IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S190713
Plaintiff and Respondent,	(Fourth Dist., Div. 3, No. G040716
v.	(Orange County Superior Court No. 06NF2339)
COLE ALLEN WILKINS,	
Defendant and Appellant.	

Appeal from the Superior Court of Orange County
Hon. Richard F. Toohey, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Attachments pursuant to rule 8.204(d):

1. Trial exhibit 26 (map showing cell phone towers), reproduced from prosecutor's PowerPoint presentation for opening summation (court exhibit 46, slide 8).

2. Trial exhibit 44 (map showing Doherty's house in relation to burglary site), reproduced from prosecutor's PowerPoint presentation in opening statement (court exhibit 45, slide 58).

TABLE OF AUTHORITIES

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ISSUE PRESENTED

"Should the trial court have instructed the jury, as requested, with CALCRIM No. 3261, on the theory that a homicide and an underlying felony do not constitute one continuous transaction for purposes of the felony-murder rule if the killer has escaped to a place of temporary safety before the homicide takes place?" (Order granting review.)

STATEMENT OF THE CASE

I.

Procedural history

Wilkins was charged by first amended information with one count of murder (Pen. Code, § 187) and one count of receiving stolen property (Pen. Code, § 496), with an allegation of a prior prison term (Pen. Code, § 667.5, subd. (b)). (CT (1) 189-90.) Prior to trial, the court dismissed the count of receiving stolen property on the People's motion. (CT (1) 282; Aug. RT (1) 5:22-6:22.)

Trial on the prison prior was bifurcated. (RT (1) 30:19-26.) The jury found Wilkins guilty of first-degree murder. (CT (2) 402; RT (6) 1033:24-1034:10.) He waived his right to a jury or court trial on the prison prior and admitted it. (RT (1) 31:2-15; (6) 1038:14-1039:13.)

The court sentenced him to the prescribed term of imprisonment for 25 years to life for the murder, with a consecutive term of one year for the prior. (CT (1) 563-64, 566-67; RT (6) 1055:2-8.) The Court of Appeal (Fourth District, Div. 3) affirmed in a published opinion, which was superseded by this Court's grant of review and limitation of the issue. (People v. Wilkins (2011) 191 Cal.App.4th 780, review granted May 5, 2011, S190713.) (See "Issue Presented" above.)

II.

Statement of facts

The jury found that Wilkins committed burglary felony murder: Sometime after he had stolen kitchen appliances from a house under construction and had loaded them in the back of his pickup truck, one of the appliances fell from the truck onto the freeway, precipitating a collision that resulted in the death of another motorist. The following facts are either undisputed or viewed in the light most favorable to the judgment, except where specifically noted.

A. The burglary.

Wilkins, who was 30 years old at the time of the crime (July 2006), worked in construction, disposing of drywall scraps at the worksites of his uncle's drywall company. (RT (2) 90:1-12; (2) 93:9-94:4; (2) 109:4-10; (3) 390:2-11; (5) 744:8-9; (5) 755:5-756:10.) Wilkins and a former girlfriend, Kathleen Trivich, an emergency-room physician, bought a plot of land in Palm Springs as an investment, intending to build a house and then sell the property. (RT (3) 323:13-325:15; (3) 326:2-6; (5) 744:10-24; (5) 746:17-747:3.) Trivich provided the money for the land and construction expenses; Wilkins's role was to oversee the construction. (RT (3) 326:7-20; (5) 747:4-11.) Trivich also bought a Ford F250 pickup truck for Wilkins's use, but the title was in her name and the insurance specifically excluded him; she expected him to have his own insurance. (RT (3) 329:7-331:1.)

On June 28 or 29, 2006, Wilkins happened to be working at a job site just 300 to 400 yards from the site where Dennis and Audrey Kane were constructing their own house in Menifee, Riverside County. (RT (2) 90:15-93:22; (2) 95:23-96:22; (2) 113:16-115:24 (referring to exhibit 5); (5) 469:19-470:13 (cell phone records); exhibit 26 (chart of cell towers).) On that day, the Kanes happened to receive a shipment of numerous large kitchen appliances and some other fixtures, including a stove, refrigerator, microwave oven, stove hood, sink, and ceiling fans. (RT (2) 115:25-116:21.) They had the items stored in the kitchen and garage. (RT (2) 116:22-25.) Wilkins would have been able to see the delivery and unloading from the nearby job site. (See RT (2) 115:21-24; exhibit 5.)

On July 6, at about 7:30 or 8 p.m., Todd Gorman, who was doing some construction work on the Kane house, locked the house up for the evening. (RT (2) 113:21-114:7; (2) 133:9-134:1.) The appliances and other items were locked inside. (RT (2) 134:4-135:4.) Sometime that night or early the next morning – possibly at about 4 a.m., based on cell phone records – Wilkins drove to Kane's home and entered the house through the laundry room window, which had a faulty lock. (RT (2) 129:10-130:7; (2) 136:7-137:6; (2) 140:12-15.)[1]

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[1] Cell phone records showing a call at 4:30 a.m. originating at or near a cell tower about 31 miles north of Kane's house, near the intersection of the I-91 and I-215 freeways (RT (2) 254:7-24; (3) 481:4-482:10; (4) 547:9-548:12; exhibit 26), which allowed an inference that Wilkins left the Kane house at about 4 a.m. As

(. . . continued)

He loaded up his F250 truck with the appliances and other items, putting the boxed stove, the boxed refrigerator, and other large appliances in the truck bed, and piling smaller items in the cab. (RT (2) 176:1-7; (2) 178:24-179:4.) He left the tailgate down and did not use any tiedowns on the boxes in the bed, even though he had tiedowns available to use. (RT (2) 175:25-26; (2) 179:18-180:4; (2) 295:22-26; (2) 310:4-11; (5) 870:1-4 (Wilkins's admission at trial).) According to a videotaped simulation of the load based on an eyewitness's recollection, Wilkins may have been unable to put the tailgate up because one of the boxes jutted back too far. (RT (2) 180:5-181:18; exhibit 28 (video).) Wilkins then headed back to his home in Long Beach. (RT (2) 254:7-24; (5) 778:18-24; see (2) 180:5-181:25; exhibit 28.)

B. <u>The freeway accident and homicide.</u>

At about 5 a.m., while Wilkins was driving westbound on the 91 (Artesia) freeway near the truck scales, a few miles before the Kraemer exit, motorist Danny Lay happened to be driving behind him. (RT (2) 164:11-167:7.) Both Lay and Wilkins were in the no. 2 lane (that is, the fast lane was to the left, and the diamond lane to the left of that), and both were traveling 60 to 65 mph. (RT (2) 164:18-165:2; (2) 167:13-17.) It was still dark

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will be seen, the traffic accident occurred a further 31 miles west at about 5 a.m. (RT (3) 390:2-11; (4) 547:2-548:12.) No eyewitness testified to seeing Wilkins at the house at any time after Todd Gorman had locked it up.

outside. (RT (2) 165:9-12; (2) 217:7-10.)

Lay noticed that the tailgate of Wilkins's pickup truck was down, and he saw the boxes piled on the bed. (RT (2) 167:18-22; (2) 175:25-176:3.) It appeared to Lay that Wilkins "was driving in the lane like any other vehicle was" (RT (2) 167:18-22), and the load of boxes was stationary, not shifting (RT (2) 187:21-188:23).

Lay followed behind Wilkins without incident for five and a half miles, but suddenly, near the Kraemer exit, a box containing a stove fell off the bed of the pickup truck and landed in the same lane. (RT (2) 167:1-7; (2) 168:2-6; (2) 188:24-189:13; (4) 546:16-547:1 (distance).) Lay swerved left to try to avoid the box but it struck the right front of his car. (RT (2) 168:9-25.) The impact kicked the box to the right. (RT (2) 168:26-169:1.)

Other vehicles on the freeway also struck the box. (RT (2) 215:17-217:22; (2) 222:4-16.) Some motorists swerved and were able to avoid the box. (RT (2) 216:1-8; CT (2) 570 (transcript of 911 call played for jury).) Murder victim David Piquette, who had been driving his Crown Victoria sedan in the fast lane or the no. 2 lane, evidently tried to avoid the box but lost control: When the box was ahead of him in the no. 2 lane or straddling the no. 1 and no. 2 lanes, he made a sharp turn to the right, which one eyewitness characterized as a "90 degree turn." (RT (2) 224:10-226:1; (2) 229:6-8; (2) 231:5-8; (2) 233:11-14; (2) 236:11-13; (3) 391:3-19; (4) 663:24-664:13; see (4) 660:12-661:10 (accident reconstruction explains how a sharp turn might appear to an observer to be 90 degrees).)

Piquette struck a big rig double-trailer truck that had been

traveling in the no. 4 (slow) lane. (RT (2) 224:10-14; (2) 234:5-12; (2) 239:17-19; (2) 248:13-249:10; (2) 251:23-25.) The driver of the truck, who had veered to try to avoid Piquette's car, lost control and crashed into the K-rail on the right of the shoulder. (RT (2) 239:20-23; (2) 249:11-13; (2) 252:12-14; (4) 671:11-672:3.) The truck fell over to the left, pinning Piquette's car under it, between the two trailers. (RT (2) 239:17-240:6; (3) 424:22-425:2.)

Piquette died at the scene. (RT (3) 427:22-428:13.) The cause of death was positional asphyxia: the body was compressed in the wreckage so that Piquette could not breathe. (RT (3) 417:4-21.)

C. Wilkins's attempts to conceal his role in the accident.

Danny Lay, whose car had been damaged when it struck the stove, maneuvered his car to try to signal Wilkins to pull over. (RT (2) 168:26-171:26.) Wilkins slowed down and began to pull over to the shoulder but then accelerated and drove off again. (RT (2) 171:6-172:24.) Lay resumed trying to signal him with flashing lights and horn blasts, and Wilkins finally exited and drove with Lay to a parking lot. (RT (2) 173:4-175:3.) When Lay got out of his car and approached Wilkins in the truck, Wilkins threatened to "kick your ass." (RT (2) 175:10-14.) But when Lay told him something had fallen out of his truck, Wilkins walked to the bed of the truck, saw that the boxed stove was missing, and exclaimed: "Oh, my God. It's a thousand-dollar stove." (RT (2) 175:10-21; (5) 781:4-8.)

Lay observed that the tailgate was still down, and he saw

no tiedowns or any remnants indicating that tiedowns had ever been used. (RT (2) 175:25-26; (2) 179:18-24.)

Wilkins provided a false name (Michael (not Cole) Wilkins), and after pretending to search his glove compartment he told Lay that he did not have his registration and insurance information in the truck. (RT (20 176:8-177:2; 2) 178:16-20; (5) 781:21-782:4.) (Wilkins's driver license had been suspended, but his ID card and Trivich's insurance policy were in the cab. (RT (4) 527:11-528:15; (5) 782:5-14; (5) 875:7-14.)) He truthfully stated that the owner of the truck was Trivich, but he provided phony contact numbers. (RT (2) 177:3-178:5; see (3) 330:5-6.) The truck displayed paper plates, but a DMV envelope containing metal plates was in the cabin. (RT (2) 165:25-166:6; (4) 523:23-524:19; exhibit 25.) (The truck had been purchased just three months earlier. (RT (3) 329:21-24.))

After talking to Lay in the parking lot, Wilkins got back on the freeway and returned home to Long Beach. (RT (2) 259:13-261:2.) His girlfriend, Nancy Blake, helped him unload the boxes. (RT (2) 254:7-255:14; (2) 262:2-263:7.) That evening, they reloaded some of the appliances into the pickup truck and drove to a friend's home in Palm Springs. (RT (2) 266:11-267:20; (2) 268:4-7; (2) 270:2-5.) Wilkins unloaded the appliances and stored them in the friend's garage. (RT (2) 270:21-272:8; (3) 376:13-22; (3) 382:9-383:6; (3) 402:14-405:16.) He told the friend (Sean Doherty): "I'm in trouble. Something's happened. There has been an accident" in which someone died. (RT (3) 378:12-18.) He said he hadn't gone back to the scene of the accident because "he

couldn't go to jail." (RT (2) 380:13-17.) When Trivich came to Doherty's home later the same day, Wilkins asked her to say that she had been driving the truck, but she refused. (RT (3) 344:7-16; (3) 381:4-382:3; (3) 387:22-388:3.)

Wilkins gave Lay's contact information to Trivich, and she phoned Lay to arrange to resolve the damages without involving an insurance company, but Lay did not pursue this after he learned of the fatality. (RT (2) 183:10-185:6; (2) 206:10-207:1; (3) 341:23-344:2.))

D. Defense case.

Wilkins testified on his own behalf. The jury evidently did not credit the evidence that he was not the burglar but only a receiver of stolen property. The jury also did not credit the evidence that the accident was not part of a continuous transaction with the burglary, under the instructions given.

Both the prosecution and the defense versions provided evidence that the accident was not part of a continuous transaction with the burglary. Under the prosecution version, given the distance from Menifee to the accident site, the burglary could not have taken place after 4 a.m., and by the time of the accident an hour later Wilkins was already 62 miles away, and not being pursued. (See RT (4) 548:7-12.) Under Wilkins's version, as summarized below, he had gone to Palm Springs and was safely at his friend's house, so that the subsequent trip to Long Beach was a separate journey long after he had obtained unquestioned control over the goods.

Wilkins testified that he bought the appliances and other goods from another man, knowing or at least assuming that they were stolen property. (RT (5) 766:1-21; (5) 768:5-20; (5) 851:8-11.) The man, whom he knew only as "Rick," had sold him items in the past. (RT (5) 760:8-761:8.) On July 5, Wilkins stopped at a health club on the way home from community service and happened to see Rick in the parking lot. (RT (5) 831:7-832:4.) Rick, who apparently knew that Wilkins was going to be building a house, told him he had some appliances for sale. (RT (5) 762:19-26; (5) 832:5-13.) They agreed to meet the next evening, July 6, at a Home Depot parking lot en route to Palm Spring. (RT (5) 763:6-20; (5) 835:22-836:4.) (Wilkins was going to be driving to Palm Springs the next day in order to get an early start the next morning dealing with local officials over a zoning issue for the house he and Trivich planned to build. (RT (5) 764:25-765:26; (5) 770:14-772:22.)) When they met at the Home Depot, Rick offered to sell him a panoply of appliances and other items (all of them stolen from the Kane house) for $1500. (RT (5) 766:9-767:4.) Wilkins agreed, and after a short delay for Wilkins to obtain more money, he paid the $1500 and loaded the goods into his truck. (RT (5) 768:21-769:5; (5) 848:21-8849:7; (5) 850:23-851:1.) He then proceeded to Palm Springs, intending to store the goods at Sean Doherty's house. (RT (5) 851:17-852:3.)

It was now a little after midnight on July 7. (RT (5) 850:26-851:5.) The fact that Wilkins had already obtained the goods by this time was corroborated by prosecution witness Kathleen Trivich, who testified that when she spoke to Wilkins by phone at

about 12:45 a.m., he told her: "I got some big things for the kitchen." (RT (5) 337:21-339:21; see also (5) 773:25-775:16.) (Trivich even remembered the part of the conversation in which she asked whether the items included a washer and dryer, and he had responded curtly that those were not *kitchen* appliances. (RT (3) 339:12-21; (5) 774:20-775:16.)) According to cell phone records, Wilkins's location at the time of the 12:45 a.m. call was the Yorba Linda area, which was consistent with Wilkins's version of where he purchased the items. (See RT (3) 479:3-480:5 (describing location on exhibit 26); exhibit 26.)

Wilkins drove to Sean Doherty's house to unload the goods, but they were too heavy for him to unload them himself, and Doherty was not at home. (RT (5) 776:16-777:20.) Eventually he decided to return home to Long Beach with the goods, but the accident occurred en route. (RT (5) 777:19-778:24.)[2]

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[2] Wilkins's credibility, however, was impeached by evidence that he had committed two thefts in 1991, when he was 17 years old. (RT (5) 743:3-19.)

ARGUMENT

I.

The trial court erred in refusing Wilkins's request for an instruction that felony-murder liability is terminated when the actual perpetrator has reached a place of temporary safety after committing the predicate burglary

A. Rules of law applicable to the complicity aspect of the felony-murder rule are not ipso facto applicable to the aggravation aspect.

There are two aspects to the felony-murder rule (Pen. Code, § 189), depending upon whether the defendant is the actual perpetrator (killer) or an aider and abettor. (People v. Pulido (1997) 15 Cal.4th 713, 720.) The felony-murder rule *aggravates* the punishment for the perpetrator, who would otherwise be guilty of a lesser crime for the homicide (or no crime at all in the case of an accident), whereas the rule extends *complicity* for the homicide to an aider and abettor, who would otherwise not be exposed to any liability at all for a homicide committed by someone else. (Ibid.) (There are two steps to aider and abettor liability: first, the aider and abettor is made complicit in the homicide, and then, as with the actual killer, his guilt is aggravated into first-degree murder. Thus, both the complicity and the aggravation aspects apply to an aider and abettor.)

Professor Robinson, whose terminology has been adopted by this court, sharply distinguishes the two aspects:

> When the killer co-felon does not have the

> culpability required for murder, the aggravation of culpability aspect of the felony-murder rule imputes that state of mind to the killer, and the complicity aspect of the rule imputes both the killing and culpability to the co-felons.

(Robinson, *Imputed Criminal Liability* (1984) 93 Yale L.J. 609, 618, fn. 25, cited in Pulido, supra, at p. 720; see also People v. Cavitt (2004) 33 Cal.4th 187, 196.) (As Robinson observes, once the complicity aspect is established, the aggravation aspect applies to the aider and abettor as well. (Robinson, at p. 618, fn. 25.))

The theoretical or policy rationales supporting the two aspects are distinct from each other. (See Robinson, supra, at pp. 663-65 (discussing the rationales for the aggravation aspect); id. at pp. 665-669 (discussing the rationales for the complicity aspect).)[3]

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[3] As one illustration of the distinct rationales for the two aspects, Professor Robinson proffers an "evidentiary justification" for the aggravation aspect, under which the felony-murder rule is justified because "such killings probably are purposeful, knowing, or at least reckless under circumstances manifesting an extreme indifference to the value of human life." (Robinson, supra, at p. 665.) That is, proof of malice is deemed unnecessary because the perpetrator likely harbored malice in any event. This justification obviously does not apply to an aider and abettor, who may not even be aware that the perpetrator has killed someone. Professor Robinson therefore concludes that if there is an evidentiary justification for the complicity aspect, it is far more restricted and somewhat different than for the aggravation aspect. (Robinson at pp. 667-668.)

(. . . continued)

As Professor Robinson concludes:

> This aspect [aggravation] of the felony-murder rule is conceptually and historically distinct from the complicity aspect discussed supra note 25.

(Id. at p. 624, fn. 40.) Thus, it cannot be presumed that a rule of law that applies to the complicity aspect also applies to the aggravation aspect. The two aspects serve different purposes, are based on different historical antecedents, and are conceptually different.

This court, accordingly, has taken care to distinguish the two aspects when announcing a rule of law that is applicable to one but not the other. For example:

> This case involves the "complicity aspect" of the felony-murder rule. As in Pulido, we are not concerned with that part of the felony-murder rule making a *killer* liable for first degree murder if the homicide is committed in the perpetration of a robbery or burglary. Rather, the question here involves "a *nonkiller's* liability for the felony murder committed by another.

(Cavitt, supra, at p. 196, italics in original, internal citation and

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Similarly, the justification based on deterrence is different for each aspect. The aggravation aspect directly deters the potential perpetrator from, say, firing the gun; the complicity aspect indirectly deters the potential perpetrator by encouraging each participant to police the other participants. (Robinson, supra, at pp. 665, 668.)

quotation marks omitted.) And:

> At the outset, it should be emphasized we are not concerned here with that part of the felony-murder rule making a killer liable for first degree murder if the homicide is committed in the perpetration of robbery. This case involves only the question of a *nonkiller's* liability for the felony murder committed by another. We are concerned, in other words, not with the felony-murder rule's "aggravation of culpability aspect," but with its "complicity aspect."

(Pulido, supra, at p. 720, italics in original.)

B. For the aggravation aspect, this court has consistently held that the perpetrator's liability for felony murder terminates when he has reached a place of temporary safety, even though the aider and abettor's liability under the complicity aspect may continue beyond that point.

As this court has long held, a defendant is not liable for felony murder if the homicide and the underlying felony (such as burglary) were not part of "one continuous transaction." (People v. Chavez (1951) 37 Cal.2d 656, 670 ("There being no requirement that the homicide occur 'while committing' or 'while engaged in' the felony, or that the killing be 'a part of' the felony, other than that the two acts be parts of one continuous transaction, the trial court did not err in refusing the requested instructions"); People v. Booker (2011) 51 Cal.4th 141, 175 ("The killing is considered to

be committed in the perpetration of the underlying felony if the acts were part of a continuous transaction").)

Under the aggravation aspect, that is, where defendant is the actual perpetrator, the "continuous transaction" terminates when defendant has reached a place of temporary safety. Thus, in People v. Young (2005) 34 Cal.4th 1149, 1166, a post-Cavitt case, defendant was the actual perpetrator of the homicide of victim Rivers. He argued that there was insufficient evidence to support first-degree felony murder. (Id. at p. 1176.) This Court, relying on the rule that "[a] robbery is not complete until the perpetrator reaches a place of temporary safety," held that there was sufficient evidence that defendant had not yet reached a place of temporary safety, and hence sufficient evidence to support felony murder. (Id. at p. 1177.)

Similarly, in People v. Fields (1983) 35 Cal.3d 329, there was sufficient evidence that defendant, the actual perpetrator, was liable for felony murder because he had not yet reached a place of temporary safety:

> Thus, the trier of fact could reasonably find that defendant's murder was a continuation of the robbery, done because until the robbery victim was killed, [defendant's] home was not a place of even temporary safety.

(Id. at p. 368; see also People v. Milan (1973) 9 Cal.3d 185, 195 ("Here the jury was warranted in concluding that defendant had not won a place of temporary safety when he shot Burney. Accordingly, the court did not err in giving instructions on the

felony-murder rule"); People v. Salas (1972) 7 Cal.3d 812, 820-25 (defendant's liability for felony murder extended only until the time he reached a place of temporary safety).)

This court has also applied the escape rule to find that there was insufficient evidence that the underlying felony and the homicide were part of one continuous transaction. In People v. Ford (1966) 65 Cal.2d 41, 56-57, overruled on other grounds in People v. Satchell (1971) 6 Cal.3d 28, 35, there was insufficient evidence of felony murder because defendant had already reached a place of temporary safety, for he had been driving "aimlessly" for four hours after committing the robbery before committing the homicide.[4]

The Courts of Appeal have applied the same rule, consistently holding that the perpetrator remains liable until he has reached a place of temporary safety, that is, that the escape rule is coterminous with the continuous-transaction rule. Thus, for example:

> In determining whether the killing is part of a continuous transaction, the courts have applied what is known as the escape doctrine, which means that included within the perpetration of an offense is the reasonable notion that the perpetrator wants to escape without apprehension. Ordinarily, when

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[4] Though Ford is an older case, this court recently reaffirmed its validity on this point. (People v. Bacon (2010) 50 Cal.4th 1082, 1117-18.)

> a homicide occurs during the felon's immediate flight from the crime, the killing is in the perpetration of the felony because the felony is not legally complete until the felon has found a place of temporary safety.

(People v. Russell (2010) 187 Cal.App.4th 981, 988; see also People v. Thongvilay (1998) 62 Cal.App.4th 71, 77 ("Felony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery until the perpetrator reaches a place of temporary safety because the robbery and the accidental death, in such a case, are parts of a 'continuous transaction.'"); People v. Portillo (2003) 107 Cal.App.4th 834, 843 ("Moreover, because flight following a felony has also been considered as part of the same transaction, it has generally been held that a felony continues for purposes of the felony-murder rule until the criminal has reached a place of temporary safety") (internal citations and quotation marks omitted); People v. Bodely (1995) 32 Cal.App.4th 311, 314 ("Since the application of the escape rule to burglary is consistent with the 'one continuous transaction' test, we conclude that felony-murder liability continues during the escape of a burglar from the scene of the burglary until the burglar reaches a place of temporary safety"); People v. Fuller (1978) 86 Cal.App.3d 618, 623 ("Flight following a felony is considered part of the same transaction as long as the felon has not reached a 'place of temporary safety").)

In numerous other cases, this court has recognized, in dictum or in holding, that the escape rule determines the scope of

felony-murder liability (in the case of the actual perpetrator, as will be seen). (See, e.g., People v. Gomez (2008) 43 Cal.4th 249, 256, fn. 5 ("Under the escape rule, as applied in the context of the felony-murder doctrine and certain other ancillary consequences of robbery, robbery is said to continue through the escape to a place of temporary safety, whether or not the asportation of the loot coincides with the escape") (internal quotation marks and citation omitted); People v. Lawrence (2000) 24 Cal.4th 219, 228-29 (escape rule inapplicable to three-strikes analysis because the crime did not "result in felony murder"); In re Malone (1996) 12 Cal.4th 935, 967 ("The jury was correctly instructed that for felony-murder purposes a robbery continues until the perpetrator has reached a place of temporary safety and is in unchallenged possession of the stolen property") (internal quotation marks and citation omitted); People v. Cooper (1991) 53 Cal.3d 1158, 1166 ("The escape rule originated in the context of the felony-murder doctrine"); People v. Bigelow (1984) 37 Cal.3d 731, 753 ("Under this test [for felony murder], even though every element of a crime has been fulfilled (and thus in a sense, the crime has been 'perfected'), the crime continues until the criminal has reached a place of temporary safety").)

In People v. Cavitt, supra, 33 Cal.4th 187, this court, dealing solely with the complicity aspect of felony murder, determined that the escape rule and the continuous-transaction doctrine were "related, but distinct" as to aiders and abettors. (Id. at p. 208.) The court declined to treat escape as the

termination of the "continuous transaction" for aiders and abettors, and instead held that an aider and abettor was liable for the homicide committed by the actual perpetrator if the underlying crime and the homicide were both causally and temporally related:

> The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction.

(Id. at p. 194.) There, the aiders and abettors argued that the escape rule applied to relieve them of liability for felony murder, given that they had safely escaped some minutes before the perpetrator committed the murder:

> Defendants challenge next the instructions concerning the temporal relationship between the homicide and the felonies. The defense theory was that Mianta killed Betty in the five or ten minutes after defendants had left the house and, along with the stolen property, had reached a place of temporary safety but before Mianta reported the crime. Thus, in their view, the burglary and robbery had ended before Betty was killed, relieving them of liability for felony murder.

(Id. at p. 206.) This court held that, *as to the aiders and abettors*,

the underlying felony and the homicide remained part of "one continuous transaction," making the aiders and abettors liable for felony murder, given that there was also a logical nexus. (Id. at pp. 207-209.)

The court emphasized, however, that it was dealing only with the complicity aspect of felony murder. (See id. at p. 196 (quoted in subsection (A).) This court has subsequently acknowledged the same limitation. (People v. Dominguez (2006) 39 Cal.4th 1141, 1158 ("We recently addressed the liability *of nonkillers* under the felony-murder rule in People v. Cavitt") (emphasis added).)

Thus, the fact that the accomplices in Cavitt were liable for felony murder even though (under one view of the evidence) they had safely fled the scene has no bearing on the scope of the perpetrator's liability. For the perpetrator, the rule remains that liability ceases when he has reached a place of temporary safety, that is, reaching a place of temporary safety constitutes termination of the continuous transaction. The authors of CALJIC have recognized this principle:

> For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a burglary, the commission of the crime of burglary is not confined to a fixed place or a limited period of time. [¶] A burglary is still in progress after the initial entry while the perpetrator is fleeing in an attempt to escape. Likewise it is still in progress so long as

> immediate pursuers are attempting to capture the perpetrator or to regain stolen property. [¶] A burglary is complete when the perpetrator has eluded any pursuers and reached a place of temporary safety, and is in unchallenged possession of stolen property after having effected an escape with the property.

(CALJIC No. 8.21.2, internal brackets and blanks omitted.) The Cavitt rule applicable only to aiders and abettors is contained in a separate instruction, CALJIC No. 8.27 ("First degree felony murder – aider and abettor").) As this court has held, CALJIC No. 8.27 does not apply to the case of the actual perpetrator. (People v. Dominguez, supra, 39 Cal.4th at pp. 1158-1160 (given prosecutor's theory that defendant was the perpetrator, trial court was not required to instruct with CALJIC No. 8.27 until the jury's question indicated that it was considering whether defendant was only an aider and abettor).)[5]

C. There is no basis for this Court to overrule settled precedent and apply the *Cavitt* rule to the aggravation aspect of felony murder.

As explained above, Cavitt does not purport to address the long-standing rule that the actual perpetrator is no longer liable

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[5] The corresponding CALCRIM instructions are discussed in subsection (D) below.

for felony murder once he has reached a place of temporary safety. (In the language of People v. Bodely, supra, 32 Cal.App.4th at p. 314, once the defendant has reached a place of temporary safety, any subsequent homicide is no longer part of one continuous transaction with the underlying felony.) Rather, Cavitt carefully restricted its analysis to aiders and abettors. (Cavitt, supra, 33 Cal.4th at p. 196.)

There is no need to delve into the "conceptual[] and historical[]" distinctions (Robinson, supra, at p. 624, fn. 40) justifying a different rule for the aggravation aspect from the complicity aspect. Rather, the practical reasons alone for applying a different rule to an aider and abettor than to the perpetrator are reasonably evident; A single rule cannot feasibly be applied to both types of defendants because it would be overbroad in some cases and too narrow in others. If the perpetrator has escaped his pursuers and reached a place of temporary safety, there is no longer any opportunity for the perpetrator to kill someone in connection with the felony, and hence no longer any immediate danger to any victim or bystander arising out of the felony, so that the escape rule properly terminates the perpetrator's liability for felony murder. An aider and abettor, in sharp contrast, may have escaped, and yet the victim may still be in danger because the perpetrator himself has not left the scene. In Cavitt, for example, under the defense theory, the two aiders and abettors escaped some minutes before the remaining participant decided to kill the victim. (Cavitt, supra, 33 Cal.4th at pp. 194-195, 206.) The aiders and abettors were nonetheless

liable for felony murder, even though they were "not physically present." (Id. at pp. 197, 207-208.) The escape rule is therefore too narrow to catch someone who was guilty of participating in the underlying dangerous crime but who had the good fortune to step away to safety shortly before the perpetrator committed the homicide. (Cavitt declined to approve or disapprove a rule that liability of an aider and abettor continued while any one participant had not yet reached a place of temporary safety or while any one participant remained in control of a victim. (Id. at p. 209.))

On the other hand, the escape rule would be too broad in a private-motive case, ensnaring an aider and abettor even where the homicide had nothing to do with the underlying felony. In Cavitt, this court observed that if the perpetrator had killed the victim out of some "private motive," that fact would be relevant to whether the murder was part of a continuous transaction. (Cavitt, supra, 33 Cal.4th at p. 210 ("On the other hand, evidence that Mianta had a private motive was relevant to the jury's determination that the homicide and the burglary-robbery were part of a single continuous transaction").) Under the escape rule, the aider and abettor would remain liable for felony murder in this situation because he had not yet left the scene of the crime, much less reached a place of temporary safety. The Cavitt rule, with its requirement of a logical nexus, is therefore necessary to insulate the aider and abettor from liability in such circumstances, however rare.

Turning to the perpetrator, application of the Cavitt rule to

him might result in a windfall. To use an illustration from Cavitt, suppose the perpetrator, while committing a robbery, spotted an enemy and killed him. (See Cavitt, supra, 33 Cal.4th at p. 200.) Surely the jury would be entitled to find him liable for felony murder; after all, if even an accidental homicide against a third party during the commission of a robbery may constitute felony murder – for instance, if the gun accidentally discharges and strikes a bystander – an intentional, opportunistic homicide against the same bystander should be treated at least as harshly. (Cf. People v. Brown (1985) 169 Cal.App.3d 728, 737 (illustrating accidental shooting during commission of felony).) Under the escape rule, the perpetrator would remain liable for felony murder because he was still at the scene, whereas under the Cavitt rule he might escape such liability (though of course he would be exposed to conviction for premeditated or nonpremeditated murder or manslaughter, depending upon his state of mind).

As these examples illustrate, the fact that the Cavitt rule makes sense for aider and abettor liability does not mean it is also appropriate for the perpetrator. Rather, to apply the Cavitt rule to the perpetrator would risk arbitrary or incongruous results, and there is no indication that it would be an improvement over the escape rule in any other respect, such as for purposes of deterrence or some other policy goal. Long-settled precedent that has worked well should not be upset for any speculative benefit.

D. The trial court therefore erred in refusing Wilkins's request for an instruction on the escape rule and instead instructing that escape was only one of many factors that the jury could consider.

Wilkins specifically requested that the court instruct with the burglary portion of CALCRIM No. 3261, which embodies the escape rule, namely, that liability for felony murder ceases when the perpetrator has reached a place of temporary safety. (CT (2) 400-01 (proposed instruction, marked "refused" by the court); RT (5) 701:14-702:3; (5) 733:6-8.) Wilkins also objected to the Cavitt instructions. (RT (5) 701:14-24 (referring to CALCRIM No. 549).) Wilkins pointed out that Cavitt did not apply because in that case "one burglar remained at the scene, and I [*sic*; must be "1"] after" (RT (5) 701:14-18), such that "there was no break" (RT (5) 727:14-22). The prosecutor opposed the request, reasoning that CALCRIM No. 549 was the appropriate instruction. (RT (5) 733:10-734:2.) The trial court, relying on the CALCRIM Bench Notes, refused Wilkins's request and instructed with CALCRIM No. 540C, which set forth the Cavitt rule of a continuous transaction and a logical connection, and CALCRIM No. 549, which defined a continuous transaction. (CT (2) 350-54; RT (5) 727:4-734:6.)[6]

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[6] The Bench Note to CALCRIM No. 3261, citing Cavitt, specifies: "This instruction should **not** be given in a felony-murder case to explain the required temporal connection between the felony and the killing. Instead, the court should give CALCRIM No. 549, *Felony Murder: One Continuous Transaction – Defined.*" (Boldface in original.)

The jury was accordingly never instructed that escape to a place of temporary safety terminated the perpetrator's liability for felony murder. Instead, the jury was given a grab-bag of factors that it "may consider," such as whether the felony and homicide occurred at the same place, how much time elapsed, whether the homicide was for the purpose of escape, and whether it occurred while the perpetrator was fleeing. (CT (2) 353-54.) The jury was specifically instructed that no factor was dispositive and indeed that the People need not prove *any* of the factors:

> It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction.

(CT (2) 354, quoting CALCRIM No. 549.)

The court erred. As explained above, the Cavitt rule applies only to aiders and abettors, that is, to the complicity aspect of felony murder. For the actual perpetrator (the aggravation of culpability aspect), escape to a place of temporary safety marks the termination of liability; from that point and beyond, the felony and the homicide are no longer part of a continuous transaction.

The authors of CALJIC have, in this instance, correctly interpreted this court's teaching, recognizing that the Cavitt rule applies only to aiders and abettors. For the actual perpetrator, the correct instruction is CALJIC No. 8.21.2 (quoted earlier), which sets forth the escape rule. CALJIC No. 8.27, which, like

CALCRIM No. 540C and CALCRIM No. 549, sets forth the Cavitt rule, applies only to aiders and abettors, as the title of CALCRIM No. 8.27 indicates ("First Degree Felony Murder – Aider and Abettor"). As noted earlier, a post-Cavitt opinion of this Court recognizes that CALJIC No. 8.27 does not apply to the case of the actual perpetrator. (People v. Dominguez, supra, 39 Cal.4th at pp. 1158-1160 (given prosecutor's theory that defendant was the perpetrator, trial court was not required to instruct with CALJIC No. 8.27 until the jury's question indicated that it was considering whether defendant was only an aider and abettor).)

The Court of Appeal below made the same error, interpreting Cavitt to apply to Wilkins's case, without recognizing that Cavitt itself held that it was dealing only with the complicity aspect of felony murder. (See People v. Wilkins, supra, former opinion published at 191 Cal.App.4th at p. 800 ("However, as stated above, the temporary safety doctrine does not define felony-murder liability. [Citation to Cavitt.] The Cavitt court found that limiting the felony-murder rule to only those killings that occur prior to the felon reaching a place of temporary safety would lead to absurd and unintended results"); see Cavitt, supra, 33 Cal.4th at p. 196 ("This case involves the "complicity aspect" of the felony-murder rule").)

Attempting to reconcile this court's prior cases, the Court of Appeal further reasoned that a burglary continues *at least* until the perpetrator reaches a place of temporary safety, but may continue beyond that point:

> Reconciling Cavitt with cases that have discussed temporary safety as a component of the felony-murder rule, leads us to the following conclusion: for purposes of the felony-murder rule, a robbery or burglary continues, *at a minimum*, until the perpetrator reaches a place of temporary safety. That is to say a killing, even an accidental killing, committed while the perpetrator is in flight and prior to reaching a place of temporary safety, may be fairly said to be part of one continuous transaction with the underlying felony. But reaching a place of temporary safety does not, in and of itself, terminate felony-murder liability so long as the felony and the killing are part of one continuous transaction.

(Wilkins, supra, former opinion published at 191 Cal.App.4th at p. 800, italics in original.)

This court's cases, however, do not support this theory. For example, in the post-Cavitt case, People v. Young, supra, 34 Cal.4th 1149, this court did not state that a robbery continues "at a minimum" or "at least" until the perpetrator has reached a place of temporary safety; rather, it states the categorical rule that "[a] robbery is not complete *until* the perpetrator reaches a place of temporary safety." (Id. at p. 1177, emphasis added.) The plain meaning of *until* is that once the perpetrator *has* reached a place of temporary safety, the robbery is complete and there is no longer one continuous transaction. (See also People v. Milan,

supra, 9 Cal.3d 185, 195 ("Here the jury was warranted in concluding that defendant had not won a place of temporary safety when he shot Burney. Accordingly, the court did not err in giving instructions on the felony-murder rule"); People v. Bodely, supra, 32 Cal.App.4th 311, 314 ("Since the application of the escape rule to burglary is consistent with the 'one continuous transaction' test, we conclude that felony-murder liability continues during the escape of a burglar from the scene of the burglary *until* the burglar reaches a place of temporary safety") (emphasis added).) As noted earlier, this Court found insufficient evidence of felony murder where the homicide occurred when the perpetrator was driving aimlessly four hours after committing the felony precisely because defendant had reached a place of temporary safety:

> In the present case, however, many hours elapsed between the time of the robbery and the shooting of Officer Stahl. Unlike People v. Rye [and Nixon (1949) 33 Cal.2d 688], there was here no direct evidence that defendant was endeavoring *to escape* the robbery when he shot the deputy; on the contrary, there is strong evidence that he was not. Officer Stahl's pursuit of defendant was not in relation to defendant's earlier commission of the robbery; there was no showing at trial that the police even knew of the robbery until after defendant had been apprehended. Additionally, it should be pointed out that defendant had the

> opportunity to and did spend some of his loot prior to the shooting; that during the period of approximately four hours between the robbery of Roope's house and the killing he drove aimlessly over a great distance; and that, with respect at least to the robbery, *he had won his way to places of temporary safety* before he committed the homicide.

(People v. Ford, supra, 65 Cal.2d 41, 56-57, emphasis added.) This explicit reliance on escape to a place of temporary safety is hard to "reconcile" with the Court of Appeal's theory that the jury is entitled to find the perpetrator liable for felony murder even after he has reached a place of temporary safety.

The Court of Appeal below did not even attempt to proffer a scenario under which the jury could reasonably find the perpetrator liable for felony murder after he had reached a place of temporary safety. It is hard to see what legitimate purpose of public safety or punishment would be served by such an extension. As this court admonished long ago:

> Although it [the felony-murder rule] is the law in this state (Pen. Code, § 189), it should not be extended beyond any rational function that it is designed to serve.

(People v. Washington (1965) 62 Cal.2d 777, 783 (Traynor, C.J.); see also People v. Pulido, supra, 15 Cal.4th at p. 726 (declining to extend felony-murder liability to a late-joining accomplice: "Section 189 does not demand the imposition of such retroactive

liability, either by its terms or by incorporation of common law principles of criminal liability").)

The Court of Appeal's attempt to "reconcile" the opinions is therefore not well considered. The escape rule has long been settled as setting the termination of the actual perpetrator's liability for felony murder. Nothing in Cavitt affects this long-standing precedent. The Court of Appeal found itself unable to provide a justification for disregarding precedent and extending liability beyond the point of escape.

For all of these reasons, it was error not to instruct the jury pursuant to CALCRIM No. 3261 or a similar statement of the escape rule, such as CALJIC No. 8.27. Of course, although CALCRIM instructions are approved by the Judicial Council, they do not provide a safe harbor; it is ultimately the trial court's obligation to provide correct instructions. (Cal. Rules of Court, rule 2.1050(b).)

E. In the alternative, the court erred in failing to instruct on the concept of escape to a place of *temporary* safety as a significant factor under the continuous-transaction rule.

Even assuming arguendo that escape to a place of *temporary* safety is not coterminous with the continuous-transaction rule for the actual perpetrator, the trial court at least erred in failing to tailor Wilkins's proffered instruction to make clear to the jury that this was a significant factor to be considered with the other significant factors, even if not dispositive. The trial court's instruction (CALCRIM No. 549) did not refer at all to

the concept of escape to a place of temporary safety, much less frame it as even a significant factor. (See CT (2) 353-354.) Nowhere did the instruction refer to "temporary safety" or indeed to "safety" at all. It merely referred to "fleeing" and to a "purpose" to "escape." (CT (2) 353.) Thus, the jury was left in the dark about the significance of the end point, that is, the consummation of the escape, and in particular the significance of escape to a place of *temporary* safety. The jury might well have assumed that Wilkins was still in flight or in the process of escape because he had not yet reached a place of *permanent* safety, such as his own home. Indeed, the trial court's instruction (CALCRIM No. 549) was affirmatively misleading because the court's omission of the concept of *temporary* safety, while specifying flight and escape in general, constituted implied guidance that the concept of temporary safety was utterly irrelevant or at least too trivial to mention.

In this light, even if the trial court had no sua sponte obligation to instruct on *any* of the factors relevant to the doctrine of a continuous transaction (see generally People v. Cavitt, supra, 33 Cal.4th at p. 204), having undertaken to provide such guidance, the court was obliged to provide complete and correct guidance, not misleading guidance. (See People v. Castillo (1997) 16 Cal.4th 1009, 1015 ("Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly"); People v. Baker (1954) 42 Cal.2d 550, 575-76 ("when a partial instruction has been given we cannot but hold that the failure to give complete

instructions was prejudicial error").)

Even if there was no sua sponte obligation to specify the factor of temporary safety under the circumstances of this case (where the court did specify other factors), it was encompassed by Wilkins's request. Although he did not specifically request this fallback instruction, it was the trial court's obligation to provide it, under the settled principle that if a defendant proffers a defective instruction on an issue for which he is entitled to instructions, it is the court's obligation to correct it, not deny it outright. (See People v. Falsetta (1999) 21 Cal.4th 903, 924 ("Contrary to the Court of Appeal, we think the trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"); People v. Fudge (1994) 7 Cal.4th 1075, 1110 ("To the extent that the proposed instruction was argumentative, the trial court should have tailored the instruction to conform to the requirements of [the controlling case] rather than deny the instruction outright").)[7]

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[7] This court's order limiting the issue on review refers only to failure to provide CALCRIM No. 3261, not failure to provide an instruction specifying the factor of escape to a place of temporary safety even if that factor is not dispositive. The latter, however, is a lesser included instructional request to the former, and therefore appears to be encompassed by rule 8.516(a) of the Rules of Court ("issues fairly included" in specified issue).

F. Should this Court announce a new rule, it would not be retroactively applicable to Wilkins's case.

When this Court overrules its own precedent to alter criminal liability to defendant's detriment, the new rule does not apply to defendant under the ex post facto clauses of the state and federal constitutions. (See, e.g., People v. Farley (2009) 46 Cal.4th 1053, 1121 (court eliminates merger rule for burglary felony murder, but only prospectively: "Because, due to ex post facto concerns, an unforeseeable judicial enlargement of a criminal statute may not be applied retroactively, our overruling of [a prior opinion] does not apply retroactively to defendant's case"); People v. Blakeley (2000) 23 Cal.4th 82, 91; U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Here, as explained in subsection (B), it has long been settled precedent that for the actual perpetrator, escape to a place of temporary safety terminates felony-murder liability. Cavitt was careful to emphasize that its rule applied only to aiders and abettors (the complicity aspect) (Cavitt, supra, 33 Cal.4th at p. 196), and never suggested that the same new rule might ever be applied to the actual perpetrator. Accordingly, even if this Court should adopt a new rule, the old rule applies to Wilkins. The trial court therefore erred in failing to instruct on the escape rule.

II.

The error was prejudicial[8]

A. Standard of prejudice.

The error is evaluated under the *Chapman* reasonable-doubt standard applicable to federal constitutional violations. This is because the erroneous instruction on the necessary relationship between the felony and the homicide amounted to misinstruction on an element of the offense in violation of the right to due process under the Fourteenth Amendment and the right to trial by jury under the Sixth and Fourteenth Amendments. (See United States v. Gaudin (1995) 515 U.S. 506, 509-510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; People v. Hudson (2006) 38 Cal.4th 1002, 1013.) The element at issue is the connection or relationship between the felony and the homicide, namely, whether they were part of one continuous transaction.

Insofar as the escape rule is viewed as a defense rather than (or in addition to) the statement of the element of the relationship between the felony and homicide, the error violated Wilkins's right to present a defense under the Sixth and Fourteenth Amendments and his right to due process under the Fourteenth Amendment, whether escape is considered a "true"

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[8] The Court's order limiting the issue on review does not specifically refer to prejudice, but this is an essential part of any analysis of trial error and therefore appears to be encompassed by rule 8.516(a) ("issues fairly included" in specified issue).

defense or a negation of an element. (See California v. Trombetta (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413]; Mathews v. United States (1988) 485 U.S. 58, 63 [108 S.Ct. 883, 99 L.Ed.2d 54]; Taylor v. Withrow (6th Cir. 2002) 288 F.3d 846, 852 ("a defendant in a criminal trial has the right, under appropriate circumstances, to have the jury instructed on his or her defense, for the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions"); United States v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405, 1413-14 ("a defendant has a constitutional right [under the due-process clause] to have the jury consider defenses permitted under applicable law to negate an element of the offense"); see generally People v. Anderson (2011) 51 Cal.4th 989 (court has duty to instruct *upon request* on the defense of accident, which negates element).)

Under the *Chapman* standard, the error is prejudicial unless the People prove beyond a reasonable doubt that the error did not affect the verdict. (Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) For example, the People must be able to rule out that even a single juror would have voted to acquit or would have been unable to decide one way or the other. (See People v. Soojian (2010) 190 Cal.App.4th 491, 521 (there is a different "result" if "one juror would have voted to find [defendant] not guilty"); Dean v. Hocker (9th Cir. 1969) 409 F.2d 319, 329 (error is harmless under *Chapman* "only if it can be said that there is no reasonable possibility that illegally admitted evidence did not overcome in the mind of the dullest juror a doubt

which that mind might have conceived to be reasonable").) Of course, proof "beyond a reasonable doubt" is equivalent to a "subjective state of near certitude." (Jackson v. Virginia (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

Finally, as will be seen, even under the state-law *Watson* standard (People v. Watson (1956) 46 Cal.2d 818), the error was prejudicial. As this Court recently reemphasized, the *Watson* standard, though framed in terms of "probability," does not in fact require a showing that reversal is probable, that is, more likely than not:

> Under the *Watson* standard, prejudicial error is shown where after an examination of the entire cause, including the evidence the reviewing court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. We have made clear that a probability in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*

(Richardson v. Superior Court (People) (2008) 43 Cal.4th 1040, 1050 (italics in original; internal quotation marks and citations omitted).)

B. The jury likely gave little or no weight, much less dispositive effect, to whether Wilkins had reached a place of temporary safety, because the trial court did not instruct on that principle at all, and the prosecutor repeatedly relied on the erroneous instruction.

As noted earlier, the court's instruction (CALCRIM No. 549) did not refer at all to the rule of escape to a place of temporary safety, much less frame it as even a significant factor. (See CT (2) 353-54.) Thus, the jury was not only unaware that escape to a place of temporary safety terminated liability for felony murder, but was unaware that it had any independent significance beyond the amorphous concept of "escape."

Worse, the prosecutor repeatedly hammered home the erroneous principle that no single factor was dispositive and that none of the specified factors, including a "purpose" to "escape" or "flight," need even be present. Thus, in his opening summation he displayed three PowerPoint slides that displayed verbatim CALCRIM No. 549, with yellow highlighting of the provision that "[i]t is not required that the People prove any one of these factors." (Court exhibit 46, slides 40-42.)[9] He did the same in his rebuttal summation. (Court exhibit 47, slides 17-19.) In his opening summation he did not merely emphasize the instruction but also invited the jurors to engage in a free-wheeling exercise of

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[9] The court marked the Power Point CDs used by the prosecutor in his opening statement, opening summation, and rebuttal summation as court exhibits 45-47. (CT (2) 413; RT (6) 988:8-22.)

thinking up whatever factors they wanted:

> There's a list of factors that the jury instruction say [sic], hey, you can consider these factors. Factors that you think of on your own. And lots of times juries think of good factors.

(RT (5) 928:6-10.) And:

> Use your own factors. Use those factors. Use some. Don't use others.

(RT (5) 931:13-14.) Further, not content with relying on the PowerPoint slides, the prosecutor orally emphasized CALCRIM No. 549 in both his opening and rebuttal summations. (RT (5) 928:11-932:10 (opening summation); (6) 983:3-984:8 (rebuttal summation).)

Thus, the prosecutor, far from endeavoring to cure the court's instructional error, exacerbated the prejudice. (Cf. People v. Nelson (1960) 185 Cal.App.2d 578, 582 ("how can we say that the jury composed of laymen did not follow it when it was one of the lines of reasoning contended for by the district attorney"); People v. Pantoja (2004) 122 Cal.App.4th 1, 14-15 (finding prejudice in the admission of a declaration where the declaration "was the first thing that the prosecutor discussed in his closing argument, and the last piece of evidence he mentioned in his rebuttal"); People v. Cruz (1964) 61 Cal.2d 861, 868 ("There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it").)

The error thus went to the heart of the case as highlighted by the prosecutor. The only remaining issue is whether there was

evidence from whether a properly instructed jury could have found that Wilkins had reached a place of temporary safety. As explained below, not only was there such evidence, but it was overwhelming.

C. A properly instructed jury would have had ample or even overwhelming evidence to harbor a reasonable doubt whether Wilkins had reached a place of temporary safety, even if the jury had disregarded the entirety of the defense case.

1. The error was prejudicial even assuming arguendo that the jury credited only the prosecutor's version of the facts. Even if a juror did not credit a single word that Wilkins or the other defense witnesses uttered on the witness stand, there was ample evidence that Wilkins had reached a place of temporary safety before the stove fell from the bed of the truck and caused the accident that killed the victim. Wilkins was 62 miles away from the scene of the burglary, and in fact was in an entirely different county. (RT (4) 548:7-12 (distance); see (2) 113:16-20 (Kane's house was in Riverside County); (3) 389:7-390:5.) Given the distance and the fact that the accident occurred at about 5 a.m., he must have committed the burglary no later than 4 a.m., that is, an hour earlier.

Most importantly, no one was pursuing him because no one yet knew that a burglary had even been committed. (Cf. People v. Ford, supra, 65 Cal.2d at p. 56 (defendant had reached a place of temporary safety where, among other facts, "there was no

showing at trial that the police even knew of the robbery until after defendant had been apprehended").) It was only at 7:00 or 7:30 a.m. – more than two hours after the accident, and more than three hours after the latest time that the burglary could have been committed – that Kane was notified of the burglary. (RT (2) 121:16-122:5.) It was a construction worker (one "Jay") who phoned and said the appliances were missing. (RT (2) 131:20-25.) Jay and Todd Gorman were the men who had locked the house up the night before. (See RT (1) 133:9-23.) Jay therefore must have discovered the theft when he came to work the next morning, and it can be inferred that he reported this serious incident as soon as he discovered it, rather than keeping it to himself.

Thus, at the time of the homicide, Wilkins was in unchallenged possession of the loot. No one knew he was carrying stolen goods because no one knew the goods had been stolen. Further, even if Kane or Gorman had known, they would have had no means to find the culprit because they would have had no idea who the thief was and no idea where he might be or what vehicle he might be driving. Finally, even if the Riverside County sheriff had been on the lookout for a burglary suspect driving a Ford F250, Wilkins would have eluded his grasp because he was already in a different county. In short, the jury had ample and indeed overwhelming grounds to conclude that Wilkins had reached a place of – at the least – *temporary* safety

in full, unchallenged possession of the loot.[10]

In short, under the prosecutor's own version of events, there was compelling evidence from which a properly instructed juror could have harbored a reasonable doubt whether Wilkins had reached a place of temporary safety. If a juror had harbored such a doubt, he or she would have had to find that there was no felony murder. The error was therefore prejudicial under any standard. Of course this does not mean that Wilkins would have walked out of the courtroom; the prosecutor also proceeded on a theory of implied-malice murder based on Wilkins's failure to secure the load and raise the tailgate before driving a long distance at a high speed on the freeway. (See CT (2) 349 (court specifies to the jury the two theories of first-degree felony murder and second-degree implied-malice murder); RT (5) 898:18-901:8 (opening summation).)[11]

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[10] Appellant does not concede that this is even a debatable question for the jury; rather, as a matter of law, Wilkins had reached a place of temporary safety. (Cf. People v. Ford, supra, 65 Cal.2d at p. 57 (finding that defendant had reached a place of temporary safety as a matter of law).) In light of the limitation of issues in the grant of review, however, it is unnecessary for appellant to make the case for insufficiency as a matter of law.

[11] As the jury was instructed, the two theories of felony murder and implied-malice murder applied to different crimes (first-degree and second-degree murder, respectively). (CT (2) 364.) Thus, all jurors must have found Wilkins guilty of felony murder, and therefore had no reason to reach the issue of implied-malice murder.

2. **The error was also prejudicial because the jury had strong evidentiary grounds to credit the indirectly corroborated aspects of the defense case.** The discussion thus far assumes that the jury utterly disregarded Wilkins's version of events. Certainly the jury rejected his testimony that he was not the burglar but only a receiver of stolen property, for it found him guilty of first-degree murder, which had to be based on burglary felony murder, because the only other theory was implied-malice murder. (See CT (2) 350-52, 361-62; CT (2) 402.) As the cases recognize, however, although a jury may be skeptical of a defendant's uncorroborated, self-serving testimony, it may well credit portions of that testimony that are independently corroborated. (See People v. Medina (1978) 78 Cal.App.3d 1000, 1005 ("We do not question a jury's right to accept part of the testimony of a witness, while rejecting the rest"); United States v. Joost (1st Cir. 1996) 92 F.3d 7, 12 ("while conclusory and self-serving statements by a defendant are not sufficient, defendant's account, though self serving, may have weight if it is interlaced with considerable detail and has some circumstantial corroboration in the record") (internal citation and quotation marks omitted).) By way of analogy, in a motion to withdraw a plea based on ineffective assistance of counsel, defendant's bare self-serving declaration is insufficient, but it may become sufficient if it is "corroborated independently by objective evidence." (In re Alvernaz (1992) 2 Cal.4th 924, 938.)

Here, there was independent corroboration suggesting that the burglary took place well before the prosecutor's theorized

time of 4 a.m. This corroboration was both documentary and testimonial.

(a) **Cell phone records of the 4:30 a.m. call were consistent with Wilkins returning from Palm Springs rather than from the Kane house in Menifee.** According to cell phone records, at 4:30 a.m. (about a half hour before the accident), Wilkins's cell phone registered a call at the Victor Hill cell phone tower to Nancy Blake. (RT (3) 481:11-482:13; see also (2) 278:24-279:23; (5) 777:23-778:4.) As the prosecutor's map of cell calls (exhibit 26) shows, this cell tower was near the intersection of the I-215 and I-91 freeways.[12]

The Kane house, however, was some 32 miles nearly due south of this location, close to the intersection of the I-215 and I-15 freeways. (See exhibit 26, dot labeled "Audrey Kane"); RT (4) 547:16-547:20.) As exhibit 26 shows, if Wilkins had intended to go home to Long Beach right after leaving the Kane house, he likely would have taken the I-15 freeway northwest up to the I-91 freeway, and from there to Long Beach. He would not have taken the I-215 freeway almost due north, for although the I-215

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[12] Attached to this brief pursuant to rule 8.204(d) of the Rules of Court, incorporated by reference in rule 8.520(b)(1) and (c)(3), are color photocopies of exhibit 26 (a map showing cell phone sites and the Kane house) and exhibit 44 (a map showing the location of Doherty's house in relation to the Kane house and other locations), reproduced from the PowerPoint slides the People used in their opening statement and opening summation (court exhibit 45, slide 58; court exhibit 46, slide 8).

connects eventually to the I-91 (some distance beyond the 60 freeway), this was an extreme long way around.

On the other hand, Wilkins's position at the intersection of the I-91 and I-215 freeways at 4:30 a.m. made sense if, as he testified, he had taken the I-215 to go to Sean Doherty's home in Palm Springs (presumably via the I-10 or 60 to the I-10), and then, after staying at Doherty's home for about an hour, had gotten back into the truck and driven from the I-10 to the I-91 to head home to Long Beach. (See exhibit 26; RT (5) 776:16-778:24; (5) 866:17-26 (Wilkins estimates he arrived at Doherty's home at about 2 a.m. and left at about 3 a.m.); (5) 868:11-23 (Wilkins explains the times were just rough estimates).)[13]

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[13] According to the testimony, the distance from the Kane house to the Victor Hill tower was about 31 miles. (RT (4) 547:9-15 (transcript erroneously refers to "Victorville scale tower" rather than "Victor Hill" tower).) The jury did not have exact mileages to compare the distance to the I-91 from the I-15 rather than the I-215, but the prosecutor's maps (exhibits 26 and 44) contained a mileage scale at the bottom right. The maps illustrate at a glance the folly of connecting to the I-91 from the I-215 rather than from the I-15. It is not just that the I-215 goes almost straight north, whereas the I-15 goes northwest; in addition, the I-91, beginning just about the intersection with the I-15, verges sharply northeast. Thus, a motorist taking the I-215 would have to connect to the I-91 roughly ten miles due north and roughly 15 miles due east of where he would have connected by taking the I-15. In short, jurors did not need to remember much of their middle-school geometry to immediately discern that by far the shortest way back to Long Beach was to travel a single leg of the triangle, northwest, not to travel north and then have to travel not merely west but southwest (because of the I-91's sharp curve).

The prosecutor, seeking to explain away the stubborn fact of the location of the 4:30 call, asked the jury to suppose that Wilkins was just trying to get to the nearest freeway in order not to be seen on a surface street with the loot. (RT (6) 977:22-978:2.) (As exhibit 26 shows, the Kane house was a little bit closer to the I-215 than to the I-15.) Jurors, however, who do not leave their common sense at the threshold of the deliberation room, would have recognized the implausibility of this conjecture. *First*, if Wilkins had wanted to get onto the nearest freeway in order to head back to Long Beach without being seen on a surface street, he would have taken the I-215 *south*, not north. (See exhibit 44.) By going south on the I-215, he would have connected to the I-15 in Murrieta, just a few miles below the Kane house, and then could have proceeded north on the I-15 to the I-91. That is, by going south rather than north on the I-215, he would have saved himself a detour of roughly 15 miles net (taking into account the travel to Murrieta and then back up), while still getting off the surface street as quickly as if he had taken the I-215 north.[14]

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[14] Further, jurors in adjacent Orange County, who probably had personal familiarity with the major arteries in nearby Riverside County, likely knew that if Wilkins had traveled north on the I-215 to connect to the I-91, he would have had to navigate the detours, sharp curves, and bottlenecks of the freeway construction in that area during this period (July 2006). The California Department of Transportation has described in detail this massive construction project. (E.g., California Department of Transportation, Project Description (available at http://www.dot.ca.gov/dist8/projects/riverside/6091215/description.htm [as of July 20, 2011]).) Thus, for reasons of both distance

(. . . continued)

Second, the prosecutor's assumption that Wilkins's foremost concern was to get off the surface street as soon as possible was faulty. The prosecutor overlooked the fact that no one yet knew that a burglary had even occurred. If Wilkins had been worried about the burglary being discovered soon (say, when the workmen came at daylight), his concern would have been to get home before the workmen came early in the morning. He therefore would have wanted to take the shortest route home (either the surface street west to the I-15, or else south on the I-215 to the junction with the I-15), rather than a lengthy roundabout route. He would not have been concerned about driving for an extra few moments on the surface street because no one was pursuing him and no one even yet knew that there had been a burglary. Further, it was still dark so that no one would have seen that the boxes in the truck bore the name of Kane on the address labels, and indeed it is unlikely any bystander or other motorist would have even seen the boxes unless he were very close to the truck. Thus, the prosecutor's theory was internally inconsistent: the prosecutor theorized that Wilkins was desperate not to be seen on the road, but in that case, Wilkins would have taken the shortcut via the I-15, not the long way around, because his fear of detection would arise when

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and construction impediments, if Wilkins had wanted to return directly to Long Beach, as the prosecutor argued, he would not have gone north on the I-215 but rather south or west to catch the I-15.

it became light and the crime was discovered, not when it was still dark and no one knew that a crime had even been committed.

(b) **Trivich's testimony about a 12:45 a.m. phone call showed that Wilkins knew by that time that he would be committing the burglary shortly thereafter.** Kathleen Trivich, testifying for the prosecution, said that when she spoke to Wilkins by phone at 12:45, he said he "had gotten" or "got" the appliances. Thus:

> Q Your testimony is that at 12:45, he told you he had some news for you?
>
> A Yes.
>
> Q Okay. And what did he say at 12:45? What was this news that he said he had?
>
> A He said he had gotten some big – some big kitchen items as of – I – I had the impression big kitchen appliances.
>
> Q It's – I'm – I'm only going to ask you what the defendant said. I'm not going to ask you what your impressions are, okay?
>
> A Okay.
>
> Q As best you can recall, what did the defendant say when you talked to him at 12:45?
>
> A That he had gotten some big items for the

kitchen. I don't recall the exact word that he used.

Q Did he specifically use the term or a phrase to indicate that he already had the items in his possession or that he was getting them, if you recall?

A He – he said I – I got – "I got some big things for the kitchen."

(RT (3) 337:21-338:15.) She particularly remembered this conversation because she had asked whether the items included a washer and a dryer, and Wilkins had stung her with a comment about being "retarded" because those were not items for the kitchen. (RT (3) 339:12-25.) (Wilkins would testify to the same conversation. (RT (5) 773:19-775:16.)) The time of this call was corroborated by the cell phone records. (See RT (3) 479:3-480:5.) Trivich was particularly credible because, as Sean Doherty testified, she had adamantly refused to lie for Wilkins by pretending to have been the driver. (RT (3) 387:22-388:3 ("I won't perjure myself. I absolutely won't perjure myself").)[15]

Now, Wilkins was at or near the Yorba Linda cell phone tower adjacent to the I-91 freeway when he spoke to Trivich at

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[15] In his opening statement the prosecutor inadvertently misstated the evidence, telling the jury that the call in which Wilkins said he "got" the appliances was at about 1:15 (actually, the second call was at 1:12). (Aug. RT (2) 2926-17.) Both Trivich and Wilkins testified that it was in the 12:45 call, not the 1:12 call, that he said he had already obtained the appliances. (RT (3) 337:2-338:15; (5) 773:19-774:22; (5) 776:7-15.)

12:45, and he was likely heading east, for at 1:12 there was another call from Trivich when he was about ten miles to the east (at or near the Bee Canyon School cell phone tower, also adjacent to the I-91). (RT (3) 479:3-481:10; (3) 491:22-492:1 (distance of ten miles); (5) 776:7-10; exhibit 26.) This suggests that he had not yet committed the burglary but rather was en route. However, it is not necessary to credit Wilkins's statement to Trivich that he had *already* obtained the goods; it is only necessary to infer that he had, at the least, formed the intent to commit the crime by that time, when he was roughly 50 miles away. If he was already so close to the Kane house when he revealed his intent to commit the burglary, he would have arrived well before 2 a.m., given that almost the entirety of the trip was on a freeway. Certainly he had no reason to loiter or drive aimlessly, having already formed the intent to commit the crime. The 12:45 a.m. call therefore tends to show that the burglary was committed about two hours prior to the prosecutor's theorized time. This in turn made it that much more likely that the jury would find that Wilkins had reached a place of temporary safety at the time of the accident. (See People v. Ford, supra, 65 Cal.2d at p. 57 (relying in part on the fact that "approximately four hours" had elapsed between the predicate robbery and the homicide).) Further, the lapse of so many hours also made it more probable that Wilkins had safely escaped and parked the truck somewhere (even if not at Doherty's house) before venturing out again. Otherwise, he would have been driving around for several hours to no purpose. If he had found a place to

park while in full possession of the loot, he had surely reached a place of temporary safety, even though he later decided to venture out again. (This is not to say that he needed to park the truck in order to obtain temporary safety; in People v. Ford, after all, "during the period of approximately four hours between the robbery of Roope's house and the killing [defendant] *drove aimlessly* over a great distance." (Id. at p. 57, emphasis added.))

In summary, even though the jury evidently did not credit Wilkins's testimony insofar as he asserted he was not the burglar, it might well have credited his circumstantially *corroborated* testimony that he had already obtained the goods well before 4 a.m., even if not quite (as he claimed) 12:45 a.m. This corroboration consisted of (a) Trivich's testimony about the 12:45 phone call and (b) the documentary cell phone records showing that Wilkins was near the I-91 and I-215 intersection at 4:30 and hence was likely taking the I-10 (or 60) to the I-91, heading west from the direction of Sean Doherty's house in Palm Springs, rather than immediately from the Kane house.[16]

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[16] Another possibility that a juror could have credited was that Wilkins had already committed the crime and was on his way home to Long Beach by the time of the 12:45 a.m. call, but decided shortly thereafter to head back east toward Palm Springs. This would explain why the cell phone records make it appear that it took him a full 27 minutes to travel the mere ten miles (RT (3) 491:22-492:1) on the freeway from the Yorba Linda tower at 12:45 to the Bee Canyon School tower at 1:12. (Some of that discrepancy, however, could also be explained by the fact that cell phone towers have a range of up to two miles (in urban

(. . . continued)

In summary, under any standard, at least one properly instructed juror might well have harbored a reasonable doubt whether Wilkins had reached a place of temporary safety by the time of the homicide. After all, even under the prosecutor's version, Wilkins had managed to flee 62 miles and had been safe for an hour, with no one pursuing him and no one even aware that a burglary had been committed. And under Wilkins's circumstantially corroborated version, the timeline was pushed back even farther, and Wilkins may actually have parked the car at Doherty's home before venturing out again. Accordingly, if only the jury had been correctly instructed that there cannot be a continuous transaction after Wilkins had reached a place of temporary safety, rather than that it was merely one of many nondispositive factors it could consider, at least one juror might have voted to acquit or might at least have been unable to decide

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areas) to up to ten miles (in "very rural" areas). (See RT (3) 437:26-439:3.)) It may even be that Wilcox never got all the way to Doherty's house but rather, sometime en route, changed his mind again and returned home. These scenarios are not inconsistent with the fact that Wilkins made a call at 10:13 p.m. (July 6) in Long Beach (see RT (3) 477:13-478:24; exhibit 26 (showing Bret Harte tower)), for he was driving on the freeway in the middle of the night and therefore had enough time to reach the Kane house and head part way back. These scenarios thus add to the likelihood that at least one juror would have had a reasonable, if not considerable, doubt as to the prosecutor's timeline, under which Wilkins committed the burglary at 4 a.m. and then headed to his home immediately thereafter, without stopping anywhere.

one way or the other.

Finally, the instructional error cannot be saved on the supposition that the actus reus was the failure to secure the load initially, rather than the driving with the unsecured load at the time the stove fell out. The Court of Appeal below, in discussing the related issue of sufficiency of the evidence of felony murder, reasoned that the "act" causing the murder was Wilkins's failure to properly stow the goods while he was still at the scene of the burglary, not the incident that took place an hour later and 62 miles away: "Here, the act that caused the homicide – the failure to tie down the load of stolen loot – occurred at the scene of the burglary, not 60 miles later when part of the unsecured load fell off the back of defendant's truck as he drove to where he could unload and hide the loot." (People v. Wilkins, supra, formerly published at 191 Cal.App.4th at p. 803.)

The opinion cited no authority for its position, and its analysis is not well considered. The *act* that proximately caused the homicide was the *driving*, not the failure to secure the load sometime beforehand. Specifically, the act that proximately caused the homicide was the driving of a long distance (say, 62 miles) at a high speed on the freeway with a load that was not properly secured for those conditions (namely, a long distance and a high speed). This is supported by the fact that the load was in fact stable for the first 62 miles: Danny Lay, who was driving immediately behind Wilkins for over five miles, testified that the load of boxes was stationary, not shifting. (RT (2) 167:1-7; (2)

187:21-188:23; (4) 546:16-547:1.)

At the least, it was for a properly instructed jury to determine what the act causing the homicide was, for it is the jury's role to determine proximate causation when that is an issue. (See generally People v. Cervantes (2001) 26 Cal.4th 860, 871-72; People v. Briscoe (2001) 92 Cal.App.4th 568, 584.)[17]

Finally, the Court of Appeal's analysis assumed that Wilkins drove directly from the Kane house to the scene of the accident. As explained earlier, however, there was indirectly corroborated evidence from which a juror could have concluded that he had gone to Doherty's house first. Wilkins testified that the tailgate was up when he left the Kane house; it was only after he had parked at Doherty's house and then drove off again that he failed to put the tailgate back up. (RT (5) 770:3-7.) It was inherently plausible that after trying to unload the goods at Doherty's house, Wilkins would forget to put the tailgate back up. Accordingly, a properly instructed jury might well have credited this evidence and determined that even if the actus reus was the failure to secure the load, it could not determine whether this omission occurred at the Kane house or in Palm Springs after Wilkins had safely arrived at Doherty's home.

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[17] The Court of Appeal did not disagree with this. As noted above, its discussion of the actus reus was in the context of sufficiency of the evidence.

CONCLUSION

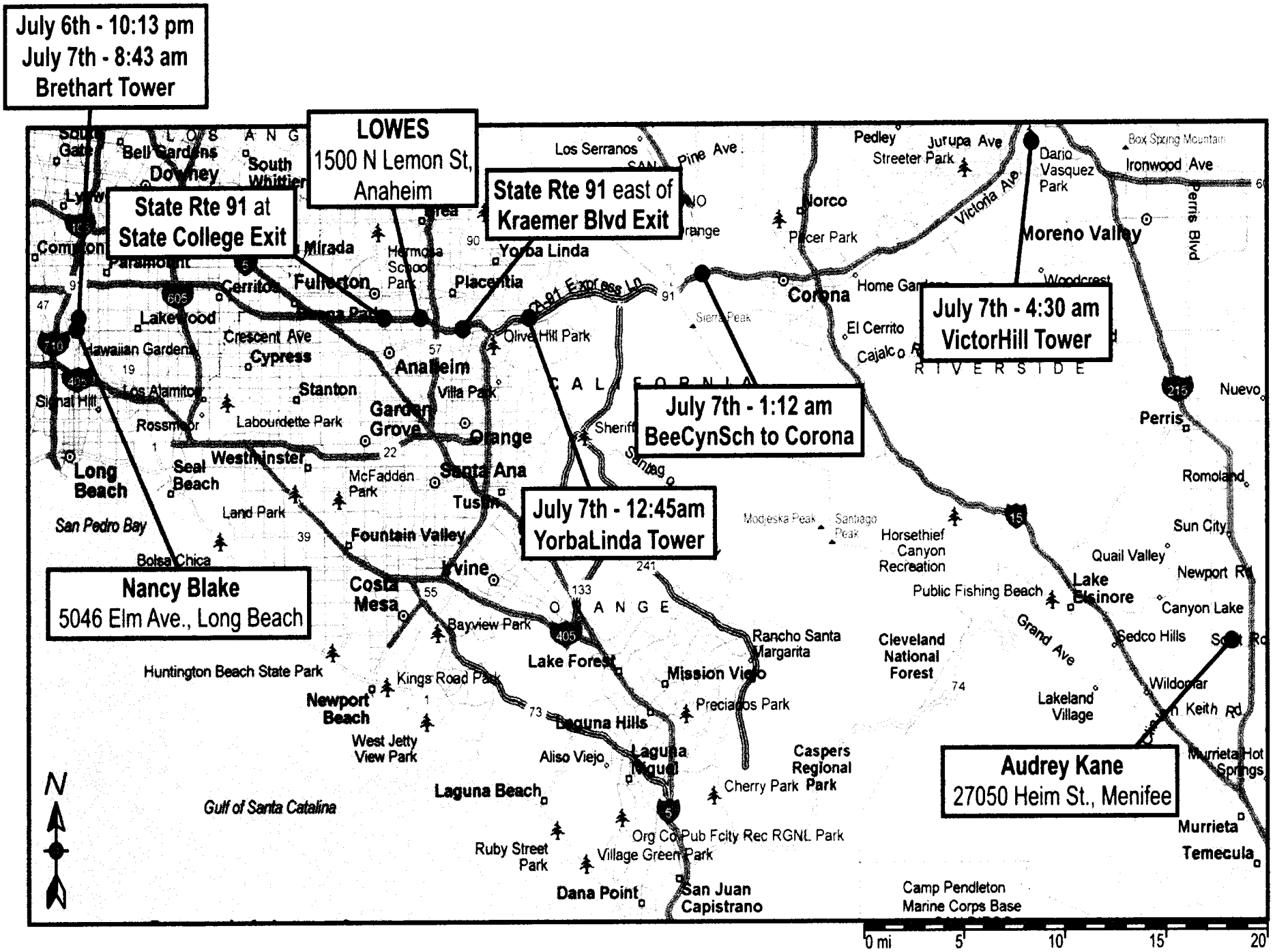
For the foregoing reasons, defendant and appellant respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: July 26, 2011.

Respectfully submitted,

_____

Richard A. Levy
Attorney for
Cole Wilkins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July 7th - 8:43 am
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LOWES
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Anaheim
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July 7th - 4:30 am
VictorHill Tower
July 7th - 1:12 am
BeeCynSch to Corona
July 7th - 12:45am
YorbaLinda Tower
Nancy Blake
5046 Elm Ave., Long Beach
Audrey Kane
27050 Heim St., Menifee
Los Angeles
Orange
Riverside
Long Beach
Anaheim
Santa Ana
Irvine
Fullerton
Placentia
Yorba Linda
Corona
Moreno Valley
Perris
Lake Elsinore
Temecula
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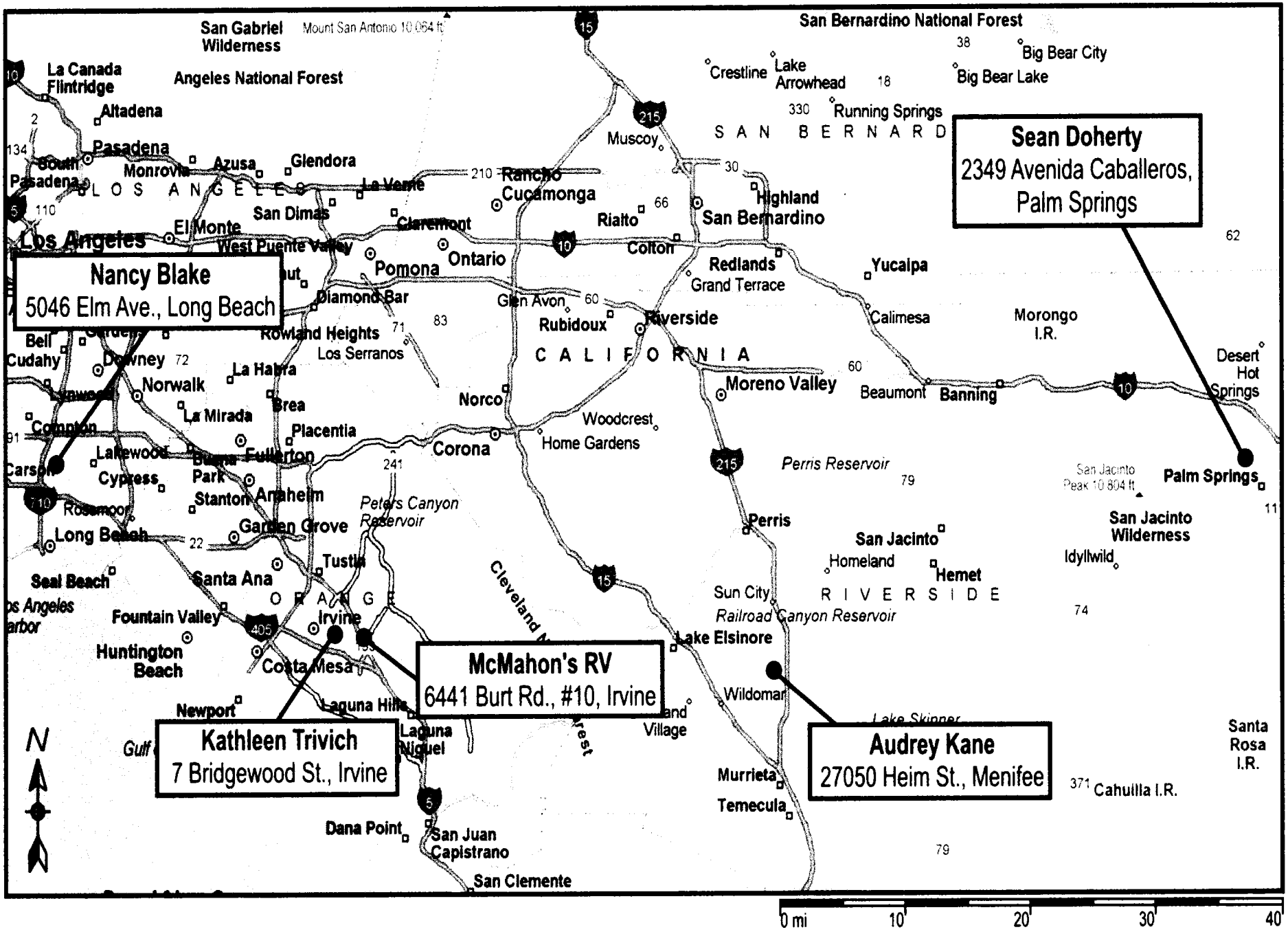
Nancy Blake
5046 Elm Ave., Long Beach
Sean Doherty
2349 Avenida Caballeros, Palm Springs
McMahon's RV
6441 Burt Rd., #10, Irvine
Kathleen Trivich
7 Bridgewood St., Irvine
Audrey Kane
27050 Heim St., Menifee
San Gabriel Wilderness
Mount San Antonio 10,064 ft
Angeles National Forest
San Bernardino National Forest
Big Bear City
Big Bear Lake
Crestline
Lake Arrowhead
Running Springs
La Canada Flintridge
Altadena
Pasadena
South Pasadena
Monrovia
Azusa
Glendora
La Verne
San Dimas
Claremont
El Monte
West Puente Valley
Los Angeles
Pomona
Ontario
Rancho Cucamonga
Muscoy
Rialto
Colton
Highland
San Bernardino
Redlands
Grand Terrace
Yucaipa
Calimesa
Morongo I.R.
Desert Hot Springs
Palm Springs
Diamond Bar
Glen Avon
Rubidoux
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Rowland Heights
Los Serranos
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Cudahy
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Norwalk
La Habra
La Mirada
Brea
Norco
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Moreno Valley
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Placentia
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Fullerton
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Cypress
Stanton
Anaheim
Garden Grove
Long Beach
Rosemoor
Carson
Seal Beach
Los Angeles Harbor
Santa Ana
Tustin
Irvine
Fountain Valley
Huntington Beach
Costa Mesa
Newport
Laguna Hills
Laguna Niguel
Dana Point
San Juan Capistrano
San Clemente
Gulf
Peters Canyon Reservoir
Perris Reservoir
Railroad Canyon Reservoir
Lake Elsinore
Perris
San Jacinto
Homeland
Hemet
Idyllwild
San Jacinto Peak 10,804 ft
San Jacinto Wilderness
Sun City
Wildomar
Murrieta
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Richard A. Levy

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 21535 Hawthorne Blvd., Suite 200, Torrance, CA 90503-6612. On the date of execution set forth below, I served the foregoing document described as:

APPELLANT'S OPENING BRIEF ON THE MERITS

on all parties to this action and the trial court by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Attorney General of California
Attn: Criminal Appellate Section
P.O. Box 85266
San Diego, CA 92186-5266

and placing such envelopes with postage thereon fully prepaid in the United States mail at Torrance, California. **Executed on July 26, 2011**, at Torrance, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.