted that its opinions do not constitute clearly established federal law. *Frost II*, 757 F.3d at 916, n.1.

Instead, the single-sentence citation to two circuit cases applying *Herring* to similar closing-argument restrictions served only as an example of the clarity of *Herring*'s principle, *Frost II*, 757 F.3d at 916 (citing *Miguel*, 338 F.3d at 1000-03, and *Conde*, 198 F.3d at 739), and "merely reflect[ed] what has been 'clearly established'" by this Court's cases. *Matthews*, 132 S.Ct. at 2155.

The Ninth Circuit was explicit on this point. It quoted *Herring* that "[n]o matter how 'open and shut' the prosecution's case may seem, there are 'cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict.'" *Frost II*, 757 F.3d at 916 (quoting *Herring*, 422

U.S. at 863). "And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel." *Herring*, 422 U.S. at 863 (quoted in *Frost II*, 757 F.3d at 916). And referring to *Herring's* legal principle, the *en banc* opinion remarked, "For these reasons, we have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error." *Frost II*, 757 F.3d at 916 (citing *Miguel*, 338 F.3d at 1000-03, and *Conde*, 198 F.3d at 739).

IV. The State Seeks Error Correction, and Its Argument Lacks Merit.

The State requests that the Court grant *certiorari* to correct what it believes to be the Ninth Circuit's erroneous conclusion that the *Herring* error here was structural error. Taken on its own terms, the State's request is for "simple error correction," which is not a reason for this Court to grant *certiorari*. *See Kyles v. Whitley*, 514 U.S. 419, 422, n.1 (1995). The State's request is particularly inappropriate given that it was the Washington Supreme Court that concluded the *Herring* violation lowered the prosecution's burden of proof. *Frost I*, 161 P.3d at 368. Consequently, the intrusion on state prerogatives in this case is far lessened and the core reason for habeas is present—to allow for new trials when previous trials were fundamentally unfair.

Moreover, the State is simply wrong. In light of the long line of this Court's cases, violating the right to present a legitimate argument in summation and lowering the prosecution's burden of proof are structural errors because they strike at the very framework of the adversarial justice system and their effects cannot be measured.

A. The Sixth Amendment Right to Present Proper Argument in Summation Is Clearly Established.

Herring v. New York recognized the right to present proper argument on the evidence and applicable law in summation as one of the most fundamental and enduring of the adversarial trial rights. 422 U.S. at 858-62. Notwithstanding the clarity of *Herring* on this point, the State argues that the right to present legitimate argument in summation is not clearly established because the New York statute at issue in *Herring* foreclosed summation altogether. Pet. at 16. The State believes that *Herring*'s rationale for striking the statute was *dictum* and *Herring* means only that the accused has the right to say *something* in summation. The State has even argued that, under *Herring*, a ten-second summation might be proper, and that *Herring* permits the trial court to compel defense counsel to admit his client's guilt in

summation and to preclude counsel from addressing a count entirely.[3]

1. The State ignores *Herring's* legal principle. *Herring* did not limit its holding to the complete preclusion of summation, as the State suggests, although it did limit it to "final argument or summation" instead of "argument at any other stage" of trial. *Id.* at 863, n.13. Instead, *Herring* recognized the defendant's broader right to be heard in summation "from the point of view most favorable to him." *Id*. at 864. It is *per se* reversible error to deny this right, *Herring* concluded, because it is essential to the framework of our adversarial system of criminal justice, and because "there is no way to know whether . . . appropriate arguments" would have affected the outcome. *Id.* at 864. This reasoning was not *dictum*. It was an indispensable part of *Herring's* rationale, its holding.

Herring left "no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial." 422 U.S. at 858. It found "no aspect" of the adversarial process "could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862.

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[3]*Available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006216 at 31:00-32:10 (limiting summation to one count); 35:20-36:20 (10 second summation). 43:50-44:15 (admitting guilt).

"'The Constitutional right of a defendant to be heard through counsel *necessarily* includes his right to have his 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.'" *Id.* at 860 (quoting *Yopp*, 178 A.2d at 881) (emphasis added). "[T]he trial court has *no discretion* to deny the accused such right." *Id.* (emphasis added).

The *Herring* Court took as self-evident that this "basic right of the accused to make his defense[,]" 422 U.S. at 859, and in particular, to argue reasonable doubt to the jury, was central to a fair trial. "[F]or the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* at 862 (citing *Winship*, 397 U.S. 358).

Herring concluded that no right was more central to partisan advocacy, the "very premise of our adversary system[,]" than the right to present proper argument to the factfinder. *Id.* at 860, 862. The right to argument dated back to the Sixteenth Century "when notions of compulsory process, confrontation, and counsel were in their infancy[.]" *Id.* at 860. "Whatever other procedural protections may have been lacking, there was no absence of debate on legal and factual issues raised in a criminal case." *Id.*

The twenty-six state court cases *Herring* cited as "universally" recognizing "the right to make a closing summation to the jury[,]" *id.* at 858, n.8, reflect the breadth of the right. These cases consistently held that depriving the defendant a legitimate argument—even where some argument is permitted—violates the fundamental right to make a closing argument in summation. In fact, only four of the twenty-six cases cited by *Herring* involved the complete preclusion of summation. *See id.*[4]

Several of the cases cited by *Herring* concerned the complete preclusion of a legitimate defense theory in summation and held that completely barring a legitimate defense theory is reversible error because denying the right to present a proper defense theory is tantamount to denying the right to present any argument at all.[5] These cases, like *Herring*, recognized that the trial court

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[4] *Hall v. State*, 160 So. 511 (Fla. 1935); *Porter v. State*, 65 S.E. 814 (Ga. Ct. App. 1909); *Stewart v. Commonwealth*, 11 A. 370 (Pa. 1887); *Word v. Commonwealth*, 30 Va. 743 (1827).

[5] *State v. Shedoudy*, 118 P.2d 280, 285 (N.M. 1941) (conviction vacated because trial court barred reasonable doubt argument); *State v. Verry*, 13 P. 838, 840 (Kan. 1887) (trial court improperly limited defense from presenting a legitimate argument to the jury in violation of the defendant's right to "make a full defense" a "substantial and constitutional right, which cannot be taken away."); *Lynch v. State*, 9 Ind. 541, 1857 WL 3659, *1 (1857) (reversing summation limitation, noting "if it would be error to prohibit counsel to argue a case at all, it was error in the Court below to refuse to permit counsel to argue the legal branch of the case").

retained discretion to curtail argument but no discretion to preclude a proper defense theory. *See*, *e.g.*, *Verry*, 13 P. at 840.

A majority of the cases *Herring* cited involved time limits on summation and held that courts may regulate summation but cannot deny counsel a "reasonable opportunity to make defense for their clients." *Yeldell*, 14 So. at 572.[6]

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[6] *State v. Ballenger*, 24 S.E.2d 175 (S.C. 1943) (one-hour limit infringed on the constitutional right "to be fully heard in his defence [sic] by himself or by his counsel or by both" in a complex case) (citation omitted); *People v. McMullen*, 133 N.E. 328 (Ill. 1921) (thirty-five-minute time limit violated the right to "a reasonable opportunity to discuss before the jury both the facts and the law of the case . . . . Any limitation of the constitutional right which deprives a defendant of an opportunity to have his counsel argue the law and the facts has always been regarded as error requiring a new trial."); *State v. Mayo*, 85 P. 251, 254 (Wash. 1906) (ninety-minute limit reversed because in this complex capital case the limitation "was too restrictive to allow a full and fair discussion of the facts of the case; and hence was a violation of the defendant's constitutional rights."); *State v. Rogoway*, 78 P. 987 (Or. 1904), rehearing, 81 P. 234 (1905) (reversing a one-hour limit because it was "too restrictive to permit full and fair discussion of the case" and because the Oregon constitution, like the Sixth Amendment to the U.S. Constitution means "that the accused shall have the right to be fully and fairly heard, or else it means nothing."); *State v. Tighe*, 71 P. 3 (Mont. 1903); *Yeldell v. State*, 14 So. 570, 572 (Ala. 1894) (noting that judges must be careful "to allow full and fair opportunity to counsel to present his client's defense."); *People v. Green*, 34 P. 231 (Cal. 1893) (one-hour time limit reversed because "it was impossible, fully and properly, to argue the case to the jury for the defendant within one hour" and "a defendant being tried on a charge of felony has a constitutional right to be fully heard in his defense by counsel, which it is not within the discretionary power of the court to deny or abridge"); *Wingo v. State*, 62 Miss. 311, 1884 WL 3462, *3 (1884) (reversed one-hour summation limit because it abridged the defendant's "right to the time necessary for making his defense fully and fairly"); *State v. Hoyt*, 47 Conn. 518, 1880 WL 2281, *13 (1880) (affirming four-hour time limit because "there is no claim . . . that the time so allowed was insufficient for the purposes of a full, fair and complete defense."); *Williams v. State*, 60 Ga. 367, 1878

Like the cases it cited, *Herring* also recognized that courts may place limitations on a closing argument, such as by requiring that it "not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." 422 U.S. at 862. But nothing in *Herring* suggests that a trial judge may foreclose a legitimate legal argument. Rather, even in a case that appears "to be simple – open and shut – at the close of the evidence," "there is no certain way for a trial judge to identify accurately" whether "closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict" "until the judge has heard the closing summation of counsel." *Id.* at 863.

2. The State essentially argues that law is "clearly established" under 28 U.S.C. § 2254(d)(1) only in contexts factually identical to this Court's cases. This argument conflicts with how the Court determines clearly established federal law.

This Court has instructed that "'clearly established Federal law'" for

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WL 2652 (1878); *Weaver v. State*, 24 Ohio St. 584 (1874) (reversing five-hour time limit noting "To allow insufficient time for argument is, practically and in principle, equivalent to a denial of the right to argue the cause. To the full extent that the cause was not argued for the want of time, the defendant was deprived of his defense, and stands convicted without the aid of counsel.") (citations omitted); *State v. Page*, 21 Mo. 257, 1855 WL 5300, *1 (1855) (affirming fifteen-minute limit in a simple case, but noting "There are cases in which the time necessary to a proper and fair elucidation of the matters involved in the prosecution, must be greater then and others.").

purposes of 28 U.S.C. § 2254(d)(1) "does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). Rather, "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

As this Court has explained, "'clearly established Federal law' under § 2254(d)(1) is the *governing legal principle or principles* set forth by the Supreme Court at the time the state court renders its decision." *Andrade*, 538 U.S. at 71-72 (emphasis added). These principles guide the Section 2254(d)(1) analysis. *See Abdul-Kabir v. Quarterman,* 550 U.S. 233, 258 (2007) ("ignoring the fundamental principles established by [the Supreme Court's] most relevant precedents" may be contrary to or an unreasonable application of clearly established federal law).

"Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado,* 541 U.S. 652, 666 (2004). The right to

participate fully and fairly in the adversary system by having counsel present proper argument is just such a fundamental right. *See Herring*, 422 U.S. at 858, 862 (describing the right to have counsel make a proper argument in summation as a "basic element of the adversary fact-finding process" and beyond compare in importance to partisan advocacy, the "very premise of our adversary system").

This Court has repeatedly relied on the legal principles underlying this Court's cases in defining clearly established law. For example, in *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (per curiam) this Court described *Batson v. Kentucky*, 476 U.S. 79 (1986), as requiring "a judge ruling on an objection to a peremptory challenge to undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" instead of *Batson's* most narrow fact-bound holding—to overrule *Swain v. Alabama*, 380 U.S. 202 (1965), and hold that a defendant could establish a *prima facie* case of discrimination in the use of a preemptory challenge. *Id.* at 47 (internal quotation marks omitted); *Accord Bell v. Cone*, 535 U.S. 685, 695-6 (2002) (legal principle of *United States v. Cronic*, 466 U.S. 648, 659 (1984), includes its discussion of three hypothetical denials of counsel in which prejudice would be presumed, instead *Cronic's* most limited facts: that giving a young

inexperienced lawyer 25 days to prepare for trial in a complex and grave case was not *per se* denial of counsel); *Yarborough v. Alvarado*, 541 U.S. at 662 (citing as clearly established law a footnote from *Berkemer v. McCarty*, 468 U.S. 420, 422-3 (1984), that cited a New York State court decision finding an objective custodial test preferable to a subjective one, instead of the most limited holding of *McCarty*, that *Miranda v. Arizona*, 384 U.S. 436 (1966), applied to misdemeanor offenses and that the roadside questioning of a motorist did not constitute a custodial interrogation) (citing *McCarty*, 468 U.S. at 442, n.35 (quoting *People v. P.*, 21 N.Y.2d 1, 9-10 (1967))).

3. The State's remaining arguments are quickly resolved. First, *Herring's* legal principle governs Mr. Frost's case and does not require the recognition of another implied right, as the State argues. Pet. at 15. Consequently, the State's reference to *Kane v. Garcia Espitia*, 546 U.S. 9 (2005), is misplaced. In *Espitia*, this Court found that the Sixth Amendment right to self-representation does not encompass the right to adequate access to a law library because the lead case, *Faretta v. California*, 422 U.S. 806 (1975), "says *nothing* about any specific legal aid that the State owes a *pro se* criminal defendant." 546 U.S. at 10 (emphasis added). In contrast, *Herring* specifically referred to summation as the last opportunity to convince the jury "there may

be reasonable doubt." *Herring*, 422 U.S. at 862 (citing *Winship*, 397 U.S. 358). And due process requires the court to hold the prosecution to its heavy burden of proof beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993).

Nor did the Ninth Circuit opinion introduce a new rule "'under the guise of extensions to existing law.'" *White v. Woodall*, 134 S.Ct. at 1706 (quoting *Alvardo*, 541 U.S. at 666). The Ninth Circuit did not rely on a general principle, but on *Herring*'s more limited rule that it is structural error to deny the defendant's Sixth Amendment right to "make a proper argument on the evidence and the applicable law in his favor." *Herring*, 422 U.S. at 860.

B. The Ninth Circuit Opinion Is Consistent with this Court's Structural Error Case Law.

This Court has repeatedly referred to *Herring* error as structural error. *See Cone*, 535 U.S. at 696 (including *Herring* among cases "where we found a Sixth Amendment error without requiring a showing of prejudice."); *Cronic*, 466 U.S. at 659, n.25 (listing *Herring* error as one "the Court has uniformly found constitutional error without any showing of prejudice"). Notwithstanding this Court's repeated affirmations, the State argues this Court should grant *certiorari* because the Ninth Circuit opinion "expands structural error law" by finding *Herring* error structural. According to the

State, *Herring* never concluded that denying the defendant the right to make a proper summation was "structural;" it only concluded it was error. Pet. at 21. This question is not worthy of *certiorari* because the State is flat wrong.

1. *Herring* held that denying the right to "'make a proper argument on the law and applicable law'" was structural error. *Herring*, 422 U.S. at 860 (quoting *Yopp*, 178 A.2d at 881). *Herring* concluded that denying a legitimate argument in summation struck at the very framework of the adversarial system of criminal justice. *Id.* at 862. Summation was a "basic element" of the factfinding process and the most important expression of partisan advocacy, "[t]he very premise of our adversary system of justice." *Id.* As *Herring* explained, "no aspect" of the advocacy essential to that adversarial process "could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862.

This Court has used similar language to describe structural error. *See, e.g., Rose v. Clark*, 478 U.S. 570, 578 n. 6 (1986) (structural errors abort or deny the basic trial process); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (describing structural errors as ones that "affect[] the framework within which the trial proceeds"). And in assessing whether an error is structural or subject to harmless error review, this Court looks to see whether the defendant has

"received a full opportunity to put on evidence and make argument to support his claim of innocence." *Clark*, 478 U.S. at 579.

Herring's conclusion that "[t]here is no way to know" whether "appropriate arguments in summation might have affected the ultimate judgment[,]" 422 U.S. at 864, is a hallmark of structural error. *See Gonzalez-Lopez*, 548 U.S. at 149, n.4 ("here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.") (citations omitted); *Sullivan,* 508 U.S. at 282 (defective reasonable-doubt instruction produces "consequences that are necessarily unquantifiable and indeterminate[.]"). And the fact that *Herring* vacated the conviction without analyzing harm is also significant because, prior to *Herring*, this Court had recognized that constitutional errors could be harmless. *See Chapman v. California,* 386 U.S. 18 (1967). *Cf. Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008) (noting that cases decided before *Chapman* had no reason to address whether constitutional error could be harmless).

Finally, the fact that the state interfered with Mr. Frost's Sixth Amendment right to counsel reinforces that the violation is structural. In *Strickland v. Washington*, this Court noted that "[i]n certain Sixth Amendment contexts, prejudice is presumed [including] various kinds of state interference

with counsel's assistance. . . . such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." 466 U.S. 668, 692 (1984).

Herring also recognized that state interference with counsel's "opportunity to participate fully and fairly" constitutes Sixth Amendment structural error. The right to assistance of counsel, *Herring* explained, "has been understood to mean that there can be no restrictions upon the functioning of counsel in defending a criminal prosecution." 422 U.S. at 857. *Herring* relied on *Brooks v. Tennessee*, 406 U.S. 605, 612–613 (1972), and *Ferguson v. Georgia*, 365 U.S. 570 (1961), which respectively struck down statutes that restricted when counsel may call her client to testify or prevented defense counsel from conducting a direct examination of her client at trial. Like *Herring*, these limitations denied the accused the "guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (quoted in *Brooks*, 406 U.S. at 613; *Ferguson*, 365 U.S. at 594-95), and were *per se* reversible error.

2. The State argues that the Ninth Circuit's application of *Herring* results in a "nebulous" rule that calls into question any number of convictions where evidence was excluded or questioning was barred. Pet. at 22-3 (citing

Crane v. Kentucky, 476 U.S. 683 (1986) (harmless error applied to barring evidence of coerced confession), and *Delaware v. Van Ardall*, 475 U.S. 673 (1986) (harmless error to refuse to permit counsel to question regarding deal for key witness). This argument fails because *Herring* is limited to summation, and not argument at any of point of trial. 422 U.S. at 863, n.13.

Nor did the Ninth Circuit expand the law when it found that compelling Mr. Frost to concede guilt beyond a reasonable doubt was structural error. The State's argument to the contrary relies exclusively on cases that apply harmless error analysis to erroneous jury instructions based on the assumption that the trial was fundamentally fair and a reliable vehicle for determining guilt. Pet. at 18, n.4. (citing *Neder v. United States*, 527 U.S. 1, 9-10 (1999); *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1989); *Pope v. Illinois*, 481 U.S. 497 (1987); *Washington v. Recuenco*, 548 U.S. 212 (2006)).

In contrast, and what was denied in this case, permitting defense counsel to challenge the sufficiency of the prosecution's evidence before the jury is a basic protection that is indispensable to the trial's fundamental fairness and reliability. *See, e.g., Clark*, 478 U.S. at 578 ("Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may

present evidence *and argument* before an impartial judge and jury.") (emphasis added); *Neder*, 527 U.S. at 8-9 (structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'") (quoting *Clark*, at 577-78). Denying this right lowered the prosecution's burden of proof, *Frost I*, 161 P.3d at 368, and rendered the trial fundamentally unfair.

The error, here, did not concern a single missing element from a jury instruction or an erroneous permissive inference. Rather, Mr. Frost's counsel was ordered to concede guilt on each and every element of the offenses. *See Herrera v. Collins*, 506 U.S. 390, 398 (1993) (noting the defendant's due process right to insist that guilt be proven beyond a reasonable doubt) (citing *Winship*, 397 U.S. 358). "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at 657.

C. The Ninth Circuit Opinion Does Not Conflict with a Federal Due Process Case or State Affirmative Defense Law.

The State claims the Ninth Circuit decision here "essentially held" that due process prohibits *ever* requiring the defendant to choose between

reasonable doubt and an affirmative defense, even when state law requires it. Pet. at 19. This holding, the State argues, conflicts with *dictum* from *United States v. Russell*, 411 U.S. 423 (1973), that an entrapment defense is not of a constitutional dimension, *id.* at 433, and the law in several states requiring defendants to admit an offense before claiming an entrapment defense, *see* Pet. at 17 (citing cases), as well as a circuit court decision upholding one such law against a due process challenge. *See Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (*en banc*). This argument is unworthy of *certiorari* because the Ninth Circuit's *en banc* decision contains no such holding.

The Washington Supreme Court concluded that the trial court's error, not state affirmative defense law, cost Mr. Frost his right to challenge the sufficiency of the evidence in summation and lowered the prosecution's burden of proof. *Frost I*, 757 F.3d at 368 (citing *Winship*, 397 U.S. at 364). Washington law entitled Mr. Frost to argue that he acted under duress and the prosecution failed to prove that he participated in his accomplices' criminal acts "with adequate knowledge of promotion or facilitation." *Frost I*, 161 P.3d at 368. This decision bound the Ninth Circuit. *See Bradshaw v. Rickey*, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal, binds a federal court sitting in habeas corpus").

For this reason, the State's reliance on *Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (*en banc*), is misplaced. *Eaglin* concerned a due process challenge to an Illinois common law rule that barred the defendant from pleading entrapment without admitting the *actus reus* (but not the *mens rea*) of the offense. *Id.* at 498. The Seventh Circuit concluded the rule did not violate due process because entrapment was not a federally-guaranteed defense, leaving Illinois "free within extremely broad limits to decide upon the elements of a crime." *Id.* at 500. The court cautioned, however, that once a state defines the elements of an offense, "it may not convict without proof beyond a reasonable doubt that every element was present[.]" *Id.* (citing *Winship*, 397 U.S. at 364.) *See also Patterson v. New York*, 432 U.S. 197, 211, n.11 (1977) ("The applicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged in any given case.").

In this case, the prosecution was required to prove every element of accessorial liability beyond a reasonable doubt. *Eaglin*, 57 F.3d at 500 (citing *Winship*, 397 U.S. at 364). "By preventing defense counsel from arguing reasonable doubt in closing, the trial judge 'lessened the state's burden to some degree' and 'infringed upon Frost's due process rights.'" *Frost II*, 757 F.3d at

914 (quoting *Frost I*, 161 P.3d at 368). Precluding Mr. Frost from challenging the prosecution's proof beyond a reasonable doubt, while leaving the prosecution free to present whatever arguments it wanted, was a far more egregious affront to the adversary system of criminal justice than *Herring's* equal denial of summation to both parties because it struck at the presumption of innocence. *Frost II*, 757 F.3d at 916.

Given the lack of conflict with this Court's opinions, and absence of a circuit split or conflict with any state court of last resort, the petition is simply a request for this Court to correct what the State perceives to be an erroneous decision. This Court should deny *certiorari* not only because this Court is not primarily a court of error correction, *see* S. Ct. Rule 10, but also because the Ninth Circuit's decision was correct.

The State's argument that *Herring* means nothing more than that the accused has a right to say *something* in summation betrays *Herring's* true and stated purpose: to vindicate the defendant's Sixth Amendment right to participate "fully and fairly" in the adversary proceeding. 422 U.S. at 858. A ten-second summation[7] and the complete preclusion of a proper defense theory in summation simply cannot be squared with *Herring*'s recognition of the "right

[7] *See* page 18, footnote 3, *supra.*

to present proper argument on the evidence and law in his favor." 422 U.S. at 859 (quoting *Yopp*, 178 A.2d at 881).

CONCLUSION

For these reasons, this Court should deny the petition for *certiorari*.

Respectfully submitted,

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September 29, 2014

APPENDIX

Description **Page**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff,	
Vs.	NO. 03-1-01034-7KNT
JOSHUA FROST, Defendant.	COA NO. 53767-9-I

ORIGINAL

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE CATHERINE SHAFFER, JUDGE
KING COUNTY SUPERIOR COURT
KENT, WASHINGTON

DECEMBER 11, 2003

APPEARANCES:

FOR THE PLAINTIFF: ZACH WAGNILD
DEPUTY PROSECUTING ATTORNEY

FOR THE DEFENDANT: JERRY STIMMEL
ATTORNEY AT LAW

VICTORIA RACCAGNO
OFFICIAL COURT REPORTER

assault. He had nothing to do with assaulting anyone and as to Kurt Sears nobody assaulted him. I hope those will be the verdicts you reach. And you will have to struggle with it, I know, because it is a painful case. But the particular focus I believe is the special verdicts, not armed with a firearm. Joshua Frost asks you -- it asks you was Joshua Frost armed with a firearm. The answer should be no on all of those. Thanks.

THE COURT: Thank you very much, Mr. Stimmel. Ladies and gentlemen, once again the state has the opportunity to address you on rebuttal. Please give your attention to Mr. Wagnild on behalf of the state.

MR. WAGNILD: Thank you very much, your Honor.

Ladies and gentlemen, noticeably absent from Mr. Stimmel's closing argument is reference to the law. There is a reason for that. Because if Mr. Stimmel had pointed you to the law and pointed to the elements of the offenses and he pointed to the firearm instruction and made his argument you would realize that his argument is phoney, his arguments don't match up with what the law is and that is really what we are here for.

He starts out by saying, well, we will throw you a bone, we will give you the Gapp robberies. Why? They

are just so bad that you would have a hard time finding him not guilty. For the life of me I don't understand that argument. You don't find someone guilty because the crime is so bad that you just have to punish someone. I am not asking you to do that. I am asking you to find Mr. Frost guilty because he took part in this robbery because he was an accomplice to this robbery, that is why he is guilty, not because Mr. and Mrs. Gapp are elderly, not because Mr. Gapp's rib was broken, not because Mrs. Gapp was hit in the face. You will find him guilty because he was involved.

And somehow, somehow Mr. Stimmel then tries to separate out the Gapp robbery from the rest of them. But there is no difference here. I mean, sure, he went in during the Gapp robbery, but the rest of them he was simply the driver. He was involved. His role changed. Whereas Mr. Williams and Alexander Shelton's roles stay the same and Mr. Frost's role changed, that doesn't make him any less guilty. He is no different. And then he asks you not to find him guilty of the burglary charge? Why? Not for any legal reason. Just because, you know, it is not really what the intent was.

Look at the jury instructions. Just look at the

elements of burglary in the first degree. Of course that was their intent. They unlawfully entered. They assaulted somebody. They unlawfully entered the house with an intent to commit a crime. That is what I need to prove. He raises the issue of whether or not I am trying to say that Mr. Frost was in the 7/Eleven store and the Ronnie's Market store. Quite frankly, I just don't know. We just can't tell. There is an interesting argument to be made there. First of all, we know that Alexander Shelton wears glasses, and when you look either at the video or you look at the pictures, say from the 7/Eleven robbery, it is difficult to see any glasses. They are not the clearest pictures but it is difficult to see glasses on the subject on the one that is not the African-American male.

We also know that Mr. Frost does an exceptional job of trying to minimize his involvement. So it would be quite likely that he would say he drove in all of them and, in fact, he was involved. We also know that Eddy Shaw, who knows these individuals, looked at him and immediately recognized this to be someone who looks just like Mr. Frost. Was it Mr. Frost who entered the stores? I just don't know. It could be. Might not be. But it doesn't really

matter for the purposes of finding him guilty, because even if it wasn't him who went into the stores, we know it was him that drove them and then drove away. So we know he was an accomplice, we just don't know if he was the person that went inside.

And, finally, I want to talk about firearms enhancement, these special verdict forms, because Mr. Stimmel dedicated a lot of his closing to that. He says at one point that he is trying -- they want to divorce themselves from the guns. Well, I have got news for the defense, it is too late for that. If Mr. Frost wanted to divorce himself from the guns you don't do it at trial. You do it when your accomplices are pulling out loaded firearms and heading into stores to rob them, that is when you divorce yourself from guns. It is too late. Mr. Frost is already bound to those guns. He tells you that he wants you to exonerate his client on the firearm enhancement and yet not once does he say, hey, why don't you look at instruction number 34. If you look at instruction 34 at the very bottom it says if one participates in a crime armed with a firearm all accomplices to that who participated in the crime charged are deemed to be so armed even if only one firearm is involved. As long as Mr. Frost is an accomplice to these robberies and

as long as one other participant is armed with a firearm, he is, too. That is what the law is. All I am asking you to do is follow the law.

Mr. Stimmel has simply pointed you to one reason why you shouldn't just simply follow the law on that. The answer is you should. That is what we are here for.

We talked about this in jury selection. Some of it you may not be sure you completely agree with it, but the fact is what we are here to do is look at the facts and apply it to the law. The law is clear, if one participant was involved with carrying a firearm, they all are.

Ladies and gentlemen, I am not asking you to find Mr. Frost guilty because these were violent crimes, I am not asking to you find him guilty because the Gapps are old, I am not asking you to find him guilty because someone was shot. I am asking you to find Mr. Frost guilty because he is guilty, because he was an accomplice to every one of the crimes charged. Thank you very much.

THE COURT: Thank you very much, Mr. Wagnild. All right, ladies and gentlemen. We have got a little more business with you this point, and our first order of business with you since you have all patiently