The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants

By STEVEN F. SHATZ* & LAZULI M. WHITT**

ON THE EVENING of September 11, 1981, Ginger Fleischli went to a bar with a group that included David Leitch, her roommate and sometime lover until the previous month, and Thomas Thompson, Leitch's current roommate.1 Around 1:00 a.m., Fleischli went with Thompson and a third person to the Leitch/Thompson apartment, and sometime after 2:00 a.m., the third person left.2 Two days later, Fleischli's body was found in a field ten miles from the apartment.3 Thompson and Leitch subsequently were charged with rape and murder and the prosecution sought the death penalty on the theory that the killing occurred in conjunction with the rape.4 At the preliminary hearing, the prosecutor called four jailhouse informants ("Leitch informants") who all claimed to have heard Thompson confess that "Leitch wanted Fleischli dead for interfering with his attempts to reconcile with his wife . . . and, therefore, had recruited Thompson to

---

* Philip and Muriel Barnett Professor of Trial Advocacy, University of San Francisco School of Law. J.D. 1969, Harvard; A.B. 1966, University of California, Berkeley. Professor Shatz was co-counsel for Teddy Brian Sanchez, who is presently on death row, on his automatic appeal and petition for habeas corpus in the California Supreme Court. See People v. Sanchez, 906 P.2d 1129 (Cal. 1995); In re Sanchez, No. S049502 (Cal. Sup. Ct. 1997). Mr. Sanchez's case is one of those discussed in this article.

** J.D. 2002, University of San Francisco; B.A. 1995, Lewis & Clark College.
2. See id.
3. See id. at 543.
help him kill her." According to one of the informants, Thompson said that he had engaged in consensual sex with Fleischli, and, when Leitch returned home, they executed Leitch’s plan.

The cases were severed, and Orange County Deputy District Attorney Michael Jacobs elected to try Thompson first. At Thompson’s trial, Jacobs did not call any of the Leitch informants. Instead, he produced two new informants ("Thompson informants"), who testified that Thompson had confessed to them that he had raped and killed Fleischli before Leitch returned home and that Leitch had merely helped Thompson dispose of the body. In his closing argument, Jacobs called the Thompson informants’ testimony "dispositive" and "very, very damaging," and he argued to the jury that the sole motive for the killing was Thompson’s desire to cover-up the rape and that Thompson committed the murder alone:

[Thompson] was the only person in that apartment with Miss Fleischli the night—at the time she was killed.

We have the evidence that establishes Mr. Thompson alone in an apartment with a girl who is raped and murdered.

With regard to Leitch’s role in the killing, Jacobs said:

The David Leitch involvement .... What evidence do we really have that he did anything, had any part except that his car was used to move the body and that his shoe print was at the scene? There is no evidence we have putting him in the apartment that night.

Thompson was convicted and sentenced to death.

At Leitch’s trial, Jacobs reverted to the prosecution’s theory from the preliminary hearing—that Leitch masterminded the killing. Jacobs did not call either of the Thompson informants, but instead called on the defense witnesses from the Thompson case to testify about "Leitch’s violent disposition, Leitch’s threats toward Fleischli, and Leitch’s motive to kill Fleischli." To the Leitch jury, Jacobs argued that Leitch was the only one with any motive for her death:

[Leitch’s desire to reunite with his ex-wife is] really the only motive we have in this case, and people have killed for less.

---

5. Id. at 1055.
6. See id.
7. See id. at 1056.
8. See id.
9. Id. at 1057 (alteration in original).
10. Id.
12. Thompson, 120 F.3d at 1056.
Leitch's was the only motive or reason for her demise. In his argument to the jury, Jacobs ridiculed the very factual theory he had used to put Thompson on death row:

The problem is, all of the evidence we have incriminates Mr. Leitch, at best, equally, and more so than Mr. Thompson.

... Both men were together inside that apartment with Ginger Fleischli.

... So we have to ask ourselves, why would Mr. Thompson murder Miss Fleischli alone in an apartment where he lived, with no transportation, no means to move the body and wait for Mr. Leitch to come home to be an A-1 witness for the murder of his ex-girlfriend? Is that reasonable or logical? Do you think that's what happened?

... You think Mr. Thompson did this all by himself and waiting for this good guy to come home so he could see him standing over his ex-girlfriend, who he lived with ten days before? No, it didn't happen that way.

Leitch was found guilty of second-degree murder.

Thus, the prosecutor succeeded in placing Thompson on death row and Leitch in prison, each on a version of the facts that he disavowed in the other's case. When the case reached the Ninth Circuit, the majority of the en banc court found the prosecutor's conduct to be misconduct and a denial of due process. Surprisingly, such prosecutorial conduct has not been uncommon in California capital cases. In at least five pairs of cases since the Thompson/Leitch cases, California prosecutors have obtained death sentences by pursuing inconsistent factual theories at separate murder trials of co-defendants. And, as in Thompson, the California Supreme Court has

13. Id. at 1056–57 (alteration in original).
14. Id. at 1057 (alteration in original).
15. See Calderon, 523 U.S. at 544.
16. See Thompson, 120 F.3d at 1057–59 (plurality opinion); id. at 1063 (Tashima, J., concurring). The court affirmed the district court's partial grant of habeas corpus on other grounds: the ineffectiveness of Thompson's counsel. See id. at 1055. The Supreme Court reversed the Ninth Circuit's decision, not on the merits, but on the ground that the en banc court had abused its discretion in recalling the mandate that had issued after the panel's decision. See Calderon, 523 U.S. at 542. Thompson was executed on July 14, 1998. The sequence of events resulting in Thompson's execution is described and criticized by Judge Stephen Reinhardt in The Anatomy of an Execution: Fairness vs. "Process," 74 N.Y.U. L. Rev. 313 (1999).
17. The prosecutions were against: (1) Charles Huffman and Lee Farmer for committing a burglary murder, see People v. Farmer, 765 P.2d 940 (Cal. 1989); (2) Samuel Bonner and Watson Allison for a robbery murder, see People v. Allison, 771 P.2d 1294 (Cal. 1989); (3) Teague Scott and Melvin Turner for a double robbery murder, see People v. Turner, 878 P.2d 521 (Cal. 1989) and People v. Turner, 726 P.2d 102 (Cal. 1986); (4) Teddy
rejected "inconsistent theories" challenges in each of the cases it has decided.18

This article examines whether, and under what circumstances, a death row defendant is entitled to relief as a result of the prosecutor's use of inconsistent factual theories at the separate trials of the defendant and a co-defendant.19 In Part I, we take a closer look at the California cases raising the issue and describe the variables that might affect whether relief is warranted; we explore why the use of inconsistent factual theories is misconduct; and we review the treatment of the issue in the California courts. In Part II, we analyze whether such misconduct violates either the Due Process Clause of the Fourteenth Amendment or the Eighth Amendment's ban on cruel and unusual punishments. In Part III, we look at possible challenges to such misconduct under state law. We conclude, in Part IV, that the prosecutor's use of inconsistent factual theories to obtain a death judgment can be challenged on both federal constitutional and state law grounds and that the courts' failure to address the issue is an open invitation to further abuse.20

Sanchez and Robert Reyes for aiding and abetting in a double murder, see People v. Sanchez, 906 P.2d 1129 (Cal. 1995); (5) Tauno Waidla and Peter Sakarias for a burglary/robbery murder, see People v. Waidla, 996 P.2d 46 (Cal. 2000) and People v. Sakarias, 995 P.2d 152 (Cal. 2000). In the first four pairs of cases, only one of the defendants was sentenced to death with the result that there is only one published opinion for each pair. In the Waidla/Sakarias cases, both defendants were sentenced to death.

18. See discussion infra Part I.C.

19. The issue of the prosecutor's use of inconsistent theories can only arise when co-defendants are tried separately, but separate trials are the rule rather than the exception in capital cases. In a substantial number of capital cases, the prosecutor wants to introduce a confession of one or more of the defendants, and, under the rule of Bruton v. United States, 391 U.S. 123, 126 (1968) and its California counterpart, People v. Aranda, 407 P.2d 265, 270 (Cal. 1965), the prosecutor cannot introduce such evidence at a joint trial if it implicates the other defendant(s). See also Gray v. Maryland, 529 U.S. 185, 192-94 (1999) (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must comply with Bruton, hold separate trials, use separate juries, or abandon the use of the confession). In each of the six case pairs discussed in this article, the prosecutor introduced confessions against one or both of the co-defendants. Separate trials also help to ensure that the Eighth Amendment requirement—that the sentencing jury consider "the uniqueness of the individual" to be sentenced, Zadley v. Ohio, 497 U.S. 474, 485-87 (1988)—is fulfilled.

20. Throughout this article, except when referring to actual prosecutors in specific cases, we employ feminine pronouns when referring to the prosecutor. We do this, not because most prosecutors (or most prosecutors using inconsistent theories) are women, but because we want to avoid the awkwardness of using dual pronouns and to distinguish the prosecutors from the defendants, who, in most death penalty cases and in all the cases discussed in this article, are men.
I. The Inconsistent Theories Problem

The conduct of the prosecutor in the Thompson/Leitch cases was not only criticized by the judges of the Ninth Circuit; it also has been roundly condemned by commentators.21 However, is the presentation of inconsistent factual theories in separate trials of co-defendants misconduct?22 In order to answer that question, we first describe the variations in inconsistent theories cases as reflected in the six California capital case pairs in which the issue has been raised.23 We then examine the reasons for labeling such use of inconsistent factual theories as misconduct. Finally, we look at the California courts' treatment of the issue.


22. The inconsistent theories problem considered here—the prosecutor's deliberate attempt to obtain inconsistent verdicts—is not to be confused with the question whether inconsistent verdicts themselves are subject to challenge. Despite the Supreme Court's acknowledgment of the "scandal and inequity of inconsistent verdicts," Richardson v. Marsh, 481 U.S. 200, 210 (1987), the Court has long held that a defendant may not challenge a verdict on the ground that the verdict was inconsistent with the factfinder's treatment of other counts against the same defendant, see Dunn v. United States, 284 U.S. 390, 393 (1932), or that it was inconsistent with a verdict rendered against a co-defendant, see United States v. Dotterweich, 320 U.S. 277, 279 (1943). The California Supreme Court has adopted the same rule. See People v. Sanchez, 29 P.3d 209, 221 n.11 (Cal. 2001); People v. Palmer, 15 P.3d 234, 296-38 (Cal. 2001).

23. The description of the Thompson/Leitch cases, see supra pp. 1-4, is drawn entirely from published sources. The descriptions of the other five case pairs are drawn from the published opinions of the California Supreme Court, see supra note 17, and the following unpublished materials: as to the Huffman/Farmer cases, the briefs of the parties and unpublished opinion of the court in Farmer v. Ratelle, No. 96-56489 (9th Cir. 1997); as to the Bonner/Allison cases, the briefs of the parties in Allison's pending federal habeas corpus case, Allison v. Woodford, No. CV 92-6404-CAS (C.D. Cal.) and the order of the court in In re Allison, No. S042478 (Cal. Sup. Ct.); as to the Scott/Turner cases, the briefs of the parties in Turner's pending federal habeas corpus case, Turner v. Woodford, No. CV 965-2844 (C.D. Cal.); as to the Sanchez/Reyes cases, the briefs of the parties in In re Sanchez, S049502 (Cal. Sup. Ct.) and the memoranda of the parties and transcript of proceedings on defendant's Motion to Dismiss Special Circumstances (Collateral Estoppel) in People v. Reyes, No. 34638 (Kern Co. Super. Ct.); as to the Waidla/Sakarias cases, the briefs of the parties in Sakarias's pending state habeas corpus case, In re Sakarias, No. S082299 (Cal. Sup. Ct.). As to each of these five case pairs, one or more counsel handling the case involving the death-sentenced defendant confirmed the accuracy of the description. While citations are given here only for direct quotes from unpublished materials, all materials from which the descriptions are drawn are on file with the University of San Francisco Law Review.
A. Variations on a Theme

The six California case pairs raising the inconsistent theories problem all involve the prosecutor having argued inconsistently about the role of the defendants in the murders. In four of the six case pairs, the Thompson/Leitch, Bonner/Allison, Sanchez/Reyes, and Sakarias/Waidla cases, the inconsistency was as to which of the two defendants was the actual killer (or, in the Sanchez/Reyes cases, which was the actual aider and abettor). In the other two case pairs, the Huffman/Farmer cases and the Scott/Turner cases, the prosecutors argued consistently as to which of the pair was the actual killer, but their inconsistent arguments as to the role played by the other defendant raised the question whether the prosecutor even had correctly identified the actual killer. Despite this common theme in the prosecutors' use of inconsistent factual theories, the case pairs vary in three respects that could be considered relevant to the question of whether the prosecutor engaged in misconduct and whether the death row defendant is entitled to any relief.

1. The Nature of the Inconsistency

As the six California case pairs reflect, there are three different categories of inconsistent theories cases. In some cases, the prosecutor presents substantially the same evidence at both trials but argues that the factfinders should draw different inferences from the evidence ("inconsistency by inference"). In other cases, the prosecutor presents different evidence in the two trials in one of two ways. In some cases the prosecutor presents contradictory evidence in the two trials ("inconsistency by commission"). In other cases, the prosecutor creates a different evidentiary picture by presenting a less complete version at one trial of the evidence presented at the other trial ("inconsistency by omission").

The Thompson/Leitch cases involved "inconsistency by commission": the prosecutor used different witnesses at each trial, and their testimony was irreconcilable. The Sanchez/Reyes cases constitute an-
other example of contradictory informants and inconsistency by commission. Sanchez and Reyes were both charged with aiding Joey Bocanegra in the double murder of his parents, and the prosecutor sought the death penalty against both defendants.\textsuperscript{26} Sanchez was tried first. The prosecution evidence established that Joey Bocanegra had stabbed both his parents a number of times and that the stabbing was the sole cause of their deaths, and it also established that both parents had been struck several times on the head by a bar or rebar. The evidence linking Sanchez to the crime came from a jailhouse informant who testified that Sanchez had confessed to him that he entered the house when Bocanegra was fighting with his father and that he struck the father on the head with a bar. The informant offered no testimony concerning Reyes. In her closing argument, the prosecutor asserted that there were only two people present and that, if Joey Bocanegra was stabbing his parents, Sanchez must have been the one to strike all the blows with the bar.

He chose to hit the old man, and he did. . . . There is no evidence that there was anyone else other than Mrs. Bocanegra in the house. . . .\textsuperscript{27}

In her rebuttal argument, the prosecutor, speaking of the killing of the mother, made the same point.

I think it's quite clear that this crime was committed quite similarly to that of Mr. Bocanegra, that is two people committing the crime. And the idea that there was a third person in the house that might have picked up this pipe or bar—there's no evidence there was a third person in the house. There was evidence of two different kinds of shoe tracks. There was evidence from Mr. Sanchez that Mr. Bocanegra was in the house, but there's no other evidence of a third person to pick up the bar.\textsuperscript{28}

After obtaining murder convictions and a death sentence against Sanchez, the prosecutor then proceeded to prosecute Reyes using a different jailhouse informant. According to this informant, Reyes had confessed to him that he (Reyes) was present at the Bocanegra murders, and that when Joey Bocanegra started fighting with his father, he (Reyes) hit the father a number of times with a piece of rebar he was carrying and, subsequently, also hit the mother. When Reyes's attorneys brought a pre-trial motion to challenge the prosecutor's use

\textsuperscript{26} The two defendants were also charged with an unrelated non-capital felony-murder, see People v. Sanchez, 906 P.2d 1129, 1140–41 (Cal. 1995).
\textsuperscript{27} Petition for Writ of Habeas Corpus at 141, In re Sanchez, No. S049502 (Cal. Sup. Ct.).
\textsuperscript{28} Id. at 142.
of inconsistent theories, the prosecutor expressly stated that she believed the second informant was telling the truth, and she flatly asserted that there were three men in the house committing the crime. Reyes ultimately pled guilty to the murders in exchange for life sentences.

The *Bonner/Allison* cases and the *Waidla/Sakarias* cases involve inconsistency by omission: the prosecutor created a different evidentiary record in the second trial by failing to introduce evidence used in the first trial. In the *Bonner/Allison* cases, the two defendants were charged with a break-in robbery-murder and the prosecutor sought the death penalty against both. Bonner was tried first, and the prosecutor’s theory was that Bonner and Allison had both entered the victim’s apartment and that Bonner had been the one to shoot the victim. In support of this version of the facts, the prosecutor called a jailhouse informant, who testified that Bonner confessed the entire crime to him, including that Bonner had shot the victim. In his final argument, the prosecutor said:

> What evidence did I ask you to consider in putting the gun in the hand of Samuel Bonner? His own words saying he did it. That is not circumstantial evidence. It is direct evidence and an admission of fact, if you believe it.

> It is direct evidence of guilt, the admission of the person. "I did it." It's not—doesn't require logical inference. That's there. If you believe the statement by Samuel Bonner, "I did it," it directly proves the fact that he is guilty of it. Therefore, no logical inference need [be] drawn, like a fingerprint means he touched something.29

The jury convicted Bonner of first degree murder and special circumstances, but did not find true that he had personally used a firearm. At that point, the prosecutor dropped his request for the death penalty and proceeded to trial against Allison on the theory that Allison was the actual killer and Bonner was nothing but a “wheelman” who never entered the victim’s apartment. At Allison’s trial, the informant’s testimony was not introduced, and the prosecutor ridiculed Allison’s defense that Bonner was the actual killer:

> The evidence all points to Allison is the one going in [sic], and all the evidence that’s reasonable and believable that you will look at

---

shows Bonner drove the Ford all the time and was not the inside man.30

Why, all of a sudden, is Samuel Bonner the prime mover in the crime when everything you have heard shows he is the wheelman, just bringing the parties together. Why does Sam Bonner, which [sic] the evidence shows is a relatively minor participant, based on conduct observed by the innocent witnesses, citizen [sic] of the neighborhood—why does the conduct of Samuel Bonner get twisted around and all of a sudden it’s Mr. Allison that’s driving the car away and it’s Bonner inside doing everything?31

Do you know why? Because that’s the only way he can escape the truth of the special circumstance that he intentionally killed the victim.32

Allison was convicted and sentenced to death.

In the Waidla/Sakarias cases, the pattern was similar, although the missing evidence at the second trial was a portion of a medical examiner’s testimony, rather than the testimony of a jailhouse informant. The evidence was that Waidla and Sakarias participated in a murder during the commission of a burglary and robbery. The victim was attacked with a hatchet and a knife, and the fatal blow was struck with a hatchet. Waidla was tried first, and the prosecutor’s theory was that Waidla planned the burglary and robbery, played the dominant role in the crimes, and struck the fatal blow. The prosecutor’s medical examiner testified that the victim had a post-mortem abrasion on her back consistent with having been dragged from one room to another. The prosecutor argued that Waidla wielded the hatchet and led the attack on the victim in the living room and that Waidla struck her until she was dead.

We know she was dead in the front room of her home in her living room. We know she did not live to see or to be dragged back into her bedroom . . . . At the point that she was dragged into the back room, we know that [the victim] was already dead by the facts as the coroner testified.33

Waidla was convicted and sentenced to death. At Sakarias’ trial, the prosecutor presented much the same evidence as was presented at Waidla’s trial, and, in addition, he introduced Sakarias’ statements to the effect that, at Waidla’s command, he went back to the bedroom and struck the victim twice with the hatchet. Although the medical

31. Id. at 26.
32. Id. at 27–28.
examiner testified as to the cause of death, the prosecutor failed to elicit from him testimony about the abrasion. With no contrary testimony in the record, the prosecutor argued that the victim was alive when she was dragged to the bedroom, and that it was Sakarias who had struck the victim with the hatchet "thus finally ending her life." He concluded that there was "absolutely no evidence of domination" on the part of Waidla and that Sakarias was "in every respect" Waidla's partner. Sakarias was convicted and sentenced to death.

The Huffman/Farmer cases and the Scott/Turner cases involved inconsistency by inference. In the Huffman/Farmer cases, the evidence was that Huffman and Farmer together committed a burglary of the victim's apartment and that later the same night, after the victim returned home from work, one or both of the defendants returned to the apartment and committed the burglary-murder that resulted in Farmer's death sentence. The prosecutor's circumstantial evidence in the two cases tended to establish three facts: (1) Farmer reentered the apartment and committed the murder (the victim identified the assailant as a drug customer of the victim's roommate, and Farmer's name and phone number were found on a list kept by the roommate); (2) Huffman reentered the apartment with Farmer and participated in the murder (the footprints of both men were found outside the victim's window); and (3) only one person reentered the apartment and committed the murder (the victim referred to only one intruder being in his apartment). All three of these "facts" could not have been true. At Huffman's trial, the prosecutor's theory was that facts #1 and #2 were true, that Farmer and Huffman together committed the murder, and that, if anything, the physical evidence (footprints) more clearly established Huffman's guilt. Huffman was acquitted of the burglary-murder. At Farmer's trial, the prosecutor's theory was that facts #1 and #3 were true, and that Farmer committed the murder acting alone. Farmer was convicted and sentenced to death.

34. Id. at 52.

35. See People v. Farmer, 765 P. 2d 940, 948 (Cal. 1989) (reversing the penalty verdict). If subsequent events are any measure, both of the prosecutor's theories were wrong. At Farmer's penalty retrial, the defense introduced evidence that Huffman had confessed to at least two people (one being Farmer's counsel) that he was the actual killer and had acted alone. The jury sentenced Farmer to life imprisonment. Farmer then sought habeas corpus to overturn the underlying burglary and murder convictions. After being denied relief in the state courts, he ultimately prevailed in the Ninth Circuit. That court found that the failure of Farmer's counsel "to present the most powerful exculpatory evidence available to a defense attorney representing a client in a capital murder case, a third-party
In the *Scott/ Turner* cases, a double murder arising out of a robbery, Turner was tried first. The prosecutor introduced the testimony of a jailhouse informer concerning a conversation between Scott and Turner suggesting that Turner was the actual killer and Scott was surprised by the killing. In asking for the death penalty, the prosecutor attempted to lay the entire blame for the killings on Turner by arguing that there was no evidence that Scott intended the killings. Turner was convicted of the murders and sentenced to death, but the conviction was overturned on appeal. While Turner’s case was on appeal, Scott was tried for the robbery and murders, and the prosecutor sought the death penalty against Scott on the theory that Scott had intentionally aided and abetted in the killings. In pursuit of that theory, the prosecutor unsuccessfully objected to the testimony of the informer, testimony which he had introduced at Turner’s trial. Scott was convicted of the murders, but the jury did not find a special circumstance (presumably finding that Scott neither killed nor intended the killings). At Turner’s retrial, the prosecutor returned to his original theory: that only Turner intended the killings.

Scott clearly wanted to escape. That was the reason for tying the victims. But not to kill them. . . . It may well be true that Scott wanted to tie the victims. But only to escape.\(^{37}\) Turner was once again found guilty and sentenced to death.\(^{38}\)

---

\(^{36}\) “Confession” constituted a clear case of ineffective assistance. Memorandum of Decision at 2, Farmer v. Ratelle, No. 96-56489 (9th Cir. 1997) (unpublished opinion).


36. See People v. Turner, 726 P.2d 102, 103 (Cal. 1986).

37. Second Amended Petition for Habeas Corpus at 203, Turner v. Woodford, No. CV 965-2844 (C.D. Cal.).

38. While the prosecutor’s use of inconsistent theories in these cases might have been countered by an able and well prepared defense counsel, it is well known that most capital defendants do not get such representation. See generally Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 Tex. L. Rev. 1301 (1997); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994). California capital cases are no exception to the general rule. In the last year alone (July 2001–June 2002), the Ninth Circuit, in seven California capital cases, granted or affirmed habeas relief on the basis of ineffective assistance of counsel. See Jennings v. Woodford, 290 F.3d 1006, 1019–20 (9th Cir. 2002); Visciotti v. Woodford, 288 F.3d 1097, 1109 (9th Cir. 2002); Karis v. Calderon, 283 F.3d 1117, 1141 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247, 1259 (9th Cir. 2002); Silva v. Woodford, 279 F.3d 825, 850 (9th Cir. 2002); Mayfield v. Woodford, 270 F.3d 915, 932–33 (9th Cir. 2001); Ainsworth v. Woodford, 268 F.3d 868, 878 (9th Cir. 2001). In both *Thompson* and *Farmer*, the only two of the “inconsistent theories” cases to reach the Ninth Circuit, the court granted relief on the basis of ineffective assistance. See supra notes 16 and 35.
2. Possible Justifications for the Inconsistent Theories

There may be occasions when there is good cause for a prosecutor’s use of inconsistent theories at the separate trials of co-defendants. Where a prosecutor, after the first trial, discovers evidence not previously available that supports the theory of the second trial, there should be no question that the change in theories is justified.\(^\text{39}\) In this situation, the only question is whether the prosecutor should be able to insist on the validity of the first conviction when the new evidence, which the prosecutor has used and which the second jury has accepted, negates the theory by which the first conviction was obtained.\(^\text{40}\) That issue is not presented in any of the six case pairs because none involved a change in theory based on newly discovered evidence.

The facts of the cases do suggest two other possible justifications that might be offered for the prosecutor’s change in theories. It might be argued that presentation of different evidence in the two cases is justified because evidence admissible against one defendant was not admissible against the other.\(^\text{41}\) That was the situation, for example, in the Sanchez/Reyes cases (inconsistency by commission), where each defendant allegedly made statements to a different informer, and in the Bonner/Allison cases (inconsistency by omission) where Bonner allegedly confessed to an informer. As the Ninth Circuit implicitly found in Thompson, however, the inadmissibility of certain evidence against one of the defendants is not good cause for a change of theories.\(^\text{42}\) For the prosecutor to change theories, not because she now believes the second theory is correct, but only because

---

39. See United States v. Sharpe, 193 F.3d 852, 872 (5th Cir. 1999) ("there is no due process violation when new significant evidence comes to light that justifies a subsequent prosecution") (quoting Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), rev’d on other grounds, 523 U.S. 538 (1998)).

40. It is difficult to imagine how a prosecutor could justify defending a conviction obtained on the basis of a factual theory which she, herself, has proved to be false. In fact, the prosecutor in this situation should be obliged to take affirmative steps to set aside the first conviction. See H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Dispute, 68 FORDHAM L. REV. 1695, 1704 (2000) (stating that an ethical prosecutor upon learning of post-conviction facts indicating innocence has a duty to resume the role of neutral investigator and conduct "a thorough and dispassionate investigation of the new development... and, where the result warrants, the prosecutor must not hesitate to cancel the victorious judgment and see that justice is done in the light of the amplified or revised facts").

41. The most common example is an admission by one of the defendants (often to a "jailhouse snitch") which is admissible against that defendant but is hearsay as to the co-defendant. See supra note 19.

42. See Thompson, 120 F.3d at 1058-59.
the rules of evidence encourage the change, plainly runs counter to the prosecutor's duty to seek justice.

A more difficult question is whether the first jury's rejection of the prosecution's theory justifies the prosecutor's changing theories for the second trial. In three of the case pairs, the prosecutor failed to obtain a death sentence in the first trial and changed theories to get a death sentence in the second trial. In the Huffman/Farmer cases, the prosecutor switched arguments after Huffman was acquitted, dropping the theory that Huffman was a co-equal participant in the second burglary and suggesting that Farmer acted alone. In the Scott/Turner cases, after the jury failed to find a special circumstance true as to Scott, the prosecutor changed theories to put the entire blame for the killing on Turner. In the Bonner/Allison cases, after the first jury refused to find that Bonner had personally used a gun, the prosecutor changed theories to put the gun in Allison's hand. Is the first jury's verdict good cause for shifting theories? The argument that it is good cause necessarily derives from the premise that the jury's understanding of the case is "truer" than was the prosecutor's, i.e., that, as in the case of newly discovered evidence, the prosecutor has obtained new information that has properly altered her view of the case. The argument cannot be sustained. The very reason that the courts find no error when juries render inconsistent verdicts is that a jury's verdict does not necessarily determine the "truth" of a charge. Juries are permitted "to acquit out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." 43 In reality, the prosecutor knows the case much better than the jury ever can:

[T]he prosecutor is much better qualified than the jury at judging the factual and legal truth of a case. The prosecutor knows much more about the case than the jury could ever know. The prosecutor has more information about the background of witnesses and the defendant, and the availability of other admissible and non-admissible evidence. The prosecutor has spent more time studying the evidence than the jury, has more experience than the jury in judging the credibility of particular witnesses, and has acquired an expertise in specialized areas of prosecution that the jury lacks. 44

---


In sum, the only legitimate justification for the prosecutor to change factual theories is her discovery of new evidence following the first trial.

3. The Effect of Inconsistent Theories

The effect of the use of inconsistent theories varies depending on the phase of the trial at which the theory is relevant. In California, a capital trial takes place in two phases: a guilt phase and a penalty phase. At the guilt phase, the prosecution must prove the defendant guilty of first degree murder and also must prove, beyond a reasonable doubt, the existence of a special circumstance, making the defendant death-eligible. At the penalty phase, the jury hears evidence regarding aggravation and mitigation and is read a list of eleven factors to consider in reaching its verdict. In order to impose a death sentence, the jury must determine that the aggravating circumstances outweigh the mitigating circumstances. However, in making this determination, the jury is not required to make any particular findings as to aggravating and mitigating circumstances and thus has "unbridled discretion." The differences between the two phases lead to differences in the effect of the prosecutor's use of inconsistent theories.

In the Thompson/Leitch, Huffman/Farmer, and Sanchez/Reyes cases, the prosecutor's inconsistencies affected the guilt phase verdicts as to the death-sentenced defendant. In each of the case pairs, had the prosecution presented, and the factfinder accepted, the prosecutor's "other" theory or portions of the other theory, the factfinder would have found the death-sentenced defendant not guilty, or at least not death-eligible. In the Farmer case, had the jury accepted the prosecutor's theory from Huffman that Huffman reentered the victim's apartment and participated in the murder and the theory from Farmer that only one person reentered the apartment and committed the murder, they would have acquitted Farmer (as the jury, on retrial, did). In the Sanchez case, if the testimony of the informant used in the Reyes case were credited, Sanchez would not even have been found guilty of the capital murders. According to the informant, it was Reyes, not

45. See CAL. PENAL CODE § 190.3 (West 1999). Where the defendant pleads not guilty by reason of insanity, there is also a separate sanity phase between the guilt and penalty phases. See CAL. PENAL CODE § 1026(a) (West Supp. 2002).
46. See CAL. PENAL CODE § 190.4(a) (West 1999).
47. See CAL. PENAL CODE § 190.3 (West 1999).
48. See id.
Sanchez, who struck one of the victims, and neither Sanchez nor Reyes anticipated the killing of the other victim. In the Thompson case, had Thompson’s jury accepted the prosecutor’s theory from the Leitch case, it would have found Thompson guilty of murder for aiding Leitch in the killing, but it would not have found the special circumstance that the killing resulted from a rape.

In the Scott/Turner, Bonner/Allison, and Waidla/Sakarias cases, the prosecution’s inconsistencies affected only the penalty phase. In each case pair, the prosecution theory in the “other” case was that the death-sentenced defendant participated in the murder and, therefore, was death-eligible, but that the death-sentenced defendant was less culpable than he was portrayed to be at his own trial. As the Supreme Court has recognized, the issue of relative culpability is a “critical issue” in the penalty phase of a death penalty case. In the Scott/Turner cases, in the Scott trial, Scott was portrayed as equally responsible with Turner for the killings: he tied up the victims; he intended the killings; his fingerprints were found on the murder weapon. In the Turner trial, the prosecutor’s theory was that Turner alone did the killings, which caught Scott by surprise. In the Bonner/Allison cases, the prosecutor changed theories as to which of the two was the actual killer. In the Waidla/Sakarias cases, the prosecutor also changed theories as to who was the actual killer. At the Waidla trial he argued that Waidla was the actual killer and Sakarias’s blows were post-mortem, but at the Sakarias trial he argued that the victim was alive when Sakarias struck the fatal blows.

Unlike the use of inconsistent theories at the guilt phase, the use of inconsistent theories at the penalty phase cannot be said necessarily to have affected the result. Because of its “unbridled discretion” at the penalty phase, a jury, even if it believed that the defendant had played the lesser role in the killing described by the prosecutor in the other case, still might have returned a death verdict. Nevertheless, as noted above, relative culpability is a critical factor in the penalty determination. Consequently, the prosecutor’s use of a substantially different factual theory with regard to the defendant’s role in the murder(s), particularly the portrayal of the defendant as the actual killer rather

than as an aider and abettor, is at least reasonably likely to affect the penalty determination.\textsuperscript{51}

**B. The Use of Inconsistent Theories as Prosecutorial Misconduct**

Although, as noted above, the Ninth Circuit found that the prosecutor's use of inconsistent theories in *Thompson* violated due process,\textsuperscript{52} it has been the position of the prosecutors in the various cases and/or the California Attorney General, arguing on their behalf, that the use of inconsistent theories is not improper. Their argument may be summed up as follows: as long as the prosecutor does not knowingly make false arguments or misstate the evidence at the particular trial, or conceal material evidence in the particular case, she is not guilty of misconduct, regardless of what she knows about the facts of the case.\textsuperscript{53} Thus, in the *Reyes* case, the prosecutor explained her taking of an inconsistent position in the *Sanchez* case as follows:

What I argued to the Judge [in *Sanchez*] was based on the evidence that was before the Judge. It was not based on what I knew about Charles Seeley [the informer]. It was not based on what I knew about Joey Bocanegra [the actual killer]. It was not based on what I knew about Robert Reyes. It was based on the evidence that was before the Court.\textsuperscript{54}

Contrary to the prosecutors' argument, courts and commentators have taken the position that prosecutors' use of inconsistent factual theories in successive trials may violate several ethical norms. The first

\textsuperscript{51} Whether the defendant challenging the use of inconsistent theories was tried first or second is another variation that might affect the defendant's right to relief. See discussion infra Parts III.B, III.C. Thompson, Sanchez and Waidla were tried first, so they would be arguing to overturn verdicts on the basis of the prosecutor's post-verdict conduct. Farmer, Turner, Allison and Sakarias were tried after their co-defendants, so they might have challenged the prosecutors' change of theories (as Reyes actually did) on grounds of estoppel, a challenge unavailable to the first person tried.

\textsuperscript{52} See Thompson v. Calderon, 120 F.3d 1045, 1057-59 (9th Cir. 1997) (en banc) (plurality opinion), rev'd on other grounds, 523 U.S. 538 (1998); see also discussion infra Part II.A.

\textsuperscript{53} As the Attorney General put it in the *Allison* case,

Rather than act as a self-appointed jury to decide who actually pulled the trigger, the District Attorney's Office apparently decided to charge both defendants with the personal use of a firearm enhancement, submit all of the evidence, including [the informant's] testimony, to a jury, and allow the jury to weigh the conflicting evidence and decide the facts.

Respondent's Reply to Opposition to Motion for Partial Summary Judgment at 7, Allison v. Woodford, No. CV 92-6404-CAS (C.D. Cal.).

and most basic is the requirement that the prosecutor "seek justice." The Supreme Court long ago stated, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." The prosecutor's "seek justice" mandate has been characterized as a "duty to the truth." The prosecutor's duty to the truth arises from her constitutional obligations not to present false evidence and to disclose material evidence favorable to the defendant, from various ethical rules that "require prosecutors to have confidence in the truth of the evidence before bringing or maintaining criminal charges," and from her power as a representative of the government to affect the evaluation of facts by the fact-finder. As the California Supreme Court recently made clear, the obligation of the prosecutor not to become an "architect of a proceeding that does not comport with the standards of justice" applies with special force in a capital case.

55. AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (1993), at Standard 3-1.2(c) (adopting language from Berger v. United States, 295 U.S. 78, 88 (1935)) [hereinafter ABA STANDARDS].

56. Berger, 295 U.S. at 88. See also ETHICS COMMITTEE OF THE CAL. DIST. ATTORNEYS ASS'N, PROFESSIONALISM, A SOURCEBOOK OF ETHICS AND CIVIL LIABILITY PRINCIPLES FOR PROSECUTORS (Brian E. Michaels ed., 1998) at III-2 [hereinafter PROFESSIONALISM] ("The prosecutor must be impeccably professional because he or she is required to meet standards of candor and impartiality not demanded of [other attorneys].") (quoting People v. Kelley, 142 Cal. Rptr. 457, 466 (Ct. App. 1977)).

57. Gershman, supra note 44, at 315. See also Thompson, 120 F.3d at 1058 (noting that the prosecutor "has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and administer justice."); United States v. Duke, 50 F.3d 571, 578 n.4 (8th Cir. 1995) (stating that the prosecutor has "duty to serve and facilitate the truth-finding function of the courts"); Davis v. Zant, 96 F.3d 1558, 1548 n.15 (11th Cir. 1994) ("[P]rosecutors have a special duty of integrity in their arguments."); United States v. Myerson, 18 F.3d 153, 162 n.10 (2d Cir. 1994) ("[T]he prosecutor has a special duty not to mislead.") (quoting United States v. Universita, 298 F.2d 365, 367 (2d Cir. 1962)).


59. Gershman, supra note 44, at 314, 316. ("A prosecutor who proceeds with a case without being personally convinced of the defendant's guilt violates [her duty to truth] and creates an unacceptable risk that an innocent person will be convicted.").

60. See United States v. Young, 470 U.S. 1, 18-19 (1985) ("[T]he prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."); Gershman, supra note 44, at 315 (stating that the prosecutor has the power to affect the evaluation of the facts by the fact-finder because the jury "inevitably view[s] the prosecutor as a special guardian and thus a warrantor of the facts—an expert who can be trusted to use the facts responsibly").

61. People v. Seaton, 28 P.3d 175, 205 (Cal. 2001) (quoting Brady v. Maryland, 373 U.S. 83, 88 (1963)). In Seaton, the court emphasized that while most attorneys "may ethically present evidence that they suspect, but do not personally know, is false," quoting
The general duty of the prosecutor to "seek justice," is informed by more specific ethical rules to which prosecutors must adhere throughout the course of a criminal prosecution. The American Bar Association Prosecution Standards ("ABA Standards") require that the prosecutor have probable cause in order to institute a prosecution and refrain from instituting charges unless she has sufficient admissible evidence to support a conviction. However, commentators have concluded that more should be required, that, to fulfill her duty to seek justice, the prosecutor should not institute a prosecution unless she is convinced beyond a reasonable doubt of the defendant's guilt. In charging two defendants with a role in a murder that only one of them could have played, the prosecutor has violated ethical norms that require that she first determine the factual and legal truth of the case and then charge accordingly. At trial, the prosecutor corrupts the truth-seeking function, and therefore violates the duty to "seek justice," when she "takes irreconcilably inconsistent positions to ob-

People v. Riel, 998 P.2d 969, 1013 (Cal. 2000), a prosecutor who has serious doubts about a witness's testimony "should not present that evidence to a jury," id.

62. See ABA STANDARDS, supra note 55, at Standard 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.").

63. See id. ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.").

64. See Carol Corrigan, On Prosecutorial Ethics, 13 HASTINGS CONST. L. Q. 537, 540 (1986) ("The prosecutor does no one a service when, entertaining a doubt himself, he charges with the intent to let the jury decide."); Gershman, supra note 44, at 338-41 ("[A] prosecutor should not proceed with a case unless he is personally convinced, beyond a reasonable doubt, of the factual truth of his case—that his witnesses are truthful and accurate—and of the legal truth [of his case]—that the evidence proves the defendant’s guilt of the crime charged beyond a reasonable doubt."); Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 FORDHAM URB. L.J. 607, 641 (1999) (concluding that prosecutors “must satisfy themselves of an individual’s guilt as a precondition to determining that the conviction of an individual is an end to be sought on behalf of the state or the federal government”); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. REV. 669, 701 (1992) (asserting that a prosecutor should not charge a defendant “unless personally satisfied beyond a reasonable doubt of the defendant’s guilt”). See also Uviller, supra note 40, at 1703 (“The conscientious prosecutor, then, will not be content with ‘technical’ sufficiency for the commencement of a criminal prosecution. The prosecutor should be assured to a fairly high degree of certainty that he has the right person, the right crime, and a good chance of success.").

65. See Green, supra note 64, at 620, 639 (stating that because a prosecutor should be as certain as possible of the defendants’ guilt before charging, it is unethical for the prosecutor to separately charge two defendants with an act that only one of them could have committed, and then leave it to the jury to decide whether to convict either or both).
tian convictions against several defendants for the same crime."\textsuperscript{66} In addition, the prosecutor's use of inconsistent theories violates the ABA's Model Code for Professional Responsibility ("Model Code"), which states that the accused "is to be given the benefit of all reasonable doubts."\textsuperscript{67} By arguing inconsistent theories, the prosecutor "exploits the doubt that exists in the case, rather than giving the defendant the benefit of all reasonable doubts as the code requires."\textsuperscript{68} Various judges have expressed the same view. The Ninth Circuit plurality in \textit{Thompson} and Judge Clark, concurring in \textit{Drake v. Kemp},\textsuperscript{69} labeled the prosecutor's use of inconsistent theories in the separate trials of co-defendants as a violation of the duty to seek justice.\textsuperscript{70} Similarly, in \textit{United States v. Kattar},\textsuperscript{71} the First Circuit stated that it is the prosecutor's duty to make certain that the "truth is honored to the fullest extent possible during the course of the criminal prosecution and trial."\textsuperscript{72} Therefore, "[i]f it happens that the government's original perspective on the events in question is proven inaccurate, such revelation is in the government's interest as well as the defendant's. The criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth."\textsuperscript{73} The Eighth Circuit reached a similar conclusion in \textit{Smith v. Groose},\textsuperscript{74} noting that the "system is poorly served when a prosecutor, the state's own instrument of justice, stacks the deck in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth."\textsuperscript{75}

Within the general ethical requirement imposed on the prosecutor to "seek justice," is the more specific requirement that the prose-

\textsuperscript{66} Gershman, \textit{ supra} note 44, at 926-27. In coming to his conclusion, Gershman makes no distinction between cases where only one of the defendants could have committed the crime and cases where two or more co-defendants were involved in the crime, and the prosecutor took inconsistent positions regarding the role that each defendant played in the crime. \textit{Id.}

\textsuperscript{67} \textit{MODEL CODE OF PROF'L RESPONSIBILITY} EC 7-13 (1980).

\textsuperscript{68} Michael Q. English, \textit{A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?}, 68 \textit{FORDHAM L. REV.} 525, 555 (1999).

\textsuperscript{69} 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., concurring).

\textsuperscript{70} \textit{See} Thompson v. Calderon, 120 F.2d 1045, 1059 (9th Cir. 1997) (en banc) \textit{rev'd on other grounds}, 523 U.S. 538 (1998); \textit{Drake}, 762 F.2d at 1470 (Clark, J., concurring) (stating that prosecutors' use of inconsistent theories "reduce[s] criminal trials to mere gamesmanship and rob[s] them of their supposed search for truth").

\textsuperscript{71} 840 F.2d 118 (1st Cir. 1988).

\textsuperscript{72} \textit{Id.} at 127.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} 205 F.3d 1045 (8th Cir. 2000).

\textsuperscript{75} \textit{Id.} at 1051.
The role of the penalty hearing in a capital case implicates yet another ethical obligation of the prosecutor, to “seek to assure that a fair and informed judgment is made on the sentence.”80 Included in this duty is the requirement that the prosecution reveal exculpatory information to the sentencing judge or jury.81 Consequently, when a prosecutor argues inconsistently to the judge or jury regarding the pertinent sentencing factors, she is providing inaccurate or misleading sentencing information and thereby contributing to an inaccurate sentence.82 In addition, because the prosecutor is required under the

77. Id. at R. 3.3(a)(4) (2001).
78. See ABA Standards, supra note 55, at Standard 3-2.8(a) (“[a] prosecutor should not intentionally misrepresent matters of fact or law to the court”); California Rules of Prof'L Conduct R. 5-200(A)(3) (1995) (requiring that, in presenting matters to a tribunal, an attorney must "employ, for the purpose of maintaining the causes confided to [him or her] such means only as are consistent with truth and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law”); Professionalism, supra note 56, at III-4 (stating that a prosecutor may not “misstate the evidence presented or attempt to mislead the jury”).
80. ABA Standards, supra note 55, at Standard 3-6.1(a) (“To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.”). This requires that the prosecutor, at sentencing, continue to accord the defendant procedural justice. See id. at Standard 3-6.2 cmt.
81. See id. at Standard 3-6.2 cmt.; Model Rules of Prof'L Conduct R. 3.8(d) (2001) (requiring that the prosecutor “in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor”); Model Code of Prof'L Responsibility DR 7-103(B) (1980) (“A public prosecutor . . . shall make timely disclosure . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment”); Professionalism, supra note 56, at III-15 (“[C]onstitutional law and ethics rules compel[] a prosecutor to make known any evidence which would negate guilt, reduce the degree of responsibility or mitigate punishment.”).
82. See Nichols v. Collins, 802 F.Supp. 66, 74 (S.D. Tex. 1992) (condemning the prosecutor's use of inconsistent theories at sentencing, because “the state of Texas has determined, by law, that it is important for purposes of sentencing that a jury know which
ethical rules to turn over all mitigating evidence relevant to sentencing that tends to reduce punishment, the prosecutor is required to disclose all evidence supporting each inconsistent theory used as to the other defendant. When the prosecutor fails to do this, she has violated her ethical obligations. Further, by arguing inconsistent theories at sentencing, the prosecutor is effectively trying to obtain the harshest possible sentence for each codefendant regardless of the existence of true mitigating evidence. This violates the prosecutor’s duty to “ensure that individuals are not punished more harshly than deserved.” Further, such behavior suggests that the prosecutor, in violation of the ethical rules, is judging her effectiveness based on the severity of the sentences she obtains.

Finally, the prosecutor must avoid conduct that undermines public confidence in the integrity of the legal system. Specifically, “the prosecutor must execute the duties of this representative office diligently and fairly, avoiding even the appearance of impropriety that might reflect poorly on the State.” When two defendants are convicted for a crime that only one of them could have committed, or when one (or both) of two co-defendants receives a harsher sentence based on inconsistent theories at trial and sentencing, the public cannot have confidence that the trials were fair and/or that the convictions and sentences were just. The use of inconsistent theories itself demonstrates to the public that criminal trials are not a search for truth and that prosecutors are allowed to use unfair means to secure convictions. Judge Kozinski, even while dissenting from the grant of

[defendant] did fire the bullet”), rev’d on other grounds, in Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).

83. See supra notes 80–81 and accompanying text.
84. Green, supra note 64, at 634.
85. See ABA STANDARDS, supra note 55, at Standard 3–6.1(a). (“The prosecutor should not make the severity of sentences the index of his or her effectiveness.”).
86. See Model Code of Prof’l Responsibility EC 9–2 (1980) (“When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.”); Nat’l Dist. Attorneys Ass’n, National Prosecution Standards Standard 25.1 cmt. (1977) (“As a public prosecutor constantly in the public eye, it is imperative that the prosecutor . . . avoid even the appearance of professional impropriety.”); Green, supra note 64, at 636 (asserting that the prosecutor has a “duty to avoid the public perception that criminal proceedings are unfair.”).
88. See Smith v. Groose, 205 F.3d 1045, 1051–52 (8th Cir. 2000); Thompson v. Calderon, 120 F.3d 1045, 1057–59 (9th Cir. 1997) (en banc), rev’d on other grounds, 523 U.S. 538 (1998); Nichols v. Collins, 802 F.Supp. 66, 74 (S.D. Tex. 1992) (“[T]he integrity of the judicial system commands that citizens can rest assured that prosecutors are seeking truth
relief in *Thompson*, stated that "[w]hether or not the United States Constitution allows [prosecutors] to argue inconsistent theories to different juries, it surely does not inspire public confidence in our criminal justice system for prosecutors to leave themselves open to charges of manipulation."  

Prosecutors' use of inconsistent factual theories in successive cases violates ethical norms, but the question remains whether the death row defendant is entitled to relief on that ground. Several courts and individual judges have recognized that prosecutors were guilty of misconduct in this regard, but have taken the position that defendants were not entitled to relief. As we will see, the California courts have yet to grant relief on this ground.

C. Inconsistent Theories in the California Courts

Although the inconsistent theories problem now has been raised in seven capital cases, either on appeal or on habeas corpus, the California Supreme Court has had little to say on the subject. The Court failed or refused to address the issue in upholding the death sentences in *Thompson, Allison, Sanchez,* and *Waidla.* In *Farmer,* which involved inconsistency by inference, the court addressed the inconsistency issue only in dicta:

> [C]ounsel have a right to present to the jury their views on the deductions or inferences that the facts warrant. Their reasoning may be faulty, but this is a matter for the jury to decide. Even if the prosecutor had argued in the Huffman case that the evidence pointed to Huffman's guilt and in the present case that it sug-


90. See, e.g., *Thompson,* 120 F.3d at 1063–64 (Tashima, J., concurring); United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988).

91. It is unclear which is the appropriate proceeding for raising the inconsistent theories issue because of the California Supreme Court's seemingly contradictory rulings on the subject. Compare *Order at 1, In re Allison,* No. S042478 (Cal. Sup. Ct. April 16, 1997) (rejecting Allison's inconsistent theories claim on habeas corpus "because [it] could have been, but [was] not, raised on appeal") with *People v. Sakarias,* 995 P.2d 152, 176 (Cal. 2000) (holding that inconsistent theories claim "should be presented by petition for writ of habeas corpus rather than by appeal") (quoting *People v. Sanchez,* 986 P.2d 1129, 1166 (Cal. 1999)).
gested defendant was guilty, his argument would not be improper as long as it was based on the record and made in good faith.\textsuperscript{92}

While the court appeared to sanction the making of inconsistent arguments, the key element of the court's statement, "good faith," was not defined, so the court's position remains unclear. In \textit{Turner}, the other case involving inconsistency by inference, the court again addressed the issue in dicta (after holding that the defendant had failed to preserve the issue by objecting at trial) and stated that Turner was not prejudiced by any inconsistency in the prosecutor's argument because the challenged inconsistency concerned only Scott's role in the killing, not Turner’s.\textsuperscript{93} In \textit{Sakarias}, a case of inconsistency by omission, the court recognized the issue:

That a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process is well established. Less clear is whether, knowing falsity aside, a prosecutor oversteps constitutional limits by asserting, in separate trials of different defendants, factually inconsistent or contradictory theories of the criminal events.\textsuperscript{94}

However, the court refused to address Sakarias's claim, finding that it would be better addressed on habeas corpus.\textsuperscript{95}

The only substantial discussion of the inconsistent theories issue in the California courts, albeit not in the context of a capital case, appears in the Court of Appeal's decision in \textit{People v. Watts}.\textsuperscript{96} Watts, Shaw and Dues had entered a restaurant and, between them, robbed two employees at gunpoint and attempted to rob victim Bishop and another. One of the robbers pointed a gun at Bishop and forced her

\textsuperscript{92} People v. Farmer, 765 P.2d 940, 962–63 (Cal. 1989) (citations omitted), partially overruled on other grounds by People v. Waidla, 996 P.2d 46, 66 n.6 (Cal. 2000). The statement was dicta because the court had earlier held that the defense counsel's attempt to argue the inconsistencies to the jury was properly barred by the trial court since the defense had failed to introduce the prosecutor's inconsistent arguments in evidence. See Farmer, 765 P.2d at 962. The court did grant Farmer a penalty reversal, finding that a different argument made by the prosecutor was improper. See id. at 968.

\textsuperscript{93} See People v. Turner, 878 P.2d 521, 553 (Cal. 1994).

\textsuperscript{94} People v. Sakarias, 995 P.2d 152, 174 (Cal. 2000) (citations omitted).

\textsuperscript{95} See id. at 177. The issue has been reraised in Sakarias's pending habeas corpus petition. See generally In re Sakarias, No. S082299 (Cal. Sup. Ct.).

\textsuperscript{96} 91 Cal. Rptr. 2d 1 (Ct. App. 1999), rev. denied, 2000 Cal. LEXIS 1428 (Mosk and Kennard, JJ., dissenting), cert. denied, 531 U.S. 837 (2000). The issue was mentioned in an earlier case, People v. Hoover, 231 Cal. Rptr. 203, 211 (Ct. App. 1986), where the court upheld a murder conviction arguably based on inconsistent theories. However, \textit{Hoover} is a dubious precedent, in that the court's entire analysis of the issue is contained in the statement: "[N]o rule of misconduct or due process binds a prosecutor to a theory asserted in closing argument in a related prosecution," id. at 208, and none of the three cases cited by the court for that proposition were inconsistent theories cases. See id.
to the floor, and the same robber forced her to try to open the safe.\textsuperscript{97} Shaw was tried before Watts and, \textit{inter alia}, was found to have personally used a firearm in the attempted robbery of Bishop. Watts was subsequently tried and (in addition to being convicted of various other counts) also was found to have personally used a firearm against Bishop. On appeal, Watts challenged the firearm use enhancement on due process and judicial estoppel grounds.\textsuperscript{98} Although the court acknowledged that the two verdicts were inconsistent and that "[a]t first blush, the action of the prosecutor in seeking a conviction against [Watts] for certain crimes after having secured a conviction against Shaw for the same crimes, is troubling,"\textsuperscript{99} the court found no prosecutorial misconduct and no basis for granting relief. The court found no due process violation because the prosecutor had probable cause to charge Watts, there was no indication that the prosecutor had caused the witnesses to change their testimony or otherwise had acted improperly, and there was sufficient evidence to support the firearm use finding.\textsuperscript{100} The court refused to apply judicial estoppel—the doctrine barring a litigant from taking a position inconsistent with a position which the litigant had successfully asserted in a previous case\textsuperscript{101}—because there was no authority for applying the doctrine against the government in a criminal case and because the doctrine "should not act to prevent the State from taking inconsistent factual positions in separate proceedings."\textsuperscript{102} In the end, the court found no misconduct and no threat to the integrity of the judicial process from the conviction of two defendants for a crime only one of them committed.\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{97} See Watts, 91 Cal. Rptr. 2d at 3–5.
\item \textsuperscript{98} See id. at 7.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} See id. at 8. The court suggested that, in fact, it was the finding against Shaw that was erroneous.
\item \textsuperscript{101} See discussion \textit{infra} Part III.B.
\item \textsuperscript{102} Id. at 9. But see In re Derrick R., 2001 WL 1554217 at *4 n.4 (Cal. Ct. App. 2001) ("The doctrine of judicial estoppel generally precludes a prosecutor from pursuing inconsistent theories at separate trials.") (citing Thompson v. Calderon 109 F.3d 1358, 1371 (9th Cir.1996)).
\item \textsuperscript{103} See Watts, 91 Cal. Rptr. 2d at 10. The court explained that the prosecutor does not vouch for the version of the facts she is presenting:
\begin{quote}
That the evidence adduced during one proceeding provides proof that one thing in fact occurred, while the evidence adduced during a second proceeding provides proof that a different thing in fact occurred, is an unavoidable risk of the judicial process. \ldots [T]he prosecutor's argument is not that a particular set of facts is the true set of facts; but that the \textit{evidence shows} that a particular set of facts is the true set of facts.
\end{quote}
\end{itemize}

\textit{Id.}
II. The Federal Constitution and Inconsistent Theories

The Supreme Court has never addressed directly whether the prosecutor's use of inconsistent factual theories in a capital case violates the Constitution. The inconsistent theories problem was presented to the Court in \textit{Green v. Georgia},\footnote{442 U.S. 95 (1979).} where the prosecutor had used inconsistent factual theories as to the roles of two co-defendants in a murder. The inconsistency was created by the introduction of the co-defendant's confession in the first trial but not in Green's trial.\footnote{See id. at 96. The case is similar, in this respect, to the \textit{Bonner/Allison} cases. See discussion \textit{supra} pp. 7–8.} However, without addressing the inconsistent theories issue as such, the Court vacated the penalty determination on the ground that due process was violated when Green was not permitted to introduce the confession at his trial.\footnote{See id. at 97.} The only discussion of the issue is in Justice Stevens' dissent from the denial of a stay of execution in \textit{Jacobs v. Scott}.\footnote{513 U.S. 1067 (1995) (Stevens and Ginsburg, JJ., dissenting from denial of certiorari).} Jesse Jacobs and his sister, Bobbie Hogan, were each charged with kidnapping and murdering a woman in the woods. At Jacobs' trial, the prosecution introduced Jacobs' confession to the effect that he had abducted and fatally shot the victim and presented testimony that Jacobs had led investigators to her body. Jacobs, however, testified that the confession was false and that he had made it in hopes of getting the death penalty rather than life imprisonment. He testified that he kidnapped the victim and brought her to a cabin in the woods, but it was Hogan who shot the victim. According to Jacobs, he had not known that Hogan was armed and was not present when the killing occurred.\footnote{See id. at 1067–68.} The prosecutor argued to the jury that "[t]he simple fact of the matter is that Jesse Jacobs and Jesse Jacobs alone killed [the victim]."\footnote{Id. at 1068 (quoting Jacobs v. Scott, 31 F.3d 1319, 1322 n.6 (5th Cir. 1994)).} Jacobs was convicted and sentenced to death. At Hogan's subsequent trial, the prosecutor abandoned his theory that Jacobs had killed the victim and instead called Jacobs as a prosecution witness to testify that Hogan was the killer.

The prosecutor told the jury that he had "changed my mind about what actually happened. . . . And I'm convinced that Jesse Jacobs is telling the truth when he says that Bobbie Hogan is the one that pulled the trigger."\footnote{Id. (quoting 31 F.3d at 1322 n.6 ).}
Justice Stevens, writing for himself and Justice Ginsburg, thought the case raised "a serious question of prosecutorial misconduct," and, analogizing the case to those where the Court had found due process violations based on the prosecutor's introduction of false testimony, he described the result as fundamentally unfair. Justice Stevens also referred to the "heightened need for reliability" in capital cases, thereby suggesting that the prosecution of co-defendants on inconsistent theories might violate the Eighth Amendment.

Both the Due Process Clause and the Eighth Amendment may be read to prohibit the prosecutor's use of inconsistent factual theories in capital cases. In the absence of a clearly controlling decision from the Supreme Court, the lower courts have reached conflicting decisions on due process claims based on the use of inconsistent theories and have barely mentioned the Eighth Amendment in this context.

A. Due Process

The prosecutor's use of inconsistent factual theories in capital cases has most often been challenged as a violation of due process. The issue lies at the intersection of three lines of United States Supreme Court criminal due process cases. The first line of cases, referred to by Justice Stevens in Jacobs, concerns the situation where the prosecutor knowingly introduces, or fails to correct, false evidence. Such conduct violates due process, and, although the rule, as stated, would appear to require bad faith on the part of the prosecutor, a due process violation is said to occur if the prosecutor knew or should have

111. Id. at 1069.
112. Id. at 1070 (quoting Caldwell v. Mississippi, 472 U.S. 320, 323 (1985)).
114. Whether such constitutional rights, if recognized by the courts, would be enforceable on federal habeas corpus in light of 28 U.S.C. § 2254(d)(1) (2001) (requiring the petitioner to show that a claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States") or the doctrine of Teague v. Lane, 489 U.S. 288, 310 (1989) (barring generally any claim based on a "new rule") is beyond the scope of the article. Compare Smith v. Groose, 205 F.3d 1045, 1053–54 (8th Cir. 2000) (holding that a rule that the prosecutor's use of inconsistent theories violated due process is not a "new rule" within the meaning of Teague) with Nichols v. Scott, 69 F.3d 1255, 1273–74 (5th Cir. 1995) (finding that defendant's due process claim based on the prosecutor's use of inconsistent theories seeks the benefit of a "new rule" and is barred by Teague).
115. See Napue v. Illinois, 360 U.S. 264, 269 (1959) (summarizing cases holding that knowing use of false evidence and failure to correct false evidence violate due process and finding that prosecutor had failed to correct false evidence related to the credibility of a witness).
known that the evidence was false. The second line of cases concerns the situation where the prosecutor presents a false argument, either by urging the factfinder to draw a false inference from the evidence or by misstating the evidence. Again, such conduct violates due process if, but for such conduct, there is a reasonable probability that the result would have been different. The third line of cases concerns the situation where the prosecutor suppresses evidence favorable to the defendant. Where the suppressed evidence is material, such conduct again violates due process. Plainly, the prosecutor’s use of inconsistent theories may involve conduct found to be a due process violation under one of the above rules, but it may not. That the prosecutor relied on inconsistent evidence or made inconsistent arguments and that one version of the evidence or arguments was necessarily false may not establish a due process violation under the first two rules if the death row defendant cannot show that the factual theory used in his case was the false one. Nor, as the California cases demonstrate, does the prosecutor’s use of inconsistent theories necessarily result from the suppression of evidence used, or to be used, in the co-defendant’s case. The question, then, is whether the prosecutor’s use of inconsistent theories in a capital case violates due process even when such conduct does not fall squarely within one of the three lines of cases discussed above.

The answer from the lower federal courts is that sometimes the prosecutor’s use of inconsistent theories does violate due process, and sometimes it does not. When the inconsistent theories are the product of the prosecutor’s use of contradictory evidence (“inconsistency by
commission"), the rule appears to be that there is a due process violation if the inconsistency is material. The leading case, and the only case where relief has been granted on that ground, is the Eighth Circuit's decision in Smith v. Groose, a non-capital murder case. The underlying facts in Smith describe a bizarre encounter between two independent groups bent on burglarizing the same house. At some point during the competing burglaries, the two occupants of the house were murdered. The prosecution had two contradictory statements from an informer, who was a member of Smith's group, as to how the murder occurred. The first version pointed to Cunningham, a member of the other group, as the killer. The second version pointed to Bowman (a member of the Smith group) as the killer. At Smith's trial for aiding Bowman in the murders, the informer testified to the first version of events, but the prosecution introduced and relied on the second version to impeach the informer and also to provide substantive evidence of Smith's guilt. Subsequently, the prosecution charged Cunningham with the murders and relied on the informer's testimony to the first version of events to obtain murder and burglary convictions against Cunningham. The court reversed Smith's convictions, holding that the use of inconsistent theories constitutes a due process violation if: (1) the prosecutor presented evidence and arguments that were "inherently contradictory" in the two separate proceedings; and (2) the inconsistency went to "the core of the prosecutor's cases" against the defendants.

The Ninth Circuit and Eleventh Circuit, although not having the occasion to grant a defendant relief based on the prosecutor's use of inconsistent factual theories, have recognized that when the inconsistent theories result from the prosecutor's presentation of contradictory evidence, due process is violated. In Thompson v. Calderon, the

123. 205 F.3d 1045 (8th Cir. 2000).
124. See id. at 1047-48.
125. Id. at 1051-52. Subsequently, the Eighth Circuit distinguished Smith in rejecting an inconsistent theories claim in United States v. Paul, 217 F.3d 989, 998-99 (8th Cir. 2000). In Paul, a capital murder case, the claimed inconsistency concerned whether Paul or the other participant 'had fired the fatal shot. The court found that any inconsistency was irrelevant. "When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecution's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent."
126. 120 F.3d at 1059; see discussion supra pp. 1-4.
Ninth Circuit granted habeas relief on other grounds, but Judge Fletcher, writing for a four-judge plurality of the en banc court, also would have granted relief on the ground that the prosecutor’s use of inconsistent theories in the Thompson/Leitch cases violated due process. “[I]t is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime.”\textsuperscript{127} In the view of the plurality, “little about the trials remained consistent other than the prosecutor’s desire to win at any cost.”\textsuperscript{128} The court found that the prosecutor had manipulated evidence, argued inconsistent motives, and, at Leitch’s trial, ridiculed the theory he had used to obtain a conviction and death sentence against Thompson.\textsuperscript{129} Three concurring judges did not join in this part of Judge Fletcher’s opinion,\textsuperscript{130} but Judge Tashima, writing for himself and Judge Thomas, agreed with the plurality that, “due process is violated when a prosecutor pursue[s] wholly inconsistent theories of a case at separate trials.”\textsuperscript{131} Tashima’s view of the issue is less than pellucid, however, because he went on to discuss whether Thompson was “prejudiced.” “Thus, although I agree that there was a due process violation, absent a finding of which version is true, I am unprepared to decide whether or not Thompson was prejudiced by it.”\textsuperscript{132} The implication of this statement is that Thompson would be entitled to relief only if the evidence used against Thompson were shown to be false. If that, in fact, is Judge Tashima’s position, he is not recognizing a due process violation based on the use of inconsistent theories—he is requiring the defendant to meet the more difficult standard of showing that the prosecutor used false evidence.\textsuperscript{133} Nevertheless, the plurality’s opinion on this issue appears to be accepted law in the circuit. In Nguyen v. Lindsey,\textsuperscript{134} another case of inconsistency by

\textsuperscript{127} Id. at 1058. The court had previously addressed an inconsistent theories claim in Haynes v. Cupp, 827 F.2d 435, 439 (9th Cir. 1987) (rejecting the claim on the ground that the underlying prosecutorial theory remained consistent in the two cases).

\textsuperscript{128} 120 F.3d at 1059.

\textsuperscript{129} Id. at 1057.

\textsuperscript{130} See id. at 1047.

\textsuperscript{131} Id. at 1063 (quoting the panel decision in Thompson v. Calderon, 109 F.3d 1358, 1371 (9th Cir. 1996)).

\textsuperscript{132} Id. at 1064.

\textsuperscript{133} The statement also is puzzling because, even to make out a due process violation, the defendant must show materiality, i.e., that, but for the prosecutor’s misconduct, there was a reasonable probability of a different result. See United States v. Bagley, 473 U.S. 667, 682 (1985). If the defendant has shown the materiality of the misconduct, he has shown prejudice.

\textsuperscript{134} 232 F.3d 1236 (9th Cir. 2000).
commission (the prosecutor offered contradictory evidence as to which of two gang members had fired first in a gang shootout resulting in the death of a bystander), the court cited to Thompson for the proposition that a prosecutor's use of inconsistent theories is misconduct but found Thompson inapplicable because, in the case before it, the inconsistency was immaterial since both defendants would be guilty of murder in any case for voluntarily joining the shootout. In United States v. Bakshinian, the district court, ruling on the defendant's motion to prevent the government from adopting a theory in his trial inconsistent with that adopted in a previous trial, read Thompson as requiring that, "between one trial and another, the government may not take inconsistent positions as to what occurred." In fact, the government did not dispute that such was the rule but asserted that its theories were consistent.

The Eleventh Circuit first addressed the issue of inconsistent theories in Drake v. Kemp. In Drake, although the majority granted relief on other grounds, Judge Clark stated in his concurring opinion his belief that the prosecutor's use of inconsistent theories violated due process. The inconsistency in Drake involved contradictory evidence as to whether Drake or his co-defendant was the actual killer, and the prosecutor, at Drake's trial, presented a version of the facts that he had argued was "unbelievable" at the co-defendant's prior trial. While Judge Clark's description of the prosecutor as having obtained Drake's conviction "through the use of testimony he did not believe" might suggest that he viewed the problem as one of false or perjured evidence, his assertion that the prosecution's "flip flopping of theories of the offense was inherently unfair" and that "[u]nder the peculiar facts of this case the actions by the prosecutor violate that

---

135. See id. at 1240. The court's holding in Nguyen highlights the difference between capital and non-capital cases. The inconsistency in the prosecutor's theory as to who fired first was immaterial because Nguyen was a non-capital murder case. In a capital case, the issue would be material because of the significance of comparative culpability at the penalty phase.
137. Id. at 1108.
138. See id. at 1109.
139. 762 F.2d 1449 (11th Cir. 1985).
140. See id. at 1479. Clark's opinion on this issue, although not for the court, has been frequently cited and relied upon in other cases on this issue. See, e.g., United States v. Dickerson, 248 F.3d 1036, 1044 (11th Cir. 2001); Smith v. Groose, 205 F.2d 1045, 1050 (8th Cir. 2000).
141. See Drake, 762 F.2d at 1479.
142. Id.
fundamental fairness essential to the very concept of justice,"
plainly imply that it was the change of theories—rather than the false-
ness of the theory used in Drake’s case—that constituted the due pro-
cess violation. Subsequently, in Parker v. Singletary,144 another capital
case where the prosecutors offered inconsistent theories as to who,
among three defendants, was the actual shooter, the court implicitly
accepted Judge Clark’s view but distinguished the case before it be-
cause in Parker (unlike Drake), the prosecution did not make use of
“necessarily contradictory evidence.”145 Recently, in United States v.
Dickerson,146 the court again assumed that Judge Clark’s opinion, and
the opinion of the plurality in Thompson, correctly stated the law.147
However, the court distinguished the case before it on the facts, find-
ing that “any alleged inconsistency in the Government’s conspiracy
theory had no impact on the likelihood of Dickerson being
convicted.”148

In the Fifth Circuit, the question was presented in Clark v. John-
son,149 a capital case, but the court’s opinion denying relief gives no
clear answer. In Clark, the defendant argued that the prosecutor took
inconsistent positions as to which of the two defendants was the actual
shooter, basing the inconsistent positions on contradictory evidence
adduced from the state’s medical expert. Although the court did cite
to its earlier opinion in Beathard v. Johnson150 for the proposition that
“a prosecutor can make inconsistent arguments at the separate trials
of co-defendants without violating the due process clause,” the court
characterized the claim as one based on suppression of evidence,151
and failed to discuss or even cite any of the inconsistent theories cases
discussed above. The court’s opinion can also be read as rejecting the
defendant’s claim on the facts—because the expert’s testimony was
“essentially consistent,” or because the inconsistency did not make a
different result more likely—rather than as a holding that, as a matter
of law, the defendant had no claim.152

143.  Id.
144.  974 F.2d 1562 (11th Cir. 1992).
145.  Id. at 1578.
146.  248 F.3d 1036 (11th Cir. 2001).
147.  See id. at 1044.
148.  Id.
149.  227 F.3d 273 (5th Cir. 2000).
151.  Referring to the claim as one made under Brady v. Maryland, 373 U.S. 83 (1963).
See Clark, 227 F.3d at 278–80.
152.  See Clark, 227 F.3d at 279–80.
When the inconsistent theories are the product of the prosecutor's arguments in the separate trials, rather than her manipulation of the evidence ("inconsistency by inference"), the rule in two circuits seems to be that there is no due process violation. The case most clearly making this distinction is the Eleventh Circuit's decision in *Parker v. Singletary*.\(^\text{153}\) In *Parker*, prosecutors had used the paucity of evidence as to who shot the victim to argue, in the separate murder trials of three co-defendants, that the particular defendant on trial was the actual shooter. The court found no problem with this approach:

Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries.\(^\text{154}\)

The Fifth Circuit, in *Beathard v. Johnson*, a case in which each defendant pointed the finger at the other, adopted the same reasoning used by the Eleventh Circuit in *Parker*:

The record from Beathard's trial reveals that the jury heard Beathard's version of the facts (that he remained outside, while Hathorn went into the trailer) and Hathorn's version of the facts (that Hathorn shot through the window and Beathard entered the trailer.) Price [the prosecutor] presented essentially the same two versions of the facts at Hathorn's trial, with the exception that he cross-examined Hathorn concerning whether or not he entered the trailer, rather than presenting Beathard’s live testimony to that effect. Hathorn denied it, and stuck to his story presented in Beathard's trial. Price's questions do not amount to evidence. Beathard emphasizes the fact that Price adopted one theory of the case in closing argument at Beathard's trial and a different theory in closing argument at Hathorn's trial. Again, closing arguments are not evidence. Moreover, a prosecutor can make inconsistent arguments at the separate trials of co-defendants without violating the due process clause.\(^\text{156}\)

The court then went on to hold that Beathard could not claim that the prosecutor knowingly used false evidence (even though one of the two versions of the facts was necessarily false) because the prosecutor had no way of knowing which was the false version.\(^\text{157}\)

\(^{153}\) 974 F.2d 1562 (11th Cir. 1992).

\(^{154}\) Id. at 1578.

\(^{155}\) 177 F.3d 340 (5th Cir. 1999).

\(^{156}\) Id. at 348.

\(^{157}\) See id. The Fifth Circuit also rejected an inconsistent theories claim in *United States v. Sharpe*, 193 F.3d 852, 872 (5th Cir. 1999) (finding that the prosecutor was entitled to change theories because of the discovery of "new significant evidence") (quoting Thompson v. Calderon, 120 F.3d 1045,1058 (9th Cir. 1997) (en banc), rev’d on other grounds, 523 U.S. 538 (1998)).
This distinction—between cases in which the prosecutor argues inconsistently based on different evidence at the separate trials, and cases in which the prosecutor argues inconsistently based on similar evidence at the separate trials—has little to commend it. The Parker court, which made the distinction, offered no analysis beyond the statement that, "[t]he issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries,"158 and a citation to United States v. McKeon159 for the proposition that the prosecutor's arguments should not be admitted in evidence.160 The Beathard court's explanation (set forth above) consisted of nothing more than an ipse dixit. None of the commentators have drawn such a distinction,161 and there is no obvi-

158. 974 F.2d at 1578.
159. 738 F.2d at 33.
160. See 974 F.2d at 1578 n.97 (citing to McKeon, 738 F.2d at 33). The court's reliance on McKeon is curious since the Second Circuit, in a later case, recognized the right of a defendant to introduce the prosecutor's prior inconsistent arguments. See United States v. GAF Corp., 928 F.2d 1253, 1260 (2d Cir. 1991).
161. See, e.g., Poulin, supra note 21, at 1465–71; English, supra note 68, at 551–58.
ous reason why one form of inconsistent argument is more objectionable than the other. While it might be suggested that the use of different evidence is a greater threat to a fair trial because it makes it more likely that each jury will accept the prosecutor’s argument, it might just as plausibly be suggested that the use of different evidence is less pernicious because the defendant in that situation can respond by introducing the prosecutor’s “other” evidence, thereby exposing the prosecutor’s inconsistency. At bottom, all versions of the inconsistent theories problem involve the same misconduct—the prosecutor’s use of different evidence or the ambiguities of the evidence to convince the factfinder of a “truth” that she, herself, does not find convincing—and, given the prosecutor’s inherent authority, pose the same risk to a fair trial. Accordingly, the prosecutor’s use of inconsistent theories, in whatever form, should constitute a due process violation whenever the defendant can establish materiality, i.e., that had the factfinder heard the supporting evidence and the prosecutor’s argument from the “other” case, there was a reasonable likelihood of a different result.

B. Cruel and Unusual Punishment

In the thirty years since first applying the Eighth Amendment to overturn a death penalty in Furman v. Georgia,162 the Supreme Court repeatedly has reaffirmed that the Eighth Amendment has a special role to play in capital cases.163 This understanding is derived from the premise that, as a penalty, “death is different.”

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.164

The vice of the death penalty schemes held unconstitutional in Furman was that they failed to limit the risk that the death penalty would be arbitrarily applied,165 and the Court repeatedly has held that, in order to minimize that risk, death judgments must meet a

162. 408 U.S. 238 (1972).
heightened standard of reliability. While at times individual justices have questioned this principle, virtually every justice to sit on the Court since Furman eventually has accepted it. Although the concern for the reliability of death judgments was raised first with regard to the jury’s penalty decision, the heightened reliability standard subsequently was applied to the jury’s death eligibility decision (the finding of aggravating circumstances) and to the jury’s guilt/innocence determination.

Despite the Court’s numerous references to the Eighth Amendment’s heightened reliability standard and the Court’s occasional reliance on the standard to set aside death verdicts, the Court has not developed a coherent Eighth Amendment doctrine. Nevertheless, three aspects of the Eighth Amendment’s heightened reliability standard appear to be well established and are significant for purposes of

166. See Monge v. California, 524 U.S. 721, 732 (1998) (“Because the death penalty is unique ‘in both its severity and its finality,’ we have recognized an acute need for reliability in capital sentencing proceedings.”) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977)); McKoy v. North Carolina, 494 U.S. 433, 442 (1990) (emphasizing the distinction between constitutional requirements in capital and non-capital sentencing procedures); Woodson, 428 U.S. at 305 (“Because of [the] qualitative difference [between life and death as punishments] there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

167. See Gardner, 430 U.S. at 371 (Rehnquist, J., dissenting) (“The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.”); Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (“[T]he Eighth Amendment’s prohibition is directed against cruel and unusual punishments. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment.”).


169. See Woodson, 428 U.S. at 305.


172. Professors Steiker and Steiker have argued:

It should be apparent . . . that the doctrine does not reflect a systematic effort to regulate the death penalty process so much as a series of responses to particular circumstances in which the Court deemed a state rule or practice manifestly unreliable or unfair . . . . As a result, the Court appears to invoke the death-is-different principle on a case-by-case basis without a more general theory of the fundamental prerequisites to a fair and principled death penalty scheme.

the present discussion. First, the heightened standard of reliability applied in death penalty cases affords greater protections to the defendant than the due process protections applicable in all criminal cases.173 The point is illustrated by the Court's decisions in *Beck v. Alabama*174 and *Turner v. Murray*.175 In *Beck*, the Court invoked the "death is different" principle and the heightened reliability standard to hold that, in a capital case, a defendant is entitled to lesser included offense instructions at the guilt phase of the trial.176 The Court observed that it had "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process."177 In *Turner*, the issue was whether a black defendant charged with an interracial murder was entitled to *voir dire* prospective jurors on racial prejudice.178 The Court earlier had held that the failure to permit such *voir dire* in a non-capital case did not violate due process.179 In *Turner*, the Court again invoked the heightened reliability standard and held that a defendant charged with an interracial murder was entitled to such *voir dire* of the jury that would decide on the penalty.180 This distinction between Eighth Amendment requirements and due process requirements was also made in *Sawyer v. Smith*,181 where the Court, in the context of denying relief to the habeas petitioner under the due process clause, distinguished between the protections afforded by the due process clause and the "more particular guarantees of sentencing reliability based on the Eighth Amendment."182

---


176. See 447 U.S. at 638.

177. Id. at 636. The Court also stated: "We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case." Id. at 638 n.14.

178. See 476 U.S. at 29.


180. See 476 U.S. at 36-37.


182. Id. Sawyer had sought relief on federal habeas corpus on the ground that the prosecutor's penalty phase argument violated the Eighth Amendment, see id. at 232, and he relied on the Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), which held unconstitutional a death sentence based on a similar argument. The Court refused to consider the merits of Sawyer's Eighth Amendment argument because his conviction had become final prior to the Court's holding in *Caldwell*, see Sawyer, 497 U.S. at 232, and, under the authority of *Teague v. Lane*, 489 U.S. 288, 310 (1989), a federal habeas petitioner cannot state a claim for relief based on retroactive application of a new rule. See Sawyer, 497 U.S. at 234. Sawyer therefore was obliged to make his challenge to the prosecu-
Second, although the Supreme Court's Eighth Amendment reliability standard was at one time described as only requiring "super due process" in capital cases, the focus of the standard has been not only on the fairness of the process, but also on the reliability of the outcome, and the reliability is not judged by looking at the particular case in isolation, but may require examination of other cases or of post-case developments. The Furman decision itself was not based on an examination of the fairness of Furman's trial or sentence, but on the apparent risk of an arbitrary sentence given the size of the death-eligible pool and the relative infrequency with which the death penalty was imposed. In Herrera v. Collins (a case in which the justices assumed that Herrera had received a fair trial) Herrera raised an "actual innocence" claim based on newly discovered evidence. Although the Court (6-3) affirmed the denial of relief, a majority of the justices were willing to assume that an Eighth Amendment claim would lie upon a truly compelling showing of innocence even for a defendant who had received a fair trial.

The key case, for present purposes, is Johnson v. Mississippi. In Johnson, the defendant was convicted of murder and sentenced to death on the basis of a jury finding of three aggravating circumstances, including that he had been "previously convicted of a felony involving the use or threat of violence to . . . another person," an assault with intent to commit rape conviction in New York. After the Mississippi Supreme Court affirmed the death sentence, the defendant succeeded in having the New York conviction set aside by the New York Court of Appeals. On appeal from the denial of post-conviction relief, the Supreme Court held unanimously that allowing a death sentence to stand based in part on an aggravating circumstance subsequently determined to be invalid would violate the Eighth

---

186. See id. at 393.
187. See id. at 419 (O'Connor, J., concurring); id. at 429 (White, J., concurring in the judgment); id. at 435 (Blackmun, J., dissenting).
189. Id. at 581.
190. See id. at 581–82.
Amendment. Although there was no claim that the defendant was denied due process at his trial or that the death judgment was invalid when entered, the "special need for reliability in the determination that death is the appropriate punishment" meant that a post-case event calling into question the accuracy of the information presented to the jury could invalidate a death judgment.

Third, the Court has recognized that the reliability of a death judgment may be undermined as much by a prosecutor's argument as by dubious evidence. In *Caldwell v. Mississippi*, the Court held that the prosecutor's argument suggesting that the responsibility for the death sentence would rest not with the jury, but with the appellate court, made the resulting death judgment unreliable. In *South Carolina v. Gathers*, the Court, relying on its decision in *Booth v. Maryland* that the introduction of victim impact evidence during the penalty phase violated the Eighth Amendment, held that the prosecutor's discussion of victim impact in the course of his argument, even without the introduction of victim impact evidence, also led to an unreliable death verdict and violated the Eighth Amendment.

Can a conviction and death sentence based on a version of the facts which the prosecutor herself disavows in another prosecution meet a heightened reliability standard? It would seem to be self-evident that where the inconsistency affects the guilt phase (the guilt or special circumstances verdicts) and especially where the prosecutor's alternate version of the facts has evidentiary support—i.e., the cases involve inconsistency by commission or inconsistency by omission as to the trial where evidence was omitted—the death judgment cannot be reliable. The fact that the prosecutor, who knows the case better than any factfinder did, could not, with any confidence, determine which version of the facts was correct is the most telling impeachment of the verdict. Even where the inconsistency is not created by an ar-

191. See id. at 584.
196. See *Gathers*, 490 U.S. at 811. ("While in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth.*") Both *Booth* and *Gathers* were overruled in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), where the Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar."
guably false evidentiary record, but only by the prosecutor's argument—inconsistency by omission as to the case with the more complete version of the facts or inconsistency by inference—there still would seem to be a substantial risk of an unreliable death judgment. In *Caldwell*, the Supreme Court recognized that a prosecutor's argument alone may undermine the reliability of a death verdict. If a prosecutor's argument that diminishes the jury's sense of responsibility for its verdict violates the Eighth Amendment, surely an argument that asks a jury to accept facts that the prosecutor herself has already disclaimed or will thereafter disclaim also violates the Eighth Amendment.

III. State Law and Inconsistent Theories

In addition to federal constitutional challenges, the prosecutor's use of, or attempt to use, inconsistent factual theories against co-defendants in capital cases also may be challenged under one or more of three California law doctrines: (1) the use of inconsistent theories may constitute prosecutorial misconduct invalidating a conviction; (2) judicial estoppel may bar the prosecutor from taking inconsistent positions; and (3) the prosecutor's argument in one case may be admissible as a party admission in the other case.

A. Prosecutorial Misconduct Under California Law

The California Supreme Court has regularly described prosecutorial misconduct under California law as consisting of "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." The court has yet to define what conduct is "deceptive" or "reprehensible," but it is clear that the standard

197. See *Caldwell*, 472 U.S. at 323.
198. The logic of this argument might suggest that inconsistent verdicts alone, regardless of whether the prosecutor has caused that result through the use of inconsistent theories, should be enough to call into question the reliability of a death judgment. In fact, the Supreme Court never has upheld inconsistent verdicts in the context of a capital case. Nevertheless, the two situations are distinguishable because jury discretion (which may produce inconsistencies) is a necessary and desirable aspect of our criminal justice system, while prosecutorial manipulation—the deliberate attempt to produce inconsistent results—is not.
199. This standard for granting relief is lower than the "fundamentally unfair" standard under the due process clause. See *People v. Smithy*, 978 P.2d 1171, 1184 (Cal. 1999); People v. Hill, 952 P.2d 673, 681 (Cal. 1998).
is an objective one and that the defendant claiming prosecutorial misconduct does not need to prove the prosecutor acted in bad faith, nor can the prosecutor’s showing of good faith defeat the claim:201 “We observe that the term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.”202 The focus of the inquiry is on whether the defendant was injured by the misconduct:203 “What is crucial to a claim of prosecutorial misconduct is not the good faith vel non of the prosecutor, but the potential injury to the defendant.”204 The defendant is entitled to relief if there is a reasonable probability that, but for the misconduct, the defendant would have obtained a more favorable result.205

As is discussed above,206 the prosecutor’s use of inconsistent factual theories in trials of co-defendants regularly has been labeled as “misconduct.” Whether or not such conduct is “reprehensible,” it clearly is a “deceptive” method designed to persuade the triers of fact. The prosecutor is being deceptive when she creates a different evidentiary record in the two cases and fails to advise the factfinder of the inconsistent evidence (inconsistency by commission and inconsistency by omission in the case with the less complete record). However, the prosecutor also is deceptive when she argues for inconsistent findings and fails to disclose that she has argued, or intends to argue, for the opposite findings in the co-defendant’s case (inconsistency by omission in the case with the more complete record and inconsistency by inference).

Where the prosecutor uses inconsistent theories at the guilt phase, there is a reasonable probability that but for the prosecutor’s deception—her failure to disclose her use of conflicting evidence and/or argument—the defendant would obtain a more favorable result. For example, had the prosecutor in Sanchez presented the factfinder with both the evidence that Sanchez was the aider and abettor, and the evidence that Reyes, not Sanchez, was the aider and abet-

203. See Bolton, 589 P.2d at 398 (“[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.”) (quoting Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case, 54 COLUM. L. REV. 946, 975 (1954)).
206. See discussion supra Part I.B.
tor, no reasonable jury could have found Sanchez guilty beyond a reasonable doubt. Where the inconsistency only affects the penalty phase, the situation is not quite so clear because of the wider range of evidence that can be introduced at the penalty phase and the jury's unbridled discretion in using that evidence to decide on the penalty. For example, in the Bonner/Allison cases, if Allison's jury had heard Bonner's confession that he was the actual killer and the prosecutor's argument (made in Bonner) that the confession should be believed, would that have saved Allison from the death penalty? As noted above, the fact that the defendant was not the actual killer is powerful mitigating evidence and should overcome all but the worst aggravating circumstances, but a court would still have to determine its likely effect in light of all the other evidence introduced at the penalty phase. Thus, in virtually all cases of guilt phase inconsistent theories and in most cases of penalty phase inconsistent theories, the defendant should be entitled to relief under the California standard.

B. Judicial Estoppel

The doctrine of judicial estoppel, as the Supreme Court recently explained, requires that, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position..."207 The purpose of the doctrine is to protect the integrity of the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."208 Intentionally pursuing inconsistent theories is said to be


208. New Hampshire, 532 U.S. at 750 (quoting United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)). See also Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982) ("The essential function of judicial estoppel is to prevent intentional inconsistency;
"playing fast and loose with the courts." The party invoking the doctrine must establish that the opposing party's positions are truly inconsistent, but the inconsistent position does not have to be based on sworn testimony. "[E]ven when the prior statements were not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts." The courts are divided over whether the party to be estopped has to have prevailed in the first litigation for judicial estoppel to be invoked. The majority of federal circuit courts recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation. A party need not prevail on the merits to show that the court adopted the prior inconsistent statement; rather it is sufficient that the prior court "accepted" the position. In contrast, the minority view holds that the doctrine can be applied even if the party was "unsuccessful in asserting the inconsistent position, if by his change of position he is playing 'fast and loose' with the court . . . ."

Whether judicial estoppel may be applied against the government and, in particular, against the prosecutor in a criminal case has not been clearly resolved. For example, in Heckler v. Community Heath Services, the Supreme Court considered whether estoppel (in that case equitable estoppel) could run against the government and could only conclude that there may be circumstances where "the public interest

the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery."); Mark J. Plumer, Note Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo. Wash. L. Rev. 409, 410 (1987) ("The doctrine evolved from the judiciary's recognition that the integrity of a trial is intolerably tainted when an unscrupulous litigant deliberately reverses his factual position from one trial to another and in the process forces a court, cognizant of the contradiction, to disregard the factual position previously relied upon.").

209. Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982); Scarano, 203 F.2d at 519.


211. See, e.g., Edwards, 690 F.2d at 599; Allen, 667 F.2d at 1167; Kingsport v. Steel & Roof Structure, Inc., 500 F.2d 617, 620 (6th Cir. 1974). The Ninth Circuit "has not yet had occasion to decide whether to follow the 'majority' view or the 'minority' view." Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996).


213. Yanez v. Broco, 989 F.2d 323, 326 (9th Cir. 1993) (quoting Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991) (describing the minority view)). See, e.g., Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 215 (1st Cir. 1987) (requiring plaintiff to conform to earlier representation that it would not pursue antitrust suit).

in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."215 The Ninth Circuit has applied the doctrine of judicial estoppel against the government in the context of a habeas corpus challenge to a criminal conviction. In Russell v. Rolfs,216 the court held that the doctrine prohibited the State of Washington from arguing that a criminal defendant's habeas petition was barred by a state court procedural default, after the State had successfully argued in the district court that the original petition should be dismissed because the petitioner had an adequate remedy in state court.217 The court noted that:

A state under these circumstances misleads a district court by mentioning only that portion of its views that favors the immediate result it seeks, and . . . [therefore the] state prevailed by telling the state court the opposite of what it told the federal court. The proposition that the state can be estopped from relying on the advantage it gained by doing so seems unremarkable.218

There is little law on the question of whether judicial estoppel can be applied against the prosecutor in a criminal case.219 Decisions in the First and Fifth Circuits have noted that the doctrine generally has not been applied against a prosecutor.220 On the other hand, decisions in the Seventh and Ninth Circuits have assumed that judicial estoppel is

215. Id. at 60–61. See Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 419–24 (1990) (reviewing Supreme Court equitable estoppel cases and noting that whether equitable estoppel could be applied to the government when the government was guilty of affirmative misconduct was an open question). See also Kowalczyk v. INS., 245 F.3d 1143, 1149–50 (10th Cir. 2001); Murphy v. Hood, 276 F.3d 475, 477 (9th Cir. 2001).

216. 893 F.2d 1033 (9th Cir. 1990).

217. See id. at 1038–39.

218. Id. at 1038.

219. In fact there is more law on the issue of whether judicial estoppel can be applied against a defendant in a criminal case. See, e.g., Lowery v. Stovall, 92 F.3d 219, 225 (4th Cir. 1996) (upholding a district court decision that the doctrine of judicial estoppel precluded the defendant from arguing, in contradiction of his guilty plea, that he did not maliciously attack the victim); Morris v. State, 966 F.2d 448, 453 (9th Cir. 1992) (declining to invoke the doctrine of judicial estoppel against a defendant where "its use would serve to keep a conviction in effect regardless of the innocence or guilt of defendant"); State v. Washington, 419 N.W.2d 275, 277 (Wis. Ct. App. 1987) (finding that the doctrine of judicial estoppel prohibited the defendant from inconsistently arguing that he was entitled to a mistrial).

220. See United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993) (noting that judicial estoppel "has apparently never been applied" in criminal cases); United States v. Kattar, 840 F.2d 118, 129–30 n.7 (1st Cir. 1988) (stating that "this obscure doctrine has never been applied against the government in a criminal proceeding").
applicable against the prosecutor, but have declined to apply it on the facts of the particular cases.\textsuperscript{221}

In California, the Supreme Court has held that equitable estoppel can be applied against the government if “the injustice which would result from a failure to uphold an estoppel is of a sufficient dimension to justify any effect upon public interest or policy which would result from the . . . estoppel.”\textsuperscript{222} Meanwhile, the Court of Appeal has developed and applied the doctrine of judicial estoppel in a series of cases.\textsuperscript{223} The court has said that the purpose of the doctrine is to prevent litigants from “playing fast and loose with the courts”\textsuperscript{224} and that its “essential function and justification . . . is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.”\textsuperscript{225} “One to whom two inconsistent courses of action are open and who elects to pursue one of them is afterward precluded from pursuing the other.”\textsuperscript{226} In \textit{Jackson v. County of Los Angeles},\textsuperscript{227} the court laid down the test applied in subsequent cases. Judicial estoppel applies when:

1. the same party has taken two positions;
2. the positions were taken in judicial or quasi-judicial administrative proceedings;
3. the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);
4. the two posi-

\textsuperscript{221} See United States v. Hook, 195 F.3d 299, 307 (7th Cir. 1999) (considering judicial estoppel against the government in a criminal case but declining to apply it because the government’s present position was not inconsistent with its former position); United States v. Garcia, 37 F.3d 1359, 1367 (9th Cir. 1994) (considering judicial estoppel against the government but upholding the district court’s finding that judicial estoppel was not appropriate because there was not a true inconsistency).

Some state courts have reached the same result. See State v. Towery, 920 P.2d 290, 304, 306 (Ariz. 1996) (stating that “the doctrine of judicial estoppel is no less applicable in a criminal than in a civil trial,” but declining to apply it to the facts of the case.); People v. Gayfield, 633 N.E.2d 919, 925 (Ill. App. Ct. 1994) (suggesting that the state would be estopped from inconsistently claiming in separate proceedings that different defendants shot the same victim).

\textsuperscript{222} City of Long Beach v. Mansell, 476 P.2d 423, 448 (Cal. 1970).


\textsuperscript{224} Int’l Engine Parts, Inc. v. Fedderson & Co., 75 Cal. Rptr. 2d 178, 181 ( Ct. App. 1998). See also Thomas v. Gordon, 102 Cal. Rptr. 2d 28, 32 ( Ct. App. 2000) (“Judicial estoppel is an equitable doctrine aimed at preventing fraud on the courts.”) (quoting Drain, 81 Cal. Rptr. 2d at 868, in turn quoting In re Marriage of Dekker, 21 Cal. Rptr. 2d 642, 646 ( Ct. App. 1993)).

\textsuperscript{225} Drain, 81 Cal. Rptr. 2d at 867.


\textsuperscript{227} 70 Cal. Rptr. 2d 96 ( Ct. App. 1997).
tions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.228

With regard to the third factor—that the party was successful in asserting the first position—the court went on to say that since judicial estoppel is an equitable doctrine, it could not “rule out the possibility that, in a future case, circumstances may warrant application of the doctrine even if the earlier position was not adopted by the tribunal.”229 Subsequently, in International Engine Parts, Inc. v. Feddersen & Co.,230 the court held that the doctrine of judicial estoppel should be invoked notwithstanding that the party’s actions were not taken with an evil motive nor were of consequence to the underlying proceeding. The court stated that “[r]egardless of whether the motive was pure or the effects of the falsehood inconsequential, we must expect honesty and frankness in all judicial and administrative proceedings from parties that choose to bring lawsuits in our courts.”231

As mentioned above,232 in People v. Watts,233 the Court of Appeal discussed and rejected Watts’ claim that his prosecution should have been barred by judicial estoppel.234 This decision is fundamentally flawed. Despite the number of California cases addressing the doctrine of judicial estoppel, the court cited no California authority for its position, nor did it discuss the policies supporting the rule. Instead, the court argued three points in support of its decision: (1) that several federal courts had said the doctrine had not been applied against the prosecution;235 (2) that collateral estoppel does not prevent relitigation of an issue decided against a different defendant;236 and (3) that the Washington Supreme Court, in State v. Ng,237 rejected such a claim on similar facts.238 As to the court’s first point, the fact that several federal courts said the doctrine had not been applied while

228. Id. at 103.
229. Id. at 103–04 n.8. See Thomas, 102 Cal. Rptr. 2d at 30–33 (holding that the doctrine of judicial estoppel precluded appellant from attempting to establish that she held interest in corporations sufficient to require the corporations’ accountant to keep her informed of their financial affairs, even absent proof that a court had adopted her previous position that she had no assets, in her earlier bankruptcy litigation).
230. 75 Cal. Rptr. 2d 178 (Ct. App. 1998).
231. Id. at 183.
232. See discussion supra Part I.C.
234. See id. at 9–10.
235. See id. at 9.
236. See id. at 10.
237. 713 P.2d 63 (Wash. 1985).
238. See 91 Cal. Rptr. 2d at 10.
others (noted by the Watts court) suggested that it could be applied says nothing whatsoever about whether this state law doctrine should be applied by California courts. The court’s second point, that collateral estoppel is not applied where there is no mutuality, is equally dubious. In *People v. Taylor*, the California Supreme Court did apply collateral estoppel on behalf of Taylor based on an earlier acquittal of Taylor’s co-defendant, Daniels. Finally, the court’s reliance on Ng also is difficult to understand. The Washington court rejected Ng’s claim because it found that there was no significant inconsistency in the prosecutor’s positions in the two trials. In addition, Ng (unlike Watts) was tried before his co-defendant, so there would have been no basis for the application of judicial estoppel in any event.

Watts aside, there is every reason, under California law, to apply judicial estoppel to the prosecutor’s use of inconsistent factual theories at successive trials. The situation fits comfortably within the doctrine as described in *Jackson*. Jackson’s first requirement—that the same party has taken two or more positions—is, of course, the basis of the inconsistent theories challenge. The second requirement—that both positions were taken in judicial proceedings—is satisfied because both positions were taken in separate criminal trials. The third requirement—that the party was successful in asserting the first position (i.e., “the tribunal adopted the position or accepted it as true”)—may be more difficult to establish, particularly where the inconsistency relates only to the penalty phase, but it also is not certain that this

239. The court’s discussion of the federal cases is also curious because the court discusses the Ninth Circuit panel decision in *Thompson v. Calderon*, 109 F.3d 1358 (9th Cir. 1996), see 91 Cal. Rptr. 2d at 9, without ever mentioning the superseding en banc decision, which found the prosecutor’s use of inconsistent theories to be misconduct and a violation of due process. See Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc) rev’d on other grounds, 523 U.S. 538 (1998). See also discussion supra pp. 27-28.

240. 527 P.2d 622 (Cal. 1974).

241. See Ng, 713 P.2d at 71.

242. The court later rejected an “inconsistent theories” claim by Ng’s accomplice, Mak, on the ground that there was no inconsistency. See State v. Mak, 718 P.2d 407, 414 (Wash. 1986).

243. See *Jackson v. County of Los Angeles*, 70 Cal. Rptr. 2d 96, 103 (Ct. App. 1997). See also discussion supra pp. 42-43.

244. That the prosecutions may have been conducted by different prosecutors is irrelevant since both represent the same party, the state. See *Russell v. Rolfs*, 893 F.2d 1033, 1038-39 n.6 (9th Cir. 1990) (“The fact that the earlier representation was made by the attorney general’s office and the latter by the King County prosecuting attorney is irrelevant—they were both speaking for the same party.”).

245. *Jackson*, 70 Cal Rptr. at 103.

requirement must be met.\textsuperscript{247} The fourth requirement in \textit{Jackson}—that the two positions are totally inconsistent—can be established by examining the trial transcript from the previous trial. The fifth requirement—that the first position was not taken as a result of ignorance, fraud, or mistake—is really a requirement that the prosecution establish that its position in the second trial is based on evidence discovered after the first trial.\textsuperscript{248} Where the prosecutor does seek to avoid the application of judicial estoppel on the basis of newly discovered evidence, the prosecutor in effect acknowledges that the first verdict was wrong. If the court agrees, the court ought to require the prosecutor, as a condition of avoiding the application of an equitable doctrine, to “do equity” by stipulating to the setting aside of the first conviction.\textsuperscript{249} It would be fundamentally inconsistent for the prosecutor to resist application of judicial estoppel on the ground that she is not acting inequitably by changing theories, while, at the same time, insisting on preserving a conviction, and perhaps death sentence, wrongly obtained.

Although the doctrine of judicial estoppel should protect the second defendant to be tried, what of the first-tried defendant (\textit{e.g.}, Thompson, Sanchez, or Waidla), who could not take advantage of the doctrine because, at the time of his trial and death sentence, the prosecutor had yet to take an inconsistent position? The doctrine of judicial estoppel, itself, offers no basis for relief on appeal for the first-tried defendant. However, it may have a indirect role to play on state habeas corpus.\textsuperscript{250} If the defendant has a habeas claim which turns on the disputed facts (\textit{e.g.}, actual innocence, prosecutorial misconduct, or ineffective assistance of counsel), the defendant can take the position that the prosecutor is estopped from denying the truth of the inconsistent (and presumably exonerating or partially exonerating) factual position she took at the second trial.

\textsuperscript{247} See \textit{Jackson}, 70 Cal. Rptr. 2d at 103 n.8. One commentator suggests that in “criminal cases, judicial estoppel should apply if the prosecution prevailed in a manner that is consistent with acceptance of the prior position.” Poulin, \textit{supra} note 21, at 1454.

\textsuperscript{248} The state should not be allowed to argue that although the prosecutor knew of the evidence to be used in the second prosecution prior to the first trial, it was “ignorant” of the true facts because, in the end, the evidence was ambiguous. The argument amounts to nothing more than the assertion that the prosecutor should be permitted to prosecute both defendants because she is not convinced that either one is actually guilty. Similarly, where the inconsistency is created not by different evidence, but by a different argument at the second trial, there can be no justification based on “ignorance, fraud or mistake.”

\textsuperscript{249} See discussion \textit{supra} note 40.

\textsuperscript{250} It also may play a role on federal habeas corpus, but, as noted above, consideration of federal habeas corpus is beyond the scope of this article.
C. Party Admissions

A potential limitation on the prosecutor's use of inconsistent factual theories in the successive trials of co-defendants is the ability of the second-tried defendant to introduce the prosecutor's factual theory from the previous trial as an admission of a party-opponent. Generally, relevant oral or written admissions of a party opponent are admissible against that party when offered by an opponent, and such admissions are exempted from the operation of the rule against hearsay. They constitute substantive evidence rather than mere impeaching statements. For a statement to be admitted under this doctrine, no preliminary foundation need be laid by examining the declarant about the admission, nor must it be shown that the speaker had personal knowledge about the subject matter of an admission. The party-admissions doctrine covers authorized admissions of a party-opponent, and it is well established that attorneys' statements come within the rule and that attorneys who are employed by a party are considered to have prima facie authority to make such admissions for that party. Such admissions may be made in pleadings, oral or written stipulations, or oral in-court statements representing the factual contentions of a party, including arguments that counsel make to the jury.

Prosecutors' statements in related cases have been admitted as party admissions in a number of cases in the federal courts. State

252. See, e.g., United States v. Kenny, 645 F.2d 1323, 1340 (9th Cir. 1981); United States v. Cline, 570 F.2d 731, 735 (8th Cir. 1978).
253. See, e.g., Blackburn v. United Parcel Serv., Inc., 179 F.3d 81, 96 (3d Cir. 1999). Of course such admissions must still meet other requirements for admission, e.g., relevancy.
255. See id. §§ 257, 259. See also Purges v. Sharrock, 33 F.3d 134, 143–44 (2d Cir. 1994) (finding no error in the admission against the defendant of a footnote in a brief filed on the defendant's behalf by counsel in a related case); United States v. Margiotta, 662 F.2d 131, 142 (2d Cir. 1981) (noting that arguments counsel make to the jury are admissible); Frank v. Bloom, 634 F.2d 1245, 1251 (10th Cir. 1980) (finding that a lawyer's admission in pleadings on behalf of a client was an "admission by a party made by his agent acting within the scope of his employment").
256. See, e.g., United States v. Branham, 97 F.3d 855, 851 (6th Cir. 1996) ("The government concedes that Rule 801(d)(2)(D) contemplates that the federal government is a party-opponent of the defendant in a criminal case . . . ."); United States v. DeLoach, 34 F.3d 1001, 1005 (11th Cir. 1994) (holding that a prosecutor's closing statements in related cases were admissible in subsequent trial if they were (1) "assertions of fact" that are the "equivalent of a testimonial statement"; and (2) "inconsistent with similar assertions in a subsequent trial") (quoting United States v. McKeon, 738 F.2d 26, 33 (2d Cir. 1984));
courts also have recognized the applicability of the party admissions doctrine in criminal cases. The Second Circuit, in *United States v. GAF Corp.*, summed up the reasons for allowing the defendant to introduce such evidence:

[T]he jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims. Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts.

California recognizes the doctrine of party admissions, and applies the doctrine to statements made by attorneys about their repre-

**United States v. Orena,** 32 F.3d 704, 716 (2d Cir. 1994) (allowing defense to “introduce a prosecutor’s statement from a prior trial when: (1) the prosecution offered an inconsistent assertion of fact at the prior trial; and (2) the prosecutor can offer no ‘innocent’ explanation for the contradiction”); *United States v. Salerno,* 937 F.2d 797, 811–12 (2d Cir. 1991) (stating that the jury argument by a prosecutor in related case would be admissible in the defendant’s trial as an admission of a party-opponent); *United States v. GAF Corp.,* 928 F.2d 1253, 1262 (2d Cir. 1991) (finding the prosecutor’s prior inconsistent statements regarding the theory and facts of the case admissible against the government in a subsequent trial); *United States v. Bakshinian,* 65 F. Supp. 2d 1104, 1105–06 (C.D. Cal. 1999) (holding that, because prosecutors have power to bind the government, the prosecutor’s statement during closing argument at the separate trial of the co-defendant was admissible in the defendant’s trial as an admission of a party-opponent). *But see* United States v. Zizzo, 120 F.3d 1338, 1351–52 n.4 (7th Cir. 1997) (refusing to apply Fed. R. Evid. 801(d)(2) to statements made by government employees in criminal cases); *United States v. Prevatte,* 16 F.3d 767, 779 n.9 (7th Cir. 1994) (stating that Fed. R. Evid. 801(d)(2)(D) does not apply to government agents, because no individual can bind the sovereign).

It should be noted that the doctrine of party admissions applies not only to the prosecutor’s factual assertions, but also to her opinions or contentions. *See Bakshinian,* 65 F. Supp. 2d at 1109 (asserting that when the government argues to the jury that the evidence supports a certain conclusion, although the contention is not “evidence,” it is a statement about the evidence and therefore the government can not argue that it should be excluded because it is not “evidence” or not “testimonial”).

257. *See, e.g.*, State v. Cardenas-Hernandez, 579 N.W.2d 678, 685–86 (Wis. 1998) (recognizing the doctrine, but declining to apply it on the facts of the case); People v. Cruz, 645 N.E.2d 636, 664–65 (Ill. 1994) (finding that the prosecutor’s prior inconsistent arguments regarding where the victim’s body was found were admissible under the party-admissions doctrine but declining to find that the trial court abused its discretion in not admitting evidence of those statements); Hoover v. State, 552 So. 2d 834, 840 (Miss. 1989) (holding that the prosecutor’s prior inconsistent statements regarding who was the actual gunman were admissible under Mississippi Rule 801(d)(2) and exclusion of that evidence by the trial court was error).

258. 928 F.2d 1253 (2d Cir. 1991).

259. *Id.* at 1256.

260. *See* CAL. EVID. CODE § 1220 (West 1995) (“Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.”).
sentation. As is the case under the Federal Rules, statements admitted into evidence under this doctrine constitute substantive evidence that the jury or judge considers in relation to the other evidence introduced at trial, and admissions made in one legal proceeding, through pleadings or in-court statements, can be admitted as evidence in a subsequent proceeding. Although California courts have yet to apply the doctrine of party admissions to prosecutors' statements in criminal cases, there is no obvious reason why California should not follow the majority rule and admit such evidence assuming that it is relevant and that its probative value outweighs the possibility of prejudice. In fact, admission of such evidence could be expected to operate as a powerful deterrent to the prosecutor engaging in the use of inconsistent theories.

Recognition that the party admissions doctrine should be applicable to prosecutors in criminal cases requires some additional observations. First, like the judicial estoppel doctrine, the party admissions doctrine generally will be of use only to the defendant who is tried second since, at the time of the first trial, the prosecutor will not yet have asserted an inconsistent position. Second, although the doctrine is one of state law, recognition that prosecutors' inconsistent statements may be introduced by a defendant as substantive evidence carries federal constitutional implications. Because such evidence could well be material in a given case, i.e., create a reasonable probability of a different result, the prosecutor should have an obligation to disclose her inconsistent statements to the second-tried defen-

---

261. See Justice Arthur Gilbert, 1 Jefferson's California Evidence Benchbook, § 3.36 (3d ed. Supp. 2001) (citing Cseri v. D'Amore, 45 Cal. Rptr. 36, 40 (Ct. App. 1965); see also Dolinar v. Pedone, 146 P.2d 237, 241 (Cal. Ct. App. 1944) ("Attorneys are both agents and attorneys for their clients in the matters in which they are employed, and are presumed to obtain the information contained in the pleadings filed by them from their clients.") (quoting W. Oil Fields Corp. v. Nowlin, 288 S.W. 554, 556 (Tex. Civ. App. 1926)).


264. See discussion supra Part III.B.

265. However, there may be circumstances where the party admissions doctrine could be used by both defendants. For example, in the Thompson/Leitch cases, although Thompson was tried first, he might have used the doctrine to introduce the prosecutor's inconsistent statements made at the preliminary hearing in the case. In the Scott/Turner cases, Turner was tried first, but, after he obtained a reversal of his conviction, he was retried after Scott was tried, so Scott and he both could have used the prosecutor's prior inconsistent statements.
Third, unlike the doctrine of judicial estoppel, the party admissions doctrine does not prohibit the prosecutor from changing factual theories at the second trial; it simply permits the defendant to use the prosecutor's prior theory against the prosecution. Fourth, like the judicial estoppel doctrine, the party admissions doctrine may play a role on state habeas corpus, even for the first-tried defendant who could not use the doctrine at trial, or for the second-tried defendant who did not use the doctrine at trial. If the prosecutor made admissions tending to exonerate or at least reduce the culpability of the defendant, evidence of such admissions may be introduced to establish the constitutional violations alleged by the defendant.

Conclusion

In their Executive Summary to Why There Is So Much Error in Capital Cases, and What Can Be Done About It, a massive study of the operation of the death penalty system in the United States from 1973 to 1995, the authors state that, "[t]here is growing awareness that serious, reversible error permeates America's death penalty system, putting innocent lives at risk, heightening the suffering of victims, leaving killers at large, wasting tax dollars, and failing citizens, the courts and the justice system." The authors found that, during the study period, sixty-eight percent of all death sentences were overturned by the state courts or on an initial federal habeas petition, and that in eighty-two percent of the cases where the death sentence was overturned, the defendant did not receive a death sentence on remand. This flawed system has sent numerous innocent people to death row. Between 1973 and May 2002, 101 people were released from death row because of evidence

---

266. See Kyles v. Whitley, 514 U.S. 419, 437 (1995). ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."). But see Clark v. Johnson, 227 F.3d 273, 279 (5th Cir. 2000) (finding the prosecutor had no duty to disclose his prior inconsistent position).

267. See discussion supra Part III.B.


269. Id. at i.

270. See id. at 11. This percentage does not include those sentences overturned by invalidation of the state's scheme by the Supreme Court. See id. at 18.

271. See id. at 43.
that they did not commit capital murder.\textsuperscript{272} Lee Farmer was one of those released, but only after he had spent 18 years on death row.\textsuperscript{273} There is also substantial evidence that innocent people have been executed.\textsuperscript{274} Thomas Thompson was probably one of them.\textsuperscript{275} The revelations as to the amount of error in the system have generated a range of responses. Governors in two states, Illinois and Maryland, have declared moratoria on executions because of concerns about the fairness and accuracy of their schemes.\textsuperscript{276} A number of other states have undertaken studies of their death penalties.\textsuperscript{277} Recent reports by bipartisan commissions have recommended a slew of reforms to overhaul death penalty practices.\textsuperscript{278} At this writing, the federal death penalty is facing a serious constitutional challenge asserting that the risk of executing innocents is so great as to render any death sentence a violation of due process.\textsuperscript{279}

California, the state with the largest death row in the country, is not immune from committing error in death penalty cases. According to the Columbia researchers, California had an overall error rate of eighty-seven percent during the period 1973–1995.\textsuperscript{280} Such an error

\begin{itemize}
\item \textsuperscript{272} See Death Penalty Information Center, Innocence and the Death Penalty, at http:/\!/www.deathpenaltyinfo.org/innoc.html (last visited May 28, 2002).
\item \textsuperscript{273} See Farmer, 765 P.2d at 940.
\item \textsuperscript{274} See generally Michael L. Radelet et al., In Spite of Innocence (1992) (concluding that at least twenty-three innocent people have been executed). Even Justice O'Connor has acknowledged such a likelihood, stating, "the system may well be allowing some innocent defendants to be executed." Charles Lane, O'Connor Expresses Death Penalty Doubt, Wash. Post, June 4, 2001, at A1.
\item \textsuperscript{275} See Reinhardt, supra note 16, at 350–51. Interestingly, seven former California prosecutors had asked the Ninth Circuit to spare Thompson’s life because of his probable innocence and the unfairness of his trial. See Brief of Amici Curiae in Support of Petitioner at 45, Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997).
\item \textsuperscript{277} See American Bar Association, ABA State-by-State Profiles on Moratorium Issues and Activities in Capital Jurisdictions, at http://www.abanet.org/irr/deathpenalty/states.html (last visited June 3, 2002). States currently reviewing their death penalties include Connecticut, Indiana and Nevada. States that have completed studies include Arizona, Nebraska, New Jersey, North Carolina and Virginia. States with pending legislation requiring such studies include Missouri and Oklahoma.
\item \textsuperscript{280} See A Broken System, supra note 268, at A-7.
\end{itemize}
rate is not surprising because California's death penalty scheme has most of the flaws which lead to arbitrary and erroneous results. The state has perhaps the broadest death penalty statute in the country, and with an overbroad statute comes the inevitable risk of arbitrary application. As the six case pairs illustrate, prosecutors rely heavily on the testimony of notoriously unreliable jailhouse informants in death penalty cases. California has no system for qualifying attorneys to handle death penalty cases at trial, and ineffective assistance of counsel is perhaps the leading cause of error in death penalty cases. California is one of a minority of states where its supreme court does not engage in proportionality review in capital cases, thereby increasing the risk of arbitrariness in application of the death penalty.

In a death penalty system so fraught with error, there should be no tolerance for prosecutorial conduct which increases the already high risk of an erroneous conviction or death sentence. The prosecutor's use of inconsistent factual theories in the separate trials of co-defendants (unless the change in theories results from the discovery of new evidence) is conduct which serves no legitimate state interest and creates just such a risk of an erroneous conviction or death sentence. Whether on federal constitutional grounds—because such conduct undermines confidence in the judgment or sentence under the Due Process Clause or fails to meet the heightened reliability standard

---

281. See generally Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?,* 72 N.Y.U. L. Rev. 1283 (1997) (arguing that the California death penalty scheme is unconstitutional for failing to "genuinely narrow" the death-eligible class). The Illinois Commission unanimously found that the Illinois statute, which is narrower than the California statute, was too broad, and it recommended drastically reducing the number of death-eligibility factors. See *ILLINOIS COMMISSION,* supra note 278, at 65–75.

282. See *MANDATORY JUSTICE,* supra note 278, at 52.

A... category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony.

Id.

283. See McFarland v. Scott, 512 U.S. 1256, 1264 (1994) (Blackmun, J., dissenting from denial of certiorari) ("My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt . . . whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled."). See also Bilinis & Rosen, supra note 38, at 1304–06 and nn.13-19 (listing articles and judicial opinions "de cry[ing] the sorry state of capital lawyering").

284. See *A BROKEN SYSTEM,* supra note 268, at 486–92 (discussing proportionality review); *ILLINOIS COMMISSION,* supra note 278, at 166-68 (advocating for greater proportionality review by the Illinois Supreme Court).
of the Eighth Amendment—or state law grounds—because the prosecutor has used "deceptive methods" or is judicially estopped or has admitted the correctness of her first theory—the time has come for the courts to prohibit prosecutors from arguing inconsistent factual theories and thereby playing fast and loose with the courts and the defendants.