IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LACY LETNER CHRISTOPHER ALLAN TOBIN, Defendants and Appellants.	No. SO15384 Tulare County Superior Court No. 26592

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Tulare

The Honorable William Silveira, Jr., Judge

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RICHARD LACY LETNER,** **CHRISTOPHER ALLAN TOBIN** **Defendants and Appellants.**	**No. SO15384** **Tulare County Superior Court No. 26592**

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, Christopher Allan Tobin (hereinafter "appellant"), in Tulare County Superior Court on April 24, 1990. The appeal is taken from a judgment that finally disposes of all issues between the parties. (CT 1575.)

STATEMENT OF THE CASE

Pre-trial Proceedings

This case began on March 26, 1988, when appellant, along with his codefendant, Richard Lacy Letner (hereinafter "codefendant" or "Letner") were charged in a seven count complaint with murder (Pen. Code § 187)

with two special circumstances (Pen. Code § 190.2(a)(17)), residential robbery (Pen. Code §§ 211/212), residential burglary (Pen. Code § 459), unlawful taking of a vehicle (Veh. Code § 10851(a)); and three commercial burglaries (Pen. Code § 459) in Municipal Court in Visalia, California. (ACT 299-301.)[1/] The murder, robbery and burglary charges arose out of the killing of Ivon Pontbriant in her Visalia house on March 1, 1988. The three charges for commercial burglaries were unrelated to the Pontbriant case.

On June 6, 1988, an amended complaint, adding a count of attempted rape to the seven counts originally charged against appellant and his codefendant, was filed in the Visalia Municipal Court. On June 16, 1988, a second amended complaint against appellant and his codefendant was filed, adding a fourth charge of commercial burglary. (CT 1-3.)[2/]

The preliminary hearing in this case lasted five days, from September 19 to September 23, 1988 and September 26 to 27, 1988. (ACT 20-37.) On October 11, 1988, the magistrate held appellant and his codefendant to answer on the murder, robbery and attempted rape charges. (ACT 38-39.) They were discharged on the residential burglary charge, included as both a special circumstance and as a separate count. Only Richard Letner was held to answer on the commercial burglaries counts. (ACT 38-39.)

On October 14, 1988, both appellant and his codefendant were charged again in an information filed in the Superior Court of Tulare County. The information included five counts alleging the original charges made in the Pontbriant case, including murder with three special

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1. "ACT" refers to the Augmented Clerk's Transcript.

2. "CT" refers to the Clerk's Transcript.

circumstances (attempted rape, burglary and robbery), attempted rape, residential robbery, burglary and unlawful taking of a vehicle. Codefendant Letner was charged with the four unrelated commercial burglaries while appellant was charged with four unrelated counts of receiving stolen property. (CT 7-10.) Appellant and his codefendant were arraigned on November 28, 1988, in Tulare County Superior Court; both pled not guilty to all charges and denied all special allegations. (CT 13, 14.)

On January 17, 1989, pursuant to Penal Code section 995, appellant filed a motion to dismiss the information; codefendant Letner moved to join the motion on January 26, 1989.[3] (CT 15-22; 23-24.) The Superior Court denied the motion on March 22, 1989. (CT 117.) The appellant filed, on April 4, 1989, a Writ of Prohibition and/or Mandamus in the Court of Appeal for the Fifth Appellate District, which denied this writ on April 13, 1989. (CT 120, 227.)

On February 17, 1989, appellant filed a motion to suppress evidence, which was, in fact, a motion to dismiss the attempted rape charge on the ground that part of the "rape kit" evidence had been lost or destroyed prior to appellant's arrest.[4] (CT 82-89.) Pursuant to Penal Code section 1538.5, appellant also filed a motion to suppress a vehicle stop. (CT 74-90.) On June 7 and 8, 1989, in a hearing before the Honorable William Silveira, Jr.[5]

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3. The procedural history of codefendant Letner's case will not be described in this brief except where it has significant relevance to appellant's case.

4. This type of motion, known as a *Hitch/Trombetta* motion, seeks sanctions against the prosecution for the loss of crucial evidence.

5. On July 28, 1989, Judge Silveira was assigned to the joint trial of appellant and his codefendant, Richard Letner. (CT 441.)

of the Tulare Superior Court, the parties argued these motions, which were both denied. (CT 416-418.)

On May 10, 1989, appellant filed notices for a motion to sever counts of the complaint (CT 322), and a motion for a separate trial from codefendant Letner. (CT 313.) Subsequently, on August 10, 1989, he filed another motion for a separate trial. (CT 467-468.) On August 23, 1989, the prosecution simultaneously filed its opposition to the motion for separate trials and a motion to impanel dual juries to hear the joint trial of appellant and his codefendant. (CT 484-493.) Codefendant Letner filed a reply to this opposition, which also included his opposition to the prosecution's motion for dual juries. (CT 495-502.) At a hearing on August 25, 1989, the motions for separate trials and for dual juries all were denied. (CT 503-504.)

On September 12, 1989, appellant filed a notice of a motion to sever his penalty trial from that of his codefendant. (CT 528-532.) Codefendant Letner expressly did not join in Tobin's motion to sever the penalty trials. (SRT H 1-50.)[6/] The prosecutor's opposition was filed on September 15, 1989. (CT 545-548.) In a hearing on September 21, 1989, the trial judge denied appellant's request for separate penalty trials. (CT 569-570.)

During this hearing, appellant and his codefendant orally requested the trial judge give each of them an additional twenty (20) peremptory challenges for jury selection. (SRT I 24-27.) On September 28, 1989, the trial judge granted the motion, awarding each defendant a total of forty (40) peremptory challenges. (RT 507.)

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6. "SRT" refers to the Supplemental Reporter's Transcript.

Jury selection in the case began on September 26, 1989 (CT 579) and lasted for twenty-nine (29) days. The jury was sworn on November 21, 1989. (CT 688.)

The Guilt Phase

The First Amended Information was filed on November 26, 1989. (CT 691-693.) On December 4, 1989, counsel for appellant and for his codefendant as well as the prosecutor delivered their opening arguments to the jury. (CT 697.) The prosecution began presenting its case-in-chief on December 4. After eleven (11) days of testimony and presentation of evidence, the prosecutor rested her case on December 18, 1989. Pursuant to Penal Code section 1118, counsel for both appellant and codefendant Letner moved for a dismissal of the attempted rape, robbery and burglary charges and the three special circumstance allegations. This motion was denied. (CT 725-726, RT 6563-6570.) This trial was recessed for one week because of the Christmas holidays. (CT 726.)

On December 27, 1989, the prosecution reopened its case-in-chief briefly and rested again. The trial judge excused one of the alternate jurors, Gerald Woodall, from the case on that same day. (CT 727.)

Appellant began his case-in-chief on December 27, 1989 (CT 727); his evidence took three days to present. Appellant testified on his own behalf. (CT 730-732, RT 6824-7119.) His codefendant presented evidence on January 2 and 3, 1990; Letner did not testify. (CT 734-737.) During the course of Letner's defense the issue of whether his investigator could testify regarding inconsistent statements given by prosecution witness Earl Bothwell to pre-trial investigators arose. The trial judge ruled that such testimony would not be allowed unless the prosecutor was given unlimited scope on cross-examination. (RT 7307.) Appellant then renewed his

motion for a severance and for a mistrial based on *Bruton/Aranda*.[7] (RT 7317.) The trial judge denied these motions. (RT 7318.)

The prosecution's case in rebuttal took place on January 3 and 4, 1990. (CT 737-738.) On January 8, 1990, appellant presented his last witness, and the trial judge then read the instructions to the jury. (CT 772.) Closing statements by counsel were given on January 9 and 10, 1990. (CT 961, 969.) The jury began its deliberations at 3:40 p.m. on January 10th. (CT 969.) Thereafter, counsel for codefendant Letner moved for a mistrial on the basis that the prosecutor had stated during closing argument that she had cut herself on the knives used as exhibits in this case. The trial judge denied this motion, and the jury was excused for the day at 4:30 p.m. (CT 970.)

On January 11, 1990, after six (6) hours of deliberations, the jury returned verdicts of guilt as to all counts charged against appellant and codefendant Letner as well as true findings on all three special circumstances. (CT 971-994.) Each juror was polled as to his/her verdict on every count against each defendant. (CT 974.) The trial was recessed until January 22, 1990, when the penalty phase trial was to begin. (CT 974.)

When the trial reconvened on January 22, 1990, appellant made a motion regarding the media coverage of the trial. (CT 1030.) As a result of this motion, each juror was questioned separately regarding the media coverage of the trial. (CT 1031.) The trial judge instructed the clerk to seal all documents regarding the trial for the remainder of the trial. (CT 1030.)

Appellant renewed his motion for separate penalty phase trials, which was denied. (CT 1030-1031.) Over the objections of appellant, the

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7. *Bruton v. U.S.* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 C.2d 518 prohibit the admission of inculpatory statements from non-testifying codefendants.

trial judge allowed the prosecutor to read the prior voir dire testimony of Earl Bothwell to the jury at the penalty phase. (CT 1031.)

The prosecution presented its evidence in aggravation over the course of three days, January 23, 25, and 26, 1990. (CT 1034-1035.) On January 25, 1990, codefendant Letner moved for a mistrial on the ground that the prosecution failed to provide him with evidence of a witness's conviction for a felony; this motion was denied. (CT 1038.)

On January 29, 1990, the codefendant began presenting his case in mitigation. (CT 1041.) Appellant moved twice for a severance of his penalty phase trial and for a mistrial; these motions were denied. (CT 1041-42.) Codefendant Letner testified on his own behalf, which prompted two additional motions for severance and/or a mistrial by appellant. (CT 1043.) These motions were also denied. (CT 1044.)

On February 4, 1990, appellant presented several of his witnesses out of order. Codefendant Letner completed the presentation of his case in mitigation on February 5, 1990. Appellant presented the rest of his evidence in mitigation on February 6, 1990. (CT 1052.) Codefendant Letner then moved for a severance and/or mistrial, which was denied. (CT 1053.)

On February 8, 1990, the lawyers for all parties delivered their penalty phase closing arguments to the jury. (CT 1158, RT 9631-9774.) The trial judge then instructed the jurors. (RT 9777.) Jury deliberations began on Friday, February 9, 1990. (CT 1262.) When the jurors did not reach a verdict, they were dismissed for the weekend. Codefendant Letner's attorney again moved for a mistrial and severance, which was denied. (RT 9828-29.)

Jury deliberations resumed on Tuesday, February 13 (Monday, February 12, was a national holiday) and continued on February 14 and 15. (RT 9833-34.)

On February 16, 1990, the jury foreman notified the trial judge that the jury had been able to reach a decision as to one defendant but not as to the other. (CT 1268.) After questioning the jury about this impasse, the judge recessed the trial for the weekend. (RT 9848.) The jurors resumed deliberations on February 20, 1998 and reached verdicts on both defendants.

The jury determined that both appellant and his codefendant should be sentenced to death. (CT 1272.)

Because his trial counsel, Martin Staven, was campaigning for a Municipal Court judgeship, another attorney at the Tulare County Public Defender's Office was assigned to represent appellant after conclusion of the trial. (CT 1265-1268, 1297.)

On April 2, 1990, both appellant and codefendant filed motions for a new trial. (CT 1310, 1463.)

The trial judge held a hearing on April 17, 1990, to consider not only the motions for a new trial but the applications to modify the sentence, filed by both appellant and his codefendant pursuant to Penal Code section 190.4(e). These motions were denied. (CT 1575.).

At a subsequent hearing on April 24, 1990, the trial judge formally imposed the death sentence as well as determinate sentences on the robbery, attempted rape and burglary counts as to both appellant and his codefendant. (CT 1591.)

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STATEMENT OF FACTS

I. GUILT PHASE

Ivon Pontbriant and Warren Gilliland, her longtime boyfriend, lived together in a house in Visalia, beginning in January 1988, shortly after Mr. Gilliland was released from jail. (RT 5100, RT 5194-5195.) On February 29, 1988, Mr. Gilliland, who was an alcoholic, had a "dispute" with Ms. Pontbriant. (RT 5219.) He telephoned his former wife and asked if he could come stay with her in Modesto. (RT 5354-5355.) In the early morning hours of March 1, 1988, Mr. Gilliland's son, Jerry, met his father at the Capri Motel in Visalia. They went to the house on North Jacob Street to collect some of Gilliland's belongings. Warren went into the house, and Jerry heard a woman screaming obscenities at his father. (RT 6727.) Jerry then took his father to Modesto. (RT 6731.)

Warren Gilliland first met Richard Letner, the codefendant in this case, at The Breakroom, a Visalia bar. Gilliland operated an appliance repair business out of the garage of the house on North Jacob Street. He hired Letner to help him lift and move the appliances. (RT 5110.) Letner began spending time at the house (RT 5111); Ms. Pontbriant also befriended Letner. (RT 5113.)

At about 11:30 a.m. on March 1, 1988, Pontbriant picked up her friend, Flourene Gentry, at her apartment. (RT 5516.) After doing some errands, they drove to the Fairway Market so that Ms. Gentry could cash her SSI check and buy some groceries. (RT 5516-5517.) She bought a twelve-pack of Schaefer beer as a thank you gift for Ms. Pontbriant. (RT 5518-5519.) Pontbriant drove Gentry back to her apartment at about 3:00 p.m. (RT 5520.)

That evening, Ivon telephoned Gentry three times. (RT 5521-5522 .) According to Gentry's trial testimony, the first call occurred between 6:00

and 7:00 p.m.; Ms. Pontbriant told Gentry that she was alone and was waiting for Warren Gilliland to come home. (RT 5522.) About an hour and a half later, at approximately 8:30 p.m., Ivon telephoned again, reporting that she just had a visit from a man who had bought a stove from Gilliland and wanted his money back. Because she hated this man, she had yelled at him to "get the hell out of here." (RT 5523-5524.)

The third call from Ms. Pontbriant occurred between 8:30 and 10:00. Ms. Gentry looked at her watch when the conversation was over, and it was 9:45 p.m. (RT 5528-5529.) Although Ivon told Gentry she was afraid to be alone, she declined Gentry's invitation to stay with Gentry because she feared that burglars would steal her furniture. Ms. Pontbriant said she was going to write a letter and then go to bed. (RT 5531.) While Gentry and Pontbriant were still on the telephone, Ivon said that two men had come to the door and that one of them reminded her of her son. Ms. Pontbriant sounded happy to see these visitors. (RT 5532-5533.) During each of the three telephone calls, Pontbriant mentioned that Gilliland had not come home yet. (RT 5542.)

During the third conversation, Ivon said "she was feeling no pain." Gentry did not believe, however, that Ivon meant she was drunk since she was drinking "only beer." (RT 5538-5539.)[8/] On cross-examination, Gentry denied that she told two police officers who were investigating Pontbriant's

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8. Detective Jay Frame of the Visalia Police Department testified about his contacts with Ms. Gentry. At trial Detective Frame refused to characterize Ms. Gentry as having been intoxicated at the time he interviewed her. His contemporaneous report of a March 11, 1988, interview of her, however, noted that her hands were shaking; her eyes were red and bloodshot; her speech was slurred; and she smelled of alcohol. At trial, he did concede that she had been drinking alcohol. (RT 6617, 6622-6623.)

murder that the three phone calls were made at 9:00 p.m., 11:00 p.m., and 1:00 a.m. (RT 5538.)[9/]

Edward Bourdette knew Warren Gilliland because he transported washers and dryers for Gilliland. (RT 5557-5558.) He had met codefendant Richard Letner through Warren Gilliland. (RT 5559-5560.) Bourdette was out of town during the weekend of February 27 and 28, 1988. When he returned on Sunday evening, he learned that Gilliland had been trying to reach him all weekend. (RT 5562-5563.) Because it was late, he did not try to telephone Gilliland until Monday, February 29, 1988. Ivon Pontbriant answered the phone and said that Gilliland was not there and accused Bourdette of helping Gilliland move out of their house. Bourdette told her that he had been out of town for the entire weekend. (RT 5563-5564.)

The next evening, March 1, Bourdette received about five telephone calls from Ms. Pontbriant and Richard Letner. Pontbriant continued to accuse Bourdette of helping Gilliland to move out, take her dog and steal Letner's toolbox. Letner also got on the phone and accused Bourdette of helping Gilliland steal Letner's tools. (RT 5568-5569.) Ms. Pontbriant and Letner also spoke on the telephone with Bourdette's girlfriend, Kathy Coronado. (RT 5595-5598.)

Appellant, Christopher Tobin, testified that he had been close friends with Richard Letner since their high school days in Napa. (RT 6890.) In February 1988, appellant was living in a Visalia apartment with Jeannette Mayberry and their infant daughter. (RT 6897.) However, the relationship between appellant and Ms. Mayberry was "stormy." (RT 6843.) As a result,

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9. Detective Frame initially interviewed Ms. Gentry on March 3, 1988. He testified that during that interview, Gentry maintained that Ivon Pontbriant's telephone calls to her on March 1 occurred at 9:00 p.m., 11:00 p.m. and 1:00 a.m. (RT 6617-6619.)

appellant sometimes spent the night at Letner's apartment a few blocks away. In September 1987, during one of these periods of estrangement from Mayberry, appellant and Letner had signed a lease on this apartment. At the end of November 1987, however, appellant moved back in with Jeannette Mayberry. (RT 6896-6897.) Because appellant and Jeannette had argued on Sunday and Monday, February 28 and 29, 1988, appellant was once again staying with Richard Letner on March 1. (RT 5410-5420.) Both appellant and Letner had recently been laid off from their jobs at the same company, and Letner was about to be evicted from his apartment. Since his breach with Jeannette Mayberry appeared to be permanent, appellant decided to leave California with Letner and travel to Iowa where Letner's grandparents lived in order to try to find work. (RT 6844-6845, 6896-6897, 6923.)

On the evening of March 1, 1988, appellant and codefendant Letner were at a Visalia bar when Letner received a telephone call from Ivon Pontbriant, inviting him to visit her. (RT 6847.) Before that evening, appellant had visited the house rented by Pontbriant and Gilliland three times; however, he had never before been inside the house. On his previous visits he had stayed in the garage with Richard Letner and Warren Gilliland. (RT 6850-6851.)

On March 1, when Letner and appellant knocked at the front door, Ivon Pontbriant appeared at the window and directed them to go around to the door at the back of the house. (RT 6849.) She was drinking Schaefer beer and appeared to be intoxicated and upset. Ms. Pontbriant complained that Gilliland had left her and taken her money and her dog. (RT 6851-6852.)

After the three of them had finished the Schaefer beer, appellant rode his bicycle to the Oval Liquor Store, where he bought a six-pack of

Heineken beer and a six-pack of Lowenbrau beer. (RT 6853-6854.) He returned to Ms. Pontbriant's house with the beer, which the three of them drank. After these six-packs were consumed, appellant again biked to the Oval Liquor Store and bought two more six-packs, one of Heineken and one of Lowenbrau.[10/]

When appellant returned, Letner and Pontbriant were sitting on the couch with their arms around each other. Appellant sat down and started to drink another bottle of beer; however, when Letner and Pontbriant started kissing, appellant decided to leave. By this point, Ms. Pontbriant appeared to be very intoxicated. (RT 6860.) On his way back to Letner's apartment, appellant stopped to buy a quart of beer. When he got back to the apartment, he drank about half of that bottle and fell asleep. (RT 6860.)

Some time later, Letner awakened appellant and told him that he had Ivon's car. He suggested appellant pack up whatever he wanted to store at her house while they were in Iowa. (RT 6879.) Appellant put his sword and shotgun into the trunk because he hoped to sell them. (RT 6863-6864.) When appellant got into Ms. Pontbriant's red Ford Fairmont, there was nothing on the floorboard on the front passenger's side. (RT 6867.)

Shortly before or after midnight on March 2, 1988, Officer Allyn Wightman of the Visalia Police Department stopped Letner and appellant who were driving Pontbriant's car. Richard Letner was driving, and appellant was in the front passenger seat. (RT 6138-6140.)

As Officer Wightman approached the driver's side of the vehicle, he noticed a six-pack container of beer, with four unopened bottles, on the floor behind the passenger side front seat. (RT 6150-6151.) Officer

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10. Michael Long, the manager of Frank's Liquor and Superette, recalled one of the defendants making purchases of beer and wine at *his* store one evening early in March 1988. (RT 6099-6119.)

Wightman asked Letner to get out of the car and present his driver's license, which Letner didn't have. When asked whether the car belonged to him, Letner stated that it belonged to his friend, Ivon Pontbriant.

Although Letner could not find the vehicle registration, he did locate an insurance card with Pontbriant's name on it. (CT 6152.) When asked, Letner said that Ms. Pontbriant lived on North Jacob Street, although he didn't know the exact address. (RT 6154.) Officer Wightman did a license check on Ms. Pontbriant but was unable to find a current address for her. (RT 6155-6156.)

During the course of this stop, another Visalia police officer, Jeff McIntosh, arrived at the scene. (RT 6156-6157.) Officer Wightman then did a patdown search of both codefendant Letner and appellant. He did not find any weapon on appellant, but found a Buck knife, which he temporarily confiscated, in Letner's pants pocket. (RT 6157-6158.) When appellant got out of the car, Officer Wightman noticed an open beer bottle under the seat on the passenger's side. He took the bottle out of the car, emptied its contents on the ground and threw it over the fence on the edge of the highway. (RT 6163-6164.) Officer Wightman noticed an odor coming from appellant and observed him to be intoxicated, although not "falling down drunk." (RT 6159, 6171.) He did not notice any blood on the clothing of either Letner or appellant, or on the knife or in the car. (RT 6158.)

Officer Wightman then searched other parts of the car, including the trunk, for open containers of alcohol. (RT 6168.) The trunk was very full, but he did not move any of the items in it because he did not see any open containers. His search of the trunk lasted only a few seconds. (RT 6169-6170.) Wightman also conducted a sobriety check of Letner but did not find him to be legally intoxicated. (RT 6170-6171.) He cited Letner for not

having a driver's license. The citation was dated March 2, 1988, at 0010 hours, or ten (10) minutes after midnight. (RT 6173.) Wightman ordered Letner and appellant not to drive again that night.

Appellant testified that after Letner locked the car, Letner and appellant started walking down Highway 198. (RT 6174.) They went to the Marco Polo bar and drank more beer. Appellant suggested that Letner call Ivon and let her know where her car was parked. Letner went off to make the phone call. When he returned, Letner reported that no one answered. (RT 6871-6872.)

Appellant and Letner walked over to a house on Crenshaw Avenue, where appellant and Jeannette Mayberry had once lived,[11/] because they believed that Mike Kinnett still lived there. The house was vacant, but they went inside through an unlocked kitchen door and slept on the floor for a few hours. (RT 6872-6873.) When they awoke, the sun was coming up. Deciding to take a bus to Iowa, they wanted to see if they could get a ride to the bus depot in Goshen from John Novotny, a former co-worker. They walked over to his house and knocked on the door. His wife said that John wasn't there, and she could not drive them to Goshen. (RT 6875-6876.)

Appellant testified that he and Letner then hitched a ride to Goshen where appellant bought two bus tickets to Sacramento. (RT 6876.) From

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11. The prosecution called two witnesses, Darlene Jolly and Michael Kinnett, to establish that they had lived with appellant and his girlfriend, Jeannette Mayberry, in a house located at 248 South Crenshaw Street in Visalia for several months in 1986 and 1987. (RT 6187-6188.) Because the house was too small for four people, Ms. Mayberry and appellant moved out after a few months. In March or April of 1987, Ms. Jolly and Mr. Kinnett also moved out. (RT 6189.) According to Ms. Jolly, some time later, during a chance encounter with Ms. Mayberry and appellant on the street in Visalia, she told Ms. Mayberry that she and Kinnett had moved to Tulare. (RT 6190.) Ms. Jolly did not know if appellant heard this part of her conversation with Ms. Mayberry. (RT 6197.)

Sacramento, they took another bus to Reno, Nevada. (RT 6877.) Thereafter, they hitchhiked to Council Bluffs, Iowa, where Letner's grandparents lived. (RT 6878.) When they arrived, the grandparents did not seem happy to see them. Letner's grandfather rented a room for them at the Iowana Motel for a week. Appellant began working for Earl Bothwell and Fred Hare, painting houses and doing some carpentry work. (RT 6880.)

A. The Crime Scene Investigation

On March 2, 1988, at about 7:00 p.m., Jack Cantrell discovered the body of his fifty-nine year old cousin, Ivon Pontbriant, on the living room floor of her house at 804 North Jacob Street in Visalia, California. (RT 4834.) She had sustained several stab wounds (RT 4885-4888), and she died as a result of a large wound to the back of her neck which severed her spinal column. (RT 4907-4908.)[12/] At the time of her death, which apparently occurred in the evening late on March 1 (RT 5038), Ms. Pontbriant had a blood alcohol level of .29 percent. (RT 4938.)

After the victim's cousin saw Ms. Pontbriant's body inside her house, the police were summoned. (RT 4836.) With the permission of Ms. Pontbriant's father, the police entered the house through the back door, which was unlocked. (RT 4841-4842.)

At about 9:15 p.m., John Rains, an identification technician with the Visalia Police Department, arrived at the scene to collect evidence. (RT 5613.) He observed the victim lying face down between a coffee table and a couch in the living room. She was nude except for a brassiere, which was around her waist, and white socks on her feet. A telephone cord was wrapped around her wrists and looped around her neck. (RT 5620.)

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12. The pathologist testified that Ms. Pontbriant died either as a result of the severing of her spinal cord or by exsanguination (bleeding to death). (RT 4907-4908.)

A Heineken brand beer bottle lay between her legs, close to but not touching her genital area. (RT 5622.) The bottle was securely placed and could be removed only after rolling over the body. (RT 5623.)

The police also found a pair of slippers, a pair of women's boots, a pile of clothes, including a pair of women's panties, blue jeans, a brown and white striped sweater, and a blanket near the body. Feces were on the panties and the blue jeans.[13] (RT 5658, 5661-5662.) Beginning at the neck, the sweater was torn or cut part way down the front. (RT 5662.) Other evidence collected included an ashtray containing fourteen cigarette butts and a beer cap; a partially empty Schaefer beer can; an unsmoked Marlboro filter cigarette; three matchbooks and some cellophane and foil. (RT 5649, 5651-5653.)

John E. Hamman, another prosecution criminalist, testified that a Buck knife belonging to codefendant Letner[14] could have caused the slash marks found in the coffee table and on a photograph found in Ms. Pontbriant's living room. In Hamman's view, the oriental ornamental sword owned by appellant (People's Exhibit No. 124) did not make the cut in the coffee table. (RT 6056.)[15]

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13. Regarding the feces found on the victim's body and clothes, the prosecution's pathologist stated that a defecation reaction can occur prior to death as a result of a beating, choking or stabbing. (RT 4935.)

14. The disassembled Buck knife was marked as People's Exhibit No. 117. Hamman also had examined this knife in its assembled state. (RT 6048.)

15. Hamman also examined the blade of a knife (People's Exhibit No. 194) which Warren Gilliland gave to the police about a month after the murder. Initially, Hamman testified that this knife could not have caused the cut in the coffee table because the top edge of the blade was flat and thus inconsistent with the edge of the cut. (RT 6052, 6066.) However, on

(continued...)

Several portable items of value were found in the living room, including a white purse, which contained some cash, and a blue checkbook with a piece of paper enclosed, showing the PIN identification number for the victim's automated teller machine card. (RT 5659, 5744-5745.) Rains also found a bank, shaped like a small slot machine, with money in it (RT 5732); a television and VCR (RT 5666); and some jewelry of the victim. (RT 5732.) A brown purse was found in the dining room area. (RT 5796.)

Richard Logan, the detective who initially investigated the crime scene, made an inventory of the two purses found at the crime scene. Inside the white purse, he found a checkbook and $18.29 in cash. (RT 5785, 5787.) Detective Logan also examined the contents of the kitchen trash can; it did not contain any Heineken or Lowenbrau beer bottles or cartons. (RT 6285-6286.) In addition to the Heineken bottle found between the victim's legs, Logan found another one on the floor between her body and the couch. (RT 6286.)

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15. (...continued)
cross-examination, Hamman conceded that this knife was more consistent with the depth of the cut than was the Buck knife. (RT 6061.) He also acknowledged that the blade of Letner's Buck knife was quite worn; therefore, in order for it to make this cut, it would have had to have been plunged into the table with considerable force. (RT 6073.)

B. The Autopsy[16/]

Pathologist Gary Walter[17/] conducted the autopsy of Ms. Pontbriant on March 3, 1988, at about 3:45 p.m. (RT 4871-4872.) Dr. Walter noted a large abrasion on her left cheek and left eyebrow, probably caused by some kind of blunt force. (RT 4876.) There was also redness on the right side of the victim's face, but these abrasions were much less serious. (RT 4880-4881.) In Dr. Walter's opinion, all of the trauma to the victim's face occurred while she was alive. (RT 4880.)

Dr. Walter also observed a single stab wound to the right side of Ms. Pontbriant's neck as well as two more wounds, each about one inch in length, on the left side. (RT 4882, 4889.) The wound on the right side of the neck was only about one-half inch long and was "fairly superficial" in depth. (RT 4885-4886.) Below this wound were three very superficial lacerations. (RT 4888.)

These three neck wounds were quite symmetrical, being at similar points away from the midline of the head. (RT 4892.) Although the wounds were near the carotid artery, none of them actually hit it. (RT 4893.) Dr. Walter opined that, based on the nature of these wounds, they were caused by a sharp instrument, probably pointed, which had been inserted at a right angle, straight into the neck. He did not have any opinion, however, as to the position of the victim when she received these wounds. (RT 4890, 4896.)

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16. The evidence concerning blood, hair and semen found at the crime scene are described in detail in the Argument IV, *infra,* concerning the insufficiency of the evidence to sustain a conviction of attempted rape and the attempted rape special circumstance.

17. At the time of the autopsy and of the trial in this case, Dr. Walter was not board certified as a pathologist. (RT 4942.)

There was a very large wound, approximately four and a half inches in length, on the back of the victim's neck. (RT 4897-4898.) This wound caused Ms. Pontbriant's death, either by exsanguination (bleeding to death) or by causing severance of the spinal cord. (RT 4907-4908.) If severing of the spinal cord caused death, it would have been almost instantaneous; death by exsanguination would have taken several minutes. (RT 4909.) In Dr. Walter's view, the ligature, a telephone cord tied around the victim's neck and both wrists, did not cause Ms. Pontbriant's death. (RT 4921.)

The large wound to the back of the neck was irregular in appearance and depth, suggesting that it resulted from a cutting or sawing action and was produced by more than one application of whatever cutting instrument had been used. (RT 4902.) Although the prosecutor pressed Dr. Walter to identify the type of weapon used to inflict this wound, he could not. He did state, however, that the ornamental sword (People's Exhibit No. 124) owned by appellant could not have caused any of the stab wounds found on the victim's body. (RT 4919.)

Dr. Walter agreed that a Buck knife (People's Exhibit No. 117) owned by codefendant Richard Letner could have caused these wounds. Given the size of the wound at the back of the victim's neck, however, he believed it was more likely that a longer knife had been used. (RT 4905-4906, 5040-5041.) Dr. Walter later said that, in fact, "any size knife" could have been used. (RT 5043.)

While the wound to the back of the victim's neck appeared to be the final wound which caused her death, Dr. Walter could not determine the order in which the other wounds had been inflicted, or if they were inflicted by more than one person. (RT 4932.)

Dr. Walter did not find any trauma to the victim's vagina or anus. Using a "rape kit," he swabbed these areas and created laboratory slides

with the material collected. (RT 4937.) The victim had a blood alcohol level of .29 percent, but there were no drugs in her system. (RT 4938, 4940, 5019, 5021.) Walter testified that the condition of the body was "consistent" with death having occurred in the late evening hours of March 1, 1988. (RT 5038.)

C. **Arrests In Iowa**

On March 29, 1988, at about 2:00 a.m., Council Bluffs police officers responded to a call from the Iowana Motel about a disturbance. (RT 6471-6472.) They found six people, four men and two women, in cabin number 6; there was a shotgun lying on the floor near the doorway. (RT 6473.) The police searched the four men (appellant, Letner, Bothwell and Hare); they found a Buck knife in Letner's pocket but nothing on appellant. (RT 6477-6478.)

After the police discovered outstanding murder warrants for appellant and Letner in California, they took them into custody. Bothwell and Hare also went to the police station to make statements. (RT 6481, 6483.)

On March 30, 1988, Investigator John Johnson of the Tulare County District Attorney's Office and Detective Richard Logan of the Visalia Police Department flew to Council Bluffs and met with the police. After obtaining a search warrant for the room shared by appellant and Letner at the Iowana Motel, Johnson and Logan seized some clothing and a photograph of appellant and Letner. (RT 6526-6527.) The Council Bluffs police also gave Johnson and Logan the Buck knife which they had taken from Letner at the time of his arrest. (RT 6527.)

Both Letner and appellant waived their rights to extradition hearings. Johnson, Logan and appellant flew back to California. Airline regulations prohibited transporting two prisoners on the same plane. By coin flip, it

was decided that Letner would be taken to California by van. On April 10, 1988, however, Letner escaped from the van in El Paso, Texas. (RT 6528.) He was not recaptured until he attempted to cross into Mexico at Las Cruces, New Mexico, on April 22, 1988. (RT 6516.)

D. The Victim's Blood Alcohol Level

Bill Lynn Posey, a toxicologist retained by appellant, testified about the significance of the .29 percent blood/alcohol level found in Ms. Pontbriant's body at the time of the autopsy. (RT 6759-6761.) The parties stipulated that at the time of her death, Ms. Pontbriant weighed between 140 and 150 pounds. (RT 6760.) Posey noted that a .29 percent blood/alcohol level is "obviously a rather high level." (RT 6763.) In order for a person weighing 150 pounds to have this high a blood/alcohol level, he or she would have to drink about eleven to twelve 12-ounce cans of beer in one sitting. (RT 6764.)

Although the burn-off rate of alcohol differs from person to person, the general range is between .011 and .025 per hour. (RT 6765.) Responding to a hypothetical question, Posey said that given a six (6) hour drinking period and a burn-off rate of .02, a person would have to drink about sixteen (16) cans of beer in order to have a .29 percent blood/alcohol level. (RT 6766, 6768.) If the drinking period were extended to eight (8) hours, the person would have to drink about eighteen (18) cans of beer. If the period were shortened to four (4) hours, the person would have to drink fourteen (14) or fifteen (15) cans of beer. (RT 6768.) On cross-examination, Posey agreed that these were estimates. He could not state with certainty how much beer or other alcoholic beverages Ivon Pontbriant consumed in the hours before her death. (RT 6776.)

E. The Testimony of Earl Bothwell

Earl Bothwell testified about certain contacts he allegedly had with appellant and Richard Letner in Council Bluffs, Iowa, during March 1988. At the time of his testimony, Bothwell was incarcerated at an Illinois prison for multiple counts of insurance fraud. (RT 6416-6417, 6433.)

In March 1988, Bothwell and his friend, Fred Hare, were living at the Iowana Motel, where they met appellant and Richard Letner. (RT 6418-6421) Bothwell and Hare were self-employed in the home improvement business, and they hired appellant to do some painting. (RT 6418- 6420.) Appellant worked for them about six to eight days during a two-week period. (RT 6421.)

According to Bothwell, on the morning of March 28, 1989, Letner told him about an incident involving a woman in California. Letner said he took a small amount of money – $12 or $14 – and got a pretty nice car from the woman. Allegedly, Letner also said he had been stopped by the police while driving the car, but the police had let him go. (RT 6421-6422.)[18] During this conversation, appellant allegedly came into the room and Bothwell asked him if he were wanted for murder in California. Appellant supposedly replied: "Yeah, I killed the old bitch . . . . She was hollering and screaming." (RT 6323.) That night, in the early morning hours of March 29, 1988, Tobin and Letner allegedly started a fight with Bothwell in his motel room. Someone called the police, who arrested Letner and appellant. (RT 6426.)

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18. Outside the presence of the jury, Bothwell testified that Letner had said both appellant and he had robbed the woman and taken her car. The trial judge ordered Bothwell not to testify in front of the jury that Letner implicated appellant in any crime in his statements to Bothwell. (RT 6413.)

Bothwell admitted to telling several inconsistencies in his story. First, he acknowledged that although he gave a statement to the police on March 29, 1988, he never mentioned anything about having a conversation with Letner or appellant about a robbery or murder in California. At trial, Bothwell claimed that he did not tell the police then because he was afraid they "would get me for not coming forward sooner than that." (RT 6427, 6439-6440.) Bothwell also claimed he subsequently told a Council Bluffs police officer about these so-called "confessions" by appellant and Letner when the officer came to warn him that Letner had escaped custody. Because Bothwell could not provide the name of this officer, this part of his story was never corroborated. (RT 6427, 6454.)

Bothwell also testified about a meeting he had, while he was an inmate in an Illinois prison, with D.A. Investigator John Johnson in September 1989. (RT 6430.) He denied that he received (1) any benefit as a result of his cooperation with the prosecution in this case, or (2) any information from Johnson about the case. (RT 6430.) Johnson's interview of Bothwell had not been tape-recorded. Bothwell claimed this was because Johnson had not been allowed to bring a recorder into the prison. He could not explain why the defense investigators were allowed to tape their interviews of him at the same prison. Therefore, Johnson wrote down what Bothwell told him about the "confessions" of appellant and Letner, and Bothwell then read each written statement. (RT 6431-6432.) He did not remember how many individual written statements there were but he did remember they were in sections, each of which he initialed. (RT 6450.)

Bothwell denied that he subsequently said anything to defense investigators Webb or Dunham which contradicted the written statements he gave to D.A. Investigator Johnson. (RT 6442, 6448.) He also claimed that the defense investigators had tried to "confuse" him. (RT 6443.) He

said he had been advised by a law student not to give multiple statements to different people because "they'll twist you up." (RT 6448.)

Bothwell also admitted to having used five aliases but claimed that the reason was to evade support orders from an ex-wife. (RT 6438.) He acknowledged that he had been convicted of felonies in both Illinois and Iowa in the year prior to his testimony. (RT 8433.) Initially, Bothwell denied that his situation had improved as a result of his cooperation with D.A. Investigator Johnson. He immediately contradicted himself, however, by stating that he was on "more-minimum status" at the time of his appearance in this case than he had been previously. (RT 6434.)

In rebuttal, James Dunham, appellant's investigator, testified that in October 1989, he interviewed Earl Bothwell while Bothwell was an inmate at Illinois State Prison in Lincoln, Illinois. (RT 7122.) Dunham described the difficulties he had encountered trying to locate Bothwell during the summer of 1988 before he was incarcerated. (RT 7123.) Bothwell readily admitted to Dunham that Bothwell's daughter had told him that Dunham was looking for him, but he purposefully had evaded Dunham. (RT 7124-7125.)

Officials at the Illinois State Prison told Dunham that he could tape-record his meeting with Bothwell as long as he used the prison's tape-recording machine.[19/] But citing the advice of two law students, Bothwell refused to allow the taping. Dunham initially showed Bothwell copies of the notes made by Detective Johnson regarding his interview of Bothwell and the report by private investigator Cliff Webb of his interview of Bothwell. After reading both documents, Bothwell claimed that they were

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19. This conflicted with the testimony of D.A. Investigator John Johnson, who claimed that he did not tape-record his interview of Bothwell because the prison would not allow it. (RT 6543-6544.)

both correct even though they contained contradictions. (RT 7127-7128.) Indeed, the Webb report states that Bothwell "recanted his statement to John Johnson." (RT 7128.)

Even after Dunham went through the statements line by line, pointing out the discrepancies, Bothwell continued to claim that he had told the truth to both investigators. (RT 7129.)[20] Bothwell told Dunham that Johnson had thoroughly briefed him about the facts of the murder prior to taking Bothwell's statement. (RT 7128.) Regarding the accuracy of Johnson's notes about their conversation, Bothwell claimed that he did not have his glasses on at the time and thus could not read the statement Johnson had written. (RT 7130.)

F. The Testimony of Gregory Garrard

Gregory Garrard testified as a prosecution witness. (RT 6337-6350.) Garrard was a former boyfriend of Darlene Jolly and knew appellant casually from the time when Jolly shared a house with Jeannette Mayberry. Sometime after March 1988, both Garrard and appellant were in the Tulare County Jail. While there, they had a brief discussion about the Pontbriant case. When Garrard questioned appellant about the case against him, appellant mentioned either a bloody rag or T-shirt found in a car. (RT 6338.) Garrard denied telling D.A. Investigator Johnson that it was the victim's car or that appellant was very concerned about this item of evidence. (RT 6340.)

On cross-examination, with his memory refreshed by the transcript of a tape-recorded conversation he had had with defense investigator

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20. After Dunham testified, the prosecutor objected to his testimony about the report by Cliff Webb because the defense had not provided her with a copy of this report. Subsequently, the trial judge instructed the jury to disregard Dunham's testimony concerning his view that Bothwell's statements were inconsistent with statements he gave to Webb. (RT 7140.)

Dunham, Garrard confirmed that he told Dunham that during his conversation with appellant in the county jail, appellant denied he had anything to do with the killing of Ivon Pontbriant. (RT 6344.) Garrard also described his numerous felony convictions. (RT 6346-6348.)

D.A. Investigator Johnson testified about his questioning of Garrard at the California State Prison at Tehachapi. According to Johnson, Garrard told him that he had discussed the case with appellant, who had expressed concern about a bloody rag found in the victim's car. (RT 6536.) Allegedly, Garrard also said that appellant never told him that he was innocent. (RT 6537.) Johnson asserted that he did not make any promises to Garrard for favorable treatment if he testified against appellant, nor did he give Garrard any information about the murder. (RT 6538-6539.)

G. Appellant's Testimony [21/]

Appellant denied having anything to do with the death of Ivon Pontbriant; doing anything to hurt her; taking anything from her house or ever planning to take anything from her. He also denied having told Earl Bothwell anything about killing anyone. (RT 6882.) Appellant was painting a house at Carter Lake (near Council Bluffs) on the morning that Bothwell claimed appellant had made a statement to him about the murder. (RT 6883.) In fact, the fight between appellant and Bothwell occurred in part because of a dispute between them about the amount of money Bothwell owed appellant for this painting job. (RT 6883.)

On cross-examination, appellant testified that when he was in Ms. Pontbriant's house he might have seen Ms. Pontbriant's purses, but he did not take note of them. (RT 6993-6994.) After being shown the autopsy

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21. Most of appellant's testimony focused on the events of February 29 and March 1, 1988, which have already been described previously in this statement of the facts.

pictures of Ms. Pontbriant, appellant stated that not only did he have nothing to do with her killing, but codefendant Letner had never told him that Letner was involved in the killing. (RT 7002.) Appellant also denied "wiping clean" any surfaces in Ms. Pontbriant's house or seeing Letner do so. (RT 7005-7006.) Appellant also explained that he took his ornamental sword and shotgun from Jeannette Mayberry's apartment after their argument because, in the past when she was mad at him, she had sold or given away his things. (RT 6945-6946.) He thought that the sword and shotgun would be "the first to go, because they'd be the easiest to sell." (RT 6946.)

H. Other Defense Witnesses

Appellant called Mercedes Brasel as a witness to rebut Earl Bothwell's testimony that on the morning of March 28, 1988, appellant was at the Iowana Motel confessing that he murdered Ivon Pontbriant. Ms. Brasel, an elderly woman who lived in Carter Lake, Iowa, testified that appellant, as an employee of Earl Bothwell, spent all day on March 28 painting her house in Carter Lake. (RT 7438-7440.) Bothwell brought appellant to her house in the morning and picked him up at the end of the day. This was the last day of several days that appellant had worked painting her house. (RT 7444.) Ms. Brasel was certain the date was March 28, 1988, because the cancelled payment check to Bothwell had that date on it. (RT 7440-7442; Defense Exhibit P.)

Appellant's mother, Jackie Tobin, testified about a telephone conversation with appellant on or about February 8, 1988. At that time, appellant told her that he was thinking about going to Iowa with Letner. (RT6779.)

Burt Arnold, a friend of both appellant and Letner, testified about a conversation he had with them about three weeks before Ivon Pontbriant's

death. They told him that they were planning to leave California, either to go to Oklahoma to see Letner's relatives or do some fishing. (RT 6630-6632.) On cross-examination, Arnold conceded that he hadn't told Detective Logan about this conversation when Logan contacted him on March 9, 1988, trying to locate appellant and Letner. (RT 6637-6638.) Arnold explained that he did not tell Logan because he "just plain forgot about" the earlier conversation. (RT 6639.)

II. PENALTY PHASE

It was undisputed that appellant did not have any convictions for either misdemeanors or felonies before his arrest in the instant case. Thus, at the penalty phase of the trial, the prosecution only presented evidence of uncharged alleged misconduct as aggravating evidence supporting the rendering of a death judgment. In addition, because appellant and Letner were tried together, much of Letner's case at penalty included evidence which portrayed appellant in an extremely poor light, including bad acts, threatening behavior and guilt of the capital crime.

A. The Testimony of Julie Bryant and David Bendowski

Several of the incidents offered in aggravation involved encounters between adolescent boys. For example, Julie Bryant and her brother, David Bendowski, testified about several such alleged incidents involving David, appellant and Richard Letner.[22/]

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22. This summary of the prosecution's case at the penalty phase does not include the aggravating evidence which was introduced only against codefendant Letner, including the testimony of Stephen Frame (about an assault and battery); Sheila White (about an uncharged rape); Alexander McAdams and Officer Alfred DelTorchio (about an assault); Officer Andrew Emberton (about a battery); and Mike Mohrhauser (about an assault and robbery).

Julie Bryant described an incident which allegedly occurred in January 1979, when appellant was seventeen years old. She claimed she was standing in the driveway of her parents' house in Napa, when Letner and appellant drove up and asked to see her brother, David Bendowski. When she said that David was not home, appellant allegedly threatened to "work her over" if she didn't go into the house and make sure David was not there. (RT 7944.) Bryant claimed that there was a subsequent incident where Letner and appellant appeared at the door of her parents' home and entered without being invited. She alleged that appellant kicked her brother David in the face. (RT 7747-7750.) Years later, Bryant learned that the dispute between appellant and David involved a girlfriend of appellant. (RT 7952.)

David Bendowski testified that he had known appellant since elementary school and codefendant Letner since high school. Bendowski gave his version of the second incident described by his sister in her testimony. Contrary to his sister's testimony, Bendowski claimed that this incident occurred in June 1978.[23/] According to him, appellant entered Bendowski's house and karate-kicked him. (RT 7961-7963.) Appellant was angry because Bendowski was dating appellant's former girlfriend. (RT 7960.) Several months later, according to Bendowski, Letner and appellant again appeared at his parents' house and insisted that he get into their car and go for a drive. (RT 7964-7965.) Appellant seemed to be upset about three dates that Bendowski had with appellant's former girlfriend. As Bendowski recalled events, it was Letner who brought up the subject of money, suggesting that Bendowski should pay appellant for these dates. (RT 7965-7967.) According to Bendowski, both Letner and appellant

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23. Appellant was born on November 8, 1961; therefore, in June 1978, he was sixteen years old. (RT 9177.)

threatened to beat him up and hang him from a tree if he did not give them some money. (RT 7967.) Ultimately, they did not hit him but left him stranded in the country, about 15 miles from Napa. (RT 7969-7970.) He never told his parents or the police about this incident. (RT 7971.) Bendowski also testified about a third incident which allegedly occurred on January 20, 1979. He was walking home when he was stopped by Letner and appellant. Because they "threatened" him, he got into their car. Later, they dropped him off near his house. (RT 7977-7978.)

B. The Testimony of Kenny Warren

Kenny Warren, who knew both appellant and Richard Letner when they all attended high school in Napa, testified about a fight he had with appellant and another young man, Robbie Nance, on May 29, 1981. When Nance and appellant encountered Warren in a Grand Auto Parts store, they asked him to come outside to talk and then assaulted him. A few weeks earlier, Warren, along with two carloads of other young men, had fired guns into Letner's house. There had been an "ongoing war" between this group and appellant and Letner. Warren claimed that he wasn't sure who did the shooting. (RT 8080.) Appellant supposedly told Warren that the assault at the auto parts store was "payback" for this shooting. (RT 8067.)

On cross-examination, Warren agreed that he was in a car outside Letner's house when some shots were fired, although he claimed that he did not do any shooting. (RT 8079-8081.)

C. Evidence Regarding A Dispute with "Healer the Dealer"

Willie Lee Healer testified about a confrontation he had with Richard Letner and appellant in Napa on November 29, 1986. (RT 8293.) The dispute resulted from Healer's failure to complete repair work on a car owned by appellant's mother, Jackie Tobin. The prosecutor acknowledged that Healer was currently working with the Napa Police and District

Attorney as an informant. (RT 8255-8256, 8260.) In 1989, Healer pled guilty to five charges of selling cocaine and marijuana, and his work as a police informant was the result of a plea agreement involving these charges. (RT 8345-8346.) Healer conceded that his nickname was "Healer the Dealer." (RT 8353.)

In November 1986, Healer owned a body shop and repaired heavily damaged cars. He knew appellant and Letner from high school. He agreed to repair the car of Mrs. Tobin, appellant's mother, and received $850 from Mrs. Tobin's insurance company to do the work. (RT 8291-8293.) After he did the first series of repairs on the car, Mrs. Tobin needed her car back so she could get to work. According to Healer, Mrs. Tobin was supposed to bring the car back in to be repainted. Without notifying her, he moved his business to another location. (RT 8291-8292.)

On November 29, 1986, Healer was sitting in a pickup truck in a gas station when Letner and appellant appeared; the latter said that he wanted to talk about the work Healer was supposed to have done on Mrs. Tobin's car. (RT 8295-8298.) According to Healer, appellant and Letner were very angry about his "ripping off" Mrs. Tobin, and they hit him. (RT 8369.) Supposedly, Letner also demanded money from Healer.

Healer conceded on cross-examination that he did not seek medical care for his injuries until two (2) days after the incident. (RT 8341.)

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D. Codefendant Letner's Case in Mitigation [24/]

1. The Testimony of John Letner

John Letner (hereinafter "John"), the younger brother of codefendant Richard Letner, testified on behalf of his brother at the penalty phase. He offered a different account of the second incident involving prosecution witness David Bendowski. According to John, Bendowski willingly got into the car with appellant, Letner and John when they drove up to Bendowski's house with a six-pack of beer. (RT 8486.) The four of them drove around, drinking and smoking marijuana. (RT 8487.) At some point, there was a discussion between appellant and Bendowski about some money that Bendowski owed from a drug deal and also about a girl. (RT 8488.) According to John, at the request of Bendowski, they left him at a phone booth on Soda Canyon Road. (RT 8489.)

John also offered his perceptions of the nature of the friendship between his brother and appellant. According to John, the two generally were inseparable whenever they lived in the same town (RT 8492), although there were periods of estrangement after they had argued. (RT 8519.) He also testified that, in 1978 when he was in the eleventh grade, he advised his brother that he and appellant should not spend so much time together because they were always getting into trouble. (RT 8493.) Allegedly, during a telephone conversation which took place in December 1987, Richard told John that he wanted to get away from appellant because he "was starting to act crazy." (RT 8494.)

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24. This summary of Letner's mitigation case does not include the testimony of (1) the clinical psychologist, offered to support a claim that Letner has borderline personality disorder, or (2) that portion of John Letner's testimony which focused on the troubled family and psychological history of Richard Letner.

2. The Testimony of Codefendant Richard Letner

Letner took the stand at his joint penalty phase trial with appellant. The first part of Letner's direct examination focused on refuting the testimony of the witnesses who testified against him during the prosecutor's penalty phase case-in-chief.[25/]

Letner claimed that he did not testify during the guilt phase of the trial because he didn't want to have a "rat jacket" when he went to prison. (RT 8644.) Although he was still afraid of having a "rat jacket," he stated: "I mean if I'm gonna die one way or the other, I want everybody to know the truth." (RT 8645.) Letner claimed that he did not murder Ivon Pontbriant, but that he was present when she was murdered. (RT 8645.)

Letner's account of the events occurring on the night of her murder was as follows. As it was getting dark, he and appellant arrived at Ms. Pontbriant's house. She was on the phone, but when she told them to come in, she hung up. She appeared intoxicated and very upset because Warren Gilliland had left her with all the bills, stolen her dog and stolen Letner's tools. (RT 8646.)

Ms. Pontbriant and Letner had several telephone conversations with Ed Bourdette. She believed that Bourdette had helped Gilliland move out. Letner denied threatening Bourdette and denied that Ivon Pontbriant said anything on the phone about being hurt if she didn't get Letner's tools back. (RT 8650.)

When they ran out of beer, Ms. Pontbriant gave appellant $12 and asked him to go to the store and buy some beer (Schaefer Lite brand) and

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25. Letner's testimony about the incidents described by David Bendowski (and his sister, Julie Bryant) put his own conduct during those incidents in the most favorable light, and at points painted appellant's conduct in a less favorable light.

two packs of cigarettes. (RT 8652.) While appellant was on this errand, Ivon and Letner talked, kissed and hugged. (RT 8653.) After appellant returned, the three of them continued to drink beer, and Letner "comforted" Ms. Pontbriant while they looked through a photo album. (RT 8654.) After they consumed the twelve-pack of Schaefer Lite, appellant gave Letner $10 to go buy some more beer. (RT 8655.) When Letner returned about fifteen (15) minutes later, at Ivon's request, he asked appellant to go outside for awhile. (RT 8658.) Taking five beers with him, appellant went out in the front yard. (RT 8659.)

According to Letner, Ms. Pontbriant was like a mother to him, although they had an ongoing sexual relationship. While appellant was outside, Letner and she took off their clothes and engaged in various sexual acts (but not intercourse) on the living room couch. (RT 8659-8660.) They decided that Letner was going to spend the night and were putting their clothes back on when appellant came back into the house. (RT 8660.) Ms. Pontbriant had on all of her clothes except her sweater; she lost her temper and started yelling at appellant. (RT 8661.)

When appellant asked Letner about whether he had arranged to use Ms. Pontbriant's car, she slapped Letner in the face. He slapped her back, and she fell back onto the couch. (RT 8661.) After Letner left the room to go to the bathroom, he heard Ms. Pontbriant threatening to call the police. (RT 8663.) When he came back into the living room, he saw appellant kick Ms. Pontbriant in the arm. Appellant had Letner's knife in his hand. Letner surmised that the knife had fallen out of his pocket earlier when he took his pants off. (RT 8665-8666.)

Letner further claimed that, as he watched in shock, appellant cut off Ms. Pontbriant's sweater and pulled down her pants. (RT 8667-8668.) She had defecated in her pants, and she started laughing at appellant. He

allegedly "freaked out" and grabbed her by the hair. (RT 8669.) Because appellant supposedly had the knife, Letner stood by and did nothing. (RT 8669.) Letner claimed that once appellant had Ms. Pontbriant down on the floor, he tied her wrists together with a telephone cord and then looped it around her neck. (RT 8670.) When appellant supposedly tightened the cord around Ms. Pontbriant's neck, Letner jumped on top of appellant. As they wrestled, appellant allegedly bit the top of Letner's head, and Letner bit appellant's nose, causing it to bleed. (RT 8671.)

At some point during this scuffle, Letner grabbed his Buck knife, which was now stuck in the coffee table. (RT 8672.) Appellant allegedly disappeared into the kitchen and returned with a butcher knife, with which he threatened Letner. (RT 8672.) Letner claimed that appellant then stabbed Ms. Pontbriant in the back of the neck three times while Letner watched. (RT 8673.)

According to Letner, after being threatened again, he helped appellant wipe down areas where their fingerprints might be. (RT 8675.) Appellant allegedly then went through Ms. Pontbriant's purse and took out the car keys. (RT 8676.) The original plan was that appellant would drive her car back to the apartment on Murray Street so that they could get their things; however, appellant had trouble getting the car started. Letner drove the car back to their apartment while appellant rode the bicycle, allegedly getting rid of the knife and other materials from the crime scene in a dumpster on the ride home. (RT 8678.)

Letner also gave his version of what occurred when they were stopped in Ms. Pontbriant's car by Officer Wightman. Letner told the police officer that he and appellant had gotten into a fight at Ms. Pontbriant's house, and that he was driving appellant to his girlfriend's house on Mooney Street. (RT 8680.) Letner claimed that Officer Wightman

examined his Buck knife for blood under the black light in his patrol car. (RT 8681.)

3. Cross-examination of Letner by the Prosecutor

A large portion of the prosecutor's cross-examination of Letner focused on letters which Letner wrote to (and under the direction of) Danny Payne, another inmate in the Tulare County Jail. A description of that testimony appears in Argument XXXV., *infra*, which discusses the impropriety of the cross-examination.

E. Appellant's Case in Mitigation

1. The Testimony of Appellant's Family Members

Appellant's father, Michael Tobin, Sr., testified that appellant was about fourteen years old when his parents divorced. (RT 9175 .) Appellant lived primarily with his mother after that, except for a year when he lived with his father. Mr. Tobin stated that he loved his son and wanted him to live and therefore hoped that the jury would sentence him to a life term. (RT 9176.)

Appellant's sister, Tammy Dudley, testified that she is a year and half younger than him. She stated that she had maintained contact with appellant since his arrest and that she loved him very much. She also said she hoped that he would be sentenced to life without the possibility of parole. (RT 9180.)

Appellant's mother, Jacklynn Tobin, testified about the incident involving Willie Healer. She had asked Healer to fix her car, a 1981 Nova, which had been damaged on the driver's side and door. She gave him the $850 check that she received from AAA auto insurance to have it fixed. Healer was supposed to fix the dent and door hinge and paint the car. (RT 9229.) She left her car with him for about a week, and when she went to pick it up, it wasn't finished. She arranged to bring it back, so that he

could finish the job while she was on her vacation. However, when she attempted to drop the car off again, Healer's business was no longer there. (RT 9229.) She never received any of her money back from him.

She did see Healer and her son in the parking lot of Sears. Healer appeared to be a little embarrassed but otherwise all right. (RT 9231.) After they talked about the car, she offered to give Healer a ride, but he said that he had his truck. He did not seem to be upset or afraid. (RT 9233.)

Mrs. Tobin also testified about her love for appellant. She had maintained contact with him since his arrest and wanted him to be sentenced to life without the possibility of parole, rather than sentenced to death. (RT 9236.)

Appellant's brother-in-law, Raymond Dudley, testified about a telephone conversation he heard between his wife, Tammy, and Willie Healer about the incident which was the subject of Healer's testimony at the trial -- an alleged kidnaping of him by appellant and Letner. (RT 9185.) Tammy initiated the telephone call, and Raymond listened to it on the other end of the line. (RT 9186.) He heard Healer tell Tammy that he was pressing charges against appellant because he wanted "Chris to grow up." Healer also told Tammy that appellant hadn't touched him. (RT 9188.)

2. Testimony of John Dean and Dan Hlobick

The defense offered the testimony of John Dean, a friend of appellant, to rebut the testimony of prosecution witness David Bendowski. (RT 9203.) He said that he was in the car when appellant and Letner picked up David Bendowski in the northern part of Napa in 1979 or 1980. (RT 9195-9196.) He remembered that the conversation among the three concerned money owed by Bendowski for marijuana and Bendowski's contacts with appellant's girlfriend. (RT 9199.) Dean testified that nothing

was said that was a threat or an effort at intimidation and that no one seemed angry. (RT 9199-9200.)

Dan Hlobick also testified as a rebuttal witness. He described the encounter among Willie (aka Lee) Healer, Richard Letner, and appellant. According to Hlobick, he was walking down the street with appellant and Letner when they saw Healer sitting in a truck at a gas station. (RT 9216.) The three of them got into the truck with Healer. They drove to Sears, stopping first at K-Mart to look for appellant's mother. During the ride, Letner "smacked" Healer a few times. (RT 9218.) Hbolick heard Healer apologize to Mrs. Tobin and promise to paint her car. (RT 9218.) After they left Sears, Healer stopped the truck abruptly, jumped out, and ran away. (RT 9219.) Mr. Hlobick admitted that he had been convicted of second degree burglary.

On cross-examination, Mr. Hlobick stated that he was only a casual friend of both appellant and Richard Letner. He had not talked with either of them since the incident with Healer. (RT 9222.) When Healer stopped the truck and ran off, appellant seemed as puzzled as Hlobick by Healer's bolting. (RT 9923-9924.) When Hlobick asked appellant what was going on with Healer, he said he had no idea. Mr. Hlobick said appellant never hit or grabbed Healer during the incident. Neither appellant nor Letner asked Healer for money or for his wallet. (RT 9224-9225.) At some point, Letner said something about wanting to go get a gun first, but Hlobick didn't know why Letner made this remark. (RT 9226.) Hlobick said that during this encounter, Healer seemed a "bit shaken up," but he thought that was because appellant kept saying, "Why did you do this to my mother? She never done [sic] to you." (RT 9227.)

* * * * *

ARGUMENT

I.

THE TRIAL JUDGE ERRED WHEN HE DENIED THE MOTION TO SUPPRESS ALL EVIDENCE RESULTING FROM THE ILLEGAL SEARCH BY OFFICER WIGHTMAN

On February 17, 1989, appellant filed a Notice of a Motion to Suppress Evidence pursuant to Penal Code section 1538.5. This motion sought to suppress all evidence against appellant derived from the illegal stop of a vehicle by Officer Allyn Wightman of the Visalia Police Department shortly after midnight on March 2, 1988. (CT 76-90.) The District Attorney filed his opposition to this motion on March 15, 1989. (CT 103-111.) On June 7 and 8, 1989, Judge Silveira heard evidence and argument and denied the motion.[26/] (CT 416-418.)

A. The Facts

Shortly before or after midnight on March 1, 1988, Officer Wightman was in his car patrolling the downtown area of Visalia when he noticed a red Ford Fairmont traveling southbound on Garden Street. (RT Prel.Hearing ["RT PH"] 593-594.) He testified at the preliminary hearing that the car attracted his attention because it had water beads on it, although the rain showers that night had stopped approximately two and a half hours before. (RT PH 594.) In the officer's view, these water beads were significant because "[a]ll the other cars that were traveling on the roadway at the time were free of moisture . . . if a car had a lot of water on it on the road . . . it hadn't travel [sic] very far because it would have blown off had it been on the road for quite some time." (RT PH 626.) As a result

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26. The parties stipulated that the testimony of Officer Wightman from the preliminary hearing could also be considered in conjunction with the motion to suppress. (RT 3, 6/7/89 hearing.)

of the presence of these water beads, Officer Wightman suspected that the car might have been stolen from a nearby Ford auto dealer lot. The officer testified that there had been "[p]roblems with vehicle tamperings and burglaries in the area." (RT PH 625.) Although he had not personally responded to any of the used car lot thefts, Wightman had heard about them through daily police bulletins. (RT PH 625.)

Officer Wightman testified that, based on these water beads and his knowledge of auto thefts in the area, he had a hunch the Ford Fairmont might have been stolen. He began to follow the car. (RT PH 595.) While he was following the car, Wightman ran a vehicle registration check on the car and received radio information that it was registered to Ivon Pontbriant. There was no information that the car had been stolen or involved in any crime. (RT PH 628.)

Officer Wightman continued to follow the car as it turned onto State Route 198. He observed that the Ford was traveling at a speed of about forty (40) miles per hour for ". . . between a half, three quarters of a mile, closer to a mile maybe." (RT PH 629.) According to Wightman, because the speed limit on State Route 198 was fifty-five (55) miles per hour, he became suspicious that the driver might be intoxicated, so he initiated a traffic stop. (RT PH 629.) The officer conceded that he did not notice anything else unusual about the car, other than its slow speed, that would have led him to believe that the driver of the vehicle was under the influence of alcohol. (RT PH 629.)

At the time of this vehicle stop, codefendant Richard Letner was driving the Ford Fairmont. (RT PH 595.) Appellant was sitting in the front passenger seat. (RT PH 597.) During the course of this stop, Officer Wightman observed four unopened bottles of beer on the floor in front of the back seat. (RT PH 595.) The officer detected a smell of alcohol on

Letner's breath, and Letner did not have his driver's license. (RT PH 597-98.)

When questioned, Letner told Wightman that the car belonged to Ivon Pontbriant. Letner could not provide her exact address but said she lived on North Jacob Street. (RT PH 602.) Officer Wightman conducted a pat-down search of both Letner and appellant. He found a buck knife in Letner's pocket. (RT PH 604.) He also searched the vehicle and found an open bottle of beer under the passenger side seat. He poured out the contents of the bottle and threw the bottle over a nearby fence. (RT PH 605.)

After administering the standard balance test for determining intoxication, Officer Wightman decided that he would not arrest Richard Letner for driving under the influence. He did cite Letner for failing to have a driver's license. He also ordered Letner and appellant to lock up the vehicle and leave the area by foot. (RT PH 608.)

B. <u>The Relevant Law</u>

The Fourth Amendment of United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . ." It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.) The California Constitution contains a similar guarantee against unreasonable searches by governmental agents. (Cal. Const., art.I, §13.) Since the passage of Proposition 8 in 1982, the same standard applies under both federal and state law to claims to exclude evidence for unreasonable searches and seizures. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) Under Proposition 8, evidence will not be excluded because of an unreasonable search except as required by

the federal Constitution as interpreted by the United States Supreme Court. (*Id.*, quoting from *In re Tyrell J.* (1994) 8 Cal.4th 68, 76.) [27/]

Temporary detention of individuals (no matter how brief) during the stop of an automobile by the police constitutes a search and "seizure" of "persons" within the meaning of the Fourth Amendment. (*Delaware* v. *Prouse* (1979) 440 U.S. 648, 653; see also *Whren v. United States* (1996) 517 U.S. 806, 809-810.) Although the subjective motivations of the officer involved are not important, there must be probable cause to believe a traffic violation has occurred in order for a traffic stop to be lawful. (*City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 45, citing *Whren, supra,* 517 U.S. at pp. 810-813,) California courts have recognized the right of the passenger in a vehicle which is stopped to challenge its legality based on the Fourth Amendment. (See *People v. Bell* (1996) 43 Cal.App.4th 754, 760-765; see also *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373-1375.)

On appeal, the "ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed de novo." (*Ornelas v. United States* (1996) 517 U.S. 690, 691.) In reviewing a challenge to a vehicle stop, an appellate court ". . . must look at the 'totality of circumstances' of [the] case to see whether the detaining officer has a 'particularized and objective basis' for suspected legal wrongdoing." (*United States v. Arvizu* (2002) 534 U.S. 266, 122 S.Ct. 744, 750, quoting *United States v. Cortez* (1981) 449 U.S. 411, 417-418.)

After making a determination of the events leading to the stop and/or search, the appellate court must decide "whether these historical facts,

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27. Nonetheless, as the *Camacho* opinion makes clear pre-Proposition 8 decisions of this Court interpreting federal constitutional law remain viable unless they conflict with interpretations of the United States Supreme Court. (23 Cal.4th at p. 830, fn.1.)

viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." (*Ornelas, supra,* 517 U.S. at p. 696.)

This Court has established a comparable standard. In *People v. Ayala* (2000) 23 Cal.4th 225, the Court described the standard as follows:

> In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is, however, predominantly one of law is also subject to independent review.

(*Id.* at p. 255, citing *People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

If the appellate court finds that the trial judge erred in denying a motion to suppress, reversal is necessary unless the error is found to be harmless beyond a reasonable doubt. (*People* v. *Miller* (1983) 33 Cal.3d 545, 550-56; Penal Code section 1538.5(m).)

C. The Testimony of Officer Wightman Did Not Show Facts Sufficient to Establish a Reasonable Suspicion Upon Which to Base a Traffic Stop

Officer Wightman testified about two distinct but unrelated bases for following and ultimately stopping the car driven by Richard Letner and occupied by appellant. First, according to Officer Wightman, he began following the car after he observed water beads on it. He believed that since it had stopped raining about two and a half hours before that the water beads indicated that the car might have been stolen from a nearby used car

lot. After following the car for some time, he formed another theory. According to Wightman, because the car was moving slowly (about 40 mph) even after it entered onto State Route 198, he became suspicious that the driver was intoxicated.

During the suppression hearing, Officer Wightman said that he had a "hunch" that the Ford Fairmont might have been a stolen vehicle. (RT 42, 6/7/89 hearing.) His hunch never, either objectively or subjectively, developed into a reasonable suspicion that the car was stolen since Officer Wightman testified he initiated the investigatory stop because he decided that the slow speed of the car suggested that the driver was drunk.

Indeed, given these facts, the "stolen car" theory could not have developed into a reasonable suspicion. First, while Officer Wightman was following the car he ran a radio check and learned that the car was registered to an individual, Ivon Pontbriant, rather than a used car dealer and that it had not been reported stolen or missing. (RT 43-44, 6/7/89 hearing.) Second, on its face, the officer's theory, that the car might have been stolen because it had raindrops on it and other cars did not, was not reasonable. Indeed, it was patently absurd. This Court must review independently whether Officer Wightman's theory constituted an "objectively reasonable" inference justifying the stop. (See, e.g., *People v. Daugherty* (1996) 50 Cal.App. 4th 275, 281-283 [While the testimony of the police officer who made the stop is important, the reviewing court must decide whether the facts, as adduced at the evidentiary hearing, would lead an "objectively reasonable" officer to believe there was probable cause to detain or arrest a person.].)

At the preliminary hearing, when questioned by the prosecutor about the purpose for this stop, Officer Wightman stated "Due to slow speed, possible DUI." (RT PH 595.) At the hearing on the motion to suppress,

at a slower speed prudent and safe. (RT PH 594.) The officer also observed that the vehicle's engine was running "rough" which provided a further innocent explanation for the slower speed. (RT PH 626.) At no time did the officer observe any indication of unsafe driving or any traffic violations. (RT PH 595-596.) Under these circumstances, reliance on the slow speed of the vehicle was an insufficient justification for stopping the vehicle.

The pleadings filed in the trial court by the State assert that ". . . slow speed alone may be justification for an officer to temporarily detain." (CT 108.) The prosecutor cited the following cases in support of this argument: *People* v. *Gibson* (1969) 220 Cal.App.2d 15, 20; *Williams* v. *Superior Court* (1969) 274 Cal.App.2d 709, 712; *People* v. *Anguiano* (1961) 198 Cal.App.2d 426. (CT 107-110.) As the discussion *infra* will show, however, those cases do not support the State's claim that slow speed alone is sufficient to justify an investigatory stop of a car under the circumstances of this case.[30/]

First, the contention that the facts of *People* v. *Gibson*, *supra,* are "very analogous" to the instant case was simply wrong. In the *Gibson* case, the officers heard a police radio report of a robbery. About one or two minutes later, on the same street as the robbery had occurred, they saw a car which seemed to be driven in a suspicious manner. It did not pick up speed as the other cars did at that hour of the night at that intersection. The car was moving at about 25 miles per hour in a 35-miles-per-hour zone. Because of this slow speed, the officers suspected that the driver might be the robber; however, they did not stop the vehicle immediately. Instead,

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30. Cf. *People v. Bracken* (2000) 83 Cal.App.4th 14, where the court of appeal found that the police officer acted reasonably when he stopped a car which had been weaving within its lane because he suspected the driver was drunk.

they followed it, initiating a traffic stop only after they had observed a motion in the car that looked like someone trying to put something in the back of the car. Accordingly, the three factors which led the officers in *Gibson* to stop the vehicle were: (1) a report of a recent robbery occurring on the same street; (2) a car moving at a slow speed; and (3) the suspicious movements of the occupant inside the car.

Similarly, the facts of *Williams v. Superior Court* (1969) 274 Cal.App.2d 709 are distinguishable from those involved in the instant case. In *Williams*, the police officers were in plain clothes and were driving an unmarked car with a spot light and "E" series license plates. A Volkswagen with two persons in the front seat and one in the back approached the police car from behind, in the right hand lane. When the Volkswagen pulled even with the officers' car, the person in the back seat looked over at the officers and then ducked out of view. The Volkswagen then slowed dramatically and dropped behind the police car, which then pulled in front of the Volkswagen in the same lane. The police car continued at a very slow speed in front of the Volkswagen; after about five blocks, the latter passed.

The police in the *Williams* case offered the following explanation for the stop: "For one, to see why the person was laying down in the rear seat and why they wouldn't pass us and we had slowed way down." (*Id.* at p. 711.) Also, the court of appeal did not find "slow speed" to be the primary factor justifying the stop. The court observed:

> From the facts observed by the officers, it could be reasonably inferred that the occupants of the Volkswagen recognized the officers' vehicle to be a police unit and thereafter sought to avoid it. Had the police unit been a marked patrol car, no great significance could be attached to the reluctance to pass it. However, it may be reasonably inferred that defendant's reluctance to pass the unmarked unit stemmed from reasons

> other than a desire to avoid a possible traffic citation. A person's attempt to avoid being observed by the police at night provides sufficient justification for investigation. [Citations.] The unusually slow speed of a vehicle *may* be a factor in determining the reasonableness of the temporary detention for investigation. [Citations.] While the mere impression of officers that a suspect appears to be nervous is insufficient to justify detention [citation], in the present case there were overt acts of attempts to avoid observance by the police.

(*Id.* at p. 712.)

Similarly, the decision in *People v. Anguiano*, *supra* is inapposite. In that case, the police officer began following the vehicle because it was brand new and both the driver and passenger appeared to be very young, between 16 and 18 years old. As he followed the car, the officer became more suspicious because not only was the driver going very slowly, at every intersection he slowed to an almost complete stop. Because of these factors, the officer concluded that the car might be stolen. (*Id.*, 198 Cal.App.2d at p. 428.)

He stopped the car and asked to see the license of the driver, appellant Anguiano, who said that he did not have a driver's license and that the car belonged to the passenger. Thereafter, the officer radioed the sheriff's department and learned that appellant had four or five outstanding warrants for violations of the Vehicle Code. Upon learning this, the officer arrested appellant. The court of appeal found that the police officer was justified in stopping the vehicle to question the driver and passenger. (*Id.* at p. 429.)

Contrary to the claim of the prosecutor in this case, the justification for the stop in the *Anguiano* case involved more than slow speed. Indeed, the police officer first became suspicious because the driver and passenger seemed to be too young to be driving a new and expensive automobile.

Moreover, it was not simply the slow speed of the automobile which further aroused his suspicions but the fact that the driver came to a virtual stop at each intersection.

A further reason why these cases are distinguishable from the instant case is that in none of them did the police cite the slow speed of the vehicle as the basis for an inference (or suspicion) that the driver was intoxicated. Accordingly, the fact that slow speed in these cited cases was one of the reasons for the police stop, does not justify the sole reliance on the slow speed rationale offered by the police officer in this case. At the suppression hearing, the prosecution did not offer any case which supported the slow speed/intoxication rationale for a vehicle stop.

In *United States v. Jimenez-Medina* (9th Cir. 1999) 173 F.3d 752, 755, the Ninth Circuit reversed a conviction on the ground that an investigatory stop of a vehicle near the border between Arizona and Mexico which gave rise to the criminal action was not based on reasonable suspicion and violated the Fourth Amendment. Despite the fact that the stop allegedly was based on six factors, including the slow speed of the vehicle, the Ninth Circuit found it to be illegal. On the issue of slow speed, the court of appeals noted: "This court also frowned on speed of the vehicle as a basis for reasonable suspicion in *Garcia-Camacho* [citation omitted], pointing out that the government has argued both increases and decreases in speed constitute 'suspicious' conduct, creating a 'heads I win, tails you lose' trap for drivers who do not maintain constant speed." (*U.S. v. Jimeniz-Medina, supra,* 173 F.3d at p. 755.)

In *Raulson v. State* (1996) 223 Ga.App. 556, 479 S.E.2d 386, the Georgia appellate court found that the denial of a suppression motion in circumstances very similar to those in this case constituted error. The vehicle in *Raulson* was observed traveling between 25 and 30 miles an hour

in a 55-mph speed zone. Suspecting an impaired driver or a burglar, the officer stopped the vehicle. In finding the stop illegal, the appellate court noted that the officer "did not observe defendant weave in the highway, react slowly to oncoming traffic, endanger life or property, operate her car improperly, or otherwise demonstrate that she was intoxicated. The trooper's testimony shows only that defendant was driving an automobile, early in the morning, at a lawful rate of speed." (*Id.* at p. 387.) The *Raulson* court further observed that the defendant could not have been impeding the flow of traffic because "there was no traffic on the road for defendant to impede." (*Id.* at pp. 387-388.) The same was true in the present case.

For all of the foregoing reasons, based on the "totality of circumstances," the slow speed of the automobile did not amount to a "particularized and objective basis" for suspecting the occupants of the car were engaged in criminal activity. (*U.S. v. Arvizu*, *supra,* 122 S.Ct. at p. 750.)

F. This Court Should Reverse the Ruling of the Lower Court and Suppress All Fruits of the Illegal Stop

Given the record in this case, the trial judge erred in concluding that the officer developed a reasonable suspicion justifying the vehicle stop. Contrary to the prosecutor's argument at the suppression hearing, the case law does not support a finding that slow speed is, by itself, a reasonable basis for stopping an automobile. Because the lower court erred as a matter of law in finding that Officer Wightman's stop and detention of the occupants of the vehicle, Richard Letner and appellant, was based on reasonable suspicion, this Court should reverse all of the appellant's convictions.

All "fruit of the poisonous tree" of the illegal stop and search should have been suppressed. (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) As the motion in the lower court noted, those fruits included: (1) all observations of appellant in the vehicle and thereafter at the scene of the stop; (2) all observations of the contents of the vehicle from the inception of the stop and thereafter; (3) all statements made by appellant and codefendant Letner at the scene of the stop; (4) all evidence seized from the vehicle; and (5) any and all other evidence obtained as a result of the stop of the vehicle, subsequent detention of appellant and search of the vehicle. (CT 76.)

This was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) If this evidence had been suppressed, it is not likely that appellant would have been convicted and sentenced to death. Indeed, it is questionable that the prosecutor could have linked appellant to the murder of Ms. Pontbriant. While Richard Letner had spoken on the telephone with Edward Bourdette and Kathy Coronado from Ms. Pontbriant's house on the night of the murder, there was no evidence that Bourdette and Coronado knew that appellant was also present in Pontbriant's house.[31/] Evidence from the unlawful vehicle stop was used to link appellant to codefendant Letner. This evidence was also used to link appellant to the vehicle that supposedly was the fruit of the robbery. (RT 6137-6174 [testimony of Officer Wightman].)

The prosecution used statements allegedly made by Letner and appellant during the unlawful stop in the cross-examination of appellant, thus undermining his credibility. Evidence observed in the unlawful stop, a

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31. Bourdette (RT 5557-5591) and Coronado (RT 5593-5609) each testified that they spoke to Ms. Pontbriant and Letner on the telephone; they testified to no conversations with or about appellant.

discretion of the trial judge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.)

As this Court has noted, severance is appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917; See also *People v. Champion* (1995) 9 Cal.4th 879, 904.) In *People* v. *Keenan* (1988) 46 Cal.3d 478, this Court observed: "Severance motions in capital cases should receive heightened scrutiny for potential prejudice." (*Id.* at p. 500.) This principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. (See., e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

In *Zafiro v. United States* (1993) 506 U.S. 534, the United States Supreme Court held that severance is proper "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Id.* at p. 1081.)

As this Court noted in *People v. Massie, supra,* in assessing a claim of improper denial of severance, an appellate court ". . . must weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." (*Id.* at p. 923.) The appellate court must also view the record as it stood before the trial court at the time of the motion. (*People v. Price* (1991) 1 Cal.4th 324, 388.)

Under Penal Code sections 954 and 1098,[32] when joinder of defendants' cases for trial results in substantial prejudice, such misjoinder constitutes both an abuse of discretion by the trial judge and a denial of defendants' federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process and to a fair trial. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.) Improper joinder also violates the Eighth Amendment right to reliable guilt and penalty determinations in capital cases. (*Mills v. Maryland*, *supra* 486 U.S. at p. 376.)

1. Joining a Weak Case with a Strong One

For purposes of the guilt phase, the instant case presented a classic example of joining a weak case with a strong case. The prosecution's case against appellant was far weaker than its case against Richard Letner, his codefendant. First, there was virtually no physical evidence tying appellant to the crime scene. None of the blood or the hair located in the area where the victim's body was found matched that of appellant. By contrast, hairs located on the victim's body were consistent with the hair of codefendant Letner. Also, there was blood on the victim's sweater which was consistent with Letner's blood type but also with the victim's. (RT 5884.) Although there were blood stains found in the house which were consistent with appellant's blood type, the stains were also consistent with the blood type of Warren Gilliland, who lived with the victim in the house. Those blood stains were found on a pillow case and on a doily in the bedroom. The prosecution's expert testified that the inability to detect any PGM activity in

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32. Failure to sever also implicates article I, Section 15 of the California Constitution, which guarantees a criminal defendant due process and a fair trial.

these blood samples may have been the result of the samples being very old. (RT 5901, 5903.)

The evidence did establish that on the night that the victim was killed, a police officer stopped codefendant Letner and appellant while they were driving the victim's car. (RT 5148-5149.) This evidence did not, however, contradict appellant's testimony at the guilt phase. (RT 6849-6850.) He testified that he had been present in the victim's house during the evening of March 1, 1988, the night she was killed. (RT 6860.) He also stated that she was alive when he left her house at about 11:00 p.m. Appellant left because Letner and Ms. Pontbriant had begun kissing. (RT 6859-6860.) Letner had told appellant prior to that night that he was having a sexual relationship with Ms. Pontbriant. (RT 6860.) Appellant's testimony on this point was corroborated by the testimony of Jeannette Mayberry, who confirmed that Letner had claimed to have a very close relationship with Ms. Pontbriant. He called her "mama." (RT 5407-5409; 5464; 6818-6820.)

By joining the weak case against appellant with the stronger case against Letner, the prosecution gained an unfair advantage. Denial of a severance motion is an abuse of discretion where joinder results in an unfair trial. Here, joinder permitted the prosecution to use the "spillover" effect from the stronger case against Letner to implicate appellant. Such a conviction based largely on guilt by association undermines a defendant's right to a fair trial. (*United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1246; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071-1072.)

2. Prejudicial Association With Codefendant

A primary, if not the central, theme of the prosecution in this case was that appellant and his codefendant were inseparable partners in crime. During her cross-examination of appellant at the guilt phase, the prosecutor

focused on the history of appellant's relationship with Richard Letner. (RT 6890-6901.) In some of those questions, the prosecutor improperly implied that they had a history of appearing threatening to others. For example, she asked appellant: "Did you and Richard Letner scare away people when you were together?" (RT 6902.) In her closing argument to the jury at the guilt phase, the prosecutor talked about the defendants being "tight friends" since high school. (RT 7539-7540.) She further claimed that, "They were essentially with each other continuously from Sunday, February the 28th, 1988, until their arrest on March 29th 1988." (RT 7540.) She also argued that the jurors need not worry about who actually killed Ivon Pontbriant because the defendants were acting together. (RT 7582.)[33/]

As noted previously, this Court has recognized "prejudicial association with codefendants" as a basis for severance. (*People v. Massie, supra,* 66 Cal.2d at p. 917.) The close relationship between appellant and codefendant Letner, particularly as it was portrayed by the prosecutor, tended to produce a "guilt by association" effect at their joint trial. A number of decisions discuss this phenomenon. For example, in *Williams v. Superior Court, supra,* 34 Cal.3d at p. 592, this Court recognized that in a case involving brothers charged with murder, there was an increased danger that prejudicial information as to one brother would result in undue prejudice to the other. (See also *People v. Mitchell* (1969) 1 Cal.App.3d 35, 39 ["It is . . . more than likely that the jury would have found appellant guilty if for no other reason than by association. Appellant was not only apprehended with Watkins . . . , but Watkins testified that he was

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33. Regarding the charge of attempted rape, the prosecutor actually urged the jury to combine evidence to convict both defendants. That is, she argued that because the semen found in the bedroom pointed to appellant while the hair found on the victim's chest matched Letner's hair, the jury should find them both guilty of attempted rape. (RT 7587.)

appellant's brother-in-law and that they were reared in the same neighborhood."]; *People v. Wilson* (Ill.App.Ct. 1987) 515 N.E.2d 812, 819 [failure to grant severance resulted in a reversal of murder conviction of two brothers because severance was necessary to "countermand the devastating effects of a fraternal accusation"]; *United States v. Sampol* (D.C. 1980) 636 F.2d 621, 647 [conviction reversed because of the confusing nature of the evidence when two brothers were tried together, and the prosecution failed clearly to distinguish between the defendants, resulting in violation of each brother's constitutional right to a fair trial].

Although appellant and codefendant Letner were not biologically related, the prosecution treated them as though they were an indivisible unit, like conjoined twins. She encouraged the jurors to view the defendants as inseparable, particularly during the period immediately before and after the murder of Ivon Pontbriant. Given this prosecution strategy, appellant was improperly and unduly prejudiced when his motion for severance was denied by the trial court.

B. Conclusion

A basic principle underlying the concept of a fundamentally fair trial is that the culpability of every criminal defendant on each charge will be determined solely on the basis of evidence regarding him individually. (See, e.g., *People v. Mitchell, supra*, 1 Cal.App.3d at p. 39.)

Similarly, the failure to sever the guilt phase trial prejudiced appellant in the penalty phase of his trial.[34/] The Eighth Amendment of the U.S. Constitution requires that in determining whether a death sentence is appropriate the jury must make an "individualized determination" based on the character of the defendant and the circumstances of the crime. (See,

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34. Argument III, *infra*, discusses the trial court's erroneous denial of appellant's request for a separate penalty trial.

e.g., *Zant v. Stephens* (1983) 462 U.S. 862, 879.) When carrying out this task, the jury must focus on the defendant as a "uniquely individual human being." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Also, considerations not relevant to defendant's personal responsibility and moral guilt should not play any part in the jury's determination of whether defendant should receive the death penalty. (*Ibid.*)

For all of the foregoing reasons, appellant's Fifth, Sixth, Eighth and Fourteenth Amendments to fundamental fairness, a fair and reliable guilt determination and a reliable, fair and individualized sentence as well as his corresponding rights under California law were violated.

Because the trial court erred in denying appellant's motion for severance, his convictions and death sentence must be reversed.

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III.

THE TRIAL JUDGE'S DENIAL OF APPELLANT'S MOTION FOR A SEPARATE PENALTY TRIAL WAS PREJUDICIAL ERROR, REQUIRING REVERSAL OF THE JUDGMENT OF DEATH

Before the trial in the instant case, appellant filed a Notice of Motion to Sever His Penalty Trial From That of His Codefendant. (CT 528-532.) The prosecution opposed the motion for separate penalty phase trials, and the trial judge denied appellant's request. (CT 569-570.) The failure to grant his motion for a separate trial constituted reversible error because (1) it violated the Eighth Amendment guarantees that a defendant facing the death penalty be given individualized consideration and that the sentencing decision be highly reliable, and (2) it violated due process and rendered the penalty phase fundamentally unfair by allowing the jury to hear otherwise inadmissible and inflammatory evidence against appellant.

As this Court noted in another death penalty case, *People* v. *Ochoa* (1998) 19 Cal.4th 353, the Eighth Amendment of the United States Constitution "requires an individualized assessment of the defendant's background, record, and character, and the nature of the crimes committed, both as a matter of state law and as a federal constitutional requirement." (*Id.* at p. 455, citing Penal Code section 190.3, *People* v. *Beeler* (1995) 9 Cal.4th 953, 991-992 and *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 303-305.) In *Woodson, supra,* the U.S. Supreme Court noted: "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long . . . . 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." (*Id.,* 428 U.S. at p. 305.) (See also *Zant v. Stephens, supra*, 462 U.S. at p. 879 ["What is important at the selection stage is an individualized determination on the

basis of the character of the individual and the circumstances of the crime."].)

Individualized consideration of penalty was not possible in the instant case because the codefendants ended up "throwing stones" at each other during the penalty phase. (CT 1467.) This was particularly true of codefendant Letner, who elected to testify in his own defense at the penalty phase and blame appellant for the murder of Ivon Pontbriant. Had he done so at the guilt phase, the failure to sever would have unquestionably violated appellant's due process rights because of the mutually antagonistic defenses. (*People* v. *Massie, supra,* 66 Cal.2d at p. 917.)

Where codefendants are facing the death penalty in a joint penalty phase trial and have mutually antagonistic defenses, each defendant has both the District Attorney and counsel for the other codefendant trying to convince the jurors that it is the other defendant who deserves death. This situation violated appellant's due process rights to a fundamentally fair trial. (*Zafiro v. United States , supra,* 506 U.S. at p. 539 [severance should be granted if there is serious risk that a joint trial will result in evidence being admitted against one defendant that the jury should not consider against the other defendant and would not be admissible if that defendant were tried alone]; *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362.)

During the course of the penalty phase trial, Richard Letner introduced evidence which was either not relevant to the determination whether the death penalty was appropriate for appellant or was affirmatively not admissible as to appellant. As a result, appellant's trial attorney made repeated objections during the presentation of evidence at the penalty phase. He also made additional motions for severance and/or a mistrial. (RT 8549, 8621, 8855.) By disregarding these objections and

motions, the trial court allowed a fundamentally unfair penalty phase presentation against appellant.

A. Evidence Introduced by the Codefendant Would Not Have Been Admissible at a Separate Penalty Trial of Appellant

In *People v. Boyd* (1985) 38 Cal.3d 762, this Court held that in its penalty phase case-in-chief the prosecution cannot introduce evidence which is not relevant to any of the specific aggravating factors enumerated in Penal Code section 190.3. Therefore, in the instant case, the prosecutor would not have been allowed in a separate penalty trial of appellant to offer the evidence described *infra* which codefendant Letner introduced in support of his own case for life. This otherwise inadmissible evidence portrayed appellant as a bad influence over Letner, as an unruly teenager who drank and used and sold drugs, and as a violent and threatening person.[35/] Most damaging was Letner's very detailed testimony about appellant's alleged primary role in the murder and sexual assault of the victim. This evidence included the following:

John Letner, Richard's younger brother, testified that appellant smoked marijuana, drank and sold drugs when he was a teenager. (RT 8487-8788.) According to John, it was appellant's fault that his brother and appellant were always getting into trouble together. (RT 8493.) John also stated that at Christmas time in 1987, a couple of months before the murder of Ivon Pontbriant, Richard told him that he wanted to move because appellant "was scaring him the way he was acting, Chris was acting crazy." (RT 8494.)

Codefendant Letner also presented evidence which supported his mitigation theme that he was "dominated" by appellant. For example,

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35. Appellant was further prejudiced by the fact that his own lawyer put on a very minimal and inadequate mitigation case on his behalf.

Sheila White testified that Letner treated appellant "like a god." (RT 8553.) Burt Arnold, who at one time had been a roommate of Richard Letner, testified that when Letner and appellant had arguments, it was Letner who usually backed down. (RT 8532.)

Before Richard Letner took the stand at the penalty phase, appellant's trial counsel moved for a mistrial and severance, arguing that Letner was going to present "the worst possible evidence against Tobin." This motion was denied (RT 8549-8550); however, counsel's fears were realized. Letner testified that appellant had been a "dope dealer" while he was a student at Napa High School. (RT 8564.) Because of this testimony, appellant's counsel again moved for a mistrial and severance based on this testimony. (RT 8621-8622.) The trial judge denied this motion but stated that he would give an instruction that drug dealing is not an aggravating circumstance for purposes of determining whether appellant should receive the death sentence. (RT 8622.) The record shows, however, that the trial judge failed to include this cautionary instruction in the concluding instructions to the jury at the penalty phase.

Of course, the most damaging testimony of Richard Letner at the joint penalty trial was that appellant murdered and sexually assaulted Ivon Pontbriant. (RT 8646-8676.) Given the weakness of the prosecution's case on the charge of attempted rape, Letner's assertion that appellant attempted to have sex with the victim was particularly prejudicial. (RT 8794, 8814.) Letner also claimed that he was "scared to death of Chris."[36/] (RT 8673.) Further, Letner testified that in Napa, where he and appellant grew up,

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36. See *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, where the federal appellate court granted habeas relief because the state trial judge had admitted evidence that a witness feared the defendant. Such evidence constituted an "evidential harpoon" which prejudiced the defendant to such a degree that it amounted to a denial of fundamental fairness. (*Id.* at p. 972.)

appellant was considered "a very good fighter." (RT 8718.) Appellant's trial counsel again moved for a mistrial, arguing that Letner's testimony contained unfairly prejudicial evidence against appellant because Letner was "trying to save his own neck by dumping on Chris." (RT 8729-8730.) The trial judge again denied the motion. He promised to give an instruction that prior drug dealing was not an aggravating circumstance, but stated that "[w]ith respect to the rest of it, it's up to the jury to determine the veracity and credibility of the witnesses, and to assess these matters for the purposes that they are required to make these assessments in this trial." (RT 8731.) This response by the judge ignored the points. This testimony by Letner included information that the prosecutor could not have presented if appellant had been given a separate penalty trial.

When the prosecutor cross-examined Richard Letner about the letters which he exchanged with Danny Payne, another inmate at the Tulare County Jail, additional highly prejudicial evidence was admitted, which never would have been admitted at a separate penalty trial of appellant. For example, Letner testified that Payne told him that appellant was "laying off" the murder on Letner and that appellant had a perfect alibi because Letner had escaped. (RT 8788.) This testimony was prejudicial in several ways. First, it contradicted appellant's guilt phase testimony; second, it implied that appellant was lying and was a "snitch"; and third, it "vouched" for Letner's own claims about the crime.

The notes exchanged between Letner and Payne constituted out-of-court statements offered for the truth[37/] that is, to bolster Letner's version of

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37. In fact, the prosecutor attempted to impeach Letner with some of the statements in the letters which she claimed were inconsistent with his trial testimony. Under Evidence Code section 1202, evidence offered for impeachment purposes is admissible for its truth.

the murder. At the direction of the deputy district attorney, Letner read to the jury his first letter to Danny Payne. This letter claimed that appellant had killed Ivon Pontbriant and that Letner was not even present when this occurred. (RT 8793-8796.) The tack changed in the second and third letters to Payne; Letner admitted that he was present during the murder but claimed that appellant was the murderer. Letner testified that these letters were "the exact truth." (RT 8797.)

At the prosecutor's behest, Letner read to the jury the fourth letter, which also claimed that appellant was the murderer. (RT 8799-8830.) This letter stated, inter alia, that appellant kicked Ivon Pontbriant all over, but mostly in the face; kicked a beer bottle up her rectum; and stabbed her with the knife. (RT 8825.) In justifying his failure to intervene on behalf of Ms. Pontbriant, this letter claimed that Letner was afraid of appellant because he allegedly had told Letner that he had killed someone in Napa. (RT 8841-8842.) As a result of this highly inflammatory testimony about an uncharged murder, appellant's attorney again moved for a mistrial. (RT 8842.) The record does not show any formal ruling on this motion; however, the trial judge did instruct the jury to disregard the claim in the letter that appellant had allegedly committed another uncharged murder. (RT 8843.)

Other prejudicial allegations appearing in this letter included Letner's claims that appellant threatened to "blow away" Earl Bothwell during his altercation with Bothwell which led to the arrest of Letner and appellant and that appellant would have shot Bothwell and Hare if Letner had not taken the gun away from him. (RT 8847, 8849.) Once again appellant's trial attorney moved for severance, and once again, the trial judge denied the motion. (RT 8855.)

During the course of his testimony at the joint penalty trial, Richard Letner claimed repeatedly that appellant would kill him in prison in retaliation for testifying against him. (RT 8920, 9003, 9026, 9059.) Letner also provided other alleged examples of appellant's violent proclivities and heartlessness. For example, he claimed that had Pamela Loop not come out to talk to them on the night of Ms. Pontbriant's murder, appellant would have hit her barking dog with a rock. (RT 8926.) He also alleged that once when appellant was drunk, he stabbed Letner in the leg. (RT 8886.) Letner claimed that he was afraid of appellant because (1) appellant was very skilled in fighting and had never lost a fight in the 15 years that Letner had known him and (2) that he had a cold-blooded "golden rule" to the effect "never do a crime with a partner you can't kill." (RT 8983, 8986-8987, 9019.) Letner stated that although he had tried to save Ms. Pontbriant's life, appellant was determined to kill her and that he was also prepared to kill Letner. (RT 9053, 9058.)[38/]

This very unflattering and highly prejudicial description of appellant was reinforced by the testimony of Dr. Blak, the psychologist who testified on behalf of Richard Letner. Dr. Blak opined that appellant represented "the significant other" for Letner, as well as a surrogate in Letner's eyes for Letner's dead father. According to Blak, this was the reason why Letner "chose" appellant over Ivon Pontbriant when appellant assaulted Ms. Pontbriant. (RT 9155.) Dr. Blak also repeated Letner's claim that

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38. Other highly prejudicial evidence about appellant which Letner introduced at their joint penalty phase trial included: (1) that he made fun of a crippled person (RT 8707); (2) that he would violently resist arrest (RT 8801); (3) that he bit Letner in the head (RT 8671); (4) that he had threatened to shoot numerous people (RT 8849); (5) that he had demanded money from another boy for having sex with appellant's girlfriend; and, (6) that he constantly got into fights and never lost. (RT 8718, 8985.)

Letner believed that he "would come to a bad end regardless of the outcome of the court proceedings because [appellant] would see to it that he would be killed." (RT 9436.) Obviously, if appellant and Letner had been given separate penalty trials, Dr. Blak's testimony about Letner's fears concerning appellant would not have been admissible at appellant's trial.

B. Evidence Offered by the Codefendant at the Joint Penalty Trial Violated Appellant's Rights Under California Law and Under the United States Constitution

It is obvious from the above review of the evidence presented by his codefendant at the penalty phase of the trial that appellant was denied his rights both under California law[39] and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court has made clear that any trial procedure which lessens the prosecution's burden of proof is unconstitutional. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 524 [jury instruction stating that defendant was presumed to intend the ordinary consequences of his voluntary actions constituted a denial of due process because it placed the burden on defendant to disprove intent, an element of the crime].) In this case, the deputy district attorney was aided in her effort to obtain a death sentence against appellant by the codefendant. Indeed, even the trial judge, who repeatedly refused appellant's motions for severance of the penalty phases and/or for a mistrial, noted at the close of evidence at the penalty phase that the defendants had "[the] unenviable task of carrying some of the District Attorney's burden." (RT 9595.) This

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39. See *People v. Boyd*, discussed *supra*. In addition, the improper joinder violated California law by creating a fundamentally unfair trial involving mutually antagonistic defenses and the presentation of evidence against one defendant that would have been inadmissible against appellant if tried separately. (*People v. Massie, supra,* 66 Cal.2d at p. 917.)

statement by the judge amounted to an admission that appellant's constitutional rights had been violated under the principles stated in Sandstrom, *supra.*

The introduction of evidence by and against the codefendant that would have been inadmissible if appellant were tried separately rendered the trial fundamentally unfair. (*Zafiro v. United States, supra,* 506 U.S. at p. 539.) Letner's inflammatory testimony alleging appellant's primary role in the murder and supposed sexual assault of the victim, the numerous bad acts introduced against Letner and the mitigating evidence of Letner's mental state and other sympathetic evidence, in contrast to the absence of compelling mitigation offered by appellant's counsel, combined to render the trial fundamentally unfair to appellant.

Not only was the prosecutor's burden to prove that appellant deserved the death penalty lessened by the fact that his penalty phase trial was shared with his codefendant, the prosecutor was allowed to treat the defendants as conjoined twins. Although the prosecution presented evidence of various prior bad acts solely attributable to Letner, including the Frame incident (RT 9642), the Emberton incident (RT 9656), the McAdams incident (RT 9657), the Mohrhauser incident (RT 9664) and the rape of Sheila White (RT 9663-9664), in summarizing the other acts aggravation evidence, the prosecutor lumped the defendants together. (RT 9667.) As she had during the guilt phase, Deputy District Attorney Reed argued that it did not matter which defendant actually killed Ivon Pontbriant because they were acting in "complete tandem." (RT 9684.) This prosecutorial theme of "twin" defendants dovetailed with Letner's theme that appellant was the "evil twin." Letner's attorney argued that Letner operated under extreme duress or substantial domination by appellant (RT 9726, 9729) and that appellant had threatened Letner.

(RT 9737.) The unflattering and distorted portrait of appellant put before the jury by the combined effort of the prosecutor and codefendant Letner was unfairly and grossly prejudicial.

By treating the defendants as an inseparable unit rather than as individuals, the prosecutor violated a cardinal principle of death penalty jurisprudence: that a defendant is entitled to an individualized assessment by the jury of his character, history and actual participation in the crime before the death penalty is imposed. (See, e.g., *Penry v. Lynaugh* (1989) 492 U.S. 302.)

In *United States v. Tipton* (4th Cir. 1997) 90 F.3d 861, the Court of Appeals for the Fourth Circuit rejected an argument that the trial judge had abused his discretion in denying the appellant's request for a separate capital sentencing phase trial. The *Tipton* Court nonetheless noted that the Eighth Amendment requirement that defendants facing the death penalty are entitled to individualized consideration did mean that ". . .the trial court's discretion as to severance in the capital penalty phase must be considered so constitutionally constrained at its outer limits and, as a corollary, that our standard of review for abuse of a discretion is so constrained." (*Id.* at p. 892.)

The Fourth Circuit made clear in *Tipton, supra,* that the reason why it did not find an abuse of discretion for failing to grant separate penalty phase trials to the appellants in that case was the fact that the trial judge had given "numerous" instructions to the jury about the need to give each defendant individualized consideration. In the instant case, however, the trial judge did not give numerous cautionary instructions to the jury deciding appellant's penalty. Indeed, the final instructions to the jury mention the need to give individualized consideration only once and very tersely:

> In this case, you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on both of the defendants, but do agree on the penalty as to one of them, you must render a verdict to the one on which you do agree.

(RT 9825-9826.)[40/]

In a case with similar issues, *Foster v. Commonwealth* (Ky. 1991) 827 S.W.2d 670, the Kentucky Supreme Court reversed a death sentence of one codefendant on the ground that the trial judge erred in failing to grant the defendants' requests for separate penalty phase trials. Ms. Foster and her codefendant, Tina Powell, were found guilty of committing five intentional murders. The murders in *Foster, supra,* were especially brutal, involving multiple stab wounds, gunshot wounds and driving over some of the victims with a car. At the penalty phase of the trial, Ms. Powell offered mitigation evidence in support of the theory that she had acted under duress and under the domination of Ms. Foster. One of Ms. Powell's expert witnesses testified that she suffered "battered wife syndrome" because she had been in an abusive lesbian relationship with Ms. Foster.

Determining that the trial judge's failure to sever the penalty phase of the defendants' joint trial was reversible error as to Ms. Foster, the Kentucky Supreme Court found that evidence which was relevant for Ms. Powell's mitigation case, such as evidence of Ms. Foster's violent conduct toward her and letters from Ms. Foster which involved threats, was too prejudicial to Ms. Foster. The Court observed:

> . . . specific acts of uncharged misconduct are not factors which a jury may consider in its determination of a defendant's penalty and, therefore, are inadmissible in the

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40. In addition, this instruction further confused the issue by suggesting the jurors could "agree upon the penalty to be inflicted on both of the defendants," suggesting they be treated as a unit.

> penalty phase. We agree with the trial court that the acts of misconduct were relevant to support the codefendant's claim of duress but we must hold that their admission in a joint trial was nevertheless highly prejudicial to Foster. The admissibility of the evidence would have been proper if the penalty phase of the trial had been severed to allow Foster to have her sentence determined by the jury first.

(*Id.* at p. 682.)

In California, evidence that a defendant has acted under the substantial domination of another in the murder is a statutory mitigating fact (section 190.2(g)) which Mr. Letner was entitled to have considered at his penalty phase trial. However, the evidence offered to support the allegation that Letner had acted under the domination of appellant was not only inadmissible as to appellant, it was unfairly prejudicial to him. Under the well-established tenets of Eighth Amendment law and under California law, appellant was entitled to have such evidence excluded from consideration by the jury deciding whether he would be sentenced to death. (*People v. Boyd, supra,* 38 Cal.3d at p. 773; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [the jury must focus on the defendant as a "uniquely individual human being"].)

As *Foster*, *supra*, makes clear, in a joint penalty phase trial, the judge must be careful to assure that evidence in mitigation or aggravation relevant to one defendant does not unduly prejudice the other defendant. The Eighth and Fourteenth Amendments to the federal Constitution require no less.

This Court's rejection of a similar claim in the recent decision of *People v. Ervin* (2000) 22 Cal.4th 48 is not dispositive. The *Ervin* case involved three codefendants, two of whom received the death sentence. In that case, Mr. Ervin claimed that his "case for life" was prejudiced by the mitigating evidence offered by his codefendants. There are crucial factual

differences between the *Ervin* case and the instant case: *Ervin* did not involve one defendant testifying that the other was the murderer, or that he was afraid of him. Nor were other bad acts allegedly committed prior to, during and after the capital crime introduced. The Court observed in *Ervin* that the lesser sentence given to one of the three defendants reflected the jury's careful consideration of the respective culpability of the defendants. (*Id.* at p. 96.) Also in *Ervin,* the defendant did not dispute that he was the killer. (*Id.* at p. 67.) In contrast, appellant's case presents far more serious prejudice from the failure to sever where otherwise inadmissible evidence was extremely inflammatory and undermined any claim of lingering doubt.

As the U.S. Supreme Court noted in *Satterwhite v. Texas* (1988) 486 U.S. 249, "[t]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given the sentencer." (*Id.* at p. 258.) Nonetheless, the prejudicial effect of the evidence offered by Richard Letner to support his claim that he acted under the domination of appellant is clear. During the penalty phase deliberations in this case, the jurors indicated that they were "hung" regarding one of the defendants. After they were instructed to go back and deliberate further, they ultimately reached a verdict as to both defendants: the death penalty. Even though the prosecution offered substantially more aggravating evidence (in the form of prior convictions and prior unadjudicated instances of violent criminal activity)[41] against Mr. Letner, the jurors later indicated that it was Mr. Letner as to whom they were temporarily hung. One must assume that the jurors' apparently greater sympathy for Richard Letner was the result of the evidence Letner (not the

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41. The facts in this case are just the reverse of those in *People v. Roberts* (1992) 2 Cal.4th 271, 328, where the evidence showed that Roberts had a much more extensive criminal history than his codefendant.

prosecutor) had presented that appellant was such a vicious criminal that Letner greatly feared him.

In addition, the failure to sever resulted in the presentation of mutually antagonistic defenses and the presentation of evidence of numerous prior bad acts by Letner which would have been inadmissible against appellant in a separate trial. Yet, the prosecutor lumped together the prior bad acts against both defendants (RT 9667) and portrayed the defendants as acting in tandem in committing the murder. (RT 9684.)

Thus, the respondent State of California cannot show beyond a reasonable doubt that the error of compelling a joint penalty trial of appellant and codefendant Letner was harmless. Accordingly, appellant's death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 19, 23.) (See also *Caldwell v. Mississippi* (1985) 473 U.S. 320, 341, wherein the U.S. Supreme Court held that reversal is required unless the prosecution can show that the constitutional error had "no effect" on the death penalty verdict.) The standard for assessing the effect of an error in a trial of a capital case is set forth in *Sullivan v. Louisiana* (1993) 508 U.S. 275. The Court noted that a reviewing court does not consider whether the jury would have sentenced the defendant to death in a hypothetical trial in which the error did not occur but rather whether the death sentence was "surely attributable to the errors." (*Id.* at p. 279.) Here, the jury was exposed to such an enormous amount of prejudicial evidence that would not have been admitted in a separate trial of appellant, together with arguments of the prosecutor and of counsel for Letner, that the error cannot be considered harmless beyond a reasonable doubt.

For all of the foregoing reasons, the Court should reverse appellant's death sentence.

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IV.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF ATTEMPTED RAPE, OR TO SUPPORT THE ATTEMPTED RAPE-MURDER SPECIAL CIRCUMSTANCE FINDING

A criminal defendant's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient proof of guilt. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 635; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) The test of whether evidence is sufficient to support a conviction is "whether a rational trier of fact could find defendant guilty beyond a reasonable doubt." (*People* v. *Holt* (1997) 15 Cal.4th 619, 667; see also, *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319 ["The critical inquiry is . . . whether . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt".].)

At the least, there must be evidence of "solid value" that reasonably supports an inference of guilt. (*People* v. *Johnson* (1980) 26 Cal.3d 557, 562.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, interior quotation marks deleted.) In *People v. Morris* (1988) 46 Cal.3d 1 (overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5), this Court stated:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, 'may not be based on suspicion alone, or

> on imagination, speculation, supposition, surmise, conjecture, or guess work. [Para.] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'

[Citations.] (*Id.* at p. 21; emphasis and ellipses in original.)

Further, when the sufficiency of the evidence is challenged at the close of the prosecution's case-in-chief on the motion of the defendant, as occurred in this case,[42] a later conviction must be reversed if, judging the record as it was at that point in the case, the evidence was insufficient to establish each element of the offense. (*People v. Allen* (2001) 86 Cal.App.4th 909, 913, citing *People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

A. Elements of Attempted Rape and an Attempted Rape-Murder Special Circumstance

Forcible rape under California law as defined in Penal Code section 261, subdivision (2) is "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against . . . a person's will by means of force, violence, duress, or fear of immediate and unlawful bodily injury on the person or another." An *attempt* to commit a crime has two elements: the intent to commit the crime and a direct but ineffectual act done towards its commission. (*People* v. *Carpenter* (1997) 15 Cal.4th 312, 387.) The act done must be more than mere preparation; it must be a direct movement after the preparation which would have accomplished the crime if not frustrated by extraneous circumstances. (*Ibid.*) As the Court explained in *People v. Dillon* (1983) 34 Cal.3d 441, pp. 454-455, an "attempt is underway" only if the act is *unequivocal.*

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42. Both appellant and his codefendant filed motions for judgments of acquittal at the close of the prosecution's case-in-chief. (CT 725-726; RT 6563-6570.)

A special circumstance exists if a murder was committed while the defendant was engaged in the commission or attempted commission of rape in violation of Penal Code section 261. (Pen. Code § 190.2 (a)(17)(C.)) [43/]

The prosecution here alleged attempted rape only. Therefore, it had to prove that appellant possessed the specific intent to commit rape (*People* v. *Craig* (1957) 49 Cal.2d 313, 318; see also *People* v. *Bradley* (1993) 15 Cal.4th 1144, 1154), and that appellant took an unequivocal direct action toward raping Ms. Pontbriant; or else that codefendant Letner possessed the specific intent to rape Ms. Pontbriant, took an unequivocal direct action toward raping her, and appellant aided and abetted Letner in his attempt to rape Ms. Pontbriant.

B. The Evidence Was Insufficient to Establish That an Attempt to Rape Ms. Pontbriant Occurred

The prosecution presented no eyewitnesses to the murder or to the alleged attempted rape of Ms. Pontbriant,[44/] and the forensic evidence did not support a charge of actual rape. The attempted rape charge rested entirely on supposition. None of the evidence, individually or collectively, established that appellant or codefendant Letner attempted to rape Ms. Pontbriant. Moreover, the prosecution offered no evidence or theory to explain why an actual rape did not occur, if one or both of the defendants had attempted to rape Ms. Pontbriant. Lastly, the prosecution presented no evidence of conduct or statements by either defendant, made before, during

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43. Appellant contends in Argument V that this Court should hold that a special circumstance allegation cannot be based on *attempted* rape-murder.

44. The only eyewitness testimony was presented by appellant, and he denied that he attempted to rape or murder Ms. Pontbriant. He also testified that he did not witness codefendant Letner attempting to rape – or murder – Ms. Pontbriant, and that he did not aid Letner in attempting to rape Ms. Pontbriant. (RT 6983-6987.)

or after the murder which supported an inference that either defendant intended to rape Ivon Pontbriant or committed any direct act toward having sex with her. (Cf., *People v. Marshall* (1997) 15 Cal.4th 1 [one month before defendant killed the victim, he had attempted to rape another woman who had screamed, causing him to flee].)

From the outset, the prosecution conceded that it had insufficient evidence to charge either defendant with actual rape. (See CT 7-8 [Information No. 26592 charged only attempted rape].) After presenting its evidence at trial, the prosecutor conceded this once again. (RT 7583-7584.) There was no evidence of semen found on or near the victim's body. However, throughout the guilt trial, Deputy District Attorney Reed argued the case as if proving attempted rape required some lesser standard of proof than proving actual rape. Although attempted rape *is* a lesser included crime of rape, it is actually more difficult to prove, because it requires a showing of a specific intent to rape. It is especially difficult to prove where the victim is unavailable to testify, there are no other witnesses, and there is no physical evidence of rape. The evidence supporting an attempted rape allegation is sufficient where the victim and/or other witnesses can testify as to the defendant's words and conduct, for example, as in *People v. Craig* (1984) 25 Cal.App.4th 1995 (*"Craig II"*), in which the defendant was pulled off the victim before he could rape her. The evidence is necessarily insufficient, in contrast, if no physical evidence conclusively shows that an attempt to rape occurred, there are no eyewitnesses, and there are no admissions by the accused.

The prosecution argued the attempted rape count/attempted rape-murder special circumstance to the jury based on the following evidence: (1) when the victim's body was discovered, she was naked except for her bra and socks; (2) the victim's sweater had been torn down the front; (3) a

bloodstain on the side of the sweater could have come from codefendant Letner; (4) a beer bottle was lodged between the victim's legs, near but not touching her genital area; (5) hair which could have come from codefendant Letner was found on the victim's chest (after her body was rolled over); (6) two months after the murder the police collected carpet fibers from the bedroom on which semen was found, which possibly could have come from appellant, and which possibly was deposited in the carpet on the night the victim was murdered; (7) blood smears on a pillowcase and on a doily found in the bedroom, and on a rag found in the victim's car, could have come from appellant; and (8) appellant testified that "sexual contact was beginning to take place between Letner and the victim." (RT 7585-7587.) This evidence was insufficient to support either appellant's attempted rape conviction or the jury's attempted rape-murder special circumstance finding.

1. The Fact That the Victim Was Found Naked Except for Her Bra and Socks Did Not Establish That an Attempt to Rape the Victim Occurred

This Court has never sustained a rape or attempted rape conviction based solely on the fact that the murder victim was found naked. (See, e.g., *People v. Anderson* (1968) 70 Cal.2d 15 [young girl found naked next to her bed]; *People v. Johnson* (1994) 6 Cal.4th 1 [female victim found naked from the waist down]; see also, *People v. Morris*, *supra,* 46 Cal.3d 1 [male victim found naked except for his shoes and socks in public bathhouse known as a meeting place for the gay community; neither rape nor attempted rape even alleged].)

The fact that Ms. Pontbriant was found naked except for a bra around her waist and socks on her feet is not in itself sufficient to sustain appellant's conviction of attempted rape or the special circumstance finding

of attempted rape-murder. Moreover, other indicia of a sexual assault typically found at a rape or attempted rape scene were absent here.

First, the position of Ms. Pontbriant's body on the floor did not correlate with a sexual assault. Ms. Pontbriant was found lying face down. Her legs were close together, not spread apart. She was lying on the floor in the fairly narrow space between two pieces of furniture, the couch and the coffee table. These facts contrast sharply with the typical rape/murder crime scene, such as described in *People v. Chambers* (1982) 136 Cal.App.3d 444. In that case, the victim was found dead lying face up on the floor of her living room. "Her sweater and bra were both pushed above her breasts. Her pants and underpants were removed from one leg and bunched up around the foot of the other. Her legs were spread. There was no evidence she had been dragged." (*Id.* at p. 454.)

Here, although the victim's clothes had been removed, they were not found in disarray partly on the body and partly off, as in *Chambers.* They were stacked in a fairly neat pile some distance from the victim's body. The victim's bra was not pushed up above the breasts, which could be indicative, as in *Chambers,* of aggressive, forced sexual assault.

Thus, neither the position of the victim's body here nor the condition and position of the victim's clothing suggested a sexually motivated attack, as in *Chambers, supra.* Moreover, the wound which killed Ms. Pontbriant was inflicted from the rear, not the front, and was inflicted in a manner that required the victim to have been lying on the floor face down while her assailant "sawed" at the back of her neck with a knife or other sharp instrument. (RT 4902-4903). The nature of this wound did not in any way suggest it was inflicted as part of a sexual attack.

Unlike in *Chambers, supra,* there was no evidence of trauma to the victim's genitals. In *Chambers,* "[t]here was also evidence of actual

penetration. Among other wounds she had two bruises on her labia . . . . The bruising was consistent with a human penis." (*Ibid.*) The absence of such evidence does not preclude the possibility that a sexual attack occurred or was attempted, but its absence must raise the bar for the quanta of *other* proof that the prosecution must present in order to meet the due process requirement that an attempted rape conviction be based on evidence of solid value.

The *Chambers* court also specifically noted that when a claim is made that the evidence is insufficient to find that a rape occurred, a relevant consideration is whether there is "other evidence which affirmatively tended to negate a finding of rape." (*Ibid.*) In the instant case, there was an array of such negative evidence, even beyond the absence of genital trauma: no sperm was found in, on or around the body; no foreign pubic hair was positively located;[45/] the position of the victim's body was not sexually suggestive (victim not lying on her back with legs spread apart); and there was little evidence to support an inference that the victim struggled to fight off a sexual attack.[46/] Further, the prosecution offered no evidence or even

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45. According to FBI hair expert Malone, two hairs found on the victim's chest were "possibly" fringe hairs from the pubic area, but these hairs did not possess sufficient unique characteristics to permit them to be matched with anyone. (RT 5970.) These hairs were not positively identified as pubic hair, nor could the prosecution exclude them as coming from the victim herself.

46. No blood, skin or other trace evidence was found under the victim's fingernails. (RT 5857-5858.) Moreover, Ms. Pontbriant suffered no obvious defensive wounds. Dr. Walter observed two cuts to the left arm of the victim which might have been defensive wounds. Each wound was a relatively superficial laceration, one near the wrist and one higher on the forearm. However, Dr. Walter also testified that these wounds were consistent with being inflicted incidentally by a knife held in the assailant's hand while the assailant was tying the telephone cord around the victim's

(continued...)

a theory to explain why or how, if an attempt to rape the victim occurred, it was interrupted or stopped or could not have been completed.

In addition, even assuming arguendo that sexual activity with the victim did occur, there was substantial evidence contradicting the inference that such activity was non-consensual. First, Ms. Pontbriant welcomed the night time visit by codefendant Letner. She told her friend, Flourene Gentry, to whom she was talking on the telephone at the time, that she was pleased when she realized that Letner had come to visit her. (RT 5532-5533.) She then spent the evening drinking in her home with Letner and appellant.[47]

In *People v. Morris, supra,* this Court described possible sequences of events prior to the death of the victim. These scenarios demonstrated why the speculative nature of the jury's finding in *Morris* that the victim was robbed *prior* to being shot by the defendant was too speculative to be sustained:

> If, prior to the shooting, the assailant removed the credit card from the victim's clothes [which were found on the ground near the victim], then the taking constituted a theft but not a robbery. Similarly, if, prior to the shooting, the victim volunteered the credit card to his assailant as a form of consideration for sexual services, then no robbery was committed.

(*Id.*, 46 Cal.3d at p. 20.)

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46. (...continued)
wrists. In fact, Dr. Walter testified that there were "several" scenarios that might account for the two wounds to the victim's left arm. (RT 4928-4929.)

47. Ms. Pontbriant's blood alcohol level at the time of the autopsy was .29 percent. (RT 4938.) Defense toxicologist Bill Lynn Posey testified that a person with a standard alcohol burn-off rate would have had to drink around 20 cans of beer to attain a .29 percent blood alcohol level within a six-hour period, or about 14-15 cans of beer during a four-hour period. (RT 6766-6768.)

Any conclusion in the present case that an attempt to rape Ms. Pontbriant occurred before she was murdered was even more speculative. When a victim is assaulted in a manner that indicates the assailant has a sexual motive, but the assailant is either scared off (see, e.g., *People v. Marshall, supra,* 15 Cal.4th at pp. 11-12) or driven off (see, e.g., *Craig II, supra,* 25 Cal.App.4th at p. 1596), it is reasonable to draw the inference that the object of the assault was rape, and thus the assault constituted attempted rape. Where a murder occurs without eyewitnesses, however, it cannot be reasonable to conclude that the assault was sexually motivated, unless the physical evidence unequivocally indicates that sexual activity occurred prior to the murder *and* was not consented to.

Absent that evidence, the only fact which the jury could find beyond a reasonable doubt was that Ms. Pontbriant was murdered. As this Court emphasized in *People v. Morris, supra,* crimes must be proven with specific evidence, not atmospherics. This Court recognized in *Morris, supra,* that because felonies such as attempted rape elevate a murder trial into a capital trial, the proof supporting any such felony must be closely scrutinized.

In the instant case, the trier of fact could only speculate as to what happened prior to the murder, since there was no clear physical evidence that a sexual assault occurred. The prosecution had to establish more than the fact that the victim was found naked.

2. The Blood Stain Evidence Did Not Establish That an Attempt to Rape the Victim Occurred

The prosecutor argued that the blood on the pillowcase and on the doily from the bedroom, the blood on the rag from the victim's car, and the blood on the victim's torn sweater constituted evidence that an attempt to rape Ms. Pontbriant occurred. (RT 7561, 7585, 7778.) This blood evidence, however, did not support the attempted rape charges. The blood on the

pillowcase, on the doily and on the rag from the car could have come either from appellant or Warren Gilliland who lived in the house.[48/]

The Type A blood found on the victim's sweater in the living room could have come from codefendant Letner, but it also could have come from the victim. The blood was "rather insoluble," which suggested to Mr. Andrus that it was "an aged or degraded specimen." (RT 5884.) Therefore, Mr. Andrus did not even try to test this blood to obtain a PGM type. (RT 5884-5885.) The blood's insolubility indicated that it was *not* deposited as recently as the night of the murder.

Thus, none of the blood evidence, taken separately or together, unequivocally pointed to either appellant or to codefendant Letner as the contributor. Nor could the prosecution establish that the blood had been deposited on the night the victim was killed.

In any event, the blood evidence could not establish that either appellant or codefendant Letner *attempted to rape* Ms. Pontbriant. No logical nexus existed between the presence of blood on the pillowcase, doily, rag or sweater and an attempt to rape Ivon Pontbriant. The small amounts of blood found on the pillowcase and on the doily from the bedroom, the relatively small amount found on the rag from the car, and the fact that none of these items were found in the immediate area of the murder, countered any inference that this blood showed that appellant struggled with the victim, much less that he struggled with the victim in order to sexually assault her.

With regard to appellant, this blood evidence at most supported only an inference that he had been in the victim's bedroom and had also sat in the victim's car, *possibly* on the same evening that Ms. Pontbriant was

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48. In both the ABO and PGM systems of blood typing, appellant and Warren Gilliland shared the same blood type. (RT 5824-5825.)

murdered. But appellant himself testified that he socialized with Ms. Pontbriant at her house on the evening of March 1 (RT 6849-6850), and that he was sitting in the passenger seat of Ms. Pontbriant's car when Officer Wightman stopped that vehicle. (RT 6066; see also testimony of Officer Wightman, at RT 5148-5149.) Thus, the blood evidence (assuming arguendo that the blood even came from appellant) could do nothing more than corroborate facts which were not in dispute and which did not prove that an attempt to rape the victim occurred.

Negative blood evidence also has to be considered here. The murder scene was very bloody, but the police investigators found no ABO Type O blood (appellant's blood type) on or near Ms. Pontbriant's body, or anywhere else in the living room. Conversely, no blood belonging to Ms. Pontbriant was found in the bedroom, and there was no other substantive evidence that any type of struggle with the victim occurred in that room. Thus, finding droplets of blood in two locations in the bedroom, which possibly came from appellant, could not reasonably ground the inference that he attempted to rape Ms. Pontbriant. In short, any scenario creating a nexus between the blood evidence and the attempted rape allegations rested on pure speculation.

3. The Feces-Covered Beer Bottle Did Not Establish That an Attempt to Rape the Victim Occurred

The prosecutor also argued that the Heineken beer bottle found lodged between the victim's legs indicated that the defendants intended to sexually assault Ms. Pontbriant. (RT 7585-7586; 7616.) In her closing argument, the prosecutor reminded the jurors of the testimony by Dr. Walter that feces can be involuntarily released during times when a person is experiencing trauma or at the time of death. Deputy District Attorney Reed then argued: "Because this bottle is covered with feces down to the top

portion of the bottle, I would submit that it is clear that the bottle was kicked or shoved in its place prior to [the victim's] death." (RT 7586.)

The prosecutor's argument, however, did not logically relate to an attempted rape charge. Although the bottle likely did come to be lodged between the victim's legs before she died, the prosecutor's assertion that the bottle was either kicked or shoved into its location involved pure speculation. Police technician Rains testified that the beer bottle was "securely placed between the victim's legs" (RT 5623) and that he could not remove it until the body was rolled over. However, neither Rains nor Dr. Walter, the prosecution pathologist, testified that the bottle appeared to have been kicked or shoved into place. Moreover, Dr. Walter did not note any bruising on the victim's legs around the area of the bottle. Dr. Walter did not address the issue of whether the bottle was "securely placed between the victim's legs." However, Rains' testimony that he could not remove the bottle until the body was turned over has to be considered in conjunction with Dr. Walter's testimony regarding the effects of rigor mortis. (RT 4951-4952). Because the victim's body was not discovered until the evening of March 2, 1988, rigor mortis had set in, which would have caused the victim's legs to stiffen.

The prosecutor argued that the bottle did not get between the victim's legs because it was lying on the carpet already, or because it was knocked onto the carpet as Ms. Pontbriant came to the position she was found in. (RT 7777.) However, in answer to a question from the trial judge, Rains reviewed People's Exhibit 13 (a photo which showed the location of the bottle after Ms. Pontbriant's body was turned over), and Rains then stated, "it appears, your Honor, that a portion of the bottle would have been resting on the floor." (RT 5757.) Rains also stated that a portion of the bottle was underneath the victim before her body was turned over.

(RT 5754.) He agreed that he easily removed the bottle once he turned the victim's body over, because then "the entire weight of the victim was not resting upon it." (*Ibid.*)

This testimony directly contradicted the prosecutor's scenario that one of the defendants kicked or shoved the bottle between Ms. Pontbriant's legs after she was laying on the floor. If one of the defendants had done so, then the beer bottle would have likely been wedged between the victim's legs with the bottom of the bottle sticking *upwards,* rather than downward, touching the floor underneath the victim, as Rains testified.

A more elaborate theory would be that the victim at some point was lying on the floor on her back, before one of the defendants turned her over and inflicted the lethal cut to the back of her neck. But this scenario requires even more speculation than the first scenario. Rains described the positions of the victim's body (face down) and of the beer bottle as he saw them. No testimony supported a theory that the beer bottle was shoved between the victim's legs when she was in a different position.

Further, the prosecution presented no evidence that fingerprints, blood, or hairs belonging to either defendant were detected on the bottle. Ms. Pontbriant's blood/alcohol level at the time of her death established that she had drunk a considerable amount of beer during the evening. The bottle found between her legs could have been one *she* had been holding and had set down on the coffee table or the floor.

But most importantly, Dr. Walter found *no evidence* either of penetration or of sexual trauma to the victim's genital area. (RT 4935-4936.) Dr. Walter testified specifically, on cross-examination, that he did not observe any vaginal or anal changes consistent with rape – by a human penis *or* by a foreign object. (RT 5046.) This finding by Dr. Walter was

precisely the reason the prosecution had to charge each defendant only with attempted rape.

Even assuming arguendo that the evidence was sufficient to support the inference that the beer bottle *had* been pushed or shoved between the victim's legs by appellant or by codefendant Letner, the trier of fact still could not reasonably infer from the location of the bottle or its condition that appellant – or codefendant Letner – possessed either a specific intent to rape the victim, or took any overt action toward raping the victim. The prosecution's theory that appellant or codefendant Letner tried to kick or shove the beer bottle into the victim's vagina or anus would have been relevant if the prosecutor had charged each defendant with an attempted violation of Penal Code section 289, penetration by a foreign object. But such conduct would not have constituted rape, or attempted rape, under Penal Code section 261. The prosecution's evidence must be sufficient to support a conviction of the *specific type* of sexual offense alleged. (*People v. Raley* (1992) 2 Cal.4th 870, 890-891 [reversal of attempted oral copulation conviction].)[49/]

Even if object penetration were the equivalent of rape, in any case the prosecution put on no evidence that any "sexual penetration, however slight" occurred. Neither rape nor rape by a foreign object is completed unless there is proof that penetration occurred. (See Penal Code

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49. While some statutes refer to section 289 object penetration as "rape," and there is a very close relationship between rape and object penetration, it is also clear that to convict a person of rape by a foreign object, the prosecution has to charge that person with a violation of section 289, not of section 261. (See *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1369-1370.) The same rule must apply to the separately defined special circumstances of rape in violation of section 261 (Pen. Code § 190.2(C) and rape by instrument in violation of section 289 (Pen. Code § 190.2(K).

section 263; *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1370.) Thus the prosecution's theory could only be that an *attempt* to sexually penetrate Ms. Pontbriant with the Heineken beer bottle occurred. But no reasonable trier of fact could conclude that one of the defendants kicked or shoved the bottle into that position with the specific intent to sexually penetrate the victim with the bottle, but here again, as with one or both of the defendants' direct attempts to rape the victim, the defendant for some reason failed to achieve penetration. In any case, if this were the prosecution's theory, appellant was charged with the wrong crime. The jury was instructed concerning an attempted rape, not other sexual crimes.

The prosecutor's argument here was a transparent attempt to inflame the jury against the defendants, which the prosecutor apparently succeeded in doing. The prosecutor's argument was "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." (*Powell v. Galaza* (9th Cir. 2002) 282 F.3d 1089, 1097, quoting *Quercia v. United States* (1933) 289 U.S. 466, 472.)

4. The Hair Evidence Did Not Establish That an Attempt to Rape the Victim Occurred

Hairs matching the victim were found on the victim's buttock, on the victim's back, on the floor near the victim and on the sofa near the victim. All appeared to have been removed by force. (RT 5962-5966.) Hair belonging to Ms. Pontbriant was also found intertwined with the knot in the telephone cord tied at her left wrist. (RT 4927-4928.)

Three hairs consistent with codefendant Letner were found on the victim's chest. (RT 5967-5969.) Two other hairs found on the victim's chest were not suitable for comparison. The prosecution's hair expert, FBI Agent Malone, offered that it was *possible* that these were "fringe hairs." If

so, they would have come from an area near the pubic region. (RT 5969-5970.) In closing argument on the attempted rape charges, the prosecutor emphasized that hairs matching Letner were found on the victim's chest, and also that "fringe hairs" (i.e., hairs coming from the pubic region) had been found. (RT 7554-7555.)

Several hairs inside a baseball hat located in the bedroom matched codefendant Letner's hair, and several hairs inside a cap located in the victim's car also matched his hair. (RT 5970-5972.) This latter evidence might prove that codefendant Letner left a cap in the victim's bedroom which he had once worn, and left another cap inside the victim's car that he also had worn. But Letner had been to the victim's home many times, including on the night she was murdered. According to Jeannette Mayberry, he had driven the victim's car on previous occasions (RT 5408-5409); and he drove the victim's car on the night she was murdered. These facts were not in dispute, and they did not prove that Letner or appellant attempted to rape Ms. Pontbriant.

No evidence existed that an attempt to rape Ms. Pontbriant occurred in her car. No evidence existed that an attempt to rape Ms. Pontbriant occurred in the bedroom, except for the alleged semen stain located in the bedroom carpet two months after the murder. The semen stain was relevant to appellant, if at all, not to codefendant Letner, and for the reasons explained in subsection (5), *infra,* the semen stain itself was not evidence of solid value.

The most significant hair evidence, the three hairs matching codefendant Letner found on the victim's chest, supported an inference that Letner was the person who murdered Ms. Pontbriant. But these hairs could tell the trier of fact absolutely nothing about what Ms. Pontbriant's attacker might have done to her, if anything, prior to killing her. Because the hairs

appeared to have been forcibly removed, they constituted some evidence that Ms. Pontbriant struggled with codefendant Letner. However, an animal hair was also found on the victim's chest. (RT 5969-5970.) The animal hair must have gotten on the victim's chest from being on the carpet already. It stayed there when the victim's body was turned over.[50] It was just as possible that the other hairs matching Letner got onto the victim's chest the same way. In any case, the presence on the victim's chest of hair matching codefendant Letner, even hair forcibly removed, could not tell the trier of fact whether codefendant Letner attempted to rape Ms. Pontbriant.

The two possible "fringe hairs" also found on the victim's chest were not relevant evidence for any purpose. FBI Agent Malone testified that these hairs were unsuitable for comparison, because "there was not enough characteristics for me to call it one way or another." (RT 5967.) Malone explained further, "[w]hen you have a hair that's not suitable for comparison, you can't eliminate somebody, you can't associate somebody." (*Ibid.*) Thus, these two hairs possessed insufficient individual characteristics to allow Mr. Malone to compare them to any known hair specimens. This fact rendered them useless as evidence.

Mr. Malone then seemingly resurrected the evidentiary value of the two hairs by suggesting that because these hairs were so characterless, it was "possible" they were fringe hairs from the pubic region. (RT 5970.) The prosecutor in her closing argument ignored Malone's qualifier that the two characterless hairs were "possibly" pubic hairs, and disregarded the real

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50. Warren Gilliland testified that he and Ivon Pontbriant had a puppy dog that he took with him to Modesto (RT 5142; see also, RT 5367-5368, testimony of Etta Gilliland that when Warren Gilliland arrived in Modesto on February 29, 1988, he had a dog with him.) The animal hair found on the victim's chest likely came from the puppy.

significance of Malone's testimony, which was that he could not associate the two hairs with anyone.

Finally, the forcibly removed hair belonging to the victim found on or near the victim's body was not evidence that a *sexual* attack occurred prior to her murder or was a motive for her murder. This evidence did suggest that the victim was grabbed by her hair at some point. The hair intertwined in the knot at her wrist suggested she was grabbed by her hair before the knot was tied. The forcibly removed hair of the victim conceivably indicated the victim resisted an assault, but it in no way constituted evidence that appellant or codefendant Letner attempted to rape Ms. Pontbriant.

5. The Semen Stain in the Bedroom Carpet Did Not Establish That an Attempt to Rape the Victim Occurred

The prosecutor asserted in her closing argument that semen which came from appellant was found in the bedroom carpet, and that this proved – in combination with the blood evidence found in the bedroom – that appellant "was in the bedroom perpetrating robbery, burglary and what appears to be very definitely attempted rape." (RT 7560-7561; see also, RT 7806.) However, this semen evidence was neither probative nor reliable. First, Mr. Andrus, the prosecution expert, could not say *when* the semen was deposited in the carpet. Second, Mr. Andrus's hedging testimony on whether the semen could be identified as coming from a secretor or a non-secretor provided no solid basis to conclude that the semen found in the bedroom carpet came from a secretor (which would have made it consistent with appellant).

Third, the process by which this evidence was obtained and tested rendered the semen stain devoid of evidentiary value. Police technician Rains did not collect the two carpet samples from the victim's bedroom

until May 5, 1988, more than two months after the murder. Mr. Rains and another technician went to the victim's house with a laser light under the impression that the house had not been cleaned up since the murder. However, they discovered that the interior of the house had been cleaned, the furniture had been removed and the living room rug appeared to have been shampooed.[51/] The carpet in the master bedroom appeared to Rains not to have been shampooed, so the technicians scanned it with the laser light. They then collected two areas of the carpet that fluoresced under the laser light, raising the possibility that the carpet sections contained semen. (RT 5721-5722.)

They did not collect any other areas of the carpet to serve as controls for testing purposes, however. Nor did they note whether the carpet sections were collected from areas of the carpet which had been covered by furniture on March 1, 1988.

A year later, Mr. Andrus tested the carpet fibers which Rains had collected. (RT 5872-5874.) The carpet fibers from one of the two carpet sections contained no material of evidentiary value. (RT 5675.) Andrus located semen on the carpet fibers from the second carpet section. (RT 5875.) However, he did not locate any sperm. Further testing of the carpet fibers revealed no identifiable PGM activity; his ABO testing did not achieve any conclusive results; and his testing for secretor/non-secretor markers also was inconclusive. (RT 5876-5879.) Reasons for these negative results included "the age of the specimen" and the "lack of sufficient sample." (RT 5875.)

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51. The victim and Warren Gilliland were renters, not owners of the house on North Jacob Street. (RT 5100-5101 [Warren Gilliland]; 5333-5335 [Sharon Layman].) Evidently, the owner or the property manager had the house cleaned subsequent to the initial police investigation.

Andrus was also unable to date the semen stain. The semen could have been deposited in the bedroom carpet at any point before or after the murder occurred, up to May 5, 1988. The prosecution made no attempt to show that the North Jacob Street house was unoccupied between March 4, 1988, and May 5, 1988. Subsequent to March 2, 1988, Warren Gilliland and a friend, James Wright, lived in the Jacob Street house for at least a couple of days. (RT 63-55-6356 [James Wright].)[52/] Mr. Wright might have been a masturbator. (RT 5523-5524.) According to Flourene Gentry, Ivon Pontbriant told her while they talked on the phone on the night of March 1, 1988, that a man she did not like had come to the house that evening to see Warren Gilliland. Ivon did not like this man because "he played with himself." (RT 5287.) According to Warren Gilliland, Ivon did not like Warren's friend James Wright, because of some of his "mannerisms," specifically that Wright "played with himself".

The prosecution also presented no evidence that the crime scene had been secured from March 2, 1988, through May 5, 1988. Police technician Rains' testimony about being surprised to find that the furniture had been removed and that the living room rug had been shampooed showed that the police had not kept the crime scene secure and, in fact, did not have any idea what the owners of the house were doing about renting the house out again.

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52. It appears that Warren Gilliland stayed at the North Jacob Street house longer than a couple of days. He testified that he moved after Ivon Pontbriant's death. (RT 5229.) But Gilliland also testified that he had a conversation with Detective Logan at the North Jacob Street house. (RT 5227-5228.) Detective Logan testified that he interviewed Warren Gilliland once the day Gilliland returned to Visalia (March 4, 1988) and a second time on March 11, 1988. (RT 6649-6650.) So Gilliland apparently lived at the North Jacob Street house from March 4, 1988 through at least March 11, 1988.

The semen also could have been deposited in the carpet *before* Warren Gilliland and Ivon Pontbriant ever moved into the house. In fact, Andrus admitted, it could have been deposited even years before the time of testing. (RT 5880.) This last possibility was all the more likely, given that all the testing Andrus performed on the carpet fibers for identifying markers yielded only negative or inconclusive results. PGM markers deteriorate over time. (RT 5885, 5899-5900.)

Because the testing of the semen for sub-typing markers was negative, and Mr. Andrus could not reliably date the specimen, the semen evidence did not constitute evidence of solid value establishing either that an attempt to rape Ms. Pontbriant occurred or that the semen came from appellant.

Further, in addition to stating as his professional opinion that his testing of the sperm for secretor/non-secretor markers was inconclusive, Mr. Andrus admitted that the antigenic activity which he did detect in the carpet material could have been caused by chemicals involved in the manufacture of the carpet or added later to it (rather than because the semen was contributed by a secretor). (RT 5877, 5935.) He had no control samples of the carpet to test. In short, the antigenic activity was possibly "background" antigenic activity present throughout the carpet. (RT 5876.)

Among the substances, other than blood group antigens and salivary antigens, that produce ABO antigenic activity are bacteria, sweat, other body fluids, animals, and chemicals. (RT 5877.) More than two months passed between the murder and the collection of the carpet section. The rental house had not been kept secure by the police during this time. Thus, Andrus could not eliminate the possibility that the antigenic activity he detected in the carpet fibers came from body fluids, such as saliva or perspiration, or was caused by bacteria, deposited in the carpet fibers

subsequent to March 1, 1988, or earlier than that date, since the semen stain could not be dated. Such contamination of the specimen would obviously make any finding of low-level antigenic activity useless as an indicator that the specimen came from a secretor.[53]

In sum, whether the semen in the bedroom carpet was contributed by a secretor or by a non-secretor could not really be known. Even though he was pushed by the prosecutor on this point, Mr. Andrus testified, in the most hedging manner conceivable about the secretor/non-secretor status of the semen:

> Well, I reported it [the test for a secretor/non-secretor marker] as an inconclusive result, simply because there was not sufficient information in my mind, to confirm or to conclude the specific antigenic marker that was inferred. [Para.] There

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53. See *People v. Alvarez* (1975) 44 C.A.3d 375, 380, in which a prosecution criminalist gave testimony explaining that he did not perform semen-typing tests on a semen stain found in a pair of panties because he was not confident the semen specimen had not been contaminated, due to (1) the panties having been handled by a number of persons in the course of the police investigation, who might have contributed their own perspiration to the specimen, (2) bacterial contamination of the cloth in the panties, and (3) the strong possibility that the cloth itself would contribute to the analysis and obscure the results (i.e., there might be antigenic activity in the cloth, rather than in the semen specimen). These factors, he testified, "would not just simply prevent typing, but could cause erroneous typing." (*Ibid.*) The witness gave this example: "[L]et's say the person, we test the person's spit for blood typing factors. We find out he is a secretor and what type, either A, B, or O, or AB. Then we examine the cloth. We may find out that assuming he is an A, we might find out that the cloth contributes to the A factors, the A analysis. So, right there the results are meaningless because we don't know if the typing is from the presumed, you know, the arrestee, or from the cloth, itself. So, all you can say is the result is inconclusive, frankly, meaningless." (*Id.*, fn. 5.) Mr. Andrus gave a similar example in his testimony here: Levi jeans can produce a "B" antigenic reaction. So if a test of a stain on a pair of Levis was done without a control section of the jeans also being tested, the "B" antigen detected could be from the jeans rather than the stain itself. (RT 5877.)

> was some inference as to an antigen type present, however, the reactivity of that, in my mind, was not adequate to be certain, and therefore, that is why I called it an inconclusive interpretation.

(RT 5878-5879.)

The most that Mr. Andrus would say about the significance of "the inference as to an antigen type present" was that this "would tend to indicate" that non-secretors were "likely not contributors." (RT 5879.)

However, Deputy District Attorney Reed turned Mr. Andrus's testimony on its head when she argued to the jury: "Now, it is true that Mr. Andrus said that he could not be for sure [sic] that there was evidence of secretion [sic] in that semen." Despite this, "Mr. Andrus testified, essentially, that it gave indications of being a secretor status." (RT 7560-7561.) Therefore, Ms. Reed argued, the semen found in the bedroom was consistent only with appellant Tobin, and inconsistent with Warren Gilliland or Richard Letner. (RT 7560.) But the testing conducted on the semen did not support this argument.

Even if one assumed arguendo that the antigenic activity detected in the semen specimen could actually link the specimen to a secretor, at most this simply meant that appellant could not be excluded as the donor. But secretor/non-secretor status is not a very discriminating marker. No testimony was presented regarding the relative percentages in the general population of secretors and non-secretors. Since this marker discriminates between only two possibilities, secretors must make up a large percentage of the population.[54/] This fact might not have been significant, if the carpet stain could have been dated, but as the testimony of Mr. Andrus made abundantly clear, it could not.

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54. In fact, 80% of the male population are secretors. (See, e.g., *People v. Alvarez, supra,* 44 Cal.App.3d at p. 380.)

Nor was the semen stain found in a location that associated it with the murder. No semen was located by police investigators anywhere in the living room, so the semen located on the bedroom floor was an isolated phenomenon. A great deal of blood, as well as other evidence relating to how and why the murder occurred, was located throughout the living room. But there was little to connect what the police found in the bedroom to what happened in the living room. Other than the semen stain itself, there was no evidence that any sexual encounter or struggle between the victim and her assailant occurred in the bedroom. There was no semen on the bedsheets, nor was any semen found anywhere on the bed or on the pillowcase found on the floor.

The blood found on the pillowcase and on the doily in the bedroom was of such small quantities that it could not reasonably ground an inference that the attack on the victim started or finished in the bedroom. Although the wounds inflicted on Ms. Pontbriant produced a large amount of blood and blood splattering, no blood belonging to the victim was found in the bedroom.

Moreover, all the victim's clothing was found in the living room, suggesting she undressed, or was undressed by someone else, in that room, not in the bedroom. This clothing was not strewn around the living room, much less the whole house. It was found all in one pile, one piece stacked on top of another. (RT 5739-5740.) There was feces on the victim's jeans, on her panties, and on her legs. (RT 5623, 5661.) There was no feces found in the bedroom.

All this evidence suggested that Ms. Pontbriant was never in the bedroom after she undressed (or was undressed) in the living room. None of the evidence suggested that Ms. Pontbriant was attacked in the bedroom

and then ran into the living room, or was carried or dragged from the bedroom into the living room.

This state of the evidence must raise the following questions: How likely was it that no semen would be found anywhere in or on the victim's bed, but would be found only on the floor, if Ms. Pontbriant had in fact been sexually assaulted in the bedroom? How likely was it that no blood belonging to Ms. Pontbriant would be found anywhere in the bedroom if she had been sexually assaulted in the bedroom, just before being murdered in an exceedingly bloody manner in the living room? How likely was it that no blood belonging to the victim would be found in the bedroom, when the victim suffered facial abrasions and six non-lethal stab wounds to the front of the neck before she suffered the final lethal wound to the back of her neck, if she had been sexually assaulted in the bedroom prior to her murder? The answer to each of these questions is that it was not likely at all.

The semen evidence, either considered alone or in combination with the victim's nakedness, the blood evidence, the hair evidence, and the beer bottle between the victim's legs, therefore, could not have established that an attempt to rape Ms. Pontbriant occurred before she was murdered.

6. Appellant's Testimony That Codefendant Letner and Ms. Pontbriant Kissed Did Not Establish That an Attempt to Rape the Victim Occurred

The prosecutor also argued that appellant's testimony that codefendant Letner engaged in sexual activity with Ms. Pontbriant before appellant left the victim's house provided grounds for the jury to infer that an attempted rape occurred. (RT 7566, 7586.) But appellant specifically testified that the sexual activity he observed was consensual; that Ms. Pontbriant and Mr. Letner were sitting on the couch with their arms around each other, and then started kissing. Appellant therefore felt it was time for him to leave. (RT 6859, 6971.) This testimony in no way

supported an inference that either appellant or codefendant Letner therefore attempted to rape Ms. Pontbriant, particularly since there was no clear physical evidence that any attempt to rape Ms. Pontbriant occurred.

Further, the prosecutor attempted throughout her cross-examination of appellant, and again in closing argument, to discredit appellant's trial testimony. (See, e.g., RT 6965, 6971-6972, 7562-7565, 7785-7794.) Yet she then asked the jury to accept his specific testimony about sexual activity between Ms. Pontbriant and codefendant Letner. However, insofar as this testimony *was* accepted as true, the point of the testimony was that the sexual activity that appellant observed between Ms. Pontbriant and codefendant Letner was consensual.

7. The Condition of Ms. Pontbriant's Clothing Did Not Establish That an Attempt to Rape the Victim Occurred

The prosecutor additionally argued that an attempted rape must have occurred because Ms. Pontbriant did not remove her clothes voluntarily. Ms. Reed argued that the victim must have been forced to remove her clothes because her sweater was cut, the legs of her jeans were inside out, with her underwear wrapped inside the pants, and all the victim's clothes were in a heaped up pile about four feet away from the victim. (RT 7585.)

The condition and position of a victim's clothes can provide evidence of rape or attempted rape. For example, this kind of evidence is significant where the clothes are partially removed and bunched up, as in *Chambers, supra.* There, the victim's pants and underpants were removed from one leg and bunched up around the foot of the other leg. (136 Cal.App.3d at 454.) However, in the instant case, the victim's clothing was found stacked fairly neatly in a pile several feet from the victim's body. (RT 5661.) The condition of the clothing and the feces on some of the garments did suggest Ms. Pontbriant removed the garments

hurriedly, but the stacking of the garments suggested that she removed them methodically and purposefully laid them down one on top of the other. While the clothes were piled neatly, they hardly provided a neat conclusion about how or why they got onto the floor.

Ms. Pontbriant's sweater did appear to have been ripped or cut at the neck, possibly by a knife. (RT 5662.) But this hardly constituted evidence that Ms. Pontbriant was sexually assaulted or that sex was the motive for the murder, where other, more direct types of physical evidence that a sexual assault occurred were absent.

There simply was insufficient evidence to infer that the removal of the clothing was a prelude to a rape or that it meant an attempt to rape the victim was "underway." The feces on Ms. Pontbriant's legs, jeans and panties strongly suggested that she defecated before the jeans and panties were removed. Ms. Pontbriant may have defecated because she was extremely drunk, or because she was too drunk to get to the bathroom and take off her jeans. It is possible the sole reason she took off her clothes was because she had defecated on them.

Even assuming arguendo that the removal of the clothing constituted some evidence that one or both of the defendants intended to commit a sexual act with the victim, there was no evidence suggesting what crime was intended. Removing the clothes could have been a prelude to oral copulation, for example. But as this Court stated in *People v. Raley, supra,* the prosecution must offer *specific* proof of the *specific* sexual crime it alleges was attempted. (2 Cal.4th at pp. 890-891.)

In sum, as with the fact that Ms. Pontbriant was found naked, the condition of the clothes may have raised suspicion that a sexual attack was attempted or intended. But that suspicion was not ultimately supported by any physical evidence that an actual sexual assault occurred, while other

evidence contradicted that suspicion (as detailed in subsection (1.) of this argument). The victim's nakedness and the "clothes" evidence, the blood evidence, the hair evidence, the beer bottle and the semen evidence, even taken altogether, was insufficient to establish that an attempt to rape Ms. Pontbriant occurred.

C. Federal Due Process and California Case Law Requires That Appellant's Attempted Rape Conviction and the Attempted Rape-Murder Special Circumstance Finding Against Him Be Reversed

This Court reversed underlying sex felonies, and felony-murder convictions and/or special circumstances findings based on sex offenses because of insufficient evidence in *People* v. *Craig, supra,* 49 Cal.2d 313 ("*Craig I*"); *People* v. *Anderson, supra,* 70 Cal.2d 15; *People* v. *Gernados* (1957) 49 Cal.2d 490; *People* v. *Raley, supra,* 2 Cal.4th 870; and *People* v. *Johnson, supra,* 6 Cal.4th 1. In each of these cases, the evidence that a sex crime occurred was *more* substantial than the evidence presented against the defendants here, either individually or jointly. Accordingly, appellant's attempted rape conviction as well as the jury's special circumstance finding that appellant murdered Ms. Pontbriant during an attempt to rape her must be overturned.

In *People* v. *Craig (Craig I), supra*, this Court reversed a felony murder conviction because the evidence was insufficient to prove that either an attempted rape or an actual rape had occurred. Defendant Craig told someone early in the evening of the murder that he wanted to "have a little loving." Later that same evening, he got into an argument with a woman who would not dance with him at a bar. After leaving the bar, he attacked and killed a different woman by strangling her and hitting her 20 to 80 times. Her body was found the following morning beneath an automobile at a gas station; it appeared to have been dragged approximately 25 feet.

The victim was found lying on her back with her legs spread apart, wearing a ripped open raincoat over a torn nightgown and torn underwear. The front part of her body was exposed. She had also suffered many contusions and lacerations on her face, breast, neck and lower abdomen. (*Id.* at pp. 315-316.) Defendant Craig was arrested the following afternoon with a swollen and skinned hand. In addition, the police found blood consistent with the victim's blood type on his coat, hat and shoes but not on his shorts or jeans. They also found heel prints from the defendant's shoes on the victim's body. No semen or spermatozoa, however, was found on either the clothing of the victim or the defendant, and the victim's body did not show any evidence of sexual molestation. (*Id.* at p. 317.)

This Court rejected the prosecution's argument that the torn clothing, the position of the victim's body and legs, the defendant's abusive conduct toward the woman at the bar and his statement about wanting "a little loving" proved that the defendant had raped or attempted to rape the victim. (*Id.* at p. 318.) This Court found "[a] complete absence of any evidence in the record to show that he had an intent to commit rape." (*Ibid.*) The Court further observed:

> [There was] . . . a complete lack of satisfactory evidence that this killing was committed during either an attempt to commit rape or in the commission of rape; that the evidence shows no more than the infliction of multiple acts of violence on the victim, and even though the killing was an extremely brutal one, the People have only proved that the defendant was guilty of a second-degree murder.

(*Id.* at p. 319.)

In the instant case, as in *People* v. *Craig*, *supra,* the victim was found partly unclothed and with multiple wounds. In both cases, no sperm or semen was found on or near the body of the victim or on the clothes of either the victim or the accused. In *Craig I*, however, the evidence of an

attempted rape was *more* substantial than in the instant case. First, in *Craig I*, there were wounds near the victim's breast, while in this case there were no wounds of a sexual nature. Second, in *Craig I*, blood consistent with the victim's blood type was found on the defendant's hat, shoes and coat, while in the instant case, none of the victim's blood was ever found on appellant or codefendant Letner or on any clothing or other belongings of either defendant.

Nor was the victim's blood found in the bedroom, where the prosecution argued appellant attempted to rape Ms. Pontbriant, or anywhere in or on the victim's car, in which both of the defendants were sitting when stopped by Officer Wightman just after midnight on the night Ms. Pontbriant was murdered. Officer Wightman did not observe any blood on the clothing or possessions of either defendant at that time. (RT 6158-6159.)[55]

No blood or bloody clothing or objects were found in the house on Crenshaw in which the defendants slept on the night of March 1, 1988, following Officer Wightman's traffic stop. (RT 6212; 6871-6874.) The police also searched the apartment in which Letner was living and appellant was staying, and found no blood belonging to the victim, or clothing or physical objects with blood belonging to the victim. (RT 6290-6293.)

Thus, unlike in *Craig I,* the blood evidence in the instant case did not support an inference that the victim struggled with her assailant, getting her blood on him as she defended herself. In *Craig I,* even though the blood evidence supported such an inference, this Court found that this evidence

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55. Officer Wightman patted each defendant down. (RT 6156-6157.) He saw no blood on either appellant (RT 6167) or on codefendant Letner. (RT 6182-6183.) He also examined Letner's Buck knife and the car keys which had been handled by Letner, and he did not observe any blood on these items. (RT 6183, 6185).

showed no more than that the defendant was the person who attacked the victim. The Court reversed the felony-murder conviction based on rape or attempted rape. In the present case, even less evidence supported the attempted rape allegations.

In *People* v. *Anderson*, *supra*, 70 Cal. 2d 15, a ten-year-old victim was found naked under a pile of boxes and blankets next to her bed. Her torn and bloody dress had been ripped off her and was under her bed. (*Id.* at p. 21.) The crotch of her blood soaked panties had been ripped out, and her slip, with the straps torn off, was found under the bed in the master bedroom of the house. (*Id.* at p. 24.) A large blood stain was in the center of her mattress. There were over 70 wounds on her body, including repeated cuts and lacerations on her thighs and vaginal area. A knife had been thrust into her vagina and had cut through into the anal canal. Only defendant's socks and shoes had blood on them, suggesting that he was partly nude during the attack on the victim. (*Id.* at p. 34.) The window blinds were down and the doors were locked. There was no evidence, however, of spermatozoa. (*Ibid.*)

The prosecutor argued that the murder had taken place during the course of a violation of Penal Code section 288, molestation of a victim under 14. The State cited the following evidence in support of this claim: "The nature of the wounds and the clothing of the victim, the appearance of blood in several rooms in the house, and the lack of blood on any of the defendant's clothing except for his socks and shorts." (*Id.* at p. 34.) The prosecution argued that this evidence was sufficient to infer that "defendant was almost naked while attacking the victim and pursued her through several rooms of the house and slashed, stabbed and ripped off her clothing with the intent to commit a lewd act upon her to satisfy his sexual desires." (*Ibid.*)

This Court concluded, however, that the prosecution had failed to present any evidence relating to a possible section 288 offense other than the murder itself, and, therefore, the evidence was insufficient to show that the defendant had the necessary intent to commit a sexual assault on the victim. The Court rejected the argument that the laceration to the vaginal area was relevant to show intent to commit a sexual offense because the wound was "only one of several randomly inflicted wounds covering the victim's body." (*Ibid.*)

Certainly, if this evidence was legally insufficient in *Anderson*, *supra*, for the trier of fact to find an independent intent to commit a sex crime, the evidence was insufficient here. In *Anderson,* not only was the victim's body partially undressed but there were wounds to the victim's vaginal and anal areas. In addition, the crotch of the victim's panties had been torn out, and the body was found next to her bed. At least part of the attack itself occurred on the victim's bed, since a large blood stain was found in the center of her mattress.

Further, in *Anderson* the evidence supported an inference that the victim struggled with her assailant, and fought with him or tried to escape from him as he pursued her through several different rooms in the house. Even in this circumstance, this Court found the evidence insufficient (1) to prove more than a murderous attack on the victim, or (2) to infer that the motivation for the attack was sexual.

In the instant case, by contrast, there was no clear evidence of *any* struggle with the victim. If any struggle did take place, it occurred in one room only, the living room. Even in the living room, no evidence was found upon which to ground any inference that the victim resisted a sexual attack so vigorously she caused her assailant to abandon a sexual attack and instead attack her with a knife. To the contrary, the evidence showed that

the victim was tied up, and was lying face down on the living room carpet when her assailant cut into the back of her neck with a knife. These facts do not correlate with the prosecution's theory of a sexually motivated attack on the victim.

Further, the prosecution presented no evidence explaining why, if the assault on Ms. Pontbriant began with an intent to commit a sexual assault, the sexual assault was not completed. There was no evidence that the assault was interrupted by any outside agency, or that appellant or codefendant Letner was impotent. There is a simple explanation for no sperm and no genital trauma being found in this case: no sexual assault occurred or was attempted. At the least, the physical evidence here that the attack on the murder victim was motivated by sex was less substantial than such evidence in *Anderson, supra.*

The evidence here that one or both of the defendants attempted to sexually assault the victim is also less substantial than the evidence that sex motivated the murder in *People* v. *Gernados*, *supra,* 49 Cal.2d 490. Gernados was found guilty of first-degree felony murder on the theory that the homicide was committed in perpetration of a child molestation in violation of Penal Code section 288. Gernados had lived in a common-law relationship with the young victim's mother, who testified that she had warned the defendant about bothering her daughter sexually. In response, the defendant had threatened to kill her and both of her children if she reported him to the police. (*Id.* at p. 494.)

The victim was found in her bedroom with her skirt pulled up exposing her private parts. There was blood on the wall, on the floor and on the victim's head. A blood-covered machete was found in the living room. The autopsy, however, did not show any evidence of injury to the vaginal area of the victim nor was any sperm found on the victim's body or

in the area around the body. Because of this lack of specific evidence of a sexual motivation in the attack, this Court found "a total absence of evidence that defendant violated or attempted to violate section 288 of the Penal Code." (*Ibid.*)

The facts of the *Gernados* case are similar to those in this case, insofar as the victim in each case was found partially unclothed and with multiple wounds. Similarly, in both instances, there was no evidence of semen on or near the body of the victim or on the clothes of the victim or of the accused. However, the evidence in the *Gernados* case was more substantial; that is, there was solid evidence that defendant Gernados previously had made sexual overtures to the victim, someone who could not legally consent to those overtures. Therefore, since this Court found the evidence of a sexual assault insufficient in *Gernados*, it must certainly find the evidence of an attempted rape insufficient in this case.

In *People* v. *Raley, supra,* 2 Cal.4th 870, the defendant locked two teenage girls in a basement and made them remove their clothes. He brandished a knife, handcuffed the girls and told them that he would release them after they "fooled around" with him. First, he led one of the girls, Jeanine, into a separate area. After about 15 minutes, she returned with her clothes on but looking very frightened. (*Id.* at p. 882.) Defendant then led the other girl, Laurie, to the kitchen and forced her to orally copulate him and to manipulate his penis.

After sexually assaulting Laurie, defendant stabbed and beat each girl numerous times and then put them both in the trunk of his car. Eventually, he threw them down a ravine. Laurie managed to climb up the hill to get help. (*Id.* at p. 883.) After help arrived and before she died, Jeanine explained that she had not been raped but that the defendant had made her remove her clothes and "fool around" with him. (*Id.* at p. 884.)

Ms. Pontbriant did not suffer a variety of wounds and abrasions in many distinct areas of her body. The single profound wound, the lethal cut to the back of the neck, was almost certainly inflicted by one person, while kneeling over Ms. Pontbriant's prone body.

Assuming arguendo that *one* of the defendants attempted to rape Ms. Pontbriant, the prosecution presented no evidence of solid value that this person was appellant. First, no evidence specifically connected appellant, as opposed to codefendant Letner, to the victim's body or to the infliction of her injuries. No blood belonging to appellant was found in the living room. The only blood not definitely belonging to the victim found in the room in which she was killed was the bloodstain found on the victim's sweater which was consistent with the victim and with codefendant Letner. (RT 5834-5836.)

No hair belonging to appellant was found in the living room or anywhere else in the house. Three hairs consistent with codefendant Letner were found on the victim's chest. (RT 5967-5959.) Hairs inside the baseball caps from the bedroom and the car matched Letner. (RT 5970-5972.)

According to Dr. Walter, the lacerations and stab wounds Ms. Pontbriant suffered to the front of her neck were consistent with a large pocket knife sharp only on one side of the blade. (RT 4889-4890.) These wounds were consistent with having been inflicted by a Buck knife, such as the one carried by codefendant Letner on the night Ms. Pontbriant was murdered, as observed by Officer Wightman. (RT 6156-6157.)

Second, appellant testified that he left Ms. Pontbriant's home when codefendant Letner and she began kissing. (RT 6859). Appellant testified he did not rape, attempt to rape, or attempt to harm Ms. Pontbriant in any way. (RT 6983-6985). Nothing in appellant's own testimony supported an

inference that appellant attempted to rape Ms. Pontbriant. Moreover, the prosecution presented no evidence that appellant had expressed any sexual interest in Ms. Pontbriant on the night of the murder, or at any time previously. Nor did the prosecution present any evidence that appellant had previously sexually attacked or attempted to sexually attack any woman.[59/]

Third, there was substantial evidence that codefendant Letner knew Warren Gilliland and Ivon Pontbriant fairly well and had visited their home often during January and February 1988. (RT 5111-5112 [Testimony of Warren Gilliland]; RT 5559-5562 [Testimony of Edward Bourdette]; RT 5464 [Testimony of Jeannette Mayberry].) Appellant, in contrast, based on the evidence produced at trial, barely knew Gilliland or Ms. Pontbriant.

Letner gave Ivon Pontbriant presents. (RT 5121; 5209-5210 [Testimony of Warren Gilliland].) Ms. Pontbriant on one occasion dressed a wound suffered by Letner. (RT 5282-5283 [Testimony of Warren Gilliland]; RT 5464 [Testimony of Jeannette Mayberry].) Ms. Pontbriant felt affectionate toward codefendant Letner. (RT 5464; 6818-6820 [Testimony of Jeannette Mayberry]; RT 5113-5114 [Testimony of Warren Gilliland that Ms. Pontbriant thought Letner "resembled her son"].) Ms. Pontbriant told Flourene Gentry on the telephone that she was pleased that Letner had come to visit her. (RT 5532-5533.) It is clear that codefendant Letner had developed some level of familiarity with

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59. Evidence was presented through appellant's estranged girlfriend, Jeannette Mayberry, that appellant had physically attacked her on Monday, February 29, 1988, a day before Ms. Pontbriant's murder. Ms. Mayberry's injuries were slight, however, and the fight she testified about could be described more accurately as a mutual combat. (RT 5416; 5457-5459; see also, appellant's testimony at 6840-6841.) Mayberry gave no testimony whatsoever that appellant on that occasion or on any other occasion sexually assaulted her, or attempted to sexually assault her.

Ms. Pontbriant prior to the evening of March 1, 1988, and possibly some level of intimacy.

In sum, the prosecution presented no evidence of solid value that appellant, as opposed to codefendant Letner, either possessed a specific intent to rape Ms. Pontbriant or took any action toward raping Ms. Pontbriant.

F. The Evidence Was Insufficient to Establish That Appellant Aided or Abetted Codefendant Letner in Attempting to Rape Ms. Pontbriant

Assuming arguendo that the evidence was sufficient to convict codefendant Letner of attempted rape, the prosecution failed to present sufficient evidence that appellant aided or abetted Letner in that attempt. The prosecutor argued that appellant and Letner had been "tight friends" since high school and were "essentially with each other continuously from Sunday, February 28, 1988, until their arrest on March 29, 1988." (RT 7540.) But this argument for guilt-by-association could not substitute for actual proof that appellant aided and abetted an attempted rape by Letner.

The evidence showed that appellant and codefendant Letner came to Ms. Pontbriant's house together on the evening of March 1, 1988, and at this time Ms. Pontbriant was still alive. (RT 5532-5533 [Testimony of Flourene Gentry].) It showed that appellant and codefendant Letner were riding in Ms. Pontbriant's car together later that evening, arguably after Ms. Pontbriant had been murdered. (RT 6148-6149 [Testimony of Officer Wightman].) But no evidence established what appellant did at the victim's house between those times. Establishing merely that appellant was present in the victim's house for some time did not establish a sufficient basis to convict appellant of attempted rape based on a theory of aiding and abetting.

Despite the prosecutor's rhetoric about how "tight" appellant and codefendant Letner were, there was not any evidence that appellant aided and abetted Letner in committing any crime before each of them was charged in the instant case. In fact, the testimony was to the contrary. Codefendant Letner committed several burglaries in the weeks prior to the murder of Ms. Pontbriant. (See RT 4695-4702 [in limine discussion of admissibility of items stolen by Letner in the commercial burglaries]; RT 5435-5438 [Jeannette Mayberry testimony regarding various items which Letner had stolen in commercial burglaries]; RT 6914-6916 [testimony of appellant regarding items Letner had stolen in commercial burglaries].) The prosecution did not argue that appellant committed any of those burglaries together with codefendant Letner, was present when Letner committed these burglaries, or even knew that Letner planned to commit them. Nor did the prosecutor put on any evidence that the relationship between Letner and appellant was such that appellant directed Letner to commit these burglaries or any other crimes.[60/]

At the time that Officer Wightman stopped Ms. Pontbriant's car, Letner was the driver and appellant was the passenger. During Officer Wightman's questioning of each occupant, appellant did not act in a manner which suggested that he dominated codefendant Letner or was in any way a "leader" of the two of them. Indeed, Letner passed a field sobriety test,

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60. That is, Letner did not commit crimes at the direction of appellant. Indeed, the evidence at trial relating in any way to this point directly contradicted such an inference. On Sunday, February 28, 1988, without provocation, Jeannette Mayberry twice accosted appellant, his ex-wife and his young daughter in a local Visalia public park. Each incident was sparked by codefendant Letner going out of his way to find Mayberry and tell her that appellant was at a specific location visiting with his ex-wife. (RT 5411; 5414-5415 [Testimony of Jeannette Mayberry].) Richard Letner seemed to enjoy creating uproar in the life of appellant.

while Officer Wightman concluded that appellant was too intoxicated to drive. (RT 6159, 6170-6171.) These facts are all inconsistent with any inference that appellant directed or encouraged Letner to engage in any criminal conduct during the evening of March 1, 1988, much less specifically an attempt to rape Ivon Pontbriant.

Officer Wightman's testimony that appellant was intoxicated raised doubt that appellant had the ability to aid or abet codefendant Letner in committing an attempted rape or any other crime against Ivon Pontbriant earlier that evening. Appellant's state of intoxication also raised doubt that he shared Letner's intent to rape, rob, or kill Ms. Pontbriant (assuming that Mr. Letner harbored any such intent).

Some situations demand a finding of equal responsibility even though the trier of fact cannot determine which defendant was "really" responsible. (See, e.g., *People v. McCoy* (2001) 25 Cal.4th 1111 [each of two defendants fired a handgun from a car at the victim, though only one of the defendants fired the bullet which killed the victim].) This was not such a situation. Nor was this a situation in which two persons accost a female who is a stranger to them both, and the woman is subsequently found raped and murdered.

Here, by contrast, the victim knew codefendant Letner quite well. So there was nothing unusual in Letner – accompanied by appellant – visiting Ms. Pontbriant at her house, nor in Ms. Pontbriant socializing with Letner and appellant and drinking with them during the evening of March 1, 1988.

Letner and Ms. Pontbriant also made a series of telephone calls together that evening. They talked several times with Edward Bourdette

and Kathy Coronado over a span of one-half hour to an hour. (RT 5581 [Testimony of Edward Bourdette].)[61]

These telephone calls unequivocally proved that if an attempt to rape Ms. Pontbriant occurred, it occurred *after* these telephone calls were made. Ms. Pontbriant did not tell either Bourdette or Coronado that anyone had sexually assaulted her or attempted to assault her.[62] This series of telephone calls constituted evidence, moreover, that if Letner harbored any intent to sexually assault Ms. Pontbriant, appellant was not aware of it. If appellant were aware of that intent, it is unlikely that he would have passively sat by as the telephone calls occurred.[63]

It was also significant that Ivon Pontbriant initiated the series of telephone calls, not Bourdette or Coronado. It makes no sense that the defendants would allow Ms. Pontbriant to place these calls if they had planned to rape, rob or murder her. It is equally incredible that Letner would get on the telephone to speak to someone who knew him and rant about his tools being missing, if he planned to rape Ms. Pontbriant. One

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61. See RT 5557-5591 [Edward Bourdette]; and RT 5593-5609 [Kathy Coronado] for the full description of the content of these telephone calls.

62. The telephone calls arguably constituted evidence that codefendant Letner had threatened to harm Ms. Pontbriant if she was not able to get back some tools that belonged to Letner and which he and Ms. Pontbriant seemed to believe Warren Gilliland and/or Edward Bourdette had taken. (See RT 5571-5572; 5582 [Edward Bourdette]; RT 5597 [Kathy Coronado].) But this related again to the identity of the actual killer, and not at all to the prosecution's allegation of attempted rape.

63. The prosecution did not dispute that appellant was present during the making of these telephone calls. Appellant specifically testified that he witnessed Ms. Pontbriant making several telephone calls and mentioning "Ed." He heard only Ms. Pontbriant's end of the conversation, but it appeared to him that the discussion on the telephone was angry and that people were upset. (RT 6856-6857.)

can only conclude that neither Letner nor appellant, at least prior to the time the phone calls were made to Bourdette and Coronado, harbored any intent to murder, rob or sexually assault Ivon Pontbriant.

Moreover, codefendant Letner's behavior while talking on the telephone directly contradicted the inference that the defendants possessed the intent to murder, rob and rape Ms. Pontbriant when they arrived at her house. Letner's remarks to Bourdette and Coronado were so brutish and threatening that they could easily have provoked Coronado to call the police instead of simply unplugging the telephone.[64/] Letner harassed and provoked, risking the police showing up at Ivon Pontbriant's house to arrest him, or Bourdette himself coming over to Ms. Pontbriant's house.

Assuming arguendo that codefendant Letner subsequently did attempt to rape Ms. Pontbriant, no rational trier of fact could infer that appellant was involved. Three undisputed facts were that: (1) appellant was aware of the telephone calls to Bourdette and Coronado; (2) Officer Wightman judged appellant to have been very intoxicated at about midnight; and, (3) no physical evidence in the living room, where the victim's body was found, in any way connected appellant to an attempted rape, a robbery or the murder of Ivon Pontbriant.

These facts contradicted the inference that appellant incited or encouraged codefendant Letner to attempt to rape Ms. Pontbriant (or to rob

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64. Coronado testified that during the phone conversations she kept hanging up, and Ms. Pontbriant and Richard Letner kept calling back and "threatening." Letner "wanted to meet Ed in the street and beat him up and stuff. And I got kind of mad." (RT 5598.) Coronado then got on the phone and told Letner not to call anymore. She told him that Ed did not have his tools and to just leave them alone. Letner replied, "Shut up, you loud-mouth bitch, before I stick my dick in your mouth." Coronado responded to Letner that if he did, "he wouldn't see daylight." (*Ibid.*) Coronado then hung up the telephone and unplugged it. (RT 5599.)

or murder her). To the contrary, the above facts suggest instead that: (1) appellant left the victim's house when he said he did; (2) he did not know of an intent by codefendant Letner to sexually assault Ms. Pontbriant; and (3) Letner's intent (assuming he ever had one) to sexually assault Ms. Pontbriant arose some time after the telephone calls were made to Bourdette and Coronado, not earlier.

In sum, the telephone calls show that Richard Letner had not taken any direct action toward raping or assaulting Ms. Pontbriant before the telephone calls concluded. If Letner planned at the time he arrived at Ms. Pontbriant's house to rape, rob and murder her, he certainly behaved in a way contrary to such a plan. He socialized with Ms. Pontbriant, drank beer with her, then got on the telephone with her to yell at people who knew him. If appellant shared or was aware of Letner's intent, his behavior also contradicted the basic premise of any criminal plan – that you do not identify yourself as the perpetrator just before the crime is committed.

As noted previously, the prosecutor also argued that the brutality of the murder itself was evidence that the defendants entered Ms. Pontbriant's house with the intent to rape and rob her. In addition, Ms. Reed argued that the manner of killing Ms. Pontbriant also was evidence that the murder was planned, rather than a spontaneous event. (RT 7593-7594.) But as noted previously, this Court has not found that the brutality of a murder is in itself evidence of a sexual motivation for the murder (or evidence of a robbery motivation). The manner in which Ms. Pontbriant was killed hardly showed planning, especially with regard to planning a rape or a robbery.

If a rape was planned, it is very curious that there was no evidence that a rape occurred. Similarly, if a robbery was planned, it is mystifying that money as well as possessions which normally would be the target of a robbery (televison, VCR, jewelry) still remained in the victim's house at the

time the defendants were stopped by Officer Wightman in the victim's car.[65] If either of these crimes were planned, why did the defendants let the victim telephone Ed Bourdette just before carrying out these crimes?

The prosecutor's case failed to address any of these questions. The central question of the case was why was Ms. Pontbriant killed by having her head almost severed. This level of brutality was hardly necessary to incapacitate (or kill) a 59-year-old woman with a .29 percent blood/alcohol level. The murder makes sense only if it was committed by someone who was acting irrationally and/or in a fit of rage.

Neither codefendant Letner nor appellant were hardened criminals. Neither defendant had a prior felony conviction. Both defendants had been working full-time at Modulaire Manufacturing until being laid off (not fired). (RT 6897-6900.) Nothing in appellant's past indicated appellant would plan to rape, rob and murder a woman. Nothing in appellant's life at the time of the crime gave appellant a serious motive to rob Ivon Pontbriant of cash, her possessions or her car.[66]

The circumstances of the murder do not suggest that a rape, robbery or murder was planned, but rather that a murder was unexpectedly committed by someone in a state of rage. Codefendant Letner picked up the telephone, swore at Bourdette and Coronado, and threatened to commit a sex crime on Ms. Coronado. The one scenario which fits all the known

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65. Argument VI, *infra*, sets forth in detail why the evidence was also insufficient to sustain appellant's robbery conviction.

66. This is argued in more detail in Argument VI, *infra*. But it may be noted here that appellant and codefendant Letner traveled to Iowa without using Ms. Pontbriant's car or stealing anyone else's car. The supposed motive that Ms. Pontbriant was murdered so appellant and Letner could take her car to drive it to Iowa was hardly a compelling theory.

facts in this case is that Letner's anger continued to escalate after the telephone calls and culminated in the murder of Ms. Pontbriant.

With regard to appellant, neither logic nor the evidence supported an inference that appellant aided or abetted codefendant Letner in attempting to rape Ms. Pontbriant or murder her. Therefore, this Court must reverse appellant's conviction of attempted rape and the attempted rape-murder special circumstance finding against appellant.

G. Because the Evidence Was Insufficient to Convict Appellant of Attempted Rape, the Attempted Rape-Murder Special Circumstance Finding Must Be Reversed

Pursuant to Penal Code section 190.2, appellant and codefendant Letner were each charged with the special circumstance of attempted rape-murder. Because the evidence was insufficient to convict appellant of attempted rape, the attempted rape-murder special circumstance finding against him must also be reversed. (*People v. Morris, supra,* 46 Cal.3d at pp. 21-23; *People v. Marshall, supra,* 15 Cal.4th at p. 81.)

H. Because the Evidence Was Insufficient to Establish That Appellant Had the Independent Felonious Purpose of Raping or Attempting to Rape Ivon Pontbriant Before She Was Murdered, the Attempted Rape-Murder Special Circumstance Must Be Reversed

In addition to the logical difficulty presented when a special circumstance allegation is based on attempted rape-murder, see Argument V, *infra,* in the instant case the evidence was insufficient to prove either that appellant or codefendant Letner attempted to rape Ms. Pontbriant before she was murdered, or that either defendant had an independent felonious purpose of raping Ms. Pontbriant. (*People v. Morris, supra,* 46 Cal.3d at p. 21.) Further, the evidence was insufficient to prove that appellant *shared* any independent felonious purpose possessed by Letner of raping Ms. Pointbriant (assuming the evidence was sufficient to

prove Letner possessed such an independent felonious purpose), or that he aided or abetted Letner in attempting to rape Ms. Pontbriant, before she was murdered.

For all of the foregoing reasons, the evidence in this case failed to prove that an attempt to rape Ms. Pontbriant preceded her murder. For the same reasons, the evidence failed to prove that appellant possessed an independent felonious purpose of raping Ms. Pontbriant. Moreover, since the prosecution also argued that the defendants had the intent to rob Ms. Pontbriant, the connection between Ms. Pontbriant's state of undress and an attempt to rape her was even more speculative. The fact that Ms. Pontbriant was undressed could have related exclusively to the robbery purpose (assuming arguendo there was sufficient evidence to prove that a robbery occurred).

Because the prosecution presented no eyewitnesses, and the forensic evidence did not support a charge of rape, all inferences about what either defendant "attempted" to do necessarily required speculation of such a remarkable degree that neither appellant's conviction of attempted rape nor the attempted rape-murder special circumstance finding can stand. *A fortiori*, the inference that appellant possessed an independent felonious purpose of raping Ms. Pontbriant, separate from the purpose of murdering her (assuming arguendo the evidence was sufficient to prove that appellant murdered her), requires speculation even more unbridled. A murder occurred, but the evidence did not prove that Ms. Pontbriant was murdered because appellant attempted to rape her.

I. Because the Evidence Was Insufficient to Convict Appellant of Attempted Rape, Appellant's Murder Conviction and His Sentence of Death Must Be Reversed

Appellant suffered substantial prejudice from the prosecution's reliance on the attempted rape charge and attempted rape-murder special

circumstance. In the guilt phase closing argument, the prosecutor referred to the evidence of an attempted rape as "overwhelmingly clear." (RT 7585.) The prosecutor invited the jury to base a finding of felony murder on the attempted rape evidence. (RT 7616.) Presenting the attempted rape charge to the jury created the possibility that the murder conviction is invalid as based on a legal theory not supported by sufficient evidence.[67]

Even assuming arguendo that the Court can uphold appellant's murder conviction, the Court must nonetheless reverse appellant's sentence of death. Under California law, each special circumstance finding can also serve as an aggravating factor in the death penalty weighing process. If a special circumstance finding is reversed, the death judgment must be reversed and the case remanded for a new penalty trial if there is a reasonable possibility that the jurors would have recommended life imprisonment without the possibility of parole absent the invalidated special circumstance. (*People v. Roberts* (1992) 2 Cal.4th 271, 327; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 751-753.)

It is probable that the invalid attempted rape charge affected the penalty determination. For example, in the guilt phase, speaking of the victim, the prosecutor argued that this was a case "where two macho men rip off her clothes, and rip out her hair." (RT 9690.) According to the prosecutor, the stab wounds to the neck were evidence that the victim was "probably being forced to engage in some type of sexual activity with these defendants as a result of them stabbing her on the side of the neck." (RT 9691.)

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67. Appellant's murder conviction must be reversed because the jury may have relied exclusively on the invalid felony-murder theory to convict appellant of first degree murder. (See Argument XII, *infra*.)

It is without question that a murder in the course of a sexual assault is a more heinous kind of murder that is likely to inflame the jury's passions and lead to a death sentence. Moreoever, in considering such evidence as aggravating appellant's culpability, it is likely that the jury gave substantial weight to the invalid attempted rape theory as showing intent and premeditation regarding the murder. This invalid aggravation also unfairly undercut appellant's ability to argue to the jurors that they should have a lingering doubt about appellant's participation in Ms. Pontbriant's murder. In short, presenting the attempted rape charge to the jury, unsupported by reliable evidence, allowed the prosecutor to give improper added weight to the aggravating circumstances and to skew the penalty determination. This violated appellant's right under the Sixth, Eighth and Fourteenth Amendments to a fair and reliable penalty determination.

J. Even if the Evidence Was Sufficient to Convict Appellant of Attempted Rape, It Was Not Sufficient to Uphold His Sentence to Death, In Light of the Need for Heightened Reliability to Support a Death Verdict

The United States Supreme Court stated in *Beck v. Alabama, supra*, 447 U.S. 625:

> . . . there is a significant constitutional difference between the death penalty and lesser punishments . . . . [D]eath is a different kind of punishment from any other which may be imposed in this country . . . . It is of vital importance to the defendant and to the community that any decision to impose the death sentence, be, and appear to be, based on reason, rather than caprice or emotion. (Citation.) To insure that the death penalty is indeed imposed on the basis of "reason, rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. *The same reasoning must apply to rules that diminish the reliability of the guilt determination.*"

(*Id.* at p. 637, emphasis added; see also *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

Beck, supra, also made clear that "the risk of an unwarranted conviction . . . cannot be tolerated in a case where the defendant's life is at stake." (*Ibid.*) Because there is a heightened need for reliability in fact-finding when a death sentence is involved, evidence which just barely meets the minimum requirements to uphold a guilt verdict on appeal is insufficient to also uphold a sentence of death. Thus, even assuming arguendo the attempted rape conviction can stand, something more than the bare minimum of sufficient evidence must be required before a sentence of death can also stand. The evidence that an attempt to rape Ms. Pontbriant occurred was utterly equivocal. The physical evidence did not establish that any such rape occurred, and the prosecution did not produce any other evidence to make up for the lack of such evidence. For all these reasons, the evidence that appellant committed an attempted rape was insufficient to support a sentence of death.

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V.

AS A MATTER OF LAW, AN ATTEMPTED RAPE ALLEGATION CANNOT SUPPORT AN ATTEMPTED RAPE-MURDER SPECIAL CIRCUMSTANCE

In *People v. Morris* (1988) 46 Cal.3d 1, this Court set aside a robbery-murder special circumstance finding based on insufficiency of the evidence. This Court stated:

> [i]t is clear that the evidence was not sufficient to establish that the murder was committed "during the commission or attempted commission of" the robbery. (Former section 190.2, subd. (c)(3)(I).) Under the special circumstances statute, as this court explained in *Green* [*People v. Green* (1980) 27 Cal.3d 1] and *Thompson* [*People v. Thompson* (1980) 27 Cal.3d 303], whether or not a murder was committed *during* the commission of a robbery or other felony is not merely "a matter of semantics or simple chronology." (*People v. Green, supra,* 27 Cal.3d at p. 60; *People v. Thompson, supra,* 27 Cal.3d at p. 322.) "A murder is not committed *during* a robbery within the meaning of the statute unless the accused has 'killed . . . *in order to advance an independent felonious purpose*, ...' [Citation.] A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder . . . .'"

(*Id.* at p. 21, citing *People v. Thompson, supra,* 27 Cal.3d at p. 322, quoting *People v. Green, supra,* 27 Cal.3d at pp. 60-61, italics in original.)

The "independent purpose" rule is applicable to rape-murder as well as robbery-murder special circumstance allegations.[68/] Since there can be no rape of a dead body (*People v. Kelly* (1992) 1 Cal.4th 495, 524), the rape in question must occur before the murder. However, if the underlying

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68. The California Legislature provided specific exceptions to the "independent felonious purpose" rule in enacting subparagraph (M) of section 190.2(a)(17) in 1998, relating to kidnapping and arson special circumstance allegations.

charge is attempted rape rather than actual rape, then by definition a rape did not occur, at least as a legal fact. If a rape has not yet occurred, *murdering* the victim cannot possibly "advance" the independent felonious purpose of raping the victim, since once the victim is dead, no rape can occur.

A murder following a rape attempt can serve other purposes unrelated to advancing the rape, for example, to prevent the victim from later identifying the assailant. The assailant also might commit one or more other crimes that would make the assailant death-eligible, for example, murdering the victim while engaged in a robbery. In none of these other circumstances, however, does the commission of the murder make it legally impossible to advance the initial felonious purpose. For instance, as was the case in *People v. Morris, supra,* when robbery-murder is alleged as a special circumstance, the legal question is whether the taking or attempted taking from the victim occurred prior to or in the course of the murder, giving rise to a robbery-murder special circumstance, or occurred only as an afterthought crime following the murder, negating a robbery-murder special circumstance. An afterthought taking does not constitute robbery, but only a theft. However, the question cannot become: "Can someone advance a robbery if he first kills the victim?" The answer is obviously yes. Because murdering the victim forecloses the specific felonious purpose of raping the victim, however, a rape-murder special circumstance allegation in contrast should logically raise only the legal question, "Did a rape occur at all?"

This is true even if the murder occurs because the victim resisted. The initial attempt to rape necessarily is "merely incidental to the murder," because the murder could not advance the completion of the rape.

This Court held otherwise in *People v. Kelly, supra.* Appellant submits that the Court should reconsider this holding in light of the "independent purpose" rule. In *Kelly,* the Court held that the existence of any "sexual intent at the time of the killing" is sufficient to sustain not only a felony-murder conviction based on attempted rape but also an attempted rape-murder special circumstance allegation. (*Id.* at pp. 526-527.)

However, the factual circumstances in which death-qualifying special circumstances can be validly found true differ significantly from the circumstances which support a felony-murder conviction. With regard to a felony-murder conviction based on an attempted rape, it is only necessary to prove that the murder occurred *in conjunction with* an attempted rape. (*Id.* at p. 526.) With regard to a special circumstance allegation, however, the prosecution must show that the murder actually *advanced* the rape. Obviously, a murder cannot advance a rape if that rape has not yet occurred.

This Court in *Morris, supra,* correctly limited death eligibility to defendants who advanced an independent felonious purpose while committing a murder. If an exception is made with regard to the rape-murder special circumstance, allowing defendants who only attempted to rape to become death eligible, the rape-murder special circumstance unconstitutionally fails to narrow the class of defendants eligible for the death penalty, and fails to meaningfully distinguish between those who deserve a sentence of death and those who do not. (*Zant v. Stephens, supra,* 462 U.S. at p. 876; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427.) Allowing appellant to become death eligible based on an attempted rape-murder also unconstitutionally expands the rape-murder special circumstance in a manner which was unforeseeable at the time of the commission of the crime in 1988. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 350.)

Therefore, the special circumstance finding that appellant murdered Ivon Pontbriant while *attempting* to rape her must be reversed. For the reasons discussed above, if the attempted rape-murder special is invalid, the death sentence is also invalid.

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VI.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF ROBBERY OR TO SUPPORT THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING

A. Elements of Robbery and Of a Robbery-Murder Special Circumstance

Robbery under California law is defined in Penal Code section 211 as the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." A conviction of robbery cannot be sustained absent sufficient evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act. If the intent arose only after the use of force against the victim, the taking at most constitutes a theft. (*People v. Morris, supra,* 46 Cal.3d. at p. 19, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; *People v. Green, supra,* 27 Cal.3d at pp. 52-54.)

A special circumstance exists if a murder was committed while the defendant was engaged in the commission of a robbery in violation of Penal Code section 211 or 212.5 (First-Degree Robbery). (Penal Code § 190.2(a)(17)(A)). Under the special circumstances statute, "[a] murder is not committed *during* a robbery within the meaning of the statute unless the accused has 'killed . . . *in order to advance an independent felonious purpose*, ...' [Citation.] A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder . . . .'" (*People v. Morris, supra,* 46 Cal.3d. at p. 21, quoting *People v. Green, supra*, 27 Cal.3d at pp. 60-61, italics in original; cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

As stated in Argument IV, *supra*, and similarly controlling with regard to the sufficiency of the evidence to sustain appellant's conviction of robbery and the jury's robbery-murder special circumstance finding, a criminal defendant's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient proof of guilt. (U.S. Const., 5th, 6th, 8th, and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 635; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) The test of whether evidence is sufficient to support a conviction is "whether a rational trier of fact could find defendant guilty beyond a reasonable doubt." (*People* v. *Holt* (1997) 15 Cal.4th 619, 667; see also, *Jackson* v. *Virginia, supra,* 443 U.S. at pp. 318-319 ["The critical inquiry is . . . whether . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"].) At the least, there must be evidence of "solid value" that reasonably supports an inference of guilt. (*People* v. *Johnson, supra,* 26 Cal.3d at p. 562.)

B. No Rational Trier of Fact Could Have Found That an Intent to Take Property Belonging to the Victim Arose Before Her Death

The prosecution failed to present any credible evidence that any property belonging to Ivon Pontbriant or Warren Gilliland was taken from inside the North Jacob house while Ms. Pontbriant was alive, or that Ms. Pontbriant was murdered in order to take property belonging to her. What the evidence did show was that various types of property typically the objects of a robbery were *not* taken. The victim's television, VCR, cable TV converter, and stereo, as well as her personal jewelry (both jewelry inside jewelry boxes and jewelry worn by the victim) were not taken from the house. (RT 6675-6676 [Detective Logan]; RT 5666, 5752 [John Rains].) A jar full of coins remained, and a slot machine style bank (containing a

substantial number of coins) still sat on a coffee table near the telephone. (RT 6676, 7148 [Logan]; RT 5664, 5731-5732 [Rains].)[69] A small amount of money also remained sitting on top of a dresser in the bedroom. (RT 5688-5689.)

A larger amount of money remained in the bottom of Ms. Pontbriant's purse, which along with a second purse belonging to the victim, also remained in the house. (RT 5783-5784, 5896 [Logan]; RT 5676-5677 [Rains].) Detective Logan counted out $18.29 in bills and coins. (RT 5787.)[70] Also still in the victim's purse was her ATM card, together with a piece of paper with her ATM card PIN number written on it. (RT 5744-5745.) The prosecution presented no evidence that anyone had made an unauthorized withdrawal from Ms. Pontbriant's bank account through the use of her ATM card, before or after her death.

No property from inside the house was found inside Ms. Pontbriant's car. When the police inventoried the contents of the victim's car, they found property belonging to appellant or to codefendant Letner (RT 5710, 5714-5718), and a tool chest belonging to Ms. Pontbriant (the initials "IUP"

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69. At RT 6676, Logan stated that he did not know if there were any coins inside the slot machine bank, but at RT 7148 he testified that the bank on the coffee table near the telephone had a substantial number of coins in it. He also said he saw "coins and money" inside the bank. It is not completely clear whether Logan was here referring to the "jar of coins" or the "slot machine bank," but in any case cash was in plain view in one or both of these containers. In his closing argument, codefendant Letner's attorney, James Wainwright, estimated that $25 to $30 in quarters was visible in the "bank." Wainwright was likely referring to People's Exhibit No. 36, a photograph of the telephone and the "gambling machine" on the corner table in the living room. (RT 5664.)

70. John Rains testified that the purse contained approximately $14, two fives and four ones, plus some change. However, Rains did not conduct the inventory of the purse; Detective Logan did this. (RT 5745-5746.)

were on the outside) (RT 5715), which the prosecutor did not claim had been taken from inside the house. The property belonging to appellant included a shotgun inside a shotgun case and a Japanese ornamental sword. (RT 5718.)

Codefendant Letner and appellant had access to the Murray Street apartment that Letner was living in on the night of the murder. Appellant also had access to Jeannette Mayberry's apartment. Appellant entered either the Murray Street apartment or Mayberry's apartment after he left Ms. Pontbriant's house, since the shotgun and the ornamental sword had been stored at one location or the other.[71/] However, no property belonging to Ms. Pontbriant or to Warren Gilliland was found inside the Murray Street apartment when searched by the police. (RT 6291-6292.) No property belonging to Ms. Pontbriant or to Warren Gilliland was found inside Jeannette Mayberry's apartment either. (RT 6288.)

No rational trier of fact could find appellant or codefendant Letner intended to rob Ivon Pontbriant, since they left all the items of value described above, including cash, inside her house.

Excluding evidence that *other* cash may have been taken, which as will be addressed below, was wholly incredible and not evidence of "solid value," it was uncontested that nothing was taken on the night of March 1, 1988, belonging to the victim except the victim's car and the keys to that car. It was uncontested that no property from the house wound up inside the victim's car, inside the apartment on Murray Street, or inside Jeannette Mayberry's apartment.

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71. Appellant testified that the shotgun and sword were at the Murray Street apartment, and that he put them into the victim's car after Letner awoke him at the apartment, with the intent of trying to sell them to an acquaintance, Mike Kinnett. (RT 6863-6864.)

The evidence did show that codefendant Letner was driving Ms. Pontbriant's car shortly after midnight on March 1, 1988, and that appellant was a passenger in that car. (RT 6138-6140, 6148-6149.) Even if Letner or appellant took the keys to the car from inside the victim's house, no evidence was offered to prove that the victim's car or the car keys were taken (1) while Ms. Pontbriant was alive, (2) from her immediate presence, or (3) by means of force or fear. The totality of the evidence presented only proved that codefendant Letner and appellant were riding in the victim's car at a point in time after each had left the victim's house. This is insufficient to prove robbery.

Where a car is taken following a murder, an inference that the target crime was robbery and that the victim was murdered in the course of a robbery cannot rationally be drawn when nothing is taken from the victim's house and placed inside the victim's car. (Compare, *People v. Turner* (1990) 50 Cal.3d 668 [defendant admitted killing the victim, and the victim's wallet and television set were in the victim's car when defendant was arrested in the car two days after the homicide].) This is particularly the case when money – and property which could easily be resold – has been left inside the victim's house, and the only property found inside the car which could easily be resold (i.e., appellant's shotgun) belonged not to the victim, but to the accused.[72/]

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72. Even in *Turner, supra,* the robbery-murder theory was supported by significant additional evidence, such as the victim having defensive wounds and his house having been ransacked, but most importantly, telephone cords had been cut. (*Id.* at p. 689.) See also, *Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851, 884 (also finding sufficient evidence that Turner robbed the victim, relying especially on the evidence of the cut telephone cords). In contrast to the *Turner* case, here the victim, as well as codefendant Letner, used the victim's telephone to make outside calls prior to the victim's murder.

The only evidence which conceivably was relevant to an inference that the victim's car was the object of the robbery (rather than its having been taken in an afterthought auto theft) consisted of the facts that: (a) A police officer stopped Letner and appellant in the car shortly after midnight on March 2,1988 (RT 6138-6140, 6148-6149); (b) Letner and appellant had discussed with others, prior to the evening of the murder, leaving Visalia to go to Iowa (RT 6844-6845, 6919 [appellant]; RT 6229 [Jackie Tobin]); RT 6630-6632 [Burt Arnold][73]; and (c) Letner and appellant in fact did travel to Iowa, starting their travel early on the morning of March 2, 1988. (RT 6873-6876 [appellant].)

Without more, this evidence provided no real basis to conclude that codefendant Letner and appellant planned to steal Ms. Pontbriant's car in order to drive it to Iowa. Going to Iowa hardly proved a plan to steal a car to go to Iowa – especially when Letner and appellant did not go to Iowa in Ms. Pontbriant's car.

In addition, an inference that codefendant Letner and appellant planned to steal Ms. Pontbriant's car so they could drive it to Iowa was contradicted by the following facts:

(1) The prosecution offered no evidence that either codefendant Letner or appellant had ever stolen a car before.

(2) Letner and appellant never took the victim's car outside the city of Visalia.

(3) Letner and appellant stopped at the Murray Street apartment or at Jeannette Mayberry's apartment, or at both apartments, at some point while in possession of the car, where appellant put his shotgun and ornamental sword into the car trunk, and codefendant Letner put a bag

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73. Actually, Arnold testified that he remembered appellant and Letner talking about going to Oklahoma where Letner had relatives.

containing hair products he had stolen from the Estes Hair Salon, plus a laundry basket of clothes, a tool box and a few other miscellaneous possessions of his into the car trunk (RT 5714-5718 [Rains]; RT 6862-6864 [appellant]; RT 5438-5439 [Mayberry]), but neither Letner nor appellant packed up their belongings into suitcases, backpacks or even shopping bags and put *those* possessions into the car.[74/]

(4) Officer Wightman ordered codefendant Letner and appellant to lock the victim's car and leave it on the side of Highway 198. The defendants did not thereafter return to the car, unlock it and drive it away after waiting for Officer Wightman to leave the scene, even though they had the opportunity to do so. Instead, they abandoned the car. This directly contradicted the inference that taking the car had been important enough to murder Ms. Pontbriant to get it.

(5) It is beyond reason to believe that the impetus for this murder was to take Ms. Pontbriant's car in order to drive it to Iowa. This would be an extravagant and risky criminal enterprise for simply obtaining a car. Moreover, if the object was to steal Ms. Pontbriant's car, Letner and appellant would not have sat around for two hours or more inside the house drinking beer with Ms. Pontbriant and then kill her in order to take her car. Certainly, given the undisputed evidence that Ms. Pontbriant was extremely intoxicated at the time she died, it would have been easier and much less risky to simply wait for her to pass out and then take the car.[75/]

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74. Appellant had clothes and personal possessions at Mayberry's apartment. (RT 6945-6946 [appellant]; RT 6288 [Logan].) Appellant and codefendant Letner had clothes and possessions at the Murray Street apartment. (RT 6290-6293 [Logan]; RT 5465-5466 [Mayberry].)

75. Ms. Pontbriant's blood/alcohol level at the time of her autopsy was .29 percent. (RT 4938.)

(6) The prosecution offered no evidence that either codefendant Letner or appellant had been charged with any kind of crimes, or were about to be arrested for any crimes committed before the evening of March 1, 1988, when Ms. Pontbriant was murdered, which might explain a need to steal a car that very night, in order to leave Visalia quickly. The prosecution offered no evidence to support the inference that either codefendant Letner or appellant had a reason to be desperate to leave Visalia that very evening. To the contrary, neither Letner nor appellant were in a hurry to leave Visalia that evening, because they spent the early evening at a bar (RT 6847, 6951-6952 [appellant]; RT 5492-5494 [Marilyn Reid]), then spent two or more hours at Ms. Pontbriant's home, then drove around Visalia to pick up appellant's shotgun and sword, plus some of Letner's possessions, but they did not pack up their belongings nor drive out of town.

(7) The prosecution offered no evidence that after leaving Visalia, either codefendant Letner or appellant stole or attempted to steal another car in order to get to Council Bluffs, Iowa. According to appellant, after sleeping in the vacant house on Crenshaw (RT 6872-6874), Letner and appellant traveled to the bus station at Goshen, bought bus tickets to Sacramento, then bought bus tickets to Reno, and then hitchhiked their way to Council Bluffs, Iowa. (RT 6876-6878.) Whether or not appellant's own description of their travel is accepted, that Letner and appellant were able to get to Iowa without stealing a car contradicts the inference that Letner and appellant intended to steal Ivon Pontbriant's car in order to get there.

(8) As described in detail in Argument IV, *supra,* Ms. Pontbriant, subsequently joined by codefendant Letner, called Ed Bourdette from Ms. Pontbriant's phone at least five times over the course of one-half hour to an hour on the evening of March 1, 1988. (RT 5566-5573, 5580-5581.) The

exchanges on the telephone grew heated. Both Ms. Pontbriant and Letner accused Bourdette of helping Warren Gilliland move his things out of the house on North Jacob Street and of harboring Gilliland at his house. (RT 5567-5573.) Thus, both apparently did not know that Gilliland had gone to Modesto and believed that he was staying at Bourdette's house in Visalia. This contradicted the prosecution theory that Letner and appellant came to Ms. Pontbriant's house on March 1, 1988, knowing that Gilliland was out of town. (RT 7542-7543 [prosecutor's closing argument].)

Letner in these angry conversations with Bourdette was seeking information on where Gilliland was and where Letner's tools were, which evidently Letner believed Gilliland had taken. (RT 5583-5584.) No rational trier of fact could conclude that Letner and appellant intended to steal Ms. Pontbriant's car, or anything else for that matter, after hearing evidence that (a) the defendants allowed Ms. Pontbriant to telephone Ed Bourdette several times; (b) Letner himself got on the telephone to talk with Bourdette, who had met Letner three to five times previously (RT 5559-5560), and who would recognize Letner's voice; (c) Letner told Bourdette he wanted his tools back, thus in no uncertain terms identifying himself to Bourdette; and (d) Letner escalated the acrimony in the telephone calls by not only calling Bourdette a liar, but also swearing at him, challenging him to a fight, and to top it off, speaking in an obscene manner to Bourdette's girlfriend, Kathy Coronado. (RT 5571-5572, 5598.) If appellant were a participant in any plan to steal Ms. Pontbriant's car, he would not have let Ms. Pontbriant initiate this series of phone calls, nor have passively sat by as Letner and Ms. Pontbriant continued the barrage of calls.

Letner's behavior during the telephone calls to Bourdette contradicted any conclusion that Letner intended to steal Ms. Pontbriant's car following the telephone calls. No rational trier of fact could conclude

that Letner behaved this way because he wanted to locate his missing tools in order to get them back and then put them in Ms. Pontbriant's car before he stole it to drive it off to Iowa.

Any inference that codefendant Letner and appellant intended to use force or fear to take Ms. Pontbriant's car in order to drive it to Iowa could rest only on speculation, since Letner and appellant did *not* drive the car to Iowa, and they did not pack the car as if they were preparing to drive it cross-country. Rather than suitcases, only beer bottles populated the backseat. (RT 5712.)

C. The Testimony of Earl Bothwell Was Incredible

Earl Bothwell testified that on March 28, 1988, Richard Letner told him about "an incident" involving a woman in California, in which Letner took a small amount of money from the woman, about $12-14, and her car. (RT 6421.)[76] Letner supposedly also told him that appellant and Letner would have "got to Iowa in it" if they "had not been stopped by the police in Visalia." (RT 6422.) When Letner allegedly made these statements to Bothwell, appellant was not present. (RT 6421.) Supposedly, appellant then came into the room, and appellant also admitted that he was wanted for murder in California, that he had killed "the old bitch," and that they had only gotten $12-13, some small amount, from the woman. Appellant allegedly told Bothwell the woman "was hollering, and screaming." She "would have called the cops, or had them there." Appellant asked Bothwell, "What would you do?" (RT 6423.)

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76. Bothwell did not state the date on which these alleged admissions were made. But he testified that the admissions were made during the morning of the night on which Bothwell and appellant got into a fight. (RT 6426). Council Bluffs police were called to the Iowana Motel about 2:00 a.m. on March 29, 1988, and arrested Letner and appellant at that location. (RT 6470-6472, 6480-6481.) Thus the admissions, if made, were made on the morning of March 28, 1988.

This testimony by Bothwell did not make the evidence sufficient to support an inference that Letner and appellant went to Ms. Pontbriant's house with a plan to steal her car, or that the car keys and car were taken in a "robbery" rather than as an afterthought. First, the testimony of Mr. Bothwell was both unbelievable and thoroughly contradicted. Mr. Bothwell was a convicted felon who was serving a sentence for fraud at the time he testified. (RT 6416-6417.) He had a history of using aliases and admitted to having used at least five. (RT 6438.) He had gotten into a fight with appellant on the evening of the day he said Letner and appellant each made the alleged admissions to him. (RT 6434-6435.) Appellant had beaten him in the fight. (RT 6458-6459.) For the reasons set forth in subsection (B.), above, insofar as Bothwell's testimony implied that the defendants killed the woman in California to get her car in order to drive it to Iowa, it was untenable.

Bothwell's testimony was also untenable for the following reasons:

(1) The amount of money Bothwell said Letner and appellant each told him they took closely matches the amount that Detective Logan found *still in the victim's purse.* Logan found more than $18 in cash inside Ms. Pontbriant's purse, and saw an additional significant quantity of coins in the gambling machine bank and/or the glass jar left in the house. It is ludicrous to believe that Letner and appellant killed Ms. Pontbriant in order to steal a small amount of money, while leaving an even larger amount of money behind.

(2) Appellant and Letner could not have made any admissions to Bothwell in their room at the Iowana Motel on the morning of March 28, 1988. Mercedes Brasel, at the time of trial an 86-year-old woman who lived some distance from Council Bluffs, in Carter Lake, Iowa, with her elderly sister, testified that appellant was at *her* house on that date from

early morning onward. Further, her testimony proved that appellant worked all that day painting her house on assignment from Bothwell, contrary to Bothwell's testimony that after appellant made his alleged admissions, Bothwell told appellant he had no work for him.

Bothwell testified that Letner made his admissions sometime between 9:00 a.m and noon, in Letner's room at the Iowana Hotel. (RT 6463.)[77] According to Bothwell, appellant was not there because he was out buying a six-pack of beer at the store. (RT 6421.) After appellant returned, and supposedly made *his* admissions to Bothwell, appellant asked about working that day. (RT 6424.) Bothwell testified he told appellant that he had no work for him, but if he got work he would let appellant know. In fact, Bothwell just wanted "to get away from him." (RT 6425.)

Ms. Brasel, to the contrary, testified that she had hired Bothwell to provide painting services, and that appellant spent all day on March 28, 1988, painting her house. Earl Bothwell brought appellant out to her house early in the morning and picked him up when it was "getting dusk." (RT 7436-7442.) Ms. Brasel paid Bothwell $50 for the paint work that day. She gave him a check dated March 28, 1988. (RT 7442; Defense Exhibit P.) Appellant had been coming to her house for several days to paint, and he finished the paint job that day. (RT 7444-7446.)[78]

Ms. Brasel's testimony was entirely credible and was corroborated by the evidence of the $50 check she wrote to Bothwell dated March 28, 1988. (Defense Exhibit P.) Her testimony proved that (a) appellant did not speak with Bothwell in the motel room shared by Letner and appellant

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77. Bothwell testified elsewhere on cross-examination that he saw Letner possibly between 8:00 a.m. and 9:00 a.m. (RT 6437.)

78. Appellant also testified that he worked all day on March 28, 1988, painting the house in Carter Lake. (RT 6882-6883.)

between 8:00 a.m. and 9:00 a.m., or between 9:00 a.m. and noon (the two different time frames Bothwell testified to) on March 28, 1988, as Bothwell claimed, because appellant was instead from early in the morning onward at Ms. Brasel's house in Carter Lake painting her house; and (b) on the same day that Bothwell claimed appellant made his admissions and Bothwell supposedly told appellant he had no work for him, because Bothwell secretly just wanted "to get away from him," appellant worked all day for Bothwell, completing a paint job of several days duration. In fact, Bothwell drove appellant out to Mercedes Brasel's house and then came back to pick him up at the end of the day.

(3) On the night that Letner and appellant were arrested in Council Bluffs, following the fight between appellant and Bothwell, both Bothwell and his friend, Fred Hare, also went to the Council Bluffs police station to give statements about what had happened. The prosecution offered no testimony by Mr. Hare, who according to Bothwell, was present at least part of the time during which Letner and appellant made their alleged admissions. (RT 6424.) He did not tell the Council Bluffs police that he heard any admissions by Letner or by appellant, because if he had, the prosecution would have called Hare as a witness or would have attempted to admit his statements to the police into evidence.

Most importantly, Mr. Bothwell did not tell the Council Bluffs police about the alleged admissions. Although Bothwell knew while he was at the police station that murder warrants had been issued for Letner and appellant from California (and that therefore Letner and appellant would be sitting in the Council Bluffs jail until they could be returned to California) (RT 6427), 6434-6435, 6440), he said nothing to the police about any admissions by Letner or appellant relating to the California murder. Bothwell testified that after Letner and appellant made their admissions to

him, he and Hare were "planning on going to the police about it." (RT 6425.) But neither Bothwell nor Hare told the police about any admissions when they had the opportunity to do so.

Pressed to explain why he did not tell the Council Bluffs police about the alleged admissions, Bothwell lamely claimed: (a) he was afraid that Letner or appellant would harm him if he told the police about the admissions; and (b) he did not know whether the Council Bluffs police would charge him "for withholding knowledge, that I knew about [the admissions]." (RT 6427.)

The first reason given by Bothwell was ridiculous on its face, since both Letner and appellant were incarcerated and there was no chance they would be released, regardless of whether Bothwell told the Council Bluffs police about the alleged admissions. The second reason was even more preposterous. Bothwell had numerous arrests and convictions and had served time in various state prisons. (RT 6416-6417, 6433.) He knew the system well enough to know that there was absolutely no risk that if he told the Council Bluffs police about the alleged admissions, which he claimed he had heard only the previous morning, he would be charged with "withholding knowledge." The only sensible conclusion which could be drawn about why Bothwell did not tell the Council Bluffs police about the alleged admissions while he was at the Council Bluffs police station was that *no admissions had been made to him.*[79]

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79. Bothwell claimed that he *did* tell a Council Bluffs patrol officer, about one month later, about the alleged admissions. (RT 6427.) This allegedly occurred when the patrol officer stopped by Bothwell's room at the Iowana Motel to tell Bothwell that Letner had escaped. (RT 6427-6428, 6454.) Bothwell did not know this patrolman personally, but he knew the patrolman's father. (RT 6455.) Bothwell did not name the patrolman, and the prosecution offered no witness or any documentary evidence from (continued...)

Bothwell clearly piled lie upon lie, and was tripped up when Ms. Brasel unexpectedly turned up as a defense witness.[80] Bothwell's testimony was rife with internal inconsistencies;[81] it was contradicted in its particulars; it was given by a person with no credibility; and it made no

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79. (...continued)
Council Bluffs police records to support Bothwell's claim. Also, Bothwell testified that this contact occurred at the Iowana Motel, where Bothwell was still residing. (RT 6454.) However, Detective Logan testified that when he went with Investigator Johnson to Iowa to bring appellant back to California, he and Johnson attempted to locate Earl Bothwell. They went to the Iowana Motel. This was on or around March 30, 1988. (John Johnson testified that a search warrant was executed on March 30, 1988, to search the Iowana Motel room rented by Letner and appellant, and that Johnson thereafter left Council Bluffs with appellant. [RT 6523-6524, 6527.]) When Logan and Johnson went to Bothwell's room, Bothwell and all his belongings were gone. Fred Hare was gone too. (RT 6676-6679.) In short, Bothwell's claim about telling the patrol officer about the admissions not only could not be verified, but in telling it Bothwell got caught in yet another lie – that the patrol officer located him at the Iowana Motel.

80. Earl Bothwell testified on December 19, 1989. (RT 6357, 6416.) On January 4, 1990, appellant's counsel Martin Staven requested that the trial court hold an in camera hearing with only Staven present, to hear Staven's request to put on a new witness. (RT 7404-7405.) Staven subsequently stated in open court that the witness had not been discovered until just the day before. Staven obtained permission to present the witness on January 8, 1990, the same day closing arguments began. (RT 7411-7413.) The new witness was Mercedes Brasel. (RT 7436.)

81. In addition to the inconsistencies already described, Bothwell testified that he sought Letner out on the morning of March 28, 1988, to ask him whether he was wanted for murder because Bothwell was going "to let him go" as an employee if he said yes. (RT 6372-6373.) See also, RT 6463 (Bothwell went to Letner's room at the motel to "find out if he [Bothwell] should let *them* go" [italics added]). At RT 6436, Bothwell testified that Letner had never worked for him. At RT 6456, he acknowledged that Letner had found employment with an electrical contractor right away after arriving in Council Bluffs.

sense. In short, Bothwell's testimony with regard to whether a robbery occurred was not of solid value.

While the credibility of trial witnesses is normally resolved by the jury (see, e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 735), nonetheless, a conviction must be reversed if it is based on the inherently incredible testimony of a key prosecution witness. For example, in *People v. Smith* (Ill. 1999) 185 Ill.2d 532, 708 N.E.2d 365, the Illinois Supreme Court unanimously reversed a murder conviction and death sentence where the testimony of the most crucial prosecution witness contained "serious inconsistencies" and was repeatedly impeached. (*Id.* at p. 370.) The Illinois Supreme Court held the evidence was insufficient to sustain the conviction, stating "[W]e will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." (*Ibid.*) The Court concluded:

> In sum, although the testimony of a single witness is sufficient to convict if positive and credible [citations omitted] given the serious inconsistencies in, and the repeated impeachment of, [the witness's] testimony, we find that no reasonable trier of fact could have found her testimony credible. Moreover, the circumstantial evidence tending to link defendant to the murder merely narrowed the class of individuals who may have killed the victim, without pointing specifically to defendant. . . . It is no help to speculate that the defendant may have killed the victim. No citizen would be safe from prosecution under such a standard.

(*Id.* at p. 371.)

The Illinois Supreme Court noted, as particularly relevant here, that the key witness's actions after she allegedly witnessed the murder undermined her credibility. She did not call or contact the police. She did not tell the police she witnessed the murder until two days later. (*Ibid.*) Although at trial she gave vivid testimony about what she saw, the Court found that "no reasonable trier of fact could have found her testimony

credible." (*Ibid.*) Similarly, in this case Earl Bothwell did not call or contact the police about the admissions by Letner and appellant. He testified that he planned to tell the police about the admissions, but when given the opportunity to do so at the Council Bluffs police station the next day, he did not.

In *United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, the Eleventh Circuit similarly found the evidence insufficient where it depended on the credibility of a key prosecution witness. The Court of Appeals observed:

> As far as it goes, this statement [that credibility of a witness is for the jury to resolve] is undoubtedly correct. It does not address the problem, however, which arises when the testimony credited by the jury is so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt. The mere fact that the testimony is in the record is not enough.

(*Id.* at pp. 546-547.)

While the Court acknowledged in *Chancey, supra,* that credibility issues are for the determination of the jury, it held that a defendant may not be convicted based on evidence which would not persuade a *rational* factfinder beyond a reasonable doubt. (*Id.* at p. 546.) That is the situation presented here. On appeal, before the reviewing court draws all reasonable inferences in favor of the verdict, it must first "resolve any conflicts in evidence or credibility." (*People v. Mack* (1992) 11 Cal.App.4th 1466, 1468.) This Court can only find that Earl Bothwell had no credibility, and that his testimony provided no relevant evidence to proving that a robbery occurred.

But even if Bothwell's testimony were to be accepted as credible, it still failed to establish that Letner and appellant *intended* to steal

Ms. Pontbriant's car before she was murdered. Bothwell testified only that Letner told him he "stole the car." Bothwell did not testify to any statement at all made by appellant regarding the car. Thus, Bothwell's testimony did not establish that the object of the murder was to take the victim's car, but only reiterated facts which were not in dispute, i.e., that a woman in California had been murdered, and then her car had been taken. This sequence of events, absent proof that Letner and appellant killed Ms. Pontbriant in order to obtain her car, could not support appellant's conviction of robbery, or the robbery-murder special circumstance finding, both of which required substantial evidence that the intent to take the victim's car arose before she was killed. None of the evidence, as described above, supported such an inference.

D. <u>The Testimony of Warren Gilliland Was Even More Incredible</u>

The remaining basis for concluding that a robbery occurred was that Letner and appellant took cash from Ms. Pontbriant which Warren Gilliland had given her before he left town early Monday morning, February 29, 1988. For a multitude of reasons, Mr. Gilliland's testimony possessed absolutely no evidentiary value whatsoever.

Warren Gilliland was perpetually drunk, he vowed to "punish" Letner and appellant; and out of thin air he created the "fact" that there had been money in the dead woman's checkbook. The evidence at trial clearly showed: (1) Gilliland had not yet received the Social Security disability checks he claimed were the source of this money; (2) he had not received any significant amount of money after February 12, 1988, for repairing or selling appliances; (3) he did not have any significant amount of money in his bank account at Coast Savings during February 1988; and, (4) he did not

bring any savings with him after he was released from prison in December 1987.[82/]

Gilliland had *no money* to give to Ms. Pontbriant, and he lied about every source he identified for the money. Gilliland's claim that he gave money to Ms. Pontbriant, and that this was the object of the robbery, must also be considered next to the undisputed fact that *nothing else* was taken from the dead woman's house before she died. All the real, tangible evidence in this case pointed away from the occurrence of a robbery. Warren Gilliland's testimony was not just unverifiable, it was contradicted in all its fundamentals.

Gilliland testified that on Sunday, February 28, 1988, Letner and appellant came over to the house on North Jacob with some Kahlua and two cartons of cigarettes. Gilliland, Ivon Pontbriant, Letner, and appellant then all sat at the kitchen table and drank coffee. (RT 5122-5124.) Gilliland talked about planning to leave for Modesto. Ivon mentioned that the rent was due in two days, so he opened up his wallet and gave her approximately $340 to $350. She put the money in her blue checkbook which was inside her white purse. (RT 5124-5126.)

According to Gilliland, he got most of this $340 from his Social Security disability check, and about $20 came from money he made selling appliances. (RT 5135-5136.) On cross-examination, Gilliland testified that

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82. Etta Gilliland, Warren Gilliland's ex-wife, testified that while Warren Gilliland was in jail, he requested that she send him funds. His sons also sent money to pay for essentials and school programs. (RT 5366-5367.) Nelson Chadwell, a sergeant at the Tulare County Sheriff's Correctional Center, testified that Gilliland was incarcerated from April 2, 1987 to December 15, 1987. (RT 6801-6802.) Chadwell contradicted Gilliland's testimony that he had made money while in prison from selling cigarettes and instant coffee to other prisoners, and confirmed that in December 1987 Gilliland had only $136.20 in his commissary account. (RT 6808-6809.)

after he got out of jail on December 19, 1987, his Social Security benefits were reinstated within a few weeks. (RT 5193-5194, 5196.) He claimed very specifically that he got a check for $575 during the first part of January 1988, as well as another check in early February 1988. (RT 5196-5197.) He also asserted again that he used the money from his February Social Security check to pay his share of the March rent. (RT 5198.)

Of course, Gilliland could not have given Ms. Pontbriant *all* the money he had in his wallet on Sunday morning, because Sunday afternoon he left the North Jacob house after a fight with Ms. Pontbriant and stayed Sunday evening at the Capri Hotel. He paid $25.92, including tax, to rent his room. (RT 5347.)

In fact, Gilliland could not have given Ms. Pontbriant *any* money from his February Social Security disability check, because he had not received one. Etta Gilliland, who was Warren's Social Security payee, testified that after Warren's release from prison she received Warren's first Social Security disability benefits check on March 11, 1988, *after* Ms. Pontbriant had been murdered. (RT 5360-5361.)[83/]

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83. Etta Gilliland testified that she stopped receiving Social Security disability checks for Warren when he went to jail in December 1986. She was still Warren's payee when he got reinstated after his release from prison. The first check she received was for $2,700 on March 11, 1988. (RT 5360-5361.) She deposited the money into her own account, and never put any money into Warren's account at First Interstate Bank. (RT 5362-5363.) Warren did not open the First Interstate Bank account until after he returned to Visalia from Modesto after the death of Ms. Pontbriant. (RT 5365-5366.) This also contradicted Warren's testimony that the Social Security disability payments went into his First Interstate Bank account, before Ms. Pontbriant was murdered. (RT 5103-5104.) All Warren Gilliland received through Etta Gilliland from Social Security funds prior to March 11, 1988, was $100 that she received in December 1987 or January 1988, and then gave to Warren in January or else in early February 1988. (RT 5363-5364.)

Gilliland also could not have given Ms. Pontbriant money on February 28, 1988, from a sale of a washer and dryer for $185, as Gilliland had told Investigator Johnson before trial. (RT 6791.) Sandra Saulque testified that her daughter, Kelly Saulque, had paid Gilliland $185 by check for the purchase of a washer and dryer, but the sale occurred on February 12, 1988, more than two weeks earlier than February 28. (RT 7288-7289; Defense Exhibit D [a check for $185 made out to Warren Gilliland].) The check from Kelly Saulque cleared her bank on February 16. (RT 7290-7291.) The check was ultimately deposited in Ms. Pontbriant's account at Wells Fargo Bank, and $85 was taken back as cash – *by Ms. Pontbriant.* (RT 7291; see also, RT 7700-7701 [closing argument by Wainwright].)

Gilliland also could not have given Ms. Pontbriant money on February 28, 1988, taken from his account at Coast Savings. He did not have the funds. Gilliland opened this account in November 1987, and on January 7, 1988, the balance was $170.29. However, on February 16, the balance was only $13.11. On February 25, 1988, Gilliland made a $40 deposit. On March 1, 1988, at the Modesto Coast Savings branch, Gilliland withdrew the $40. (RT 7292-7298, 7332.) This would have brought the balance back down to $13.11.

Gilliland's testimony on the critical issue of whether he gave Ms. Pontbriant cash, which after her murder was missing, was thus directly refuted by Gilliland's own Social Security records, by his Social Security disability benefits payee (Etta Gilliland), by his own bank records, and by Defense Exhibit D ($185 check cashed on February 16, 1988).[84/]

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84. Gilliland's testimony about giving a significant amount of money to Ms. Pontbriant was even contradicted by the testimony of Earl Bothwell, who said Letner and appellant each told him that they had taken (continued...)

In addition to lying about the key allegation that he gave money to Ms. Pontbriant on February 28, 1988, from the outset Gilliland's "facts" changed every time he spoke with a police investigator. Detective Logan described at trial the several contacts he had with Warren Gilliland. He first interviewed Gilliland at the Visalia Police Station a few days after the murder, just after Gilliland had returned to Visalia. Gilliland appeared to Logan to have "been drinking quite a bit." If Gilliland was not intoxicated, he was very near the point of intoxication. (RT 6644.) In Logan's opinion, based on this and additional contacts with Gilliland, Gilliland was "a hard individual to communicate with." This was true whether he was sober or intoxicated. (RT 6645.) But Logan wanted to get down whatever Gilliland had to say at this time, regardless of his condition. (*Ibid.*) Gilliland was not so drunk that he did not know what he was doing or saying at this time. (*Ibid.*)

Logan talked with Gilliland four different times. During each of these conversations, Gilliland was in the same state of insobriety as he had been in during the first interview, or worse. (RT 6695.) Logan recounted one example of the confusion which reigned when Gilliland was intoxicated: two or three times during their first conversation in the police station, the telephone rang and Logan picked up the telephone. Gilliland just kept on talking to Logan, answering questions which Logan was asking of the person on the telephone. (RT 6694-6695.)

During this first interview, Gilliland asked Logan several times to turn the tape-recorder off. (RT 6643.) During the times that Gilliland was not being recorded, Gilliland more than once threatened to kill Letner and appellant. (*Ibid.*)

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84. (...continued)
only $12 to $14 from the woman. (RT 6421-6423.)

Gilliland also told Logan that the day he left to go to Modesto was Tuesday, March 1, 1988, and that he saw Letner and appellant at his house around 10:00 a.m. At that time, he supposedly told Letner and appellant that he was going to Modesto. (RT 6669, 6698-6699.)

In addition, and most importantly, Gilliland said nothing to Logan about having given Ms. Pontbriant any money before he left for Modesto. In fact, Logan specifically asked Gilliland if there were any large sums of money in the house at the time of the murder, and Gilliland replied there were not. (RT 6647.) Gilliland could not provide Logan with any idea for a motive for the murder of Ms. Pontbriant. (RT 7154.)

Detective Logan interviewed Gilliland a second time on March 11, 1988. This conversation was not tape-recorded because Gilliland adamantly insisted that it not be recorded. Again, according to Logan, Warren Gilliland was intoxicated. (RT 6649.) During this interview, Gilliland claimed for the first time that a tool box belonging to him had been taken from the garage of the house on North Jacob Street. (RT 6650.) Warren Gilliland's son, Jerry Gilliland, directly contradicted this assertion at trial. Jerry Gilliland testified that when he took his father to the North Jacob Street house in the early morning hours of February 29, 1988, *he* took his father's tool box out of the garage at the house and put it in his car. He saw only one toolbox in the garage, and that toolbox was later stored at the house of his mother Etta Gilliland, then moved to Jerry's house, where it still was. (RT 6727-6729.)

Four conclusions are possible here. The first is that Warren Gilliland made up this claim that his toolbox was taken. The second is that he was confused about what happened when Jerry Gilliland took him to the North Jacob house to get his belongings. The third is that his recollection of the event is what is confused. The fourth possibility is that all of the above are

true. Whichever one is true, this is just one of the many instances in which Gilliland was caught in a lie, or else, putting it more charitably, he showed profound mental confusion.

Gilliland also told Logan during this interview that the keys to Ms. Pontbriant's car were usually kept on the kitchen table, in case Gilliland wanted to use the car. (RT 6650.) Gilliland then said that Ivon did not allow him to use the car. (RT 6651.) This is but one example of Gilliland making contrary statements. He did not seem to know or care when one fact he asserted contradicted another.

Gilliland also told Logan on March 11, 1988, that he had given Ms. Pontbriant $185 just before he left for Visalia. He also claimed that Richard Letner and perhaps appellant were present when he gave her this money. (RT 6651-6652.) These statements squarely contradicted Gilliland's previous statement to Logan that there had not been any large sums of money in the house except that Ms. Pontbriant may have kept up to $60 in her purse. (RT 6670.) Later in the interview, Gilliland claimed that in addition to the $185 in cash that he gave Ivon in front of Letner, he had given her $150 in cash a few days earlier. (RT 6672.)

Gilliland, during the March 11 interview, also said Monday morning (February 29, 1988) was when he saw Letner and appellant. (RT 6652, 6673.) They showed up in a white Cutlass which belonged to appellant's ex-wife. Letner gave Warren and Ivon each a carton of cigarettes. (RT 6651.) This contradicted what Gilliland had told Logan on March 4, 1988, when he said he saw Letner and appellant on Tuesday morning, March 1. However, Gilliland still was lying or confabulating, because Jerry Gilliland testified that he picked his father up between 4:00 a.m. and 5:00 a.m. from the Capri Motel to take him to Modesto. (RT 6709-6710.) Gilliland stayed at the Capri Motel on Sunday night, February 28, 1988

(RT 5341-5342), so when his son Jerry took Gilliland to Modesto, it was very early in the morning on Monday, February 29. Logan admitted that Gilliland had difficulty remembering on which day he left Visalia to go to Modesto (even though he first interviewed Gilliland on Friday, March 4, only a few days after Gilliland had left Visalia). (RT 6697.) In short, Gilliland could not have seen Letner and appellant either on Tuesday or on Monday morning.

Gilliland was also confused about the car used by Letner and appellant to come to the North Jacob house. Gilliland should have had a clear memory of the car, since he told Logan that he saw the cigarettes and liquor that Letner gave to him and Ivon that day first in the trunk of the vehicle. (RT 6673.) On March 4, 1988, Gilliland had told Logan that they drove up in an old Dodge Dart. (RT 6671.) But on March 11, Gilliland said the car was an Oldsmobile Cutlass. It did not require the testimony of an expert witness, such as in the movie *My Cousin Vinny*, to know that an Oldsmobile Cutlass is a very different looking car than a vintage Dodge Dart.

But even more significantly, neither car description given by Gilliland could have been accurate, since the only car Letner or appellant had access to at that time was the brown and white Maverick owned by Jeannette Mayberry. (RT 6831 [appellant]; 6750 [Cheryl Williams]; 5409-5410 [Mayberry].) Gilliland did not describe the car accurately because in fact he never saw Letner and appellant drive up to his house in a car on Monday or on Tuesday morning.

Investigator John Johnson of the Visalia County District Attorney's Office met with Warren Gilliland on May 24, 1988, when Gilliland was living at an alcohol recovery center in Altura. Deputy District Attorney Melinda Reed was also present. (RT 6781.) At the time of this interview,

Gilliland appeared to be sober; however, he also appeared to be very sick, as though he were still in withdrawal from alcohol. (RT 6784.)

During this interview, Gilliland gave Investigator Johnson the following account of events. Early on Monday morning, February 29, 1988, his son picked him up at the Capri Motel and took him back to the house on North Jacob Street where he found Ivon asleep. He collected some of his possessions, including his dog, and left. (RT 6785-6786.) This became the time sequence Gilliland testified to at trial, including that the day Letner and appellant came to the North Jacob house was Sunday morning, February 28, 1988. (RT 5121, 5138-5139.)

Gilliland told Johnson that about a week before Ivon's death, Letner had shown up at their house with appellant, introducing him as his cousin from Arizona. Gilliland claimed he saw appellant a second time with Letner, when they came over to the house in a car and gave Ivon some Kahlua and two cartons of cigarettes. (RT 6787-6788.) Appellant stayed in the garage while Letner went inside the house and had a cup of coffee with Ivon and Gilliland. While they were drinking coffee, Gilliland gave Ivon $340 in cash to pay the rent. According to Gilliland, Ivon already had $180 in her purse. (RT 6789-6790.) Of the $340 Gilliland gave to Ivon, Gilliland had obtained $185 the day before when he sold a washer and dryer. (RT 6791.)[85/]

Gilliland also denied to Johnson and Ms. Reed that he had been drunk during his earlier interviews with Detective Logan. Johnson himself acknowledged that Gilliland had a hard time admitting that he was an alcoholic. (RT 6793-6795.)

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85. As Sandra Saulque testified (RT 7288-7289), and Defense Exhibit D showed, Gilliland received this $185 on February 12, 1988, not February 27, as he told Johnson.

Gilliland's new time frame for the alleged visit by Letner and appellant to the North Jacob house faced another problem. A Sunday morning visit also could not have happened. Jeannette Mayberry and Cheryl Williams, appellant's ex-wife, both corroborated appellant's testimony that appellant and Letner went very early Sunday morning to the Visalia swap meet in Jeannette Mayberry's car. (RT 6824-6825.) They returned to Letner's apartment on Murray Street between 7:30 a.m. and 8:30 a.m. and shortly thereafter Carmen Renteria, a friend of Cheryl Williams, told appellant that Cheryl was outside and wanted to talk with him. (RT 6830-6832.) Appellant saw Cheryl and told her he would meet her over at the "Ice House" park. He then walked to the park. After that, he spent the day visiting with Cheryl and their daughter, Jaime, sandwiched between encounters with Jeannette Mayberry, who was upset about appellant spending time with Cheryl and Jaime, and who repeatedly tried to attack Cheryl and had to be restrained by appellant and others. (RT 6833-6835.)

Mayberry corroborated appellant's description of these events. (RT 5409-5415, 5461-5462, 5466-5467.) So did Cheryl Williams. (RT 6742-6750.) The two women were credible witnesses regarding these events. Ms. Mayberry's testimony did not paint herself in a flattering light, and Ms. Williams had had no contact with appellant for months prior to Sunday, February 28, so she had a distinctive recollection of the date and of the events of that day.

Gilliland's claim that he saw Letner and appellant at the North Jacob Street house on February 28 was also contradicted by his tying the date of the visit to the fact that Letner had a cut on his right wrist when he visited. Gilliland told Logan during the March 11, 1988 interview that Ms. Pontbriant had cleaned up Letner's cut and told Letner to go to the

hospital to have it taken care of. (RT 6652-6653.) Logan thereafter checked with the Kaweah Delta Hospital and confirmed that Letner had been treated in the emergency room. (RT 6653.) However, the date that Letner had received treatment was Monday, February 22, 1988, a full week earlier than February 28. (Defense Exhibit M [Kaweah Delta Hospital Medical Records of Richard Letner]; RT 7256, 7330.)

Above and beyond the problems arising from Warren Gilliland's ever changing statements to the police about dates, people, amounts of money and sources of this money, as well as the direct impeachment of his trial testimony by other credible witnesses, there was credible evidence of Gilliland's reputation for dishonesty and drunkenness. Etta Gilliland testified that Warren Gilliland had been receiving Social Security disability benefits since 1986 because of his alcoholism. Because he was an alcoholic, the Social Security Administration required that his checks be sent to a payee, and she was his payee. (RT 5353.) Ms. Gilliland described her former husband as a "closet type drinker." (RT 5369.) Gilliland's reputation for honesty and truthfulness "[i]n the business world . . . was real good. At home it wasn't very good once the booze took over." (RT 5374.) This was, unfortunately, most of the time, because Warren was "always drinking." (RT 5369.) Etta added weight to this characterization by stating that it was based on her personal experience with Warren over a period of 30 years. (RT 5370.)

Martin Danny Mendoza owned a furniture store where Warren Gilliland sometimes repaired washing machines. (RT 6734-6736.) He had many contacts with Warren Gilliland in the months before Ms. Pontbriant was murdered. According to Mr. Mendoza, "you couldn't believe anything

he'd tell you; everything he told me was a lie. You know, lie after lie." (RT 6738.)[86/]

Mendoza, like Etta Gilliland, had first hand knowledge of how serious Gilliland's drinking problems were. According to Mendoza, Gilliland had "a very bad drinking problem, very bad one." Gilliland was drunk "[m]ost of all the time." (RT 6738.)

Alice Quair bought a refrigerator from Warren Gilliland in March 1988, after the murder. Gilliland claimed to Quair that the refrigerator was brand new. However, Quair knew that he was lying, that it was used, and she told him so. (RT 7283-7284.) She agreed to pay him $200, with an immediate cash payment of a $150. The refrigerator worked for only six months, so she did not pay him the remaining $50. (RT 7285-7287.)[87/]

As previously shown, Warren Gilliland's general reputation for untruthfulness was borne out in his specific testimony at trial, which was inconsistent with his previous statements to Detective Logan and/or to Investigator Johnson, internally contradictory, and irreconcilable in its core criminal allegations with the documentary evidence which proved that Gilliland had no money to give Ms. Pontbriant on February 28, 1988, in the first place.

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86. Mr. Mendoza testified to a particularly revealing lie told by Warren Gilliland, although Mendoza might not at the time have known Gilliland was lying. Sometime after Ms. Pontbriant's death, Gilliland contacted Mendoza to sell him some washers and dryers. Mendoza noticed that Gilliland was injured. Gilliland said he had a bump on his head which really hurt, and bruised ribs. He said he had just been released from the police department and he had gone out looking for the defendants. He had found them! He got into a "great big fight" with them in an alley. This was how he had gotten injured. (RT 6736-6737.) But this fight could not have happened, because the defendants had left Visalia.

87. Ms. Quair's testimony also eliminated her as a source of any of the money Gilliland claimed he gave to Ms. Pontbriant *before* her death.

Lies and confusion characterized Gilliland's testimony in all regards. In addition to those already recounted, at the outset of his testimony, Gilliland suggested that he was on disability because of the physical problems he had with his legs, his heart and his circulatory system. (RT 5092-5095.) This was not true. As described earlier, Etta Gilliland testified that it was Gilliland's alcoholism that entitled him to Social Security disability benefits. (RT 5333.)

In describing Ivon Pontbriant's relationship with Richard Letner, he initially denied that Ivon had ever said that Letner reminded her of her son. (RT 5112-5114.) After prompting from the prosecutor, Gilliland agreed that Ivon had said that Letner reminded her of her son. (RT 5114.)

When Letner and appellant came to the North Jacob house on Sunday morning, February 28, Gilliland testified, they told him that the car they came in belonged to appellant's girlfriend. (RT 5121.) But Gilliland told Detective Logan that Letner and appellant told Gilliland the car belonged to appellant's ex-wife. (RT 6651.)

Gilliland's claim that he was planning a trip to Modesto and told Ms. Pontbriant and the defendants about these plans, which in turn was the reason he gave Ms. Pontbriant rent money on February 28, was thoroughly contradicted. First, Etta Gilliland testified that Warren telephoned her around either 2:00 p.m. or 4:00 p.m. that Sunday afternoon and told her that he had gotten "into it with Ivon and had decided to come back to Modesto, and wanted our son [Jerry Gilliland] to come and pick him up." (RT 5354-5355.) Etta had received no warning before this telephone call that Warren intended to make a trip to Modesto. (RT 5373.) The pattern of Warren's visits to Modesto was that "periodically" Warren and Ivon "would get in an argument and [Warren] could come to Modesto." (RT 5372.) Jerry Gilliland corroborated Etta's testimony that the first she or Jerry knew that

Warren intended to come to Modesto was Warren's phone call on Sunday afternoon requesting Etta to contact Jerry to ask him to go to Visalia to pick Warren up. (RT 6708-6709.)

Warren Gilliland's claim that he was planning a trip to Modesto and told the defendants about this trip was contradicted as well by the telephone conversations on Tuesday night, March 1, 1988, between Ivon Pontbriant and Ed Bourdette and between Richard Letner and Ed Bourdette. In these conversations, Ms. Pontbriant and Letner each asserted a belief that Warren was in Visalia, and was staying at Bourdette's house. (RT 5566-5568.)

Warren Gilliland also lied when he testified that Ms. Pontbriant was asleep when Jerry Gilliland took Warren back to their house in the early morning hours of February 29, and that he did not wake her up. (RT 5142-5143.) Jerry Gilliland subsequently described a very different encounter with Ms. Pontbriant. Jerry testified that Warren went inside the house on North Jacob and within two or three minutes he heard a woman yelling at his father. It sounded to him as if things were being thrown inside the house. The "verbal fight" was "one-sided," as the woman yelled and Jerry heard things "crashing against the walls." (RT 6712-6713.) Jerry then saw his father come out of the house, but the yelling from the woman continued. (RT 6715-6716.)

When Warren Gilliland testified about his return to Visalia on March 4, 1988, he denied that he had been intoxicated when he spoke to Detective Logan at the police station. (RT 5190.) Ms. Reed reminded Gilliland that he had "told us before that you were drunk, intoxicated, when you talked to Detective Logan." Gilliland responded, "I said that?" (RT 5190.) On cross-examination, Gilliland again denied that he had been drinking on March 4, 1988. (RT 5193-5194.) When pressed further, however, he did admit that after he received the news of Ivon's death he did

drink some of the vodka which he had purchased at the Thrifty Drug Store: "[I] took a couple of whiffs out of the bottle." (RT 5194.) But he continued to maintain that he was not under the influence of alcohol when he made his statement at the police station. (RT 5194.)

As with the contradictory and unverifiable testimony of Earl Bothwell, the testimony of Warren Gilliland did not constitute evidence of sufficiently solid value to sustain appellant's conviction of robbery or the jury's special circumstance robbery-murder finding. In addition to the cases previously cited stating that a conviction cannot rest on the testimony of a witness which is inconsistent, incredible and/or impeached, *People v. Pellegrino* (Ill. 1964) 30 Ill.2d 331, 196 N.E.2d 670, is particularly apt here. The Illinois Supreme Court reversed *this* murder conviction on the ground that the evidence was "so unsatisfactory as to raise a reasonable doubt of defendant's guilt." (*Id.* at p. 671.)

Pellegrino stemmed from a flop house brawl which resulted in the death of one of the participants. It was undisputed that a fight arose after the victim punched a prostitute, Crystal Sanders, in the face when she refused to continue their sexual encounter. When Ms. Sanders screamed, the defendant (who was the manager of the hotel and possibly her pimp) and two other men rushed into the room, and a fight ensued. At trial, Sanders and another prostitute, "Miami Kate," testified that it was defendant who beat the victim to death. Their testimony at trial, however, differed significantly from what they had originally told the police prior to trial. Also, on cross-examination the other prostitute conceded that she was just coming off a four-week "drunk" when the incident occurred, and she continued the "drunk" for another three weeks after the incident. (*Ibid.*) The Court found this evidence to be "unsatisfactory," and reversed. (*Id.* at p. 672.)

Pellegrino was cited and followed in *People v. Bloome* (Ill. 1970) 130 Ill.App.2d 277, 264 N.E.2d 772, *People v. Williams* (Ill. 1989) 189 Ill.App.3d 17, 545 N.E.2d 173, and *People v. Cunningham* (2002 WL 31051553) Ill.App. 1 Dist., Sept. 13, 2002), among other cases. In *Bloome*, the court reversed a burglary conviction because the testimony of witnesses conflicted on vital factual questions. (264 N.E.2d at p. 774). In *Williams*, the court reversed an attempted burglary conviction because it found the testimony of the complaining witness full of unlikelihoods and there was no circumstantial evidence to back up the witness's accusation. The witness accused the defendant of trying to pry open the trunk of the witness's car with a screwdriver. The court found it unlikely, however, that the defendant "would have been trying to open the trunk at lunch time on a busy street with a police officer nearby writing tickets." (545 N.E.2d at p. 175.) In the present case, it was similarly unlikely that Letner and appellant intended to rob Ms. Pontbriant of money which they knew she had because Gilliland had earlier given it to her in their presence, but before doing so they let her call Ed Bourdette several times on the telephone and for good measure, Letner decided to also talk on the phone with Bourdette and Kathy Coronado.

In *Cunningham, supra*, the court reversed a possession of a controlled substance conviction where it agreed with the defendant's claim that the testimony of the arresting officer was "so unlikely and improbable that it was unworthy of belief." (2002 WL 31051553 at p. 1.) The court found the officer's testimony "incredible, unbelievable, uncorroborated and bordering on the fiction from which fairytales are made." (*Id.* at p. 3.)

All of the above characterizations apply to Warren Gilliland's testimony. At the least, Gilliland was proven to be a liar over and over again. In *Greene v. Henry* (9th Cir. 2002) 302 F.3d 1067, the Court of

Appeals stated that because a witness's trial testimony "conflicted squarely with what she had told the police [before trial]," that testimony "established that she *had* to be a liar." (*Id.* at p. 1073, italics in original.) Gilliland either lied to the police or to the jurors about whether he gave Ms. Pontbriant money for rent. Because his testimony that he gave a significant sum of money to Ms. Pontbriant was thoroughly discredited, a rational trier of fact would have to conclude that Gilliland told the truth the first time Detective Logan interviewed him on March 4, 1988, when he said that there was not any large amount of money in the North Jacob house, and further, that he had no idea of a motive for Ms. Pontbriant's murder. (RT 6647, 7154.)

For all the above reasons, this case presents the "exceptional circumstance" where it is clear that a witness's critical testimony was "inherently improbable." (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) Although the fact that a witness's testimony is false in part "does not preclude a trier of fact from accepting as true the rest of it" (*ibid.*), in the case of Warren Gilliland's testimony, the part which was proven false *was* the very part which was relevant to the charge of robbery. For this reason, Gilliland provided *no* evidence relevant to proving that a robbery occurred.

In any event, as with the testimony of Earl Bothwell, even if Gilliland's testimony were to be fully credited, it still was insufficient to sustain appellant's robbery conviction or the robbery-murder special circumstance finding. The prosecution offered no evidence that any cash that Gilliland gave to Ms. Pontbriant on Sunday morning was still in her possession three days later on Tuesday night. It was undisputed that Ms. Pontbriant wrote and delivered a check for $50 to PG&E on Tuesday afternoon, March 1, 1988, and that she also stopped at the post office and at her *bank* before taking Florene Gentry to the market on Tuesday afternoon. (RT 5516-5517.) Ms. Pontbriant also stopped at her parents' house on

Mooney Boulevard, while Ms. Gentry waited in Ms. Pontbriant's car. (*Ibid.*) The rent on the North Jacob house was also due on March 1, and had to be paid by check. (RT 5340.)

Ms. Pontbriant could have deposited in her bank on either Monday or Tuesday any money given her by Warren Gilliland on Sunday, in order to cover her rent check. This was, after all, according to Gilliland, why he gave Ms. Pontbriant the cash (assuming he gave her any cash). Ms. Gentry specifically saw Ms. Pontbriant enter her bank on Tuesday afternoon. Ms. Pontbriant also could have given cash or a check to her parents when she saw them on Tuesday afternoon, which was the first day of the month. The theory that codefendant Letner and appellant took money from Ms. Pontbriant's checkbook, and that they took this money before Ms. Pontbriant was killed (or else that they knew the money was present and this is why Ms. Pontbriant was killed) rests on layer upon layer of speculation.

Three days elapsed between the time Warren Gilliland testified he gave Ivon cash and Tuesday evening when Ms. Pontbriant was murdered. Many bills were paid or had to be paid by March 1, nearly $20 was still found in Ms. Pontbriant's purse after her death, a jar of coins was left behind, a slot machine bank contained coins and money, and change was left lying on the bureau in the bedroom. Appellant had just received a severance check from his employment at Modulaire (RT 6836-6837), and he had sold items at the flea market in Visalia on Sunday, February 28, 1988. (RT 6827-6828, 6836.) Appellant testified that he purchased bus tickets for himself and Letner to Sacramento and then to Reno. (RT 6876-6878.) Any inference that the money appellant used to pay for these tickets came from Ms. Pontbriant's possession could only rest on speculation. Further, if appellant and Letner did have any of the money which Gilliland

claimed he gave to Ms. Pontbriant, they would not have purchased bus tickets to go only as far at Reno, then have hitchhiked the rest of the way in bad weather to Iowa.

For all the foregoing reasons, no trier of fact could rationally base appellant's robbery conviction or robbery-murder special circumstance finding on the inference that Letner and appellant took any cash from Ms. Pontbriant's possession.

E. The Evidence Failed to Establish That Property Was Taken From the Victim's Person or Immediate Presence

It is clear that neither codefendant Letner nor appellant took any property directly from Ms. Pontbriant's person. Even accepting Warren Gilliland's testimony as credible, according to him the alleged money taken was in Ms. Pontbriant's blue check register kept inside her purse (RT 5124-5125), and the car keys were usually kept on the kitchen table. (RT 6650.) The jewelry Ms. Pontbriant had been wearing was not removed from her body, even though she was found undressed. Her clothes were stacked in a pile near her body. (RT 6675-6676.) The prosecution did not allege that any of the victim's clothes had been stolen.

While the definition of "immediate presence" has been broadly construed, nonetheless this Court has recognized that where the evidence does not clearly point to a pre-existing plan to rob a victim, the evidence is too equivocal in situations such as the one presented in the instant case to sustain a conviction of robbery or a robbery-murder special circumstance. (See, e.g., *People v. Morris, supra,* 46 Cal.3d at pp. 19-21.)

Because the jury could not know whether any property was taken from the victim's immediate presence, appellant's conviction of robbery and the jury's robbery-murder special circumstance finding must be reversed.

F. The Evidence Failed to Establish That Property Was Taken From the Victim by Means of Force or Fear

If an intent to steal arises only *after* a victim is assaulted, "the robbery element of stealing by force or fear is absent." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1056.) Put more bluntly, a dead person cannot be the victim of a robbery. For all the reasons described in the previous sections of this argument, the jury here could not possibly determine whether any cash, assuming any cash was taken, or the car keys were taken *before* or *after* the death of Ms. Pontbriant. The jury could not determine whether Ms. Pontbriant was conscious, even assuming she were still alive. Ms. Pontbriant had been drinking heavily during the evening of March 1, which resulted in her having a very elevated .29 percent blood/alcohol level at the time of her autopsy. (RT 4938.) It was likely that Ms. Pontbriant was unconscious (and she was almost certainly at least stuporous) at this level of intoxication. (RT 6769.)

Unlike the law which applies to rape where consent is arguably suppressed due to drug or alcohol intoxication for which the accused is in any way complicit (see, e.g., *People v. Mack, supra,* 11 Cal.App.3d at p. 1481), in robbery cases if the victim is unconscious or stuporous due to voluntary intoxication, a robbery *cannot* occur. (*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1368-1369, citing *People v. Russell* (1953) 118 Cal.App.2d 136, 138-139 [theft from drunk, robbery conviction reversed]; see also, *Hicks v. State* (1974) 207 S.E.2d 30, 37, 232 Ga. 393 [theft from sleeping person, armed robbery conviction reversed]; *People v. Jones* (1919) 125 N.E. 256, 257, 290 Ill. 603 [pickpocketing of drunk, robbery conviction reversed]; *Hall v. People* (1898) 49 N.E. 495, 496, 171 Ill. 540 [theft from unconscious drunk, robbery conviction reversed]; *Bowling v. Commonwealth* (Ky.1952) 253 S.W.2d 21 [theft from unconscious drunk, robbery conviction reversed]; *State v. Cohen* (1978)

396 N.E.2d 235, 236, 60 Ohio App.2d 182 [theft from sleeping person, robbery conviction reversed]; *People v. Flynn* (1984) 475 N.Y.S.2d 334, 337, 123 Misc.2d 1021 ["[S]uch activities as rolling a drunk, picking a pocket or snatching a purse from an unsuspecting and unresisting victim [citation] may properly bring forth a felony count of larceny from the person [citation]; but, because of the lack of physical force involved, these actions will not support any robbery charge."]; and *Marks v. State* (1940) 102 P.2d 955, 958, 69 Okla.Crim. 330 [noting the force or fear element is missing when the theft is from one who is "helplessly drunk"].)

In *Russell, supra,* the victim had been drinking. He recalled starting for home, but he had no further recollection of what happened until he found himself in the hospital, and his wallet and money which had been in his wallet were missing. As to what occurred after he left a particular bar, he said his mind was "just a blank." (*Id.*, 118 Cal.App.2d at p. 138.) The Court concluded from the victim's testimony that he was "in a state of amnesia" regarding what had happened, and therefore there was "nothing upon which to base a finding of the use of fear in the consummation of the alleged robbery." (*Ibid.*) For this reason, Russell's conviction of robbery was reversed. (*Id.* at p. 139.) The fact that Russell was found in possession of the victim's wallet and of money that clearly belonged to the victim was insufficient to sustain the conviction, as this "went no further than to prove *some* of the elements of robbery." (*Ibid.*; italics added.)

In the present case, even less evidence than that found insufficient in *Russell* was presented to sustain appellant's robbery conviction and the jury's robbery-murder special circumstance finding. The evidence was insufficient to support a conclusion that *any* money was taken. The victim's car was taken only *after* she had died, and Ms. Pontbriant got extremely drunk *before* she was assaulted and killed. The jury could not know

whether Ms. Pontbriant was alive, or conscious, at the time either cash or car keys were taken, though it did know Ms. Pontbriant was very intoxicated. No blood, skin or trace evidence was found under the victim's fingernails (RT 5857-5858), and the victim suffered no clearly defensive wounds. (RT 4928-4929.) The jury simply could not know whether Ms. Pontbriant was tied up with the telephone cord and stabbed while she was conscious. No rational trier of fact on these facts could find beyond a reasonable doubt that appellant was guilty of robbery.

Finally, although Ms. Pontbriant clearly suffered non-lethal stab wounds to the front of her neck before the fatal wound was inflicted to the back of her neck, the jury had no way of knowing whether any of the victim's wounds were inflicted in carrying out a robbery. As described in Argument IV, *supra*, the circumstances of this murder did not suggest any crime against Ms. Pontbriant was planned, but rather that Ms. Pontbriant was murdered by Richard Letner, during an irrational outburst of rage that arose at the end of an evening of drinking.

The jury could only speculate that property was taken from the victim while she was alive, that property was taken from her immediate presence, and that property was taken by force or fear. For all the foregoing reasons, appellant's robbery conviction and the robbery-murder special circumstance finding must be reversed.

G. The Evidence Was Insufficient to Establish That Appellant Robbed Ms. Pontbriant or Aided or Abetted Codefendant Letner in Robbing Ms. Pontbriant

Assuming arguendo the evidence was sufficient to prove that a robbery occurred on March 1, 1988, the evidence was nonetheless insufficient to prove that appellant robbed Ms. Pontbriant or aided or abetted Richard Letner in robbing Ms. Pontbriant. The prosecution put forth a "guilt by association" theme that whatever criminality codefendant

Letner was involved in, appellant also was. However, the theory was not supported by the evidence. Appellant was not implicated in any of the burglaries committed by Letner prior to March 1, 1988, or in any theft committed by Letner. On the night of Ms. Pontbriant's murder, Officer Wightman spoke with and patted down both defendants and concluded that Letner was not intoxicated, but that appellant was. (RT 6159, 6170-6171.) Letner was driving the victim's car, not appellant. (RT 6148-6149.) Letner was carrying a Buck knife, but appellant had no weapon on his person. (RT 6156-6157.) Appellant had no motive to rob Ms. Pontbriant, as he had just cashed a severance check from Modulaire, and he had sold items at the Visalia swap meet on Sunday, February 28. (RT 6827-6828, 6836-6837). He possessed personal items he could sell to raise additional cash, specifically the shotgun and the ornamental sword.

As appellant showed in Argument IV, *supra*, the prosecution presented no solid evidence that appellant attempted to rape Ms. Pontbriant, but considerable evidence that Richard Letner murdered Ms. Pontbriant, and assuming that an attempt to rape Ms. Pontbriant occurred, that Letner was the attempted rapist. Assuming arguendo that a robbery occurred, that same evidence pointed to Letner as the person who robbed Ms. Pontbriant. Moreover, as between Letner and appellant, only Letner had a history of thefts and burglaries. Only Letner attempted to escape from police custody after his arrest (and succeeded for a time). (RT 6489-6496.) Only Letner's hair was found inside the victim's house and on the victim's body. (RT 5967-5969.)

In order to sustain appellant's conviction of robbery, the prosecution had to prove more than merely appellant's presence at the crime scene. But in fact, the prosecution's own case suggested that appellant was not even present at the North Jacob house for significant periods of time during the

evening of March 1, 1988, because he went out to buy beer.[88/] The trier of fact had no rational basis to conclude beyond a reasonable doubt that appellant was even present when Ms. Pontbriant was murdered, much less that appellant aided or abetted Letner in robbing Ms. Pontbriant (assuming she was robbed).

The jury had no rational basis to conclude that appellant aided or abetted Letner in any crime which Letner committed on March 1, 1988. The murder of Ivon Pontbriant was an incredibly stupid crime, if the perpetrator was thinking rationally. The facts of the murder show that the murderer was *not* thinking rationally, and that the murder was committed by one person. That person was Richard Letner. Appellant, unfortunately, was Letner's friend, and went with him to Ivon Pontbriant's house that ill-fated night. Ms. Pontbriant got very drunk, and appellant got very drunk. Letner, in contrast, got very mad. Assuming arguendo that appellant was even present when Letner killed Ms. Pontbriant, the evidence was insufficient to prove that he shared Letner's state of mind regarding either the murder or any intent to take the victim's car or any money from the victim. For all the foregoing reasons, appellant's robbery conviction and the robbery-murder special circumstance finding must be reversed.

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88. Frank's Liquor and Superette clerk Michael Long testified that a person came into the store twice on the evening of March 1, 1988, and purchased beer and other items. (RT 6104-6106.) He identified Letner and appellant from a police photo lineup as being regular customers. (RT 6113-6114, 6119.) He believed either Letner or appellant was the person who came into the store twice to buy beer on March 1, 1988. (RT 6104-6105, 6113.) Appellant testified that after arriving at Ms. Pontbriant's house on March 1, he went out twice to buy more beer. (RT 6853-6855, 6859.)

H. Because the Evidence Was Insufficient To Convict Appellant of Robbery, the Robbery-Murder Special Circumstance Finding Must Be Reversed

Pursuant to Penal Code section 190.2, appellant and co-defendant Letner were each charged with the special circumstance of robbery-murder. Appellant has established that the evidence was insufficient to convict him of robbery. Therefore, the robbery-murder special circumstance finding against him must also be reversed. (*People v. Morris, supra,* 46 Cal.3d at pp. 21-23; *People v. Marshall, supra,* 15 Cal.4th at p. 81.)

I. Because the Evidence Was Insufficient to Prove Any Robbery Was More Than Incidental to the Murder of Ivon Pontbriant, the Robbery-Murder Special Circumstance Finding Must Be Reversed

No rational trier of fact could find beyond a reasonable doubt that robbery, assuming one even occurred, was a primary criminal goal here. If the primary goal was not to steal but to kill, any robbery was incidental to the murder, and therefore could not serve as the basis for finding the robbery-murder special circumstance to be true. (*People v. Morris, supra,* 46 Cal.3d at p. 21.) Given the total discrediting of Warren Gilliland's testimony that he gave Ms. Pontbriant money before he left for Modesto on February 29, 1988, and the unreliability of Earl Bothwell's testimony, the only relevant evidence put before the jury regarding a possible robbery was the fact that codefendant Letner and appellant were riding in Ms. Pontbriant's car after she was killed. Nothing was taken from inside Ms. Pontbriant's house except the car keys to that car. Everything else of value, including cash, remained inside the house. Any rational trier of fact, given these facts, would have to conclude that taking only the victim's car keys and her car was incidental to her murder. For this reason as well, the robbery-murder special circumstance finding against him must also be reversed.

J. Because The Evidence Was Insufficient to Convict Appellant of Robbery, Appellant's Murder Conviction and His Sentence of Death Must Be Reversed

Appellant suffered substantial prejudice from the prosecution's reliance on the robbery charge and robbery-murder special circumstance, for which there was insufficient evidence. Presenting the robbery charge to the jury created the possibility that the murder conviction is invalid as based on a legal theory not supported by sufficient evidence.[89/]

Even assuming arguendo that the Court can uphold appellant's murder conviction, the Court must nonetheless reverse appellant's sentence of death. Under California law, each special circumstance finding can also serve as an aggravating factor in the death penalty weighing process. If a special circumstance finding is reversed, the death judgment must be reversed and the case remanded for a new penalty trial if there is a reasonable possibility that the jurors would have recommended life imprisonment without the possibility of parole absent the invalidated special circumstance. (*People v. Roberts* (1992) 2 Cal.4th 271, 327; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 751-753.) It is probable that the invalid robbery charge affected the penalty determination. In the guilt phase, the prosecutor argued that the defendants entered Ms. Pontbriant's home intending to steal money and her car. (RT 9591-9593.) In considering this evidence as aggravating appellant's culpability, it is likely that the jury gave substantial weight to this invalid theory as showing greed and callousness as well as intent and premeditation regarding the murder. This invalid aggravation also unfairly undercut appellant's ability to argue to the jurors that they should have a lingering doubt about appellant's

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89. Appellant's murder conviction must be reversed because the jury may have relied exclusively on the invalid felony-murder theory to convict appellant of first degree murder. (See Argument XII, *infra*.)

participation in Ms. Pontbriant's murder. In short, presenting the robbery charge to the jury, unsupported by reliable evidence, allowed the prosecutor to give improper added weight to the aggravating circumstances and to skew the penalty determination. This violated appellant's right under the Sixth, Eighth and Fourteenth Amendments to a fair and reliable penalty determination.

K. Even if the Evidence Was Sufficient to Convict Appellant of Robbery, It Was Not Sufficient to Uphold His Sentence of Death, in Light of the Heightened Need for Reliability to Support a Death Verdict

As appellant stated in Argument IV, *supra*, the United States Supreme Court, in *Beck v. Alabama* (1980) 447 U.S. 625, held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination. This includes being based on a reliable guilt determination. (*Id.* at p. 637; see also *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Thus, "the risk of an unwarranted conviction . . . cannot be tolerated in a case where the defendant's life is at stake." (*Ibid.*) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a guilt verdict on appeal, but which is equivocal, or which comes from witnesses whose reliability is in serious doubt, must be held insufficient to also uphold a sentence of death.

Thus, even assuming arguendo appellant's robbery conviction can stand, the questionable evidence of a robbery which was presented at this trial cannot be held sufficiently reliable to uphold appellant's sentence of death. The testimony of prosecution witnesses Earl Bothwell and Warren Gilliland was both (a) inherently unreliable, because of each witness's reputation for dishonesty and each witness's failure to tell the police before

trial the story each witness told at trial, and (b) contradicted in every important respect by highly credible witnesses. For this reason, this Court must reverse appellant's sentence of death.

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VII.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF BURGLARY OR TO SUPPORT THE BURGLARY-MURDER SPECIAL CIRCUMSTANCE FINDING

A. The Evidence Was Insufficient to Establish That Either an Attempted Rape or a Robbery Occurred, and Therefore the Evidence Was Insufficient to Establish That a Burglary Occurred

1. Elements of Burglary and Of a Burglary-Murder Special Circumstance

Burglary, as relevant here, is defined under California law in Penal Code section 459 as the entry of "any house . . . with intent to commit . . . any felony." A special circumstance exists if a murder was committed while the defendant was engaged in the commission of a burglary. (Penal Code § 190.2(a)(17)(G)).

2. The Evidence Failed To Establish That Appellant Entered the Victim's House With the Intent To Commit a Felony

For the reasons appellant set forth in Argument IV (insufficient evidence to sustain attempted rape conviction or attempted rape-murder special circumstance) and Argument VI (insufficient evidence to sustain robbery conviction or robbery-murder special circumstance), the evidence at trial was insufficient to prove that an attempt to rape Ms. Pontbriant occurred, or that she was robbed. Since attempted rape and robbery were the crimes charged against appellant upon which the burglary charge rested, and the prosecution failed to present sufficient evidence to prove that appellant entered Ms. Pontbriant's house with the intent to commit either of these crimes, or that he subsequently developed an intent to commit either of these crimes, the Court must reverse appellant's conviction of burglary.

B. The Evidence Was Insufficient to Establish That Appellant Either Attempted to Rape Ivon Pontbriant or Robbed Ivon Pontbriant, or Aided or Abetted Codefendant Letner in Attempting to Rape Ivon Pontbriant or in Robbing Ivon Pontbriant, and Therefore the Evidence Was Insufficient to Establish That Appellant Committed a Burglary

For the reasons appellant set forth in Argument IV (insufficient evidence to sustain attempted rape conviction or attempted rape-murder special circumstance) and Argument VI (insufficient evidence to sustain robbery conviction or robbery-murder special circumstance), the evidence at trial was insufficient to prove that appellant attempted to rape Ms. Pontbriant, or aided or abetted codefendant Letner in attempting to rape Ms. Pontbriant, and it was insufficient to prove that appellant robbed Ms. Pontbriant, or aided or abetted codefendant Letner in robbing Ms. Pontbriant. Because the evidence was insufficient on any ground to sustain appellant's conviction of attempted rape or his conviction of robbery, the evidence was also insufficient to sustain appellant's conviction of burglary, since the latter charge was based upon the sufficiency of the evidence that appellant attempted to rape Ms. Pontbriant and/or robbed her. For this reason, this Court must reverse appellant's conviction of burglary.

C. The Evidence Was Insufficient to Establish That if an Attempt to Rape Ivon Pontbriant Occurred, or Ivon Pontbriant Was Robbed, That the Intent to Commit Either of These Crimes Arose Before Appellant and Codefendant Letner Entered the Home of the Victim

Assuming arguendo that the evidence was sufficient to prove that an attempt to rape Ms. Pontbriant occurred, and/or that Ms. Pontbriant was robbed before she was killed, the evidence was insufficient to prove that appellant entered Ms. Pontbriant's house with the intent to commit either a rape or a robbery. The evidence showed that codefendant Letner and appellant arrived together at Ms. Pontbriant's house and entered the house

at the same time. (RT 5532-5533 [Florene Gentry]; 6849-6850 [appellant].) The evidence also showed that Ms. Pontbriant was pleased that codefendant Letner and appellant had come to her house (RT 5532-5533), and that Ms. Pontbriant and both defendants spent a considerable portion of the evening of March 1, 1988, talking and drinking. Ms. Pontbriant's blood alcohol level at the time of her autopsy was .29 percent. (RT 4938.) Beer bottle caps and beer bottles were found inside Ms. Pontbriant's house. (RT 5647-5648, 5651, 5667-5672.) Many cigarette butts were also found. (RT 5648-5650). This physical evidence corroborated appellant's testimony that Ms. Pontbriant and the defendants talked and drank together after the defendants were invited inside the house by Ms. Pontbriant. (RT 6851-6860).[90/]

As described in detail in Arguments IV and Argument VI above, some time after Letner and appellant entered Ms. Pontbriant's house, Ms. Pontbriant placed a telephone call to Ed Bourdette, and then Ms. Pontbriant and Letner together made a series of follow up calls, speaking with both Bourdette and Bourdette's girlfriend, Kathy Coronado. This sequence of telephone calls occurred over a period of at least one-half hour. (RT 5566-5573, 5580-5581.)

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90. In addition, Florene Gentry corroborated appellant's testimony that Ms. Pontbriant invited Letner and appellant inside her house. While Gentry was talking on the telephone with Ms. Pontbriant, the latter said "Oh," and started laughing. She then said to Ms. Gentry, "Someone's at the door and they're coming in . . . and one reminds me of my son . . . . There's two of them." Ms. Pontbriant continued to laugh as she said these things, "like she was happy." (RT 5532.) Ms. Gentry explained that the person whom Ms. Pontbriant referred to as reminding her of her son was the person who "had helped worked [sic] with Warren [Gilliland] on machines . . . . And he helped [Warren Gilliland] in his shop." (*Ibid.*) Ms. Gentry was thus identifying codefendant Letner. Ms. Pontbriant then said, "I'll talk to you later," and she hung up. (RT 5533.)

Clearly, the evidence was insufficient to prove that Letner or appellant broke into Ms. Pointbriant's house, or were trespassing when they entered her house. The magistrate, at the close of the preliminary hearing in this case, dismissed the burglary charge for this reason. (10/11/88 RT 6-8.) The prosecution resurrected the burglary charge for trial on the theory that Letner and appellant possessed an unrevealed intent to rape and/or rob Ms. Pontbriant when they entered her house. (CT 7-10.) For the reasons set forth in Argument XXII (the superior court erred in denying appellant's Penal Code section 995 motion to strike the burglary count and burglary special circumstance after the preliminary hearing magistrate found an insufficient factual basis for these charges), this Court must find that the magistrate was clearly aware of the "hidden intent" theory at the time he dismissed the burglary count against each defendant, and thus the magistrate made a factual finding which precluded the prosecution from bringing a burglary charge or a burglary-murder special circumstance allegation against appellant at trial.

Assuming arguendo, however, that the prosecution was not precluded by the magistrate's ruling from seeking to convict appellant of burglary, the evidence described above directly contradicted the "hidden intent" theory presented at trial. Neither Letner nor appellant possessed an unrevealed intent to rape or rob Ms. Pontbriant when they entered her house, or they would not have permitting Ms. Pontbriant to telephone Ed Bourdette several times before they carried out their alleged secret plan. Letner would not have gotten on the telephone with Bourdette or Kathy Coronado. Appellant would not have gone out twice to buy more beer during the evening. (RT 6853-6855, 6859, 6104-6105, 6113.) Moreover, neither Letner nor appellant knew that Warren Gilliland had gone to Modesto. Unless Letner was performing an elaborate as well as pointless

charade when he spoke angrily with Bourdette on the telephone, both Ms. Pontbriant and Letner believed that Gilliland was at Bourdette's house. (RT 5567-5573.) So far as Letner and appellant knew, Gilliland could walk into the North Jacob house at any time.

Given these facts, the jury could not reasonably conclude that Letner and appellant intended to rape and/or rob Ms. Pontbriant before they entered her house, or before the telephone calls were made to Bourdette and Coronado. Nor could the jury reasonably find that appellant suddenly developed a plan to rape or rob Ms. Pontbriant *after* the telephone calls to Bourdette and Coronado, or aided or abetted Letner in any such plan.[91] No one would hatch such a plan once Bourdette and Coronado knew that Letner was at Ms. Pontbriant's house, or at least was with Ms. Pontbriant, wherever Bourdette and Coronado might have thought Letner and Ms. Pontbriant were calling from.

For all these reasons, the evidence was insufficient to sustain appellant's conviction of burglary, and this Court must reverse that conviction.

D. Because the Evidence was Insufficient to Convict Appellant of Burglary, the Burglary-Murder Special Circumstance Finding Must be Reversed

Pursuant to Penal Code section 190.2, appellant was charged with the special circumstance of burglary-murder. Because the evidence was insufficient to convict appellant of burglary, the burglary-murder special

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91. Cf. *People v. Sparks* (2002) 28 Cal.4th 71 (entry into a bedroom within a single-family house with the intent to commit a rape can support a burglary conviction even if that intent was formed only after the entry into the house). However, *Sparks* was limited to the circumstance that the defendant entered into a separate room, a bedroom, before forming the requisite criminal intent. Here, the victim was found in the living room, the same room appellant came into when he entered the victim's house at her invitation.

circumstance finding against him must also be reversed. (*People v. Morris, supra*, 46 Cal.3d at pp. 21-23; *People v. Marshall, supra*, 15 Cal.4th at p. 81.)

E. Because the Evidence was Insufficient to Convict Appellant of Burglary, Appellant's Murder Conviction and His Sentence of Death Must Be Reversed

Appellant suffered substantial prejudice from the prosecution's reliance on the invalid burglary charge and the burglary-murder special circumstance, for which there was insufficient evidence. Presenting the burglary charge to the jury created the possibility that the murder conviction is invalid as based on a legal theory not supported by sufficient evidence.[92/]

Even assuming arguendo that the Court can uphold appellant's murder conviction, the Court must reverse appellant's sentence of death. Under California law, each special circumstance finding can also serve as an aggravating factor in the death penalty weighing process. If a special circumstance finding is reversed, the death judgment must be reversed and the case remanded for a new penalty trial if there is a reasonable possibility that the jurors would have recommended life imprisonment without the possibility of parole absent the invalidated special circumstance. (*People v. Roberts* (1992) 2 Cal.4th 271, 327; see also *Clemmons v. Mississippi, supra*, 494 U.S. at pp. 751-753.) It is probably that the invalid burglary charge affected the penalty determination. In the guilt phase, the prosecutor argued that the defendants entered Pontbriant's home with the intent to steal property because they needed the means to get to Iowa. (RT 9591-9593.) She also claimed that they scattered out the contents of the victim's purses and took the victim's car keys, and that they entered the home additionally

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92. Appellant's murder conviction must be reversed because the jury may have relied exclusively on the invalid felony-murder theory to convict appellant of first degree murder. (See Argument XII, *infra*.)

with the intent to commit a rape. (RT 7591-7594.) In considering this evidence as aggravating, it is likely that the jury gave substantial weight to this invalid aggravation as showing intent and premeditation. This invalid aggravation also unfairly undercut the appellant's ability to argue to the jurors that they should have a lingering doubt about appellant's involvement in the victim's murder. Under these circumstances, the death verdict must be reversed.

F. Even if the Evidence Was Insufficient to Convict Appellant of Burglary, It Was Not sufficient to Uphold His Sentence of Death, in Light of the Heightened Need for Reliability to Support the Death Verdict

As appellant stated in Argument IV, *infra*, the United States Supreme Court, in *Beck v. Alabama* (1980) 447 U.S. 625, held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination, which includes being based on a reliable guilt determination (*Id.* At p. 637.) For this reason, "the risk of an unwarranted conviction . . . cannot be tolerated in a case where the defendant's life is at stake." (*Ibid.*) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a guilt verdict on appeal, but which is equivocal, or comes from witnesses whose reliability is in serious doubt, must be held insufficient to also uphold a sentence of death.

Thus, even assuming arguendo appellant's burglary conviction can stand, the questionable evidence of attempted rape and of robbery presented at this trial cannot be held sufficiently reliable to uphold appellant's sentence of death. The evidence that either an attempt to rape Ms. Pontbriant occurred, or that she was robbed before she was killed, or that codefendant Letner or appellant possessed the intent to commit either

of these crimes at the time they entered the victim's house, was utterly equivocal. Moreover, the testimony of prosecution witnesses Earl Bothwell and Warren Gilliland was both inherently unreliable and contradicted in every important respect by highly credible witnesses. For this reason, this Court must reverse appellant's sentence of death.

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VIII.

BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT WAS THE ACTUAL KILLER, THAT HE HAD THE SPECIFIC INTENT TO KILL IVON PONTBRIANT OR THE SPECIFIC INTENT THAT SHE BE KILLED BY RICHARD LETNER, OR THAT HE AIDED OR ABETTED RICHARD LETNER IN THE COMMISSION OF AN ATTEMPTED RAPE, ROBBERY OR BURGLARY AS A MAJOR PARTICIPANT AND WITH RECKLESS INDIFFERENCE TO HUMAN LIFE, EACH OF THE SPECIAL CIRCUMSTANCE FINDINGS MUST BE REVERSED

A. The Evidence was Insufficient to Prove That Appellant Had the Specific Intent to Kill Ivon Pontbriant or That She Be Killed by Richard Letner

In *People v. Anderson* (1987) 43 Cal.3d 1104, 1139, this Court held that, under Penal Code section 190.2, only a defendant who was the actual killer could be found guilty of a felony murder *special circumstance* without a showing of intent to kill. If the defendant was an aider and abettor rather than an actual killer, the prosecutor had to prove that the defendant had an intent to kill. (*Id.* at p. 1147.) Moreover, it is not sufficient to prove merely that the defendant acted with the intent to commit or to aid, abet, counsel, command, induce, solicit, requires, or assist in, the commission of *the underlying felony*. (*Id.* at pp. 1138-1150; see also, *People v. Estrada* (1995) 11 Cal.4th 568, 572.)[93]

In the instant case, the prosecution never established whether appellant was the actual killer or an aider and abettor (assuming he was

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93. The prosecution, in the alternative, has to prove the defendant acted with reckless indifference to human life and was a major participant in the underlying felony. (*People v. Estrada, supra*, 11 Cal.4th at p. 572.) Appellant addresses this issue in the next subsection.

either). Indeed, the prosecutor argued to the jury that appellant and his codefendant were either, one or the other, the actual killer or the aider and abettor. In her closing argument at the guilt phase, on the subject of what roles the two defendants played in the homicide, Deputy District Attorney Reed first told the jury:

> Now, I would submit in our case, in this case, we have evidence of both defendants directly committing a crime and helping each other aiding and abetting the crime. This is obviously, as you have seen, a somewhat lengthy crime that occurred there in her house. And for me to be able to identify to you which time which person did what thing is obviously not possible.

(RT 7582.)

Later in the argument, Ms. Reed changed tack and argued:

> Obviously, only one of them may have been the one that cut the back of her neck that caused her to bleed to death. However, the other evidence tells us that the other one certainly intended that she die.

(RT 7612.)

Because the evidence in this case did not prove which defendant was the actual killer and which was the aider and abettor (again assuming arguendo that appellant was either), the prosecution was required to present sufficient evidence, to wit, substantial evidence, that appellant had the specific intent to kill Ivon Pontbriant or that she be killed. The mental state required is more than mere knowledge that a murder may be, or will be, or is being committed.

For a specific intent crime, the aider and abettor must both *know* and *share* the specific intent of the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111.) As this Court noted in *People* v. *Beeman* (1984) 35 Cal.3d 547, "an aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal

purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Id.* at p. 560.)

Contrary to the prosecutor's assertion in closing argument, the evidence presented at trial was insufficient as a matter of law to prove that appellant possessed the specific intent to kill Ms. Pontbriant or that she be killed by Richard Letner. As appellant has described previously, the physical evidence at the crime scene connected Letner to the victim's body, but not appellant. Letner's personal history, and well as his existing relationship with the victim, pointed to him as the person who murdered Ms. Pontbriant. Officer Wightman saw Letner and appellant shortly after midnight on March 2, 1988. He observed Letner to be sober but appellant to be intoxicated. (RT 6170-6171.) Assuming arguendo that the evidence tied appellant at all to the murder of Ms. Pontbriant, at most it suggested only that appellant was an aider and abettor.

In addition, the only supportable inference to be drawn from the telephone calls made to Ed Bourdette and Kathy Coronado on the night of March 1, 1988, was that appellant did not know or share any intent possessed by Letner to harm Ms. Pontbriant.

For all these reasons, the evidence was insufficient to prove that appellant was the actual killer of Ivon Pontbriant, or that he possessed the specific intent to kill Ms. Pontbriant or that she be killed by Richard Letner.

B. The Evidence Was Insufficient to Prove That Appellant Aided or Abetted Richard Letner in the Commission of an Attempted Rape, Robbery or Burglary as a Major Participant and With Reckless Indifference to Human Life

In *People v. Estrada, supra,* 11 Cal.4th 568, this Court stated, "A felony-murder special circumstance is applicable to a defendant who is not the actual killer if the defendant, either with 'intent to kill' (section 190.2, subd. (c)), or 'with reckless indifference to human life and as a major

participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies].' (Section 190.2, subdivision (d)." (*Id.* at p. 572.)

For all the reasons presented herein, the evidence was insufficient to prove that appellant aided or abetted codefendant Letner in committing any of the alleged underlying felonies. Similarly, the evidence was insufficient to prove that appellant was a major participant in any of the underlying felonies. No physical evidence tied him to the attempted rape or to the robbery; and according to Officer Wightman, appellant was intoxicated on the night of March 1, 1988. Given the phone calls made by Letner to Ed Bourdette and Kathy Coronado, it is extremely unlikely that there was a preconceived plan to kill victim since these calls placed Letner at the scene.

Even assuming arguendo that appellant did aid or abet Letner, and that he was a major participant in at least one of the underlying felonies, the evidence was nonetheless insufficient to prove that he acted with reckless indifference to human life, because he could have had no idea Letner was going to kill Ivon Pontbriant. Appellant had no reason to believe she would be killed, given her extreme state of intoxication (according to Dr. Walter, she must have had a blood/alcohol level of at least .29 percent that evening), unless Letner acted out of the blue to kill her, which is exactly what all the evidence pointed to.

In addition to the fact that all the evidence of who murdered Ms. Pontbriant pointed to Letner, the circumstances of the murder, including the telephone calls to Bourdette and Coronado preceding it, pointed to an unplanned act which from the manner of killing appeard to be spontaneous. Even assuming that appellant shared Letner's intent to rape or to rob Ms. Pontbriant, he could not have anticipated that Letner would proceed to murder her.

A conviction based on insufficient evidence violated appellant's right to due process and to a fundamentally fair trial. It also denied his right to a reliable death sentence under the Eighth Amendment. (U.S. Constitution, 5th, 6th , 8th and 14th Amendments.)

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IX.

BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT ANY OF THE SPECIAL CIRCUMSTANCES FINDINGS, APPELLANT'S DEATH SENTENCE MUST BE REVERSED

Pursuant to Penal Code section 190.2, appellant and codefendant Letner were each charged with three felony murder special circumstances: burglary, robbery and attempted rape. As established in Argument IV, Argument VI, and Argument VII, *supra*, the evidence was insufficient as a matter of law to prove that an attempted rape, or a robbery, or a burglary ever occurred in connection with Ms. Pontbriant's murder. Therefore, each of the special circumstances findings must be reversed. (*People v. Morris, supra,* 46 Cal.3d at pp. 21-23; *People v. Marshall, supra,* 15 Cal.4th at p. 81.) If each of the special circumstances findings is reversed, appellant's sentence of death must also be reversed.

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X.

BECAUSE ONE OR MORE OF THE SPECIAL CIRCUMSTANCES SHOULD BE INVALIDATED FOR INSUFFICIENCY OF THE EVIDENCE, THIS COURT MUST REVERSE APPELLANT'S DEATH SENTENCE AND REMAND THE CASE FOR A NEW PENALTY TRIAL

As this Court has recognized, the death penalty scheme in California involves a two-tiered system. (See, e.g., *People v. Bacigalupo* (1993) 6 Cal.4th 457.) The determination of whether a defendant is eligible for the death sentence is made by a jury [94] at the guilt phase of the trial when it decides whether the one or more special circumstance(s) alleged by the state are true. (*Id.* at p. 467.) If the jury finds at least one of the alleged special circumstances to be true, the case goes to the penalty phase to determine whether the defendant will be sentenced to death or life without the possibility of parole. (*Ibid.*) This decision is based upon the "weighing" of aggravating factors against mitigating factors. At the penalty phase, any special circumstance found true constitutes one of the aggravating factors that can be used as a basis for sentencing the defendant to death. (Pen. Code § 190.3(a).) As the following discussion will establish, should this Court find the evidence supporting any of the three special circumstances to be insufficient, the Court should reverse and remand the death sentence in this case for a new penalty phase trial.

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94. Actually, the statute speaks of the "trier of fact"; however, Penal Code section 190.4 (a) requires that the trier of fact will be a jury unless both the defendant and the prosecution waive a jury.

A. *Clemons v. Mississippi* Sets Forth the Applicable Standard Under the Federal Constitution for Assessing the Effect on a Death Judgment of Invalidating a Special Circumstance

In *Clemons v. Mississippi* (1990) 494 U.S. 738, the U.S. Supreme Court addressed what the Eighth Amendment requires when an aggravating circumstance has been held invalid on appeal. Mississippi, like California, is a "weighing state;" that is, at the death selection stage of the proceedings,[95] the jury is required to weigh aggravating factors against mitigating factors to determine whether death is the appropriate sentence. The *Clemons* decision held that when an aggravating factor has been invalidated, a state appellate court in a weighing state has three options: (1) remand the case for re-sentencing; (2) engage in *de novo* re-weighing of aggravating and mitigating factors to determine if death is the appropriate sentence; or (3) engage in harmless error analysis. (*Id.* at pp. 751-753.)

However, the dicta in *Clemons* which permits an appellate court, after having invalidated one of the special circumstances, to reweigh aggravating and mitigating factors to determine whether a defendant should be sentenced to death, has been called into question by *Ring v. Arizona* (2002) ___U.S___, 122 S.Ct. 2428.) In *Ring*, the Supreme Court addressed the issue whether Arizona's capital sentencing scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. In Arizona, the jury determines guilt or innocence but does not participate in the sentencing proceedings. Before a capital defendant can be sentenced to death, the trial judge must find at least

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95. The U.S. Supreme Court has distinguished between the process of determining eligibility for the death sentence and actual selection of the death sentence. The former is the process by which a state determines what types of murders make the perpetrator eligible for the death sentence while the latter determines which defendants will actually be sentenced to death.

one aggravating circumstance exists, and then find "there are [no] mitigating circumstances sufficiently substantial to call for leniency." (Ariz.Rev.Stat. Ann. §§ 13-1105(C); 13-703(F).) Although the Supreme Court had upheld the Arizona procedure previously in *Walton v. Arizona* (1990) 497 U.S. 639, in *Ring* the Court decided the procedure was unconstitutional because

> Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

(*Ring, supra*, 122 S.Ct. at p. 2432.)

The Court found the holding in *Apprendi v. New Jersey*, (2000) 530 U.S. 466, 120 S.Ct. 2348, controlled their decision. Consequently, the contrary holding in *Walton v. Arizona*, was irreconcilable and therefore overruled. (*Ring, supra*, 122 S.Ct. at p. 2432.) Although the *Ring* decision left open the question of appellate reweighing (*Id.* at p. 2437, fn.4), the ramifications of the holding are evident in the majority and concurring opinions. In his concurring opinion, Justice Scalia wrote: "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." (*Id.* at p. 2445) In another concurring opinion, Justice Breyer noted: "I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." (*Id.* at p. 2446.)

The *Apprendi* decision extended the holding of *Jones v. United States* (1999) 526 U.S. 227, to the States through the Fourteenth Amendment. (*Apprendi, supra,* 530 U.S. at p. 476.) In *Jones, supra*, the Court held:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the

> maximum penalty for a crime must be charged in an indictment, submitted to the jury, and proven beyond a reasonable doubt.

(Id., 526 U.S. at p. 243, fn.6.)

As discussed below in appellant's claim that the death penalty statute and the instructions given in appellant's case render his death sentence unconstitutional, in light of *Jones, Apprendi*, and *Ring*, California's capital sentencing scheme requires that the determination of aggravating circumstances and the weighing of the aggravators against the mitigating evidence, be made exclusively by the jury. Appellate court reweighing of aggravating and mitigating circumstances in California is therefore inconsistent with constitutional principles.

Ring v. Arizona is a landmark Sixth Amendment decision that clarifies what is required in capital cases and renders the *Clemons* case inapplicable in California. Pursuant to *Ring*, any factual findings prerequisite to a death sentence must be made by the jury beyond a reasonable doubt. Juries in California have two critical facts to determine in the second stage of a capital case: (1) the existence vel non of aggravating factors, and (2) whether such aggravating factors outweigh the mitigating factors. The delicate calculus juries must undertake when weighing aggravating and mitigating factors is skewed by the presence of an invalid special circumstance, thereby creating a risk the death sentence was imposed unconstitutionally. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-232.)

Should this Court find one or more of the special circumstances invalid, the finding by the jury that the aggravating evidence outweighed the mitigating evidence would necessarily also be invalid. The Court may not properly make a factual finding that expands the possible maximum

sentence. All such findings must be made by a jury beyond a reasonable doubt.

Because the jury in appellant's trial undoubtedly considered the invalid special circumstances as part of the calculus in determining that aggravation outweighed mitigation, it would violate the Sixth Amendment, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to permit an appellate court to determine what a jury would have done in the absence of the invalidated aggravator(s), the special circumstance(s).[96/]

B. If the Court Reverses One or More of the Special Circumstances, State Law Requires A Reversal of the Death Judgment and a Remand For a New Penalty Phase Trial

As noted previously, the California death penalty statute provides that the trier of fact, a jury (unless waived by both the defendant and the prosecution) will determine whether or not to sentence the defendant to death or to life without the possibility of parole. Penal Code section 190.4, subdivision (e) provides for the review of any sentence of death by the trial judge.[97/] In *People v. Marshall* (1990) 50 Cal.3d 907, this Court described the role of the trial judge under section 190.4(e) as

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96. That is, should this Court reverse one or more of the special circumstances in this case for insufficiency of the evidence, that would mean that the evidence supporting that invalidated special would have to be taken out of the mix of evidence lawfully supporting the death sentence. As he U.S. Supreme Court noted in *Stringer v. Black, supra*, this Court [as the reviewing court] "may not assume it would have made no difference if the thumb had been removed from the death's side of the scale." (*Id.* at p. 232.)

97. This subdivision states in relevant part: "In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision 7 of section 1181."

> 'to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law.' [Citations.] That is to say, he must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. [Citation.] And he must make that determination independently, i.e., in accordance with the weight he himself believes the evidence deserves.

(*Id.* at p. 942.)

The trial judge's denial of modification of the death penalty verdict shall be reviewed in the defendant's automatic appeal to this Court under Penal Code section 1239, subdivision (b). (Pen. Code § 190 (e).) In *People v. Mickey* (1991) 54 Cal.3d 612, 704, the Court noted:

> On appeal, we subject a ruling on such an application to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined de novo. [Citation.] Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; *we do not make a de novo determination of penalty.* (Italics added)

Article VI, section 11 of the California Constitution provides that "[t]he Supreme Court has appellate jurisdiction when judgment of death has been pronounced." The California Supreme Court has original jurisdiction only as to proceedings for habeas corpus, mandamus, certiorari and prohibition. (Cal. Const., art. VI, sec. 10.) Given the fact that the California death penalty statute limits the determination of the death sentence to the jury and/or the trial judge and the California Constitution limits the original jurisdiction of this Court, when on appeal this Court overturns a special circumstance, it should remand for a new penalty phase trial rather than attempt either to re-weigh the evidence or to do a harmless error analysis.

Even in the absence of the decisions in *Jones, Apprendi,* and *Ring*, the Court should follow the example of the Nebraska Supreme Court in

State v. Reeves (2000) 258 Neb. 511, 604 N.W. 2d 151 in recognizing the limitation on its own power to re-sentence in a death case. The *Reeves* case had taken a long route back and forth through the state and federal courts. In Mr. Reeves' first appeal, the Nebraska Supreme Court reversed the death sentence, finding that the sentencing panel [98] had erroneously considered an aggravating factor relative to one of the victims and failed to considered two mitigating factors as to both victims.

The case then went up to the U.S. Supreme Court on a different issue and was subsequently remanded back to the Nebraska Supreme Court. At this point, after re-examining both the trial and sentencing evidence, the Nebraska high court re-sentenced Mr. Reeves' to death. The case again went through the federal courts, up to and including the U.S. Supreme Court. In 1998, the U.S. Supreme Court rejected Mr. Reeves federal habeas petition, and the matter was remanded to the Nebraska state trial court. Mr. Reeves then filed a second petition for post-conviction relief, challenging the state supreme court's re-sentencing of him. The district court denied relief, and the matter was appealed to the Nebraska Supreme Court, which reversed.

The Nebraska high court found that its earlier re-sentencing of Mr. Reeves constituted an erroneous assertion of authority under state law and denial of his "life interest and due process rights." (*Id.*, 604 N.W.2d at p. 164.) The court determined that this re-sentencing (1) violated the state statute governing procedures for homicide cases and (2) amounted to an unreviewable sentence in violation of state law, thus denying Reeves due process of law. The court noted that while *Clemons v. Mississippi, supra,*

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98. Under Nebraska state law, after a conviction for first degree murder, the sentencing determination is to be made by the trial judge or a three-judge panel, which includes the trial judge. (Nebraska's Special Procedure in Cases of Homicide, Section 29-2520.)

held that re-weighing and re-sentencing by a state appellate court would not offend federal constitutional principles, that decision was premised on the fact that state law authorized such action. (*State v. Reeves, supra,* 604 N.W. 2d at pp. 164-165.)

Although the Nebraska state statute at issue (Special Procedure in Cases of Homicide, sections 29-2519-29-2546) in the *Reeves* case differs from the California death penalty statute, there are key similarities. First, both the Nebraska and California statutes distinguish between the role of the trial judge (or the sentencing panel in Nebraska) in determining whether a defendant is sentenced to death and the state supreme court's role in reviewing that sentence. The *Reeves* court noted:

> ". . . the statutory sections regarding the weighing of aggravating and mitigating circumstances and the determination of the sentence specifically place that role in the district court [trial court], with the judge who presided at trial included in the sentencing determination except where he or she is disabled or disqualified as provided for in section 29-2520(3), in which case a three-judge district court panel shall determine the sentence. There is no similar provision in the statutes authorizing sentencing by this court. The Nebraska Legislature did not authorize this court to perform the same function as the sentencing judge or sentencing panel."

(*Id.* at pp. 165-166.)

Similarly, the California death penalty statute, Penal Code section 190.2 *et seq*., does not authorize this Court to re-weigh and re-sentence after it has determined that a special circumstance must be reversed because of insufficient evidence.

The Nebraska Supreme Court also found that it had violated state law when it stepped into the sentencing panel's shoes by considering and weighing a factor that the panel had not considered and by rendering a sentencing decision which was, in effect, unreviewable. (*State v. Reeves, supra,* 604 N.W.2d at p. 167.) The court concluded:

> In summary, Reeves had a state statutory right to be sentenced by his trial judge or by a panel of three district judges and then had a right to have that sentence reviewed by this court. When this court re-sentenced Reeves in *Reeves III* [one of the earlier appeals], this court did so in contravention of state law. Given the life interest involved, such erroneous re-sentencing in *Reeves III* denied Reeves of due process. In *Reeves III*, this court acted as an unreviewable sentencing panel in violation of state law . . . . This court's re-sentencing in *Reeves III* denied Reeves of his due process right to the separate and distinct sentencing and review procedures set forth in the state statutes.

(*Id.* at p. 168.)

C. **Conclusion**

Should this Court reverse one or more of the special circumstances in the instant case, it should also find that it would be a violation of state law and of appellant's due process as well as Sixth and Eighth Amendment rights for it to re-weigh the evidence in mitigation and aggravation and re-sentence appellant. In California, such re-weighing is especially problematic because the absence of written findings make it impossible to know what mitigating and aggravating factors were found by the jury. In this case, as in most California capital cases, the record does not disclose the sentencing calculus actually made by the jurors.

By the same token, the absence of any record clearly setting forth what the jury determined to be the mitigating and aggravating factors makes it impossible to engage in meaningful harmless error analysis. The record in this case does not disclose which aggravating factors and which mitigating factors were actually found by the jury. Without such information, it is impossible to know whether the invalidation of one or more of the special circumstances would tip the balance for life.

Assuming this Court declines to follow the *Ring* decision, decisions of the U.S. Supreme Court require that if a state appellate court chooses to

which the jury can reasonably infer from facts of type '(1) or (2).'

(*Id.* at pp. 26-27.)

Under the standard stated in *Anderson, supra,* this Court has sustained verdicts when there was evidence of all three types or at least extremely strong evidence of type (1) or evidence of type (2) in conjunction with either (1) or (3). (*Ibid.*)

As noted *supra*, in the arguments discussing other sufficiency of evidence issues, an appellate court reviewing an allegation of insufficient evidence must view the entire record in the light most favorable to the judgment to determine whether there is substantial evidence (that is, evidence which is reasonable, credible, and of solid value) from which a reasonable trier of fact could find, beyond a reasonable doubt, that the defendant had premeditated and deliberated the killing. (*Jackson* v. *Virginia, supra*, 443 U.S. at p. 319.)

A. <u>There Was No Evidence of Planning</u>

The prosecution did not present substantial evidence that the killing of Ivon Pontbriant resulted from the kind of planning described in *Anderson, supra*. Contrary to the prosecutor's argument during her closing statement to the jury (RT 7593-7594), the conduct of appellant and codefendant Letner on the night of Ms. Pontbriant's murder did not show careful planning. First, the defendants were aware that other people knew that Richard Letner was at Ms. Pontbriant's house on the evening of March 1. Both Kathy Coronado and Edward Bourdette testified that they talked on the telephone with Richard Letner and Ivon Pontbriant that evening. (RT 5557-5591 [Edward Bourdette]; RT 5593-5609 [Kathy Coronado].) Indeed, both of these witnesses testified that Ms. Pontbriant and Letner initiated the first telephone call as well as the subsequent calls.

This conduct was not consistent with a plan or design to murder Ms. Pontbriant later that night.

Second, although the prosecutor argued that appellant and Letner intended to kill Ms. Pontbriant, steal her money and take her car in order to go to Iowa (RT 7993), nothing found in the victim's car suggested that the defendants had packed and were either trying to leave or were ready to leave for Iowa. Nor did the police find any evidence showing that there were items in the apartment of Richard Letner (shared on and off by appellant) showing preparation for flight. Indeed, the prosecutor argued to the jury that appellant and Letner did not appear to have even packed clothing for this trip to Iowa. (RT 7570-7571.) It was not disputed that both men arrived in Iowa with nothing but the clothes on their backs. (RT 6305-6306, 6878-6880.)

As appellant established in Arguments IV, VI and VII, *supra,* the evidence was insufficient to prove that appellant or codefendant Letner attempted to rape Ms. Pontbriant, or robbed her of any money, or planned to do so. Therefore, there was no evidence establishing the kind of planning described in the *Anderson* decision, *supra*, required to prove premeditation and deliberation.

B. <u>There Was No Evidence of Motive</u>

The prosecution also failed to present sufficient evidence of motive to support a finding of premeditation and deliberation under the *Anderson* standard. As noted above, *Anderson* requires motive evidence consisting of "proof of the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a motive for a planned killing." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.)

In this case the evidence showed that appellant had only the briefest prior contact with the victim. Before the night of her murder, appellant had

visited Ivon Pontbriant's house a few times with Richard Letner, primarily to see Warren Gilliland. (RT 6850-6851.) The night that Ms. Pontbriant was killed, according to appellant's own testimony, he was in her house for several hours drinking beer with her. (RT 6851-6860.) No evidence was introduced, beyond the prosecution's "conjecture and surmise," that appellant possessed the kind of motive contemplated by *Anderson* to support a finding of premeditation and deliberation. (*People* v. *Rowland* (1982) 134 Cal.App.3d 1, 8.)

Any inference that appellant had a motive to kill Ms. Pontbriant to prevent her from identifying appellant and Richard Letner to the police was contradicted by the fact that she and Letner initiated telephone calls to Bourdette and Coronado, before she was killed, thus already identifying Letner as being present with her that night. Moreover, as appellant has established, the evidence was insufficient to prove that either appellant or Letner attempted to rape Ms. Pontbriant or robbed her. Since appellant had neither attempted to rape Ms. Pontbriant, nor robbed her, he could not have possessed a motive to kill her in order to keep her from contacting the police to report such crimes against her.

Moreover, under *Anderson*, even if evidence of motive is present, it is insufficient to support a finding of premeditation and deliberation unless it is also supported by additional evidence of planning or of a manner of killing which also points to premeditation and deliberation. (*Id.* at p. 27.) Such evidence was not introduced in this case.

C. <u>Evidence of Manner of Killing</u>

The manner in which Ms. Pontbriant was killed did not support a finding of premeditation and deliberation. Indeed, the manner of killing in this case was very similar to that in *People* v. *Anderson*, *supra*, which this Court found, as a matter of law, did not support a finding of premeditation

and deliberation. (*Id.* at p. 21.) In both cases, the crime scene was chaotic. The victim had sustained multiple stab wounds. There also was evidence that the killer had attempted to clean up the evidence of his crime. (*Ibid.*)

In *People* v. *Frank* (1985) 38 Cal.3d 711, 734, this Court noted that "hazardous infliction of multiple stab wounds" suggests a lack of premeditation and deliberation. Moreover, in *Anderson*, the Court also noted that premeditation and deliberation cannot be inferred from "indiscriminate multiple attacks of both severe and superficial wounds." (*People v. Anderson, supra,* 70 Cal.2d at p. 21.) The prosecutor in this case, however, argued just the contrary: she advised the jurors that the many wounds, both superficial and severe, supported a finding that the murder was premeditated. (RT 7551-7554.)

The evidence of the murder in this case is "consistent with the sudden, random explosion of violence" which is insufficient to support a finding of premeditation and deliberation. (*People* v. *Alcala* (1984) 36 Cal.3d 604, 623.) The wounds suffered by Ms. Pontbriant did not exhibit a particular and exacting manner of killing or a preconceived design, as required under the *Anderson* standard.

Appellant recognizes that this Court has described the *Anderson* analysis as ". . . intended only as a framework to aid in appellate review." (*People v. Perez* (1992) 2 Cal. 4th 1117, 1125.)[99/] Nonetheless, the reasons offered by the prosecutor here for finding a premeditated and deliberated

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99. Under certain extraordinary circumstances, this Court has found evidence which would not normally be sufficient under *Anderson* to be adequate to support a finding of premeditation and deliberation. For example, in *People v. Mayfield* (1997) 14 Cal.4th 668, 767, the defendant confessed to killing a police officer to avoid arrest. In *People v. Hawkins* (1995) 10 Cal.4th 920, 956, the Court found sufficient evidence of a premeditated murder where the murder was an execution-style killing with two shots to the base of the skull.

murder were not adequate.[100/] Certainly, any evidence of a "cover up" of the crime is irrelevant to ascertaining the defendant's state of mind immediately prior to or during the killing. (*People* v. *Anderson*, *supra*, 70 Cal.2d at pp. 31-32.) Evidence suggestive of flight following the murder is similarly irrelevant to the issue of premeditation and deliberation.[101/]

For all of the foregoing reasons, even when viewed in the light most favorable to the prosecution, the evidence presented at appellant's trial did not support his conviction of first degree murder based on a premeditated and deliberated murder theory.

As appellant has established, the evidence was insufficient to support his conviction of first degree murder on any felony-murder theory. Even assuming arguendo that the evidence was sufficient to convict appellant of murder on a felony-murder theory, this Court cannot know whether the jury actually based its conviction of appellant on this theory or on the invalid premeditation and deliberation theory. This Court has held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general

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100. The prosecutor argued premeditation and deliberation were proven because the victim had been tied up, stabbed in the neck, beaten about the face, and her image in the photograph on the coffee table had also been "stabbed." (RT 7615-7616.)

101. Moreover, the "flight" evidence was equivocal. It was not disputed that appellant and codefendant Letner continued to use their own names when they went to Council Bluffs, Iowa. They chose to go to a town where Letner's father grew up and his paternal grandparents still lived. While knowing that the motel manager would call the police if a disturbance occurred at the Iowana Motel, appellant and Letner got into a fight in one of the motel's rooms, which directly led to their arrests by Council Bluffs police. Such a course of conduct did not suggest an intent to evade detection.

verdict of guilt rested, the conviction cannot stand." (*People v. Guiton* (1992) 4 Cal.4th 1116, 1122, quoting *People v. Green* (1980) 27 Cal.3d 1, 69.) Presenting a criminal charge to the jury despite a lack of sufficient evidence to support that charge constitutes the presenting of a "legally deficient" case to the jury, i.e., a "legally incorrect theory." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44; see also, *Zant v. Stephens* (1983) 462 U.S. 862, in which the Supreme Court stated: "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.") Where the trial record leaves the reviewing court uncertain as to the actual ground on which the jury's decision rested (a valid ground or an invalid ground), the reviewing court must reverse. (*Zant, supra,* at p. 879.)

In the present case, this Court cannot ascertain whether the jury exclusively relied on an invalid premeditation and deliberation theory to find appellant guilty of first degree murder. For this reason, the Court must reverse appellant's conviction of murder.

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XII.

BECAUSE THE JURY MAY HAVE EXCLUSIVELY RELIED ON AN INVALID FELONY-MURDER THEORY TO CONVICT APPELLANT OF FIRST DEGREE MURDER, APPELLANT'S MURDER CONVICTION MUST BE REVERSED

Since the jury found appellant guilty of attempted rape, the jury necessarily considered the prosecution's attempted rape theory as one basis for finding appellant guilty of first degree murder on a felony-murder theory. However, since the evidence was insufficient to sustain appellant's conviction of attempted rape, the attempted rape felony-murder theory was not a valid basis for convicting appellant of first degree murder. In Argument VI, *supra*, appellant established that there was also insufficient evidence to sustain his conviction of robbery, and in Argument VII, *supra*, that there was insufficient evidence to sustain appellant's conviction of burglary. Because all the grounds for finding appellant guilty of first degree murder based on a felony-murder theory were invalid, this Court must reverse appellant's conviction of murder.

Even assuming arguendo that the evidence was sufficient to convict appellant of murder on a premeditation and deliberation theory, this Court cannot know whether the jury actually based its conviction of appellant on this theory or on an invalid felony-murder theory. As stated in Argument ___, *supra*, this Court has held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Guiton, supra,* 4 Cal.4th at p. 1122, quoting *People v. Green, supra*, 27 Cal.3d 1 at p. 69; see also, *Zant v. Stephens* (1983) 462 U.S. 862, in which the Supreme Court

stated: "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.") Where the trial record leaves the reviewing court uncertain as to the actual ground on which the jury's decision rested (a valid ground or an invalid ground), the reviewing court must reverse. (*Zant, supra,* at p. 879.)

In the present case, this Court cannot ascertain whether the jury exclusively relied on an invalid felony-murder theory to find appellant guilty of first degree murder. For this reason, the Court must reverse appellant's conviction of murder.

In *Griffin v. United States* (1991) 502 U.S. 46, the Supreme Court held that if evidence is insufficient to support an alternative theory of liability, due process is not violated as long as the general verdict is legally supportable as to one of its grounds. Here, however, the general presumption that when given the option of relying on a factually inadequate theory, "jurors are well equipped to analyze the evidence," *id.* at. p. 59, was undermined by the ambiguous and incomplete instructions (see Argument XIV, *infra*) and prosecutorial argument which unduly stressed the importance of the unsupported alternative theories of felony murder. (See *United States v. Alexius* (5th Cir. 1996) 76 F.3d 642, 647, fn. 11 [where general verdict finding defendant guilty of perjury failed to specify which of multiple statements was perjured , and cross-examination of witness was improperly limited as to one statement, the jury was not "well-equipped to analyze" this testimony and therefore there was no reason to suppose that the jury did not rest its guilty verdict on that statement.].)

As discussed herein, there was insufficient evidence of burglary, robbery and rape. Thus, at least three of the four theories of culpability

relied on by the prosecutor were flawed. Moreover, the jury was not required to agree on which type of first degree murder was committed. Viewed in the light most favorable to the judgment, there was insufficient evidence establishing felony murder. Given that the jury was not required to be unanimous under any theory, and that three of four theories were factually inadequate, petitioner's conviction of first degree murder and the special circumstance findings were unconstitutionally obtained.

* * * * *

XIII.

ERRORS IN THE JURY INSTRUCTIONS GIVEN AT APPELLANT'S TRIAL REQUIRE REVERSAL OF HIS CONVICTIONS AND DEATH SENTENCE

Under the federal and California Constitutions, "'the defendant has a constitutional right to have the jury determine every material issue presented by the evidence.'" (*People v. Flood* (1998) 18 Cal.4th 470, 480, quoting *People v. Modesto* (1963) 59 Cal.2d 722, 730; *In re Winship* (1970) 397 U.S. 358.) Moreover, "[u]nder established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt every element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood, supra*, 18 Cal.4th at pp. 479-480.) California law also requires that a trial judge provide, sua sponte, correct instructions on general principles of law applicable to the case the jury is deciding. (*People v. Birks* (1998) 19 Cal.4th 108, 118.) These principles are those that are "closely and openly connected with the facts of the case before the court." (*People v. Hood* (1969) 1 Cal.3d 44, 449.) Moreover, even absent an objection in the trial court, an appellate court may reverse a conviction if instructional error has adversely affected the defendant's substantial rights. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

Complete and accurate jury instructions are also required under federal constitutional law. The Sixth Amendment and Fourteenth Amendment to the United States Constitution, "gives a criminal defendant the right to have the jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523.) Claims of instructional error, particularly in the context of a constitutional violation, must focus on the specific language challenged. (*Francis v. Franklin* (1985) 471 U.S. 307,

315.) Moreover, the analysis of any legally erroneous instruction must be considered in the context of the entire charge to the jury. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71.) Under *Estelle*, the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." (*Ibid.*)

As this Court observed in *People v. Cox* (2000) 23 Cal.4th 665, the case law of the United States Supreme Court makes clear that the applicable standard of review for instructional error is that set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Id.* at p. 677, fn. 6.) Moreover, in equating instructional error with evidentiary error, the U.S. Supreme Court noted:

> . . . the failure to instruct on an element in violation of the right to a new trial, infringe[s] upon the jury's factfinding role and affect[s] the jury's deliberative process in ways that are, strictly speaking, not readily calculable. We think, therefore, that the harmless error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?

(*Neder v. United States* (1999) 527 U.S. 1, 9.)

The arguments which follow explain how several instructional errors at both the guilt and penalty phases of appellant's trial violate these principles of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution and counterparts in the California Constitution.

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XIV.

THE JURY INSTRUCTIONS GIVEN AT THE GUILT PHASE OF APPELLANT'S TRIAL CONCERNING AIDING AND ABETTING WERE BOTH INCOMPLETE AND HOPELESSLY CONFUSING

In the instant case, the instructions of the trial judge regarding the crucial issue of what part, if any, each of the defendants played in the murder, were hopelessly ambiguous and confusing. The prosecutor argued two theories of murder to the jury in this case: (1) that both of the defendants were guilty of premeditated murder, and/or (2) both were guilty of felony murder. In addition to proceeding on two theories of culpability for first degree murder in this case, the district attorney told the jury that they need not decide which of the two defendants actually killed Ms. Pontbriant.[102/] The trial judge then instructed the jury not only on first degree premeditated murder and all lesser included homicides, but on felony murder and the theory of aiding and abetting. (CT 815-818; 846-876.)

The trial judge in the instant case gave the following instruction at the guilt phase of the trial:

> One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating, but he is also liable for the natural and probable consequences of any criminal act that he knowingly

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102. The prosecutor argued several conflicting scenarios for the homicide. First, she asserted: "All of this evidence, as I say, shows a calculated killing. Shows a willful deliberated and premeditated murder. It also, more important, ladies, and gentlemen, I would submit, *shows to you that there were two persons involved in this killing, two persons . . . .*" (RT 7554; italics added.) Subsequently, in discussing the concept of aiding and abetting, the district attorney argued: "Now, I would submit in our case, in this case, *we have evidence of both defendants directly committing a crime and helping each other aiding and abetting the crime.*" (RT 7582; italics added.)

> and intentionally aided and abetted. You must determine whether the defendant is guilty of the crimes charged original [sic] contemplated. And, if so, whether the crimes charged in counts one, two, three, four, and five, and the lesser included offenses were natural and probable consequences of such original [sic] contemplated crimes. This rule of law is not applicable to the special circumstances charged. In other words, if you find that the defendant was an aider and abettor, or the actual killer but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant intended to either kill a human being or aid another in the killing of a human being in order to find the special circumstance to be true.

(RT 7489-7490.)[103/]

This instruction is incomplete, ambiguous and confusing in several respects.

A. The Instruction Was Incomplete

The statement "you must determine whether the defendant is guilty of the crimes originally contemplated, and, if so, whether the crimes charged in counts one, two, three, four, five and the lesser included offenses were natural and probable consequences of such original [sic] contemplated crimes," does not make sense in the context of this case. What were the "crimes originally contemplated" if not the crimes actually charged in counts two, three, four and five, to wit, attempted rape, robbery and burglary? [104/]

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103. The written version of this jury instruction which was sent out with the jury during its deliberations varied slightly from this text. (CT 817.)

104. The Information charged appellant as follows: Count I, murder with special circumstances; Count II, attempted rape; Count III, residential robbery; Count IV, burglary of an inhabited dwelling; and Count V, unlawful driving or taking of a vehicle.

In the case law, the crimes "originally contemplated" are often referred to as the "target crimes." In *People v. Prettyman* (1996) 14 Cal.4th 248, this Court explained that

> [I]n an aiding and abetting case involving application of the 'natural and probable consequences' doctrine, *identification of the target crime* will facilitate the jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that, the prosecution contends, the defendant knowingly and intentionally aided and abetted.

(*Id.* at p. 267; italics added.)

In the *Prettyman* decision, this Court noted that "[t]o apply the 'natural and probable consequences' doctrine to aiders and abettors is not an easy task." (*Ibid.*) Further, the Court explained that if the prosecution relies upon this theory, which it did in appellant's trial, the "trial court must, on its own initiative, identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (*Id.* at p. 268.)

Given the fact that the prosecutor did urge in appellant's case that the jury could find either defendant guilty of murder as an aider and abettor on a natural and probable consequences theory, the trial court erred when it failed to identify the "target crimes" and explain the theory adequately.

B. <u>The Instruction Was Ambiguous and Confusing</u>

Not only was the above-quoted instruction incomplete, it was ambiguous and confusing. As the California Court of Appeal has noted: "It cannot be overemphasized that instructions should be clear and simple in order to avoid misleading a jury." (*People v. Carrasco* (1981) 118 Cal.App.3d 936, 944.) In *Boyde v. California* (1990) 494 U.S. 370, 380, the United States Supreme Court determined the standard to be applied when the constitutionality of an ambiguous jury instruction is challenged. The Court held:

> We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

(*Id.* at p. 380.)

Accordingly, this Court must determine whether there is a reasonable likelihood that the jury instructions in the instant case regarding first degree murder and aiding and abetting provided adequate guidance to the jury which decided appellant's case.

The confusion caused by the various instructions in this case was similar to that caused by the disputed instructions in *Smith v. Horn* (3d Cir. 1997) 120 F.3d 400,[105] a Pennsylvania death penalty case which was the subject of a federal petition for writ of habeas corpus. In *Smith*, the federal court of appeals granted the writ because portions of the jury instructions were unclear about the requisite mental state. Under Pennsylvania law, an accomplice or co-conspirator in a crime during which a killing occurs may not be convicted of first degree murder unless the Commonwealth proves that he harbored the specific intent to kill.

The facts of the *Smith* case were as follows: two men entered a pharmacy with the intention of robbing it, and during the course of the robbery one of the three people in the store was shot to death. While the evidence showed that both defendants carried handguns into the store, the evidence also tended to show that defendant Smith was the actual killer. Nonetheless, as in the instant case, the prosecutor in *Smith* argued to the jury that it did not make any difference who shot the victim because the

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105. Certiorari denied sub.nom. *District Attorney of Bucks County v. Smith* (1998) 118 S.Ct. 1037.

jurors could find that the defendants were liable for each other's misdeeds under the doctrine of accomplice liability.[106]

The *Smith* court found the jury instructions to be fatally ambiguous and confusing because they failed to clarify that one could find a defendant guilty of first degree murder under accomplice liability only if the Commonwealth had proved beyond a reasonable doubt that the accomplice intended that the victim be killed. Specifically, the court found that the instructions were not clear about whether an accomplice in the robbery was necessarily an accomplice in the murder.

Further, the confusing nature of the instructions violated defendant Smith's due process rights because they permitted his conviction without assuring that the prosecution had proven every fact necessary to constitute the crime beyond a reasonable doubt. (*Id.* at p. 415, citing *In re Winship, supra*, 397 U.S. at p. 364.) The *Smith* court noted:

> A jury instruction that omits or materially misdescribes an essential element of an offense as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's federal due process rights.

(*Id.*, citing *Carella v. California* (1989) 491 U.S. 263, 265.)

Because the Commonwealth of Pennsylvania proceeded on a theory that defendant Smith was guilty of first degree murder whether or not he intended the victim to be killed and because the evidence did not show overwhelmingly that Smith was, in fact, the actual killer, the failure to instruct the jury in a complete and clear way regarding the intent to kill required a reversal of the first degree murder conviction against defendant Smith. (*Id.* at p. 419).

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106. Under Pennsylvania law, a felony murder is a second degree murder unless the Commonwealth proves beyond a reasonable doubt that there was an intent to kill.

In the instant case, the incomplete, ambiguous and confusing instructions regarding what the jury had to determine to find appellant guilty of murder, attempted rape, robbery and burglary as an aider and abettor violated appellant's right under the Fifth, Sixth and Fourteenth Amendments to require the prosecution to prove beyond a reasonable doubt every element of every crime charged against him. There is a reasonable likelihood that the jurors in appellant's case misunderstood and misapplied the instructions concerning aiding and abetting liability, thus resulting in unreliable special circumstances findings and an unreliable death verdict in violation of the Eighth and Fourteenth Amendments.

Under the instruction given, if the jurors found the special circumstance allegations true on an aider and abettor theory, the jurors would not have made the necessary additional finding that appellant had an intent to kill. Such an additional finding is necessary for a constitutionally reliable death penalty determination. (See Argument VIII, *supra*.) Instead, the instruction directed that such a finding was necessary only if the jury could not decide whether appellant was the actual killer or an aider and abettor. This confusing instruction made it reasonably likely the jurors misunderstood and misapplied the applicable law.

C. The Natural and Probable Consequences Instruction Was Unconstitutional

Another problem with the natural and probable consequence portion of the instruction quoted above is that it implied that an aider and abettor who intentionally aids the first crime (such as the robbery, burglary or attempted rape in the instant case) is, by operation of law, automatically guilty of any other unintended crime just so long as such crime is the natural and probable consequence of the first crime. Therefore, the probability that the jury in this case may have understood this instruction to permit it to convict appellant of felony murder and special circumstance murder without

a need to decide if he had the otherwise requisite intent renders his convictions for those crimes invalid under *Stromberg v. California* (1931) 283 U. S. 359, 368.

The natural and probable consequence theory is unconstitutional in a capital case because it permits criminal liability to be imposed upon a aider and abettor based on the finding that the crime committed by the perpetrator was a "natural and probable consequence of that target crime which was aided and abetted." (*People v. Croy* (1985) 41 Cal.3d 1, 12.) Such a result is not consistent with fundamental principles of our criminal law because it allows liability to be imposed based upon negligence even when the crime involved requires a different state of mind. (LaFave and Scott, Substantive Criminal Law, (1986) § 6.8, p. 158.)

Professors LaFave and Scott have also noted that the natural and probable consequence doctrine is based on what a reasonable person would foresee as probable and natural consequences and then uses that standard to impute conclusively a higher degree of criminal culpability to a person who may not, in fact, have foreseen, let alone intended or deliberated, such consequences. (*LaFave* and *Scott*, *supra*.) In a prosecution for murder, the doctrine does operate as an irrebuttable presumption that a non-killer (i.e., an aider and abettor) has malice, even though such a state of mind could not be presumed and would have to be proven in order to convict the actual killer. (*Ibid.*)

As observed in the concurring opinion in *People v. Luparello* (1986) 187 Cal.3d 410, 452, a natural and probable consequence doctrine can produce anomalous results by basing an accomplice's culpability, not on his own intent, but rather on the intent of the perpetrator or on other circumstances of the crime. Thus, the liability of the aider and abettor is not based on his individual mental state but instead turns on the jury's

finding as to the perpetrator's mental state. (Kadish, "Complicity, Cause and Blame: A Study In the Interpretation of Doctrine," 73 Cal.L.Rev. at p. 346 (1985).) Such a result offends the due process clause of the Fourteenth Amendment. In *Clark v. Jago* (6th Cir. 1982) 676 F.2d 1099, the jury was instructed that "the essential element of purpose to kill could be found in the mind of the defendant and/or his accomplice." (*Id.* at p. 1104.) The Sixth Circuit Court of Appeals found that the instruction violated due process because it could have been interpreted to mean that it was not necessary for the accomplice personally to have had the purpose to kill because the purpose of the actual killer was sufficient to convict the accomplice. (*Id.* at p. 1105.)

To the extent to which the instruction on the natural and probable consequence doctrine permits the jury to find essential elements of the crime by reference to the perpetrator's mental state rather than to the actual mental state of the aider and abettor, such instructions are constitutionally infirm. Moreover, in a case where the death penalty could result from convictions based on such instructions, they violate the Eighth Amendment. The United States Supreme Court pointed out in *Furman v. Georgia* (1972) 408 U. S. 230, 313, a death penalty statute must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. This instruction on the natural and probable consequence doctrine would allow for a death sentence based on a vicarious negligence theory of liability and thus offends the requirement that the death penalty is reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens, supra*, 462 U.S. at p. 877, fn. 15.)

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XV.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY REGARDING THE EFFECT OF VOLUNTARY INTOXICATION ON THE MENTAL STATE NECESSARY TO CONVICT UNDER A THEORY OF AIDING AND ABETTING

The prosecution relied upon several different theories for convicting the defendant of first degree murder with special circumstances. Despite the probability of confusion due to the involvement of defendants and multiple theories of culpability, the trial court refused to sever the trials of the two defendants, as they had requested. Further confusing the matter, the prosecutor argued to the jury that it could find either defendant guilty of first degree murder as an aider and abettor, or as the actual killer. (RT 7584.) The prosecutor also argued, and the jurors were instructed, that the jury could find either or both defendants guilty of first degree murder, either on a theory that the murder had been committed in the course of the commission of one or more felonies, or that the murder was a premeditated murder. (RT 7607-7611; CT 848-853.)

Thus, the jury instructions at the guilt phase were particularly complicated because they had to encompass not only different possible theories about the participation of each defendant but also all of the lesser included offenses which are possible in a case where the murder is alleged to have been a premeditated murder. A review of the guilt phase jury instructions reveals that the prosecution's failure to focus on any particular theory about how the murder in this case occurred resulted in an incomprehensible set of jury instructions. (See RT 7488-7529.)

The confusing nature of the instructions was exacerbated by the fact that there was evidence that both the defendants and the victim were drinking heavily on the night of the murder. Accordingly, an instruction on

voluntary intoxication and its effect on whether the defendants had formed the necessary mental state to be guilty of the crimes charged was required.

The following instructions were given at the guilt phase regarding voluntary intoxication:

> Evidence has been presented concerning the voluntary intoxication of the defendant. This evidence may affect your verdict as to Count I in several ways. If, due to evidence of the defendant's intoxication you have a reasonable doubt that the killing was the result of premeditation and deliberation you may not convict him of first degree murder based on premeditation and deliberation. If, due to the evidence of defendant's intoxication you have a reasonable doubt that he formed the specific intent to commit robbery, burglary, or rape, you may not convict him of those offenses or first degree murder based on the felony murder rule. If, due to the evidence of the defendant's intoxication you have reasonable doubt that the killing was the result of premeditation or [sic] deliberation and a reasonable doubt that he formed the specific intent to commit robbery, burglary, or rape, but find beyond a reasonable doubt that he intended to kill the victim and harbored malice he is guilty of second degree murder. If due to evidence of the defendant's intoxication you have a reasonable doubt the defendant harbored malice you may not convict him of murder in any degree. If due to evidence of the defendant's intoxication you have a reasonable doubt the defendants [sic] harbored malice, but find reasonable doubt that the killing was intentional and unlawful he is guilty of voluntary manslaughter. Evidence of defendant's voluntary intoxication may also be relevant to your determination of the special circumstance allegation. If, due to evidence of defendant's intoxication you have reasonable doubt that he formed the specific intent to commit robbery, burglary, or rape, or the specific intent to kill, you must find the special circumstance allegations not true.

(RT 7492-7494.)

The first problem with this instruction is the fact that it speaks of "defendant" in the singular when the jury was being asked to judge two defendants. Although it is true that there was evidence that both appellant

and his codefendant were drinking heavily the evening the crime occurred, the failure of this instruction to differentiate between them implicitly encouraged the jury to treat them as fungible entities. This was error. Appellant had a constitutional right to have the jurors consider each of the charges against him on an individual basis. (See, e.g., *People v. Massie, supra*, 66 Cal.2d at pp. 922-923.)

The second problem with this instruction was that it failed to explain the effect of voluntary intoxication on the prosecution's claim that one of the defendants may have been an aider and abettor [107] rather than the actual killer.[108] In *People v. Mendoza* (1998) 18 Cal.4th 1114, this Court concluded that because the required mental state of the aider and abettor does not vary from crime to crime, the admissibility of evidence of intoxication also should not vary. (*Id.*) Accordingly, in order to make the law understandable to the jury, the court should "instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state." (*Id.* at p. 1134.) In the *Mendoza* case, there were three codefendants, each charged with five counts of attempted murder, one count of murder and one count of discharging a firearm at an occupied building. This Court granted the petition for review

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107. At the guilt phase, the trial judge also instructed the jury about the definition of aiding and abetting. (RT 7489-7491.)

108. Appellant's counsel did not specifically request an instruction on the effect of intoxication on any finding that appellant had been an aider and abettor as to the crimes charged. However, Penal Code section 1259 provides, inter alia, "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if substantial rights of the defendant were affected thereby." In *People v. Saille* (1991) 54 Cal.3d 1103, 1120, this Court found that defense counsel have an obligation to request a "pinpoint instruction" to relate "the evidence of [the accused's] intoxication to an element of a crime, such as premeditation and deliberation."

of one of the codefendants, Juan Manuel Valdez, who had been charged and convicted solely on a theory of aiding and abetting.

The trial judge in the *Mendoza* case gave instructions on voluntary intoxication but did not explain how those instructions related to the charge of aiding and abetting made against defendant Valdez. This Court granted review on the question of "whether the jury may consider the effect of voluntary intoxication on the existence of the mental state necessary for aiding and abetting." (*Id.* at p. 1122 .) Quoting from the decision in *People v. Beeman* (1984) 35 Cal.3d 547, 560, the Court noted in *Mendoza*: "an aider and abettor...must act with knowledge that the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Mendoza, supra,* 18 Cal.4th at p. 1123; italics in the original.)

The analysis in the *Mendoza* opinion begins with a description of section 22 of the California Penal Code, which governs the legal effect voluntary intoxication will have on a person's culpability for a criminal act. Section 22 was originally enacted in 1872 and later amended in 1981 and 1982.[109/] In *Mendoza*, this Court noted that the 1982 amendment to section 22 clarified that the 1981 amendment did not extend the admissibility of evidence of intoxication to general intent crimes. (*Id.* at p. 1124.)

The *Mendoza* decision discusses some of this Court's decisions regarding how voluntary intoxication affects the mental states required for certain crimes. Earlier decisions of this Court distinguished between "specific intent" and "general intent" crimes for purposes of determining

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109. The 1995 amendment to Section 22 does not apply to this case which went to trial in December, 1989, for offenses which took place in 1988.

the relevance of voluntary intoxication to the defendant's ability to have the requisite state of mind to be guilty of the charged crime. For example, in *People v. Hood* (1969) 1 Cal.3d 444, 445-459, this Court held that intoxication was relevant to negate the existence of a specific intent but not a general intent. The *Hood* decision acknowledged that the distinction between specific and general intent is not always clear. Indeed, in that case, the Court observed that assault could be characterized as either a specific or general intent crime.

The *Mendoza* opinion also cites this Court's decision in *People v. Williams* (1997) 16 Cal.4th 635, 676 for the proposition that aiding and abetting requires both knowledge and intent. ("One cannot intend to help someone do something without knowing what that person meant to do.") The Court also pointed out that the mental state for an aider and abettor is independent of the perpetrator's mental state and thus voluntary intoxication is relevant even if the perpetrator has engaged in a general intent crime. The *Mendoza* court observed:

> Because of the natural and probable consequences doctrine, limiting the admissibility of intoxication evidence for an alleged aider and abettor to crimes which require the perpetrator to have a specific intent would often effectively prevent that person from relying on intoxication even in defense to a specific intent crime. The rule would be arbitrary and have no relation to culpability. For example, in the hypothetical of a person handing a baseball bat to another who then uses it to assault a third party, assume that the assault was fatal but also that the person was unaware, due to intoxication, of the perpetrator's criminal intent. That person could be charged as an aider and abettor of both assault with a deadly weapon and murder, with assault being the target offense and murder a reasonably foreseeable consequence. If the aider and abettor were precluded from presenting evidence of intoxication in defense to the assault charge because it is a general intent crime, the alleged aider and abettor would

> effectively be precluded from relying on intoxication as the defense even to the specific intent crime of murder . . . ."

(*Id.* at p. 1132.)

In the instant case, it was prejudicial error for the trial judge to fail to instruct on the legal effect of appellant's voluntary intoxication, should the jury find that appellant had merely aided and abetted the crimes charged. This error affected appellant particularly because the evidence clearly pointed to codefendant Letner as Ms. Pontbriant's killer, and suggested appellant was liable if a participant in any crimes at all, as only an aider and abettor. Moreover, Officer Wightman had specifically testified that he observed appellant to be intoxicated when Wightman encountered appellant around midnight on March 1, 1988, shortly after the murder had occurred. (RT 6171-6172.) Appellate courts evaluate claims of "instructional error" in "the context of the overall charge" to the jury. (*People v. Williams, supra*, 16 Cal.4th at p. 675.) The overall charge to the jury at the guilt phase of this case was confusing and ambiguous, largely because the prosecution refused to commit itself to a theory of how the murders had been committed and what role each individual defendant played in that scenario. In particular, the instructions failed to require the jury to consider the evidence of appellant's intoxication on the aiding and abetting theory of culpability. The general instruction on intoxication was not adequate to explain this issue to the jury.

A criminal defendant has a federal constitutional right to ensure that the prosecution bears the burden of establishing each element of an offense beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364.) Deficient instructions on aiding and abetting and voluntary intoxication constitute federal constitutional error because they deprived the jury of its proper fact finding role with regard to the burden of proof. (*Martinez v. Borg* (9th Cir. 1991) 937 F.2d 422, 423.) In addition, misleading and

confusing instructions violate due process where they "are likely to cause an imprecise, arbitrary or insupportable finding of guilt." (*Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 943, 949.) Thus, the failure to provide adequate instructions to the jury directing them to consider the potential effects of voluntary intoxication on the theory of aiding and abetting violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Because the basis for the murder conviction in this case cannot be determined and the jury may have relied on an incomplete and inadequate definition of aiding and abetting without properly considering the effect of intoxication, the error was not harmless and appellant's convictions and death sentence must be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

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XVI.

THE TRIAL JUDGE VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS WHEN HE INSTRUCTED ON FELONY MURDER WHEN THE INFORMATION IN THIS CASE CHARGED DEFENDANT WITH PREMEDITATED MALICE MURDER

Appellant and his codefendant, Richard Letner, were charged in Count 1 of the information with committing

> . . . a felony, to wit: murder, in violation of section 187 of the Penal Code, in that on or about the 1st day of March, 1988 [they] did willfully, unlawfully, and with malice aforethought murder Ivon Pontbriant, a human being.

(CT 691.)

As noted, *supra*, the trial judge instructed the jury on both premeditated murder (CT 850-852; RT 7508-7512; 7516) and on felony murder (CT 853-858; RT 7512-7513; 7521). The prosecutor argued to the jury that they could find appellant guilty of first degree murder based on either a theory of premeditated, malice murder (RT 7548-7554; 7598-7600) or felony murder (RT 7600-7602).

Because the jurors were not instructed that they were required to reach a unanimous verdict as to which theory they accepted, appellant was denied his federal constitutional rights, under the Sixth, Eighth and Fourteenth Amendments, to notice of the charges against him, to have the state prove him guilty beyond a reasonable doubt, to due process and to a reliable determination of whether he should be sentenced to death.

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A. Confusion Regarding the Legal Definitions of Felony Murder and Premeditated Murder

The law of California governing first degree murder is extremely muddled.[110/] First, there appears to be significant gaps in statutory provisions covering murder. Penal Code section 187 defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Section 188, in turn, defines malice aforethought as being either express or implied. That statute states in relevant part:

> It [malice] is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It [malice] is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Neither of these two statutes governing premeditated murder include felony murder in their purview. Felony murder is included in Penal Code section 189 which categorizes different types of murders as either first or second degree murder. That statute reads, in pertinent part, as follows:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree. All other kinds of murders are of the second degree.

Instructing the jury that it could convict appellant of felony murder when he was charged only with premeditated murder under Penal Code section 187 violated appellant's rights to a jury determination on every

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110. Appellant acknowledges that this Court has rejected several arguments concerning the contradictory positions in California law regarding malice murder and felony murder; however, appellant asks the Court to revisit the issue.

element of the charged crime, to adequate notice of the charges against him, and to a unanimous verdict.

In *People* v. *Dillon* (1983) 34 Cal.3d 441, this Court found that first degree felony murder is a separate and distinct crime with specific requirements for actus reus and mens rea and is defined exclusively by Penal Code section 189. (*Id.* at pp. 465, 471-472.) Moreover, *Dillon* states that malice aforethought is not an element of first degree felony murder. (*Id.* at pp. 465, 475, 477, fn. 24.) Thus, *Dillon* appears to stand for the proposition that section 187 refers only to malice murder (that is, a homicide committed with malice aforethought).

The *Dillon* opinion also holds that the two kinds of first degree murder in California are "different in one fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all." (*Id.* at pp. 476-477.)

This Court's decision in *People* v. *Carpenter* (1997) 15 Cal.4th 312, appeared to turn the holding of *Dillon, supra,* on its head. The Court stated that *Dillon* "only meant that the elements of the two types of murder are not the same." (*Id.*, 15 Cal.4th at p. 394.)

This Court's decision in *People v. Mendoza* (2000) 23 Cal.4th 896 further added to the confusion created by the inconsistencies found in the language of *Dillon, supra,* and *Carpenter, supra.* In *Mendoza, supra,* the majority found that Penal Code section 1157 [111] did not apply because the

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111. Penal Code section 1157 states: "Whenever a defendant is convicted of a crime . . . which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime . . . of which (continued...)

jury in that case was instructed solely on felony murder involving robbery and burglary. (*Id.* at p. 908.) Citing, inter alia, *Dillon, supra,* this Court found that all felony murders are first degree murders. (*Ibid.*) By contrast, the dissenting opinion of Justice Mosk noted that:

> . . . felony murder is not a separate or distinct offense; indeed, defendants in this matter were charged with, and found guilty of the crime of 'murder' in violation of Penal Code section 187, subdivision (a)–not the crime of 'felony murder.'

(*Id.* at pp. 927-928.)

However, if, as this Court stated in *People v. Carpenter, supra,* the elements of premeditated murder and felony murder are different, then the two are different crimes. As the United States Supreme Court observed in *Richardson* v. *United States* (1999) 526 U.S. 813, "calling a particular kind of fact an 'element' carries certain legal consequences." (*Id.* at p. 817.) The *Richardson* decision concerned a federal criminal statute, and its holding was limited to interpretation of that statute. However, the Supreme Court observed that the consequence of denoting something as an element of a federal crime is that the jury "cannot convict unless it unanimously finds that the government has proved every element." (*Id.* at p. 817.) The same consequence would follow in a criminal case tried under California law since the right to an unanimous verdict arises both from federal constitutional law as well as from the state constitution and state statutes. (Cal. Const. art. I, § 16; Pen. Code §§ 1163, 1164.)

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111. (...continued)
he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime . . . of which the defendant is guilty, shall be deemed to be of the lesser degree." In *Mendoza, supra*, the defendants claimed that since the jury did not fix the degree of the murder of which they had been convicted, they should be deemed to be convicted of second degree murder.

As the majority acknowledged in *People* v. *Carpenter*, *supra*, the elements of felony murder and malice murder under California law are not the same. Moreover, the *Dillon* decision stated that "the two kinds of murder are not the same crimes." (*Id.* at p. 476, fn. 23.) Indeed, the Court characterized the difference between the two crimes as "profound." (*Id.* at p. 477.)

B. The Trial Court Should Have Instructed That to Convict Appellant of First Degree Murder, the Jury Had to Be Unanimous as to Whether the Murder Was a Felony Murder

Due process requires that the state prove beyond a reasonable doubt every fact necessary to constitute the crime charged against the defendant. (*In re Winship, supra*, 397 U.S. at p. 364.) While every state enjoys wide latitude in defining the elements of a crime, once it has done so, it may not alleviate the prosecution of the burden of proving every element. (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

Under *People v. Dillon, supra,* the elements of felony murder and of premeditated malice murder are different. (34 Cal.3d at pp. 465, 471-472, 475, 477, fn. 24.) In *Schad v. Arizona* (1991) 501 U.S. 624, the United States Supreme Court denied a due process challenge to Arizona's statute which allowed a jury to rely on either felony murder or premeditation as the basis for a first degree murder conviction. This holding was based on the fact that under Arizona law "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Id.* at p. 637.) Since Arizona did not treat premeditation or the commission of a felony as independent elements of the crime of first degree murder, Arizona law did not violate due process. The implication of *Schad, supra,* is that where statutory alternatives are

independent elements of the crime, due process is violated if the jury is not unanimous in finding all elements.

By contrast, according to *People v. Dillon, supra,* under California law, premeditated malice murder and felony murder have *different elements*. The Court reaffirmed this point in *People v. Carpenter, supra,* when it stated that "the *elements* of the two types of murder are not the same." (15 Cal.4th at p. 394, emphasis in the original.) *In re Winship, supra,* teaches that if the state removes one of those elements, or fails to require jury unanimity on each element, due process is violated. (*Schad v. Arizona, supra,* 501 U.S. at p. 632.) Even assuming that elements of felony murder and premeditated malice murder are the same under California law, malice is then an element of felony murder. The California felony murder rule would violate *Sandstrom, supra,* because the element of malice would be conclusively presumed in violation of due process.

When a court instructs a jury on a legally proper theory of guilt while also instructing on a legally improper theory of guilt, the conviction must be reversed unless the record shows that the no juror relied upon the improper theory. (*People v. Green, supra*, 27 Cal.3d at p. 69.) Because that determination cannot be made in this case, appellant's conviction of first degree murder and his death sentence must be reversed.

C. Other Problems Created by the Prosecution's Reliance on Two Theories of First Degree Murder

1. The Trial Court Lacked Jurisdiction to Try Appellant for the Uncharged Crime of First Degree Felony Murder

As noted *supra*, the information in this case charged appellant and codefendant Letner with willful and premeditated murder. In California, a court lacks subject matter jurisdiction to convict a person of an offense or a necessarily included offense not charged against him by indictment or information whether or not there was evidence at his trial to show that he

committed the uncharged offense. (*In re Hess* (1955) 45 Cal.2d 171, 174-175.) Although the information in this case alleged three felony murder special circumstances, those allegations did not change the elements of the murder charged in Count I. (*People* v. *Bright* (1996) 12 Cal.4th 652, 661.)

Appellant acknowledges that a similar jurisdictional challenge has been rejected by the California Court of Appeal in several cases. (See, e.g., *People* v. *Johnson* (1991) 233 Cal.App.3d 425; *People* v. *Scott* (1991) 229 Cal.App.3d 707; *People* v. *Watkins* (1987) 195 Cal.App.3d 258.) Those decisions were decided wrongly, and appellant urges this Court to reject them. Each of those decisions relied on the holding of *People* v. *Witt* (1915) 170 Cal. 104, that a charge of malice murder is sufficient to also allege felony murder. The *Witt* holding no longer applies, however, because it was based on the assumption that malice murder and felony murder were the same crime. (*Id.* at p. 108.) As the discussion above shows, the Court's decision in *People v. Dillon, supra*, held that under California law felony murder is a different crime than premeditated murder. *Dillon* was the controlling interpretation of the felony murder rule at the time of appellant's trial.

Similarly, this Court's decision in *People* v. *Carpenter*, *supra*, does not negate this jurisdictional challenge because it is not possible to have a single statutory offense which includes two types of murder with different elements. If there were in fact a single statutory offense of first degree murder in California, which statute would govern it? Penal Code section 187 describes murder as a killing with malice aforethought. It is clear that felony murder in California does not require malice. The only statute in California which expressly refers to felony murder is Penal Code section 189; however, appellant was not charged under that statute.

By instructing the jury that it could convict appellant of an uncharged crime (first degree felony murder) over which it had no jurisdiction, the trial court violated the appellant's right to due process of law under both the federal and state constitutions. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7, 15.) The United States Supreme Court has also noted that "conviction upon a charge not made would be a sure denial of due process." *(DeJonge* v. *Oregon* (1937) 299 U.S. 353, 362.) Moreover, it is immaterial that the evidence would have supported a conviction for felony murder even though the charge had not been properly made. In *Garner* v. *Louisiana* (1961) 368 U.S. 157, the Supreme Court noted:

> We cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send the accused to prison following conviction for a charge that was never made as it is to convict upon a charge for which there is no evidence to support that conviction.

(*Id.* at p. 164.)

2. Instructing the Jury on the Uncharged Crime of Felony Murder Violated Appellant's Right to Notice of the Charges Against Him

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation" against him. (*Herring* v. *New York* (1975) 422 U.S. 853, 856-857.) The Due Process Clause of the Fourteenth Amendment also guarantees adequate notice. As the Supreme Court noted in *Marshall* v. *Longberger* (1983) 459 U.S. 422, 436, the right of the defendant to "real notice of the true nature of the charge against him is the first and most universally recognized requirement of due process." The failure to give a defendant adequate notice of the charges against him also impairs his attorney's ability to prepare effectively for trial. The lack of adequate notice may affect the strategic choices by

counsel in attempting to defend against the charges. (*Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237; *Coleman v. McCormick* (9th Cir. 1989) 874 F.2d 1280, 1286-1287.) A defendant is entitled to put on a defense knowing what such a strategy will have on the charges against him. (*Id.* at p. 1288.) In turn, lack of adequate notice can affect the fairness and reliability of his trial. Thus, the failure to provide adequate notice also violates the defendant's rights to effective assistance of counsel and to a reliable verdict in a capital case. (U.S. Const., Amends. 6, 8, 14; Cal. Const., art. I, §§ 7, 15, and 17; *Strickland* v. *Washington* (1984) 466 U.S. 668; *Beck* v. *Alabama, supra*, 447 U.S. at p. 638; *In re Murchison* (1955) 349 U.S. 133, 137.)

Since the information in this case charged appellant with murder with malice aforethought in violation of California Penal Code section 187, he was not given notice that he could be convicted for first degree felony murder in violation of Penal Code section 189. The fact that some decisions of the California Court of Appeal have found adequate notice of felony murder in similar charging documents is of no moment because those cases (see e.g., *People* v. *Johnson*, *supra*, 233 Cal.App.4th 425) relied upon *People* v. *Witt*, *supra*, 170 Cal.104, a decision which no longer states the law of first degree murder in California.

3. Charging Both Malice Murder and Felony Murder in One Count Would Be Duplicitous

If this Court were to hold that Count I charged both premeditated murder and first degree felony murder, the joining of those two offenses in a single count would be duplicitous. In *United States v. Aguilar* (9th Cir. 1985) 756 F.2d 1418, the Court explained the mischief caused by duplicitous charging:

> The vices of duplicity arise from breaches of the defendant's Sixth Amendment right to knowledge of the charges against him, since conviction on a duplicitous count could be obtained without a unanimous verdict as to each of the offices contained in the count. A duplicitous indictment also could eviscerate the defendant's Fifth Amendment protection against double jeopardy, because of a lack of clarity concerning the offense for which he is charged or convicted.

Duplicitous informations or complaints not only violate a defendant's right to notice but also his or her right to an unanimous verdict and to the state and federal constitutional protection against double jeopardy.

D. Conclusion

The improper instruction on the uncharged crime of felony murder allowed the jury to convict appellant on an invalid ground. Appellant's conviction and death sentence must be reversed.

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XVII.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

At the request of the prosecutor, the trial judge instructed the jury on so-called consciousness of guilt.[112/] The first instruction was CALJIC No. 2.03, which reads as follows:

> If you find that before this trial a defendant made a willfully false, or deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove the consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(RT 7472; CT 783.)

The trial judge also instructed the jury, pursuant to CALJIC No. 2.06, which states:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying the evidence, or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove that a killing was deliberated and premeditated, and its weight and significance, if any, are matters for your consideration.

(RT 7472; CT 784.)

For the reasons which follow, the trial court erred in giving both of these instructions.

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112. Because the charging conference was not recorded, it is impossible to know what discussion took place regarding those objections. (RT 7430; 7432-7433; 7456-7461.) As Argument XXXVII, *infra*, explains, the failure of the trial judge to ensure that all proceedings in this case were recorded violated the provisions of Penal Code section 190.9 and requires the reversal of appellant's convictions and death sentence.

A. The Instructions Create Improper Permissive Inferences

CALJIC Nos. 2.03 and 2.06 contain permissive inferences;[113] that is, they each permit the jury to infer one fact (an elemental fact) -- appellant's consciousness of guilt -- from other facts (basic facts) -- false statements and attempts to suppress evidence. When the prosecution proves the basic fact contained in the permissive inference, the jury is permitted, but not required, to infer the elemental fact. (*County Court of Ulster County, New York* v. *Allen* (1979) 442 U.S. 140, 157.) The United States Supreme Court has held that a permissive inference instruction is constitutional only if the connection between the facts found by the jury from the evidence and the facts inferred pursuant to the instruction is rational. (*Id.*; see also *United States* v. *Gainey* (1965) 380 U.S. 63, 66-67.) Further, the connection must more likely than not follow from the proved fact to the presumed fact. (*Leary* v. *United States* (1969) 395 U.S. 6, 36.) Also, this Court has recognized that the Due Process Clause of the Fourteenth Amendment requires that inferences "be based on a rational connection between the fact proved and the fact to be inferred." (*People* v. *Castro* (1985) 38 Cal.3d 301, 313.)

Because the instructional conference in the instant case occurred off the record, it is impossible to know for certain which evidence the consciousness of guilt instructions supposedly concerned. The record does show that the prosecution requested these instructions, but it is silent about what, if any, objections were made by defense counsel to them. (CT 783-

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113. As the United States Supreme Court noted in *Francis v. Franklin, supra*, 471 U.S. at p. 314: "A permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that inference." This definition concerns the proper form of permissive inferences. In this case, the conscious-of-guilt instructions created improper permissive inferences.

784.) It would appear that the prosecutor requested CALJIC No. 2.03 in regard to alleged misstatements by the defendants because she made the following remarks during her closing argument to the jury:

> . . . the consciousness of guilt that was exhibited by both defendants. By consciousness of guilt I'm talking about the lies to Pam Loop, Denise Novotny about getting out of town. The lies to Officer Wightman.

(RT 7583.) [114/]

The problem with these allegedly false statements by appellant and his co-defendant is that none of them concerned the crimes charged against them. Even assuming that they were lies, as argued by the prosecutor, the statements were about matters collateral to the murder of Ivon Pontbriant. That is, the so-called misstatements related to why appellant and Letner needed a ride to the bus station and where they were going when Wightman stopped them in Ms. Pontbriant's car. Accordingly, these "facts" did not provide the basis for a logical and rational inference that appellant and Letner had killed Ms. Pontbriant.

The instructions were also misleading, especially in light of the prosecutor's argument, in that they failed to specify that the concept of consciousness of guilt must be considered as to each defendant individually. By lumping the defendants together, the prosecutor's argument invited the jury to use the instructions to find consciousness of guilt on the part of appellant based not on his own statements but instead on those of Letner. Indeed, it was not even clearly established that appellant was the person accompanying Letner when Letner made the allegedly incriminating statements to Denise Novotny. (RT 6251.) This created a likelihood for unjust convictions for appellant.

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114. However, the record does not show to what evidence, if any, CALJIC No. 2.06 supposedly referred.

Another reason why the consciousness of guilt instructions are problematical is that they do not limit the jury's use of evidence to a single permissible inference but instead advise the jurors that they can attach whatever weight and significance to the evidence that they choose. The evidence cited by the prosecutor in her argument, as quoted above, refers to conduct by appellant and/or Letner after the murder. Such evidence is not, however, relevant to a defendant's state of mind prior to or during the killing. In *People* v. *Anderson* (1968) 70 Cal.2d 15, this Court observed that statements made by the defendant to cover up the crime "may possibly bear on defendant's state of mind *after* the killing, it is irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing." (*Id.* at p. 32.)

Similarly, these instructions do not either specifically mention the defendant's mental state nor specifically exclude it from the inferences which supposedly can be drawn from any misleading statements or suppression of evidence by the defendants. Indeed, the instructions suggest that the scope of permissible inferences is very broad because the jurors are told that they can determine what weight and significance they wish to give the evidence.

The disputed instructions are also constitutionally infirm because they permit the jury to infer from any misstatements allegedly made by appellant that he is guilty of all the offenses with which he has been charged.[115/] Because these instructions permitted the jury to draw irrational

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115. Indeed, the decision in *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, approved such sweeping inferences. The Court held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140; emphasis in the original.) Appellant requests the Court to reconsider its endorsement of such a far reaching use of consciousness of guilt evidence.

and sweeping inferences of guilt against appellant, their use violated the standards for acceptable permissive inference instructions set forth by the U.S. Supreme Court in *County Court of Ulster County v. Allen, supra.* Accordingly, the use of the instructions undermined the reasonable doubt requirement and denied appellant a fair trial and due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15.) The instructions also deprived him of his right to a properly instructed jury in violation of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and article I, section 16, of the California Constitution.

B. <u>These Instructions Were Impermissibly Argumentative</u>

This Court has held that argumentative instructions are impermissible. (*People* v. *Sanders* (1995) 11 Cal.4th 475, 560.) The reason for this prohibition is that such instructions present the jury with a partisan argument disguised as a neutral statement of the law. (*People* v. *Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Argumentative instructions also tend to unfairly single out facts favorable to one party while also suggesting to the jury that special consideration should be given to those facts. (*Estate of Martin* (1950) 170 Cal. 657, 672.)

This Court has defined argumentative instructions as those which "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Instructions which ask the jury to consider the impact of specific evidence or imply a conclusion to be drawn from the evidence are argumentative and should be refused. (*People* v. *Daniels* (1991) 52 Cal.3d 815, 870-871; *People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9.)

Under these standards, CALJIC Nos. 2.03 and 2.06 are argumentative. It is useful to compare the syntax of 2.03 and 2.06 with the

argumentative instruction analyzed in *People* v. *Mincey*, *supra*. In *Mincey*, the disputed instruction read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.)

All three instructions state that "[i]f you find" certain facts, then "you may" consider the evidence for a specific purpose. Since the instruction in *Mincey* was found to be argumentative, so should CALJIC Nos. 2.03 and 2.06.

Appellant is mindful that this Court has previously rejected the claim that these instructions (CALJIC Nos. 2.03 and 2.06) are impermissibly argumentative; however, he respectfully requests the Court to reconsider the issue. In *People* v. *Bacigalupo, supra*, 1 Cal.4th at p. 128, the Court found that CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence." This conclusion, however, is puzzling since it does not differ significantly from the Court's description of an impermissible argumentative instruction as one which "improperly implies certain conclusions from specified evidence." (*People* v. *Wright*, *supra*, 45 Cal.3d at p. 1137.)

In *People* v. *Kelly* (1992) 1 Cal.4th 495, 532, the Court gave the following reason why consciousness of guilt instructions are permissible:

> If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence.

This reasoning does not appear to take into consideration the fact that the jury is told, via other instructions, to consider all the evidence. (CALJIC Nos. 1.00 and 2.90.) It is not necessary, therefore, to expressly invite the

jury to consider certain evidence for the specific purpose of inferring consciousness of guilt.

Moreover, the analysis in the *Kelly* opinion, *supra,* fails to explain why a trial judge should be permitted to single out evidence favorable to the prosecution and invite the jury to consider that evidence as showing consciousness of guilt. The fact that these instructions also advised the jurors that the weight and significance of the so-called consciousness of guilt evidence are matters for their determination does not mitigate the fact that the trial court is singling out evidence which is favorable only to the prosecution.

Not only did the consciousness of guilt instructions focus the attention of the jury on evidence favorable to the prosecution and lightened the prosecution's burden of proof, they placed the trial judge's imprimatur on the prosecution's evidence. In so doing, these instructions violated the defendant's right to a fair trial as guaranteed by due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15); his right to have his guilt found beyond a reasonable doubt by an impartial and properly instructed jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16); and his right to a fair and reliable adjudication of the death penalty (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17).

Because these instructions violated federal constitutional guarantees, the appellant's conviction and judgment of death must be reversed unless the prosecution can show, beyond a reasonable doubt, that the error was harmless. That is, the State must show that the erroneous instructions did not contribute in any way to appellant's convictions for murder and other crimes. (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1290, citing *Chapman* v. *California, supra*, 386 U.S. at p. 24.) Given the paucity of evidence supposedly establishing appellant's guilt, the prosecutor's

argument which focused on these instructions, the lack of any reliable evidence which shed light on the appellant's state of mind, and the manner in which the instructions lumped the defendants together, the prosecution cannot meet this burden. Accordingly, the error was not harmless, and appellant's convictions and death sentence must be reversed.

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XVIII.

THE USE OF CALJIC NO. 2.15 VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BECAUSE IT CREATED AN IRRATIONAL INFERENCE AND REMOVED AN ELEMENT OF THE CRIME FROM THE JURY'S CONSIDERATION

In this case, the prosecution charged appellant with the crime of robbery; it also alleged that he committed a special circumstance murder based on robbery. At the conclusion of the guilt phase, the trial judge instructed the jury according to CALJIC No. 2.15, which reads as follows:

> If you find that a defendant was in conscious possession of recently [stolen] property, the fact of such possession is not by itself sufficient permit an inference that the defendant is guilty of the crime of robbery. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. As corroboration, you may consider the attributes of possession: time, place and manner, that the defendant had an opportunity to commit the crime charged; the defendant's conduct, his false or contradictory statements, if any, and or other statements he may have made with reference to the property. A false account of how he acquired possession of the property, and any other evidence which tends to connect the defendant with the crime charged.

(CT 791; RT 7475.)

In this case, it is undisputed that sometime close to midnight on March 1, 1988, police officer Allyn Wightman stopped a red Ford Fairmont belonging to the victim, Ivon Pontbriant. Richard Letner was driving the vehicle, and appellant was sitting in the front passenger seat.

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Although CALJIC No. 2.15, quoted *supra*, begins with a negative, i.e., "conscious possession"[116] is not "by itself sufficient to permit an inference that defendant committed the crime of robbery," the instruction, in fact, sets forth a positive formula for conviction based upon a permissive presumption or inference that the jury may draw from a defendant's conscious possession of recently stolen property with "slight corroboration." (*People* v. *Anderson* (1989) 210 Cal.App.3d 414, 427-428, fn. 7.)

In the absence of undisputed evidence establishing that a robbery occurred, it is irrational to infer from the fact that appellant was a passenger in Ms. Pontbriant's car and thus arguably in possession of stolen property, that a robbery rather than a theft had occurred. Possession, under the circumstances of this case, does not afford a rational basis from which the jury could infer the manner in which the property was taken. The only rational inference of prior criminal activity that may be drawn from the conscious possession of recently stolen property by the accused is simply that the accused stole that property.

The inference that the defendant was a thief because he was a passenger in a possibly recently stolen automobile is based solely upon the temporal proximity of his possession to the property's theft. The temporal proximity of the possession to the theft, however, does not prove the manner in which the property was taken. As the United States Court of

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116. The reference to "conscious possession" in CALJIC No. 2.15 is ambiguous. It appears to refer to a situation where the possessor of the stolen property knows it is stolen; however, it also simply could mean that the possessor is conscious of the possession. In the instant case, appellant testified that he did not know the car was stolen. He believed that Ms. Pontbriant had loaned the car to Richard Letner. (RT 6861-6862.)

Appeals for the 11th Circuit noted in *Cosby* v. *Jones* (11th Cir. 1982) 682 F.2d 1373:

> Where the charge is robbery or burglary . . . and . . . knowledge of the stolen quality of goods possessed is not sufficient to convict, and much more caution in the application of the inference is warranted.

(*Id.* at p. 1381, fn. 16.)

Thus, conscious possession of recently stolen property, in and of itself, says nothing about whether the property was taken by force or fear, whether it was taken from the person, a residence, or a business, or whether the property was taken after entry into a building with concurrent intent to commit a theft.

Justice Cardozo observed in *People* v. *Galbo* (1960) 218 N.Y. 283, 112 N.E. 1041 that it was irrational to infer that because the defendant had been involved in the concealment of a dead body shortly after the murder took place, that he must be guilty of murder. The act of concealment, according to Cardozo, did not prove the circumstances of the victim's death:

> The People say that these acts of possession and concealment stamp the defendant as the murderer. They do, we think beyond question justify the inference that in some way and at some stage she became connected with this crime. But the question remains: In what way and at what stage? Only half the problem has been solved when guilty possession fixes the identity of the offender. There remains the question of the nature of the offense; is the guilty possessor the thief or is he a receiver of stolen goods?

(*Id.* at p. 1043.)[117/]

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117. In *Wells* v. *People* (Colo. 1975) 592 P.2d 1321, the Colorado Supreme Court found that an instruction allowing a jury to infer theft from possession of recently stolen property could not allow the jury also to infer the circumstances under which the property was stolen. Such evidence

(continued...)

A. Instructing the Jury in This Case According to CALJIC No. 2.15 Violated the Due Process Clauses of the Fifth and Fourteenth Amendments, the Right to a Fair Trial Under the Sixth Amendment, and the Right to Reliable Guilt and Penalty Determinations Under the Eighth Amendment

At a minimum, in order to pass constitutional muster, there must be at least a rational connection between a proven fact and a presumed fact. (*Ulster County Court* v. *Allen, supra*, 442 U.S. at p. 157.) In the *Ulster County* decision, the United States Supreme Court held that a statutorily created inference violated the Due Process Clause of the Fourteenth Amendment when the conclusion the jury was asked to infer had no rational relationship to the proven fact. Further, in *Leary* v. *United States* (1969) 395 U.S. 6, the Court noted that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (*Id.* at p. 36.) *Leary* was a drug case involving the presumption that the possessor of marijuana would know that the marijuana was imported. The United States Supreme Court found that this presumption did not pass the "more likely or not standard." (*Ibid.*)

The use of CALJIC No. 2.15 in this case also violated the right to trial by jury as guaranteed by the Sixth Amendment of the United States Constitution. In a criminal prosecution where the fact to be inferred may be used as proof of one of the elements of the crime, the prosecution must meet the reasonable doubt standard. The improper presumption at issue in this case withdrew an element from the jury's consideration by shifting the

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117. (...continued)
cannot substitute for proof of the corpus delicti of the crime, and the State had failed to prove beyond a reasonable doubt that an aggravated robbery, in fact, had occurred in that case.

burden of proof of an element of the crime to the defendant. An instruction which leads the jury to assume that facts have been proven, when in actuality they are in dispute, unconstitutionally withdraws the issue from the jury's consideration. (See, e.g., *United States* v. *Desoto* (10th Cir. 1991) 950 F.2d 626, 632.) Such an arbitrary determination also violates the Eighth Amendment requirement of reliability.

In *People* v. *Morris, supra*, 46 Cal.3d at p. 40, this Court noted that CALJIC No. 2.15 should be given only if there is not any dispute as to the following: (1) that the defendant actually had possession of the property in question; (2) that the property was indeed stolen; and, (3) that the crime of which the defendant is charged (in this case, robbery and a special circumstance of robbery felony murder) actually occurred. In the instant case, the question of whether a robbery actually occurred was very much in dispute. By instructing the jury that if they found that the defendants had possession of recently stolen property, only slight corroboration was necessary to find either or both of the defendants guilty of robbery, the trial judge in effect instructed the jury to presume that a robbery had been committed. This presumption left for the jurors only one question: whether or not appellant and/or his codefendant were the person or persons who committed the robbery.

Further, the instruction told the jurors that they could consider any evidence "tending to connect" the defendant or defendants with the robbery, per "the crime charged," as evidence that one or both of them committed a robbery. In short, this instruction directed the jurors that if they found that the appellant or his codefendant consciously possessed recently stolen property (that is, the victim's automobile), slight additional evidence connecting them to the crime would suffice to prove that they were guilty of

robbery. Such slight evidence included facts that was no more probative of robbery than it was of theft.

Although the trial judge delivered the standard robbery instructions at appellant's trial, the jury instructions must be considered as a whole and in the context of companion instructions. (*Estelle* v. *McGuire* (1991) 502 U.S. 52, 74-75.) Because the jury in appellant's case heard the CALJIC No. 2.15 instruction in addition to the robbery instructions, there is a "reasonable likelihood" that the jurors understood CALJIC No. 2.15 to mean that the only issue for them to decide was whether or not appellant and/or his codefendant were the persons who committed a robbery in the case, not whether or not a robbery had actually occurred.

When taken together, these instructions told the jury that even though generally the prosecution must prove a taking from a person with force or fear in order to prove robbery, under the facts of this case, possession of recently stolen property plus "slight corroboration," sufficed to prove a robbery had occurred. As the Supreme Court observed in *Francis* v. *Franklin* (1986) 471 U.S. 307, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Id.* at p. 332.) The instructional error here therefore effectively eliminated from the jurors' consideration an essential element of both the robbery charge and the robbery felony murder special circumstance allegation, thus impermissibly lightening the prosecution's burden of proof in violation of the Sixth, Eighth, and Fourteenth Amendments.

B. <u>The Instructional Error Requires Reversal</u>

Under the appropriate harmless error analysis, reversal is required. The circumstantial evidence presented by the prosecutor to prove robbery was weak. And the slim evidence presented was a matter of major dispute.

The defense contended that appellant and Letner were invited into Ms. Pontbriant's home not to burglarize and rob her but to drink. A great deal of property that normally would have been taken in a robbery was left undisturbed in the home. The evidence of the taking of money from the victim was inconsistent and uncertain. That left only the vehicle which the defense contended was borrowed with permission from the owner. Under these circumstances, the instruction was therefore critical to the prosecution meeting its burden of proof because it allowed the jury to find appellant committed robbery by merely finding him in possession of stolen property, without focusing on the critical element of a robbery -- a taking by force or fear. It is likely that the improper instruction was misapplied so as to lessen the prosecution's burden on this charge. Such an error cannot be considered harmless. This error also affected the penalty phase because the robbery special circumstance finding was reached improperly because of the faulty instruction which skewed the death penalty determination.

For all of the foregoing reasons, the Court should reverse appellant's conviction for robbery, the robbery special circumstance finding, and appellant's sentence of death.

* * * * *

XIX.

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE TRIAL JUDGE INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.50

The prosecution requested that the trial judge instruct the jury at the guilt phase of appellant's trial pursuant to CALJIC No. 2.50. (CT 912-913.) The following version of the instruction was read to the jury:

> Evidence has been introduced showing that the defendant committed a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that defendant is a person of bad character or that he or she had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: a motive for flight, for crime – correction. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show, one, motive for flight, or two, to facilitate flight from the crime. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner in which you do all the other evidence in the case. You are not permitted to consider such evidence for any other purpose. Motive is not an element of the crime charged, and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(RT 7479-7480.)

Because, as noted previously, the instructional conference was not put on the record, it is impossible to know whether appellant's trial counsel objected to the giving of this instruction. It is also unclear from the language quoted above to what evidence the instruction refers. On the one hand, there was evidence presented regarding some commercial burglaries that Richard Letner was involved in before the murder of Ivon Pontbriant.

On the other hand, the prosecution also presented the testimony of Jeannette Mayberry about a physical confrontation between appellant and her a couple of days before Ms. Pontbriant's killing. Since Ms. Mayberry described an assault on her and the destruction of some of her property, it is conceivable that the jury would have treated this testimony as evidence of other crimes, as referred to in the above quoted instruction.

Therefore, a major problem presented by this instruction was its failure to clarify the evidence to which it refers. When a trial court gives an instruction "specifically calling attention to the significance of this substantial and prejudicial evidence of prior bad acts, it should do so accurately." (*People* v. *Nottingham* (1985) 172 Cal.App.3d 485, 497; *People* v. *Key* (1984) 153 Cal.App.3d 888, 899.) This problem was exacerbated by the prosecutor's closing argument to the jury at the guilt phase. First, she mentioned the burglaries as a motivation for Richard Letner to want to leave town. The prosecutor also argued that appellant had reason to want to leave Visalia because of his argument with Ms. Mayberry. By failing to direct the jury to consider this instruction individually as to each defendant, there is a reasonable likelihood that the jury improperly used conduct by Letner as a basis for finding motive on the part of appellant as well. This is especially likely here because of the prosecution's repeated theme that the defendants were operating in tandem and the prosecutor's tendency to fail to distinguish between the conduct of the two defendants.

A. CALJIC No. 2.50 Involved a Permissive Inference Which Violated Appellant's Due Process Rights

CALJIC No. 2.50 permits a jury to draw an inference of guilt from evidence of "other crimes" and therefore creates a "permissive inference." (*People* v. *Ashmus* (1991) 54 Cal.3d 932, 976; *People* v. *Rankin* (1992) 9 Cal.App.4th 430, 436.) As noted in previous arguments in this brief, a permissive inference is one which suggest to the jury a possible conclusion

to be drawn if the state proved predicate facts but does not require the jury to draw that conclusion. (*Francis* v. *Franklin, supra*, 471 U.S. at p. 314.) While there is a possibility the jury may not draw the permissive inference suggested by an instruction, such instructions nevertheless violate the right of a criminal defendant to due process of law if "there is no rational way the trier could make the connection permitted by the inference." (*Ulster County* v. *Allen, supra*, 442 U.S. at p. 156.) The existence of a permissive inference is improper in this situation because there is a substantial risk "that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous determination." (*Ibid.*) Therefore, any instruction containing a permissive inference is consistent with due process only if the inference is "one that reason and common sense justify in light of the proven facts before the jury." (*Francis* v. *Franklin, supra,* 471 U.S. at p. 315.)

The determination of whether the defendant's right to due process of law has been violated by a jury instruction which creates a permissive inference depends upon how a reasonable juror could have interpreted the instruction. (*Sandstrom* v. *Montana, supra*, 442 U.S. at p. 514.) Reversal is required if there is "a reasonable likelihood that the jury applied the instruction in a way that violated a constitutional right." (*Masoner* v. *Thurman* (9th Cir. 1993) 996 F.2d 1003, 1006.) Moreover, the reviewing court must analyze the challenged instruction in the context of the instructions as a whole. (*Ibid.*) The constitutionality of a permissive inference instruction must be tested on a case-by-case basis in view of the specific facts before the jury. (*Ibid.*)

To the extent to which the version of CALJIC No. 2.50 which was given in this case referred to appellant's conduct during his arguments with Ms. Mayberry, this evidence of "crimes" could not lawfully provide the

basis for an inference of motive, intent, or identity with respect to any of the crimes of which appellant was charged in the instant case.

Other crimes evidence is "inherently prejudicial." (*People* v. *Alcala* (1984) 36 Cal.3d 604, 631.) Therefore, the relevancy of other crimes evidence must be "examined with care" and received with "extreme caution," and all doubts about its connection to the crimes charged must be resolved in the defendant's favor. (*Ibid.*; *People* v. *Sam* (1969) 71 Cal.2d 194, 203.) Evidence Code section 1101, subdivision (b), allows prior crimes evidence when relevant to prove such things as motive, intent, or knowledge; however, this type of evidence is prohibited if it is offered only to prove the defendant's criminal disposition. (*People* v. *Hayes* (1990) 52 Cal.3d 577, 616.) Moreover, for evidence of prior uncharged misconduct to be admissible it must share similarity with the charged offense. (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 402-403.) To prove intent, the least degree of similarity between the uncharged act and the charged offense is required. To prove identity, the uncharged misconduct and the charged offense must show distinctive common features. (*Ibid.*)

In this case, the identity of the murderer or murderers of Ms. Pontbriant was in dispute. However, under the *Ewoldt* standard, evidence regarding the uncharged misconduct – that appellant had assaulted Ms. Mayberry and broken windows in her apartment and car during an argument – was not sufficiently similar to the crimes charged to support an inference that the same person committed all the acts. Therefore, the misconduct evidence here could not have passed the hurdles of the *Ewoldt* analysis. As noted previously, uncharged misconduct evidence is inherently prejudicial and cannot be admitted unless it has substantial probative value. Therefore, the evidence which supposedly provided the basis for the CALJIC No. 2.50 instruction would not have been admissible if offered

with respect to any of the elements which the instruction permitted it to be used. Further, the inference which the instruction permitted the jury to make was not logical nor was it permissible under California law. Thus, the instruction violated appellant's Fourteenth Amendment rights to due process.

A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt. (*United States* v. *Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 296, fn.3.) Moreover, an error is harmless beyond a reasonable doubt only when "there is no reasonable possibility that the error materially affected the verdict." (*Ibid.*) Here there is more than a reasonable possibility that the jury misapplied the instruction; therefore, it adversely affected the verdicts against appellant. The jury failed to receive adequate guidance to consider this instruction individually as to each defendant. Based on this instruction and the prosecutor's argument treating both defendants as also working in tandem, it is likely that the jury attributed to appellant (to find motive) Letner's conduct in the commercial burglaries. Given the equivocal nature of the evidence against appellant, it cannot be said that this error was harmless. Accordingly, appellant's convictions and death sentence must be reversed.

* * * * *

XXI.

THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under then CALJIC 2.51:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(RT 7480.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to require appellant to show an absence of a motive to establish innocence. The instruction therefore violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

A. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone

CALJIC 2.51 states that motive may tend to establish the defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient as to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307.) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 [motive alone insufficient to prove larceny].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury in this case. (CALJIC No. 2.00, *et seq.*) Notably, the other instruction that covered an individual circumstance

included an admonition that it was insufficient to establish guilt. (See RT 7472 [CALJIC No. 2.06 (Efforts To Suppress Evidence): "However, this conduct is not sufficient by itself to prove guilt . . . ."].)

Because CALJIC No. 2.51 is startlingly anomalous in this context, it prejudiced appellant during deliberations. The instruction would appear to include an intentional omission allowing the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.)[deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law and a fair trial by jury. (U.S. Const., 5th, 6th and 14th Amends.) The

instruction also rendered the resulting verdict unreliable in violation of the Eighth Amendment.

B. The Instruction Shifted the Burden of Proof to Imply That Appellant had to Prove Innocence

CALJIC 2.51 stated that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show a motive other than the attempted rape, robbery and burglary alleged in both the felony murder and special circumstance charges. The instruction confirmed that the jury could establish or defeat the charges through the presence or absence of motive. This was particularly prejudicial in this case where the evidence connecting appellant with the crimes was weak. The prosecutor's closing arguments to the jury focused on the alleged motives of appellant and codefendant Letner (RT 7544-7545, 7570, 7584-7585, 7592-7596, 7616-7618, 7779-7785), making it highly probable that the jury improperly applied this instruction to find appellant guilty. Also as noted above, CALJIC 2.50 created false motive.

C. Reversal is Required

As discussed above, the trial court's error implicated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. As used in this case, CALJIC 2.51 also deprived appellant of his constitutional rights to due process and fundamental fairness. (*In re Winship, supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution submitting the full measure of proof. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) For reasons discussed above, the error is not harmless beyond a reasonable doubt. Reversal is required.

XXII.

THE TRIAL JUDGE ERRED IN GIVING INSTRUCTIONS WHICH DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Pursuant to CALJIC No. 2.90, the trial judge in this case instructed the jury that the two defendants, appellant Christopher Tobin and Richard Letner, were ". . . presumed innocent until the contrary is proved . . ." and that "[t]his presumption places upon the People the burden of proving [each of the defendants] guilty beyond a reasonable doubt." (CT 814.) The instruction defined reasonable doubt as:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 814.)

Although the terms "moral evidence" and "moral certainty" are not commonly understood terms, the United States Supreme Court has found an identical reasonable doubt instruction to be constitutional. (*Victor v. Nebraska* (1994) 511 U.S. 1.) Because in the instant case the trial court gave other instructions with provisions that undercut the reasonable doubt instruction, it is reasonably likely that the jury convicted appellant based on evidence that did not prove him guilty beyond a reasonable doubt. This lessening of the prosecution's burden violated appellant's right to due process of law. (In re Winship, supra, 397 U.S. 358; See also *Apprendi v. New Jersey, supra,* 530 U.S. at p. 477.)

In addition to the instruction, quoted *supra*, the jury in this case received four other instructions discussing the standard of proof beyond a reasonable doubt, circumstantial evidence and proof of specific intent

and/or mental state. These four instructions included: CALJIC No. 2.01, sufficiency of circumstantial evidence generally – guilt of crimes (CT 780-781); CALJIC No. 2.02, sufficiency of circumstantial evidence to prove specific intent or mental states of crimes charged (CT 782-783); CALJIC No. 8.83, sufficiency of circumstantial evidence generally--special circumstances (CT 887-888); and CALJIC No. 8.83.1, sufficiency of circumstantial evidence regarding mental state for special circumstances (CT 879-880).

Each of these instructions, while directed at different evidentiary points, stated that if one interpretation of the evidence "appears to you to be reasonable, you must accept the reasonable interpretation and reject the unreasonable." (CT 780, 782, 879, 887.) Because this language contradicted the requirement that the jury convict appellant *only if* the prosecution proved his guilt beyond a reasonable doubt, it violated his federal constitutional due process rights. (*In re Winship, supra; Jackson v. Virginia, supra*, 443 U.S. 307.)

These instructions suggested to the jurors that they could find appellant guilty if he reasonably appeared guilty. In effect, the four instructions appeared to direct the jury to draw an inference of guilt so long as such inference appeared "reasonable." Indeed, these instructions told the jurors that they "must accept" such an interpretation, thus creating a mandatory, conclusive presumption of guilt in violation of due process. (*Sandstrom v. Montana, supra*, 442 U.S. 510.) It is also inconsistent with the requirement that guilt must be proved beyond a reasonable doubt. (*Cage v. Louisiana* (1990) 498 U.S. 39.)

Other aspects of these instructions also served to mislead the jury. For example, CALJIC No. 2.01 states in relevant part: "if the circumstantial evidence is susceptible of two reasonable interpretations, one of which

points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt." (RT 7470.) This instruction undercuts the prosecution's burden of proof because it suggests that the defendant is required to put forth a theory of innocence in order to be entitled to an acquittal.

In this case, it is possible that a juror could conclude that the only "reasonable" inference from the evidence was one that tended to incriminate the appellant, but that such evidence was insufficient to prove him guilty beyond a reasonable doubt. However, the instruction quoted above (CALJIC No. 2.01) would have the effect of reversing the burden of proof since it required the jury to find appellant guilty unless appellant came forward with evidence explaining the incriminatory evidence offered by the prosecutor.

The above-cited instructions also tended to mislead the jurors by telling them that it was their duty to determine whether appellant was guilty or innocent rather than to determine whether the evidence proved that appellant was either guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 instructed that pity or prejudice for or against the defendant and the fact that he had been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that *he is more likely to be guilty than innocent.*" (CT 774; RT 7466; emphasis added.)

Another instruction, CALJIC No. 2.51, not cited above but given during the guilt phase of appellant's trial (CT 802), also framed the jury's choice in terms of guilt or innocence. It informed the jury that although motive is not an element of the crimes charged, the presence of motive

"may tend to establish *guilt*," while the absence of motive, "may tend to establish *innocence*." (CT 802; RT 7480, emphasis added.)

These instructions lightened the prosecutor's burden of proof because the issue is not guilt or innocence but whether the State has met its burden to prove appellant's guilt beyond a reasonable doubt. The instructions improperly encouraged the jurors to find appellant guilty because he had failed to prove his innocence.

Another instruction, CALJIC No. 2.21.2, given at appellant's trial also tended to lessen the prosecution's burden of proof. The instruction states that a witness "who is willfully false in one material part of his or her testimony, is to be distrusted in others" and that the jury could "reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (CT 794; RT 7477.) This instruction lessened the prosecution's burden of proof by encouraging the jury to assess the credibility of prosecution witnesses, such as Earl Bothwell and Warren Gilliland, by seeking only a probability of truth in their testimony. (Cf. *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1044-1045 [where the Court of Appeal found this instruction problematic but harmless].)

Another instruction regarding the assessment of evidence, CALJIC No. 2.22, informed jurors that they should determine which side had presented evidence which was comparatively more convincing than that presented by the other side. The instruction states:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim

> or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence.

(CT 796; RT 7477-7478.)

It, thus, directed the jury to determine each factual issue by deciding which witnesses and other evidence were more credible or more convincing than the other. With its reference to "not in the relative number of witnesses, but in the convincing force of the evidence," the instruction appears to replace the standard of proof beyond a reasonable doubt with something more akin to the preponderance of evidence standard.

By instructing that any fact necessary to prove an element of an offense[118] could be proven by evidence that a juror finds to have somewhat greater "convincing force," this instruction seemed to undermine the beyond a reasonable doubt standard. (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 276.) This instruction violated the mandate of *In re Winship, supra.* which requires that the prosecution must prove each specific fact necessary to making the prosecution's case.

When viewed with the other instructions discussed *supra,* CALJIC No. 2.22 vitiated the reasonable doubt instruction as well as diminished the prosecution's burden of proof. The trial judge, in essence, instructed the jury that the fundamental question was "guilt" versus "innocence" and that it was up to them to determine how to weigh the evidence bearing on that question.

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118. In *In re Winship, supra,* the Court wrote: "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*Id.,* 397 U.S. at p. 354.)

The constitutionally deficient instructions given defining proof beyond a reasonable doubt require the reversal of appellant's convictions and judgment of death. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278.) Each of the instructions discussed above in itself tended to diminish the requirement that the prosecution prove each fact necessary to prove each element of each crime charged "beyond a reasonable doubt." When taken together, it is reasonably likely that the instructions misled the jurors regarding the beyond a reasonable doubt requirement. These instructions violated the following provisions of the U.S. Constitution: the Due Process Clauses of the Fifth and Fourteenth Amendments; the jury trial guarantees of the Sixth Amendment; and the heightened reliability requirement of the Eighth Amendment in death penalty cases.

For these reasons, appellant's convictions and death sentence must be reversed.

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XXIII.

THE TRIAL JUDGE FAILED TO MEET HIS SUA SPONTE DUTY TO INCLUDE CALJIC NO. 2.71.5 AMONG THE INSTRUCTIONS TO APPELLANT'S JURY

As noted in Argument XXXIII, *infra*, the trial judge offered to instruct the jurors about the requirements of the rules governing adoptive admissions:

> As to whether it [Letner's statement to Officer Wightman that he was taking appellant home] should come in against the defendant Tobin or not, I will be glad–I think it is rather a question of fact, and I will be glad to instruct the jury as to when somebody can be deemed to adopt or not adopt an admission like that if you want one.

(RT 6128.)

None of the attorneys responded to this offer. However, California case law requires that the CALJIC instruction on adoptive admissions (No. 2.71.5) must be given sua sponte where there is evidence of an adoptive admission. (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 381.)

Argument XXXIII, *infra*, explains how the prosecutor treated the statement by Letner to Officer Wightman as an adoptive admission. She used it in her cross-examination of appellant (RT 7010-7012), and she argued inconsistencies between what Officer Wightman testified Letner had said and appellant's testimony about the conversation between Wightman and Letner. (RT 7571-7573.) The prosecutor relied upon this alleged adoptive admission to challenge the credibility of appellant.

In *People v. Atwood* (1963) 223 Cal.App.2d 316, the court of appeal found that CALJIC 2.71.5 contains "general principles of law governing the case" because it includes "principles of law commonly or closely and openly connected with the facts of the case before the court." (*Id.* at p. 332.) As such, they were necessary and vital to a proper consideration of the

evidence before the jury. (*People v. Vindiola*, *supra,* 96 Cal.App.3d at p. 382.) When a prosecutor relies upon an adoptive admission to attack the credibility of a testifying defendant, it is essential that the jury be properly instructed. As the court observed in *Vindiola*, *supra*, "[w]ithout the instruction the jury was left entirely without guidance and was not permitted to entirely disregard the statements." (*Id.* at p. 382.) Because the adoptive admissions in the *Vindiola* case involved the crucial issue of identity of the perpetrator, the court of appeal found the failure of the court sua sponte to instruct the jury regarding adoptive admissions required reversal of the judgment.

In this case, the failure of the trial judge to give the requisite instruction left the jury without proper guidance in assessing the supposed adoptive admission. This error allowed the prosecutor to treat Letner's statement to Officer Wightman as an adoptive admission by appellant and argue that appellant's failure to "correct" Letner's claim that he was taking appellant home showed that appellant was a liar. This attack on appellant's credibility resulted in substantial prejudice because appellant's testimony was critical to his defense. This error, constituted an arbitrary deprivation of a liberty interest (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), resulting in an arbitrary and fundamentally unfair application of the evidence, deprived appellant of his federal constitutional rights to a fair trial under the Sixth Amendment, to reliable guilt and penalty determinations under the Eighth Amendment and to due process under the Fourteenth Amendment. For this reason, reversal of appellant's conviction and sentence of death is required.

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XXIV.

THE FAILURE OF THE TRIAL JUDGE TO GIVE ADEQUATE JURY INSTRUCTIONS REGARDING THE SPECIAL CIRCUMSTANCES REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A central precept of the death penalty jurisprudence of the United States Supreme Court is that capital punishment must be reserved for the few murderers truly deserving of execution. (See, e.g., *Furman* v. *Georgia* (1992) 408 U.S. 238, 313.) Accordingly, the Court has required that any state with a death penalty statute must institute guidelines which "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to the others found guilty of murder." (*Zant v. Stephens supra*, 462 U.S. at p. 877.)

Further, the Court has required that the death penalty be applied only to the most culpable individuals. (*Enmund v. Florida* (1982) 458 U.S. 782, 798.) In *Tison v. Arizona* (1987) 481 U.S. 137, the Court noted that "a critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." (*Id.* at p. 156.) Both *Enmund, supra*, and *Tison, supra*, involved defendants who had been found guilty of felony murder and sentenced to death. In *Tison, supra*, the Court held that the death penalty may not be imposed in a felony murder case unless the defendant was involved as a major participant in the underlying felony, and he or she showed reckless indifference to human life. (*Id.* at p. 158.)

A. Because the Principles of Tison and Enmund Apply to the Actual Killer, the Jury Should Have Been So Instructed

After this Court determined in *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1139, that there was no requirement that a defendant charged with the felony murder special circumstance have an intent to kill if he or she were

the actual killer, questions arose whether California's death penalty statute conformed with the requirements of *Tison*. Therefore, Proposition 115, passed in 1990, amended Penal Code section 190.2 in order to bring the law of this state into conformity with the holdings of *Tison*. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn.16.) Further, CALJIC No. 8.80.1 was devised to implement this new provision of section 190.2. CALJIC No. 8.80.1 states, in relevant part:

> If you find that a defendant was not the actual killer of a human being, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant with intent to kill [aided, abetted . . . or assisted] any actor in the commission of murder in the first degree or with *reckless indifference to human life* and as a *major participant*, [aided, abetted, . . . or assisted] in the commission of the crime of robbery [or attempted rape or burglary] which resulted in the death of a human being . . . . (Emphasis added.)

This CALJIC instruction did not exist at the time of appellant's trial; nonetheless, the mandates of *Enmund* and *Tison* did. Accordingly, in order to sentence appellant to death, in the absence of a finding that he were the actual killer, the jury must find both that appellant had been a major participant in the alleged felonies (in this case, attempted rape, robbery and burglary) and that he had shown a "reckless disregard" of the life of Ivon Pontbriant.

The record in the instant case shows that the jury instructions given in appellant's trial regarding the special circumstances did not meet these criteria. That is, the jurors were not instructed that they must find both major participation in the underlying felonies as well as a reckless disregard for life in order to find the special circumstances to be true. (RT 7522-7526.)

As discussed previously in this brief, there was much confusion in the prosecution of this case about whether appellant or his codefendant, Richard Letner, was the actual killer, or whether appellant or Letner was an aider and abettor. The prosecutor argued to the jury in her closing argument *both* that the evidence showed that the two defendants together killed Ms. Pontbriant or that one was the actual killer but that the other was an aider and abettor with the specific intent to kill. First, the deputy district attorney stated:

> It also, more important [sic], ladies, and gentlemen, I would submit, shows to you that there were two persons involved in this killing. Two persons.

(RT 7554.)

Later in the argument, she asserted:

> Now, I would submit in our case, in this case, we have evidence of both defendants directly committing a crime and helping each other aiding and abetting the crime. This is obviously, as you have seen, a somewhat lengthy crime that occurred there in her house. And for me to be able to identify to you which time which person did what thing is obviously not possible.

(RT 7582.)

It is clear from these statements by the prosecutor that the picture presented to the jury about who did the actual killing in this case was very problematic. Under these circumstances, it was critical that the jurors received clear instructions about what they had to find about the conduct of each defendant, in order to determine which, if any, of the three special circumstances alleged were true as to each defendant. As noted previously, however, the instructions regarding the special circumstances did not include this crucial information about the need to find specifically and beyond a reasonable doubt that the appellant was a major participant in the

underlying felonies and that his conduct showed a reckless disregard for human life.

Moreover, the prosecutor's argument to the jury regarding the special circumstances specifically undercut any hope that the jurors would understand that in order to find the appellant eligible to be sentenced to death they had to find that (1) the appellant was a major participant in the underlying felonies committed against Ivon Pontbriant, and (2) he acted with reckless disregard for the life of Ivon Pontbriant. Indeed, the prosecutor specifically told the jurors that they could find the special circumstances true even if the killing were accidental. She argued as follows:

> Under the felony murder rule we have both the robber who's got the gun that's killed the customer accidentally on the other side of the room, and the person in the get-away car guilty of first degree murder. Because they are both principals. And the killing has occurred during the certain dangerous felonies. Now, do the special circumstances, however, apply to both the robber in the bank and the person in the car? That's when you come down here and you have to look at the different mental states of the two. The law says because the person who dropped the gun, the bank robber dropped the gun, caused the killing, he's the actual killer. *It doesn't matter whether he still did not intend that person die. He's the actual killer. He dropped that gun in the commission of the bank robbery. And the gun went off and killed the customer. The special circumstances apply to him because he's the actual killer.*

(RT 7613-7614; emphasis added.)

These statements by the prosecutor misstate the law under *Tison*. That is, she argued that the jurors could find the felony murder special circumstances with which appellant were charged to be true so long as he were the actual killer without any finding that he possessed the minimal requisite mental state: reckless indifference to human life.

B. Moral Culpability is a Jury Question Under California Law

In *Francis* v. *Franklin, supra*, 471 U.S. at p. 313, the United States Supreme Court noted that a trial judge's failure to instruct the jury on every element of an offense violates a "bedrock, axiomatic and elementary constitutional principle." Similarly, in *Cabana* v. *Bullock* (1986) 474 U.S. 376, 384-385, the Court noted that a reviewing court cannot cure a trial judge's failure to instruct on every element of the crime simply by finding that the evidence was sufficient for purposes of establishing the defendant's guilt. (See also *Carpenters* v. *United States* (1947) 330 U.S. 395, where the Court found that the failure to submit an element of the crime charged to the jury required reversal regardless of the strength of the evidence.) The United States Supreme Court also observed in *McCormick v. United States* (1991) 500 U.S. 257 that:

> This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

(*Id.* at p. 270, fn. 8.)

While it is true that the U.S. Supreme Court has held that the Eighth Amendment does not require that the moral culpability finding discussed in *Tison* and *Enmund* be made by a jury,[119] there is a federal due process right to such a determination based on the statutory procedure required in California. Also, the continued vitality of *Cabana* on this issue is now open to question in light of the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466 that any fact that increases the penalty beyond the prescribed maximum penalty must be submitted to a jury and proved beyond a

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119. See, e.g., *Cabana v. Bullock, supra*, 474 U.S. at p. 386.

reasonable doubt. In *Ring v. Arizona* (2002) __ U.S. __, 122 S.Ct. 2428, the United States Supreme Court held that a judicial determination of the absence or presence of death eligibility factors for death penalty purposes violated the Sixth Amendment right to a jury trial. Under the rationales of *Apprendi* and *Ring*, the moral culpability finding required by *Tison* must also be made by a jury upon proof beyond a reasonable doubt.

But even if the failure to require this jury finding in appellant's case did not violate the Sixth Amendment, it violated his state-created liberty interest to such a jury finding under state law. Under Penal Code section 190.2, a jury must determine the truth or falsity of any special circumstance allegation. A state statutory scheme entitling capital defendants to jury findings on moral culpability eligibility (per *Tison*), in order to find for a death penalty creates a liberty interest protected by federal due process. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Toney v. Gammon* (8th Cir. 1996) 79 F.3d 693, 699.) An arbitrary disregard of that liberty interest constitutes a violation of due process. (*Id.*, at p. 700; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 672.)

Once a state, such as California, chooses to make the determination of eligibility for the death penalty issues dependent on a *Tison* finding, it cannot arbitrarily deny entitlement to such findings. (*Walker v. Deeds, supra,* 50 F.3d at p. 672.) Arbitrary elimination of the *Tison/Enmund* determination because the defendant is the actual killer violates federal due process guarantees. Because the instructions in this case failed to properly frame the *Tison/Enmund* issue, the jury in this case did not make the requisite finding of culpability. Accordingly, appellant's death sentence must be reversed.

C. The Standard for Assessing Prejudice

The cases discussed *supra* establish that in the instant case this Court should not engage in harmless error analysis in deciding whether appellant is entitled to a reversal based on the failure to properly instruct the jury regarding the elements of the special circumstances charged against him. However, if the Court is unpersuaded and believes that it is entitled to determine prejudice under a harmless error analysis, it should apply the standard set forth in *Chapman* v. *California, supra*, 385 U.S. at p. 24. *Chapman* requires the reversal of a conviction if an error deprives a defendant of a federal constitutional right unless the prosecution can demonstrate that the error was "harmless beyond a reasonable doubt." Under the *Chapman* standard, the burden clearly rests with the prosecution to prove harmlessness.

In the instant case, the lack of clarity in the jury instructions on these crucial issues was prejudicial because the evidence regarding the respective roles of the two defendants in the crimes was far from clear or persuasive. There were no eyewitnesses to the crime. While there was one witness, Earl Bothwell, who claimed that appellant had "confessed" to him that he had killed a woman in California, that evidence was highly suspect. Indeed, the fact that the prosecutor conceded in her closing argument to the jury that she could not say which of the defendants had actually killed Ms. Pontbriant is a measure of the prosecutor's own problems with Earl Bothwell's credibility. In fact, Bothwell's testimony concerning statements allegedly made by both Letner and appellant was not consistent. On the one hand, he claimed that Letner told him that both he and appellant were wanted for murder in California. On the other hand, Bothwell claimed that appellant told him that he had killed a woman in California.

The closing argument to the jury given by the deputy district attorney shows that she was trying to finesse the problems with the state's evidence

on the crucial question of which of the defendants actually killed Ms. Pontbriant and also on the issue of whether the non-killer had the necessary mens rea. Her claim that it really didn't matter which of the defendants was the actual killer or that perhaps they were both involved in the killing was an attempt to evade this issue. Also, she misstated the law on intent.

Moreover, the confusing nature of the jury instructions concerning the homicide made it more likely that any instructional error on the special circumstances was not harmless. That is, because the prosecution insisted on having the jury instructed not only on felony murder but on premeditated murder (as well as its lesser included offenses), it is impossible to know what the jury's verdicts as to each defendant meant for purposes of determining whom they believed was the actual killer. For these reasons, reversal of appellant's sentence of death is required.

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XXV.

THE TRIAL JUDGE ERRED IN FAILING TO GIVE, SUA SPONTE, AN ACCOMPLICE INSTRUCTION AT THE PENALTY PHASE OF APPELLANT'S TRIAL

This Court has found that, when the facts call for them, the jury instructions about accomplice testimony should be given at the penalty phase of a capital trial as well as the guilt phase. (See, e.g., *People v. Mincey* (1992) 2 Cal.4th 408, 460; *People v. Varnum* (1967) 66 Cal.2d 808, 814-815.) The trial judge erred in this case by failing to give these instructions at the joint penalty phase of appellant and his codefendant, Richard Letner. Letner testified on his own behalf at the joint penalty phase and placed all blame for the murder of Ivon Pontbriant on appellant.

Letner claimed that appellant and Ms. Pontbriant got into an argument, precipitated by her extreme intoxication and anger when appellant interrupted an amorous encounter between Letner and her. (RT 8661.) Further, according to Letner, appellant reacted violently when Ms. Pontbriant threatened to call the police. (RT 8663.) Appellant supposedly cut off Ms. Pontbriant's sweater and pulled down her pants, in which she had defecated. (RT 8667.) According to Letner, when Ms. Pontbriant started laughing at appellant, he "freaked out" and attacked her, tying her up and stabbing her to death. (RT 8669-8673.)

Despite the fact that under the prosecution's various theories of the case Letner was clearly appellant's accomplice [120] and that Letner's testimony at the penalty phase of their joint trial clearly prejudiced appellant, the trial judge failed to give the standard accomplice instruction

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120. The prosecutor repeatedly urged that the two defendants worked in tandem; therefore, they were each the accomplice to the other. Penal Code section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

to the jury. This instruction should have been given sua sponte as it was "necessary to avoid any unfairness to the accused." (*People v. Hill* (1998) 17 Cal.4th 800, 842-843.) The fact that defense counsel did not request an accomplice instruction does not waive the issue because the error "affected [appellant's] right to a fair trial." (*Id.* at p. 843, fn. 8.)

CALJIC No. 3.18, the standard cautionary instruction on accomplice testimony, states:

> You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

The rule in California has been that when an accomplice is called as a witness by the prosecution, the trial judge is required, sua sponte, to instruct the jurors to view the testimony of an accomplice with distrust. (*People v. Guinan* (1998) 18 Cal.4th 558, 564, citing *People v. Williams* (1988) 45 Cal.3d 1268, 1314.) Accomplice testimony on behalf of the prosecution should be viewed with distrust, in the words of this Court, because ". . . such witness has the motive, opportunity and means to help himself at the defendant's expense . . . ." (*Ibid.*) When the accomplice is called only by a defendant, however, the instruction should only be given at the request of the defendant. (*Ibid.*) When an accomplice is called as a witness by both the prosecution and defense, the trial judge should tailor the instruction to relate only to his or her testimony on behalf of the prosecution. (*Id.* at p. 567.)

In the instant case, the formula stated in *Guinan, supra*, is not workable because neither the prosecutor nor appellant called Richard Letner as a witness. Rather, Richard Letner testified as his own witness, hoping to

save his own skin at the expense of appellant's.[121/] When accomplice testimony occurs as a result of a codefendant's decision to testify on his or her own behalf, the situation created for the non-testifying defendant is more akin to the calling of an accomplice by the prosecution because a codefendant testifying on his behalf (particularly when he is laying off the crime on the other defendant) has a motive to lie. This Court recognized this principle in a subsequent decision, *People v. Box* (2000) 23 Cal.4th 1153, 1208, where it noted that the motive to lie was present when a defendant testifies against his codefendant.[122/]

Under every theory of this case proffered by the prosecution, Richard Letner was an accomplice to appellant and vice-versa. Penal Code section 1111 provides:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense or circumstances thereof. An accomplice is hereby defined as one who is liable to the prosecution for the identical

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121. As discussed in Argumen III, *ante* (which describes the problems created by the trial court's failure to grant the defendants' numerous requests for separate penalty phase trials), the present fact situation demonstrates the problem created by a joint trial, where one of the defendants testifies and points the finger of blame at his codefendant.

122. This case is distinguishable from *People v. Terry* (1970) 2 Cal.3d 362, 398, where one defendant testified against another but no sua sponte instruction was required because "the very question submitted to the jury was whether [the defendant who testified] was an accomplice." By contrast, here Letner testified after the jury had convicted both Tobin and him of murder with special circumstances.

> offense charged against the defendant in trial in the cause in which the testimony of the testimony of the accomplice is given.[123/]

The term accomplice thus includes aiders and abettors, co-conspirators and perpetrators. (*People v. Gordon* (1973) 10 Cal.3d 460, 468.) Accordingly, it was crucial, indeed mandatory, that the trial judge give, sua sponte, the standard instruction that accomplice testimony should be viewed with distrust.

In this case, there was no evidence offered by the prosecution (or for that matter by codefendant Letner) corroborating the detailed description given by Letner of how Ms. Pontbriant supposedly was murdered. Therefore, under the facts of this case, it was crucial that the jury receive the instruction that accomplice testimony should be viewed with distrust and that the testimony regarding the crime required corroboration.

Proper instruction on the relevant law is as important at the penalty phase of a capital case as it is at the guilt phase. In *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, the United States Supreme Court reiterated that, in order to fulfill the Eighth Amendment requirement of reliability in death penalty sentencing, the jury's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Moreover, in *Walton v. Arizona, supra*, 497 U.S. at p. 653, the Court observed: "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."

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123. This Court has said that "Section 1111 applies to an accomplice's out-of-court statements when such statements are used as substantive evidence of guilt." *(People v. Andrews* (1989) 49 Cal.3d 200, 214.) Therefore, this argument regarding the necessity of an accomplice instruction also applies to the evidence submitted by the prosecutor regarding statements in Richard Letner's letters to Danny Payne about the crime.

In addition, the failure to give the accomplice instructions deprived appellant of his due process rights in violation of the Fourteenth Amendment to the United States Constitution and its state constitutional counterpart. The error denied appellant a fair trial because the jury (1) was not instructed to view Letner's penalty phase testimony with distrust, and (2) was permitted to consider this testimony without requiring it to find that such testimony was corroborated by other evidence. (See, e.g., *Estelle v. Williams* (1976) 425 U.S. 501, 503.)

Moreover, this instructional error deprived appellant of a state-created liberty interest, which also is protected by the Fourteenth Amendment. By creating the statutory right to have a jury instructed on the law of accomplices (Pen. Code § 1111), California has created a liberty interest on the part of a criminal defendant to have a jury consider accomplice testimony (when factually applicable) only if it has been sufficiently corroborated and the jury has been instructed to view it with distrust. The U.S. Supreme Court has described the principle of a state-created liberty interest as follows:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent it is determined by the jury in the [proper] exercise of its . . . discretion . . . and that liberty is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

(*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

Accordingly, the failure of the trial judge to instruct on accomplice testimony was error which prejudiced the appellant before the jury which was to decide whether to sentence him to death. Indeed, it is hard to

imagine any testimony which could have been more prejudicial to appellant than Richard Letner's graphic description of how Ms. Pontbriant was supposedly killed by appellant.

In both his testimony and the letters crafted by Letner and Payne in jail, Letner provided inflammatory allegations of appellant's involvement in the murder, while Letner minimized his own role. Letner described appellant supposedly cutting off the victim's clothes and pulling down her pants, with the victim then defecating. (RT 8666-8669.) According to Letner, when the victim started laughing at appellant, he "freaked out" and grabbed the victim by the hair, pulling out a whole bunch of hair. (RT 8669.) Letner described appellant as a "wild animal." (RT 8794.) He also claimed that appellant stabbed the victim and used a sawing motion on her neck. (RT 8674.) Letner also accused appellant of taking a beer bottle and "kicking it up her butt." (RT 8675.) Letner also alleged that appellant had killed someone before in Napa. (RT 8841.)

The jury should have been instructed to view this accomplice testimony with mistrust. It is probable that a proper instruction would have caused at least some of the jurors to discredit Letner's testimony. Given that appellant had no prior felony convictions and the evidence of aggravation relating to other acts of violence was somewhat minimal, discrediting Letner's testimony would have substantially affected the penalty determination.

Accordingly, appellant is entitled to a reversal of his death sentence.

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XXVI.

THE TRIAL COURT ERRED IN FAILING TO PROVIDE ADEQUATE INSTRUCTION TO THE JURY REGARDING THE OPTION OF A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

The defense requested the following penalty phase instruction: "A sentence of life without possibility of parole means that MR. TOBIN will remain in state prison for the rest of his life and will not be paroled at any time. A sentence of death means that MR. TOBIN will be executed in the gas chamber." (CT 1070.) The trial court declined to give this instruction. (CT 1065.)

The trial court's failure to give the requested instruction clarifying the consequences of the penalty determination violated appellant's Sixth Amendment right to a fair jury trial, his Eighth Amendment right to a reliable penalty determination, and his Fourteenth Amendment right to due process. "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The punishment in a capital case must be "tailored to [the defendant's] personal responsibility and moral guilt." (Enmund v. Florida, supra, 458 U.S. at p. 801.) The jurors must deliberate on the penalty choices with a full awareness of the gravity of their task "with due regard for the consequences of their decision." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330.) Jurors must "assume that the sentence . . . they imposed would be carried out." (*People v. Fierro* (1991) 1 Cal.4th 173, 250.) The death sentence determination in petitioner's case failed to meet these requirements because there is a reasonable likelihood that at least some of the jurors failed to understand the consequences of their decision and believed that their sentence would not be carried out.

Petitioner's death sentence is invalid because of the likelihood that the jurors failed to understand the penalty instructions regarding the meaning of a sentence of "life without possibility of parole" (LWOP) and to assume that such a sentence would be carried out. "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 169.) In *Simmons*, the Supreme Court noted that public opinion polls and juror surveys revealed that jurors were confused about the meaning of a life sentence and often assumed the possibility of parole. (*Id.* at p. 169, fn. 9.) But even in California where jurors are instructed in regard to a sentence of life without possibility of parole, empirical studies show a pervasive mistrust that a sentence of LWOP really means no parole will be given. (Haney, Sontag, and Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death,* (1994) 50 J. of Social Issues 149, 170-171.)

The trial court's refusal in appellant's case to counter the common misunderstanding regarding parole by directly informing the jurors explicitly of the consequences of their decision was contrary to well-established precedent interpreting the Due Process Clause. (See *Simmons v. South Carolina, supra,* 512 U.S. at p. 164.) This refusal in the face of the likelihood of juror confusion deprived appellant's jury of information crucial to the penalty determination. (*Id.* at pp. 163-164.)

This error resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

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XXVII.

APPELLANT'S TRIAL WAS MARRED BY PERVASIVE PROSECUTORIAL MISCONDUCT AT ALL STAGES OF THE PROCEEDINGS

A. Introduction

In this case, at both the guilt and penalty phases of the trial, the prosecutor engaged in numerous instances of misconduct. This misconduct occurred during the presentation of evidence, the examination of witnesses, and in closing arguments to the jury.

Any discussion of the issue of prosecutorial misconduct must begin with the unique role of the prosecutor in the criminal justice system. Prosecutors are held to an elevated standard of conduct. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Judge Kozinski noted in *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315: "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." (*Id.* at p. 1323.) The prosecutor is both a public servant and an advocate. (*Berger v. United States* (1935) 295 U.S. 78, 85-88.) In this role as public servant, the prosecutor's "interest . . . in a criminal prosecution is not that he or she shall win a case, but that justice should be done." (*Id.* at p. 88.) As the United States Court of Appeals for the Fifth Circuit observed in *United States v. Murrah* (5th Cir. 1989) 888 F. 2d 24, 27:

> The Supreme Court and the several federal appellate courts have long recognized that the prosecutor has a distinctive role in criminal prosecutions. As representative of the government the prosecutor is compelled to seek justice, not convictions. Justice is served only when convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have not resulted from happenstance or indifference but are the product of measured, reasoned thought . . . that criminal convictions should be based upon guilt clearly

proven in a calm, reflective atmosphere, free of undue passion and prejudice.

This Court also pointed out in *People* v. *Bolton* (1979) 23 Cal.3d 208, 213, that prosecutors are generally viewed with special regard by the jury and therefore improper statements by him or her may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*Id.* at p. 213.) Similarly, the United States Court of Appeal observed in *Brooks* v. *Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399, that ". . . the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct."

Prosecutorial misconduct may require the reversal of a conviction based on violations of either or both the United States and California Constitutions. As this Court noted in *People v. Harris* (1989) 47 Cal.3d 1047: "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*Id.* at p.1089, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.)

Even if the prosecutor's conduct does not render a trial fundamentally unfair, it violates the California Constitution if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. *(People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Gions* (1995) 9 Cal.4th 1196, 1215.) Nonetheless, prosecutorial misconduct need not be intentional in order to constitute reversible error. (*People* v. *Bolton, supra*, 23 Cal.3d at p. 214.) According to the United States Supreme Court, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." (*Smith v. Phillips* (1989) 455 U.S. 209, 219.) Therefore, a claim of

prosecutorial misconduct is not defeated by a showing of the prosecutor's subjective good faith. (*People* v. *Price* (1991) 1 Cal.4th 324, 447.)

Appellant's trial was tainted by such wide-spread prosecutorial misconduct that his rights under both the California and United States Constitutions were violated. First, he was deprived of due process and a fundamentally fair trial in violation of the Fifth and the Fourteenth Amendments of the United States Constitution and article I, sections 7 and 15 of the California Constitution. He was also deprived of a reliable adjudication of guilt and penalty in violation of the Eighth Amendment to the United States Constitution. Further, prosecutorial misconduct violated appellant's right to an impartial jury in violation of the Sixth Amendment of the United States Constitution and article I, section 16, of the California Constitution. (*People* v. *Chapman* (1993) 15 Cal.App.4th 136, 141.) Prosecutorial misconduct also compromised his right to present a defense in violation of the Sixth Amendment. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690-691.) As the following arguments will make clear, the prosecutorial misconduct in this case was prejudicial and requires reversal of appellant's conviction and sentence of death.

B. <u>The Failure of Defense Counsel To Object</u>

Despite the repeated incidents of prosecutorial misconduct and the prejudice created by this misconduct, appellant's trial counsel failed, in many instances, to make appropriate objections. In order to preserve the issue for appellate review, the general rule in California is that trial counsel must not only object to prosecutorial misconduct but also request an admonition to cure the harm. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 914.) This rule, however, "applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.) If it is likely that the objection would

have been overruled, the failure to object and request an admonition should be excused. (*People v. Green, supra*, 27 Cal.3d at p. 35, fn.19) Moreover, if an objection and admonition would not have cured the harm, the appellate court must determine ". . .whether on the whole record the harm resulted in a miscarriage of justice within the Constitution." (*Id.* at p. 34.)

Given the number and seriousness of the instances of prosecutorial misconduct in the trial of the instant case, it is unlikely that either objections or admonitions could have ameliorated the harm caused by the misconduct. As Justice Jackson aptly observed in *Krulewitch v. United States* (1949) 336 U.S. 440, "[t]he naive presumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." This Court has also recognized that in some cases, such as when the prosecution repeatedly makes improper arguments, repeated objections will only exacerbate the prejudice to the defendant. In such circumstances, the failure of trial counsel to make repeated objections is excused, and the matter is properly subject to appellate review. (*People v. Hill, supra,* 17 Cal.4th at p. 822.)

Moreover, the trial judge also had responsibility to assure that the trial conformed with the standards of due process and fundamental fairness. In his dissent in *Fisher v. United States* (1946) 328 U.S. 463, 485 n.8, Mr. Justice Frankfurther noted:

> [Federal] judges are not referees in sporting contests. Their duty to keep a trial in the course of justice is especially compelling where the penalty for conviction is death.

As the following arguments discussing specific instances of prosecutorial misconduct will establish, appellant's convictions and death sentence should be reversed.

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XXVIII.

THE PROSECUTOR ENGAGED IN MISCONDUCT DURING HER CROSS-EXAMINATION OF APPELLANT AT THE GUILT PHASE

It is not necessary to show bad faith on the part of the prosecutor to establish misconduct (see, e.g., *People v. Hill, supra*, 17 Cal.4th at p. 823); nonetheless, as described below, the record in this case does show such bad faith.

A prosecutor commits misconduct when he or she deliberately asks questions calling for inadmissible and unduly prejudicial answers or continually repeats such answers recast as questions. (*People v. Evans* (1952) 39 Cal.2d 242, 248; *People v. Locigno* (1961) 193 Cal.App.2d 360, 387-388.)

During her opening argument to the jury at the guilt phase of the trial, the prosecutor referred to a phenomenon she called "instant death." She claimed that the wounds suffered by Ms. Pontbriant -- the severance of her spinal cord and the arteries in her neck -- were examples of instant death. (RT 4806.)

During a subsequent colloquy among the attorneys and the trial judge regarding the cross-examination of Dr. Walter, the pathologist who conducted the autopsy of Ms. Pontbriant, the prosecutor stated her intention to call two witnesses allegedly familiar with the defendants who would testify that they had heard both defendants talk about "instant death." Supposedly, these witnesses also would explain that "instant death" meant the cutting of the arteries at the side of the neck and severing the spinal cord at the top of the neck. The prosecutor further claimed that the stabbing wounds in this case were unique in their placement and thus such evidence would be relevant to show identity since the defendants knew about this so-

called phenomenon of instant death, talked about it, and utilized it in their martial arts routines. (RT 4988-4989.)

Later in the trial, the prosecutor made an offer of proof regarding the proposed testimony of two witnesses on the subject of "instant death." These witnesses were young men who knew the appellant and Letner in high school and claimed that they had heard appellant talk about the instant death method of stabbing someone at the base of their skull and on the sides of their necks. (RT 5049.)

Appellant's trial counsel objected to this proposed testimony on several grounds. First, he pointed out the remote nature of this evidence; the alleged statements and acts occurred many years earlier. (RT 5053.) Second, this evidence was inadmissible under Evidence Code section 352 because the probative value of any such testimony would be greatly outweighed by its prejudicial nature. (RT 5055.) Third, there was no evidence that the victim in this case actually had died an "instant death." (RT 5053-5054.) Indeed, the pathologist had testified that the primary cause of her death was exsanguination or bleeding to death, certainly not an "instant death." (RT 5063.)

The trial judge ruled, pursuant to section 352, that the prejudicial value of the proffered testimony outweighed any probative value it might have because it had a tendency to suggest that the appellant had a "murderer's disposition." (RT 5069.) He also observed that the probative value of the evidence was minimal because "[i]f you cut somebody's neck deep enough in the back you're going to kill them. And it doesn't take any degree of brightness to know that." (RT 5069.)

Despite this very clear ruling by the trial judge that the prosecutor could not introduce evidence of alleged knowledge of or discussion by the appellant of a so-called instant death phenomenon, the prosecutor attempted

to cross-examine appellant about this subject when appellant testified at the guilt phase of his trial. While the inquiring about appellant's knowledge of martial arts, the prosecutor asked him: "There is a term in karate that is known as instant death, isn't there?" (RT 6936.) After defense counsel's objection was overruled, appellant answered: "I don't know if there is or not." (RT 6936.)

Undaunted by appellant's answer that he didn't know anything about "instant death," the prosecutor persisted with another question: "You have never heard of instant death being caused by sticking someone in the side of their neck at or near major arteries or veins?" (RT 6936.) After objections by both defense counsel, the trial judge declared a recess so that the objection could be discussed outside the presence of the jury. Appellant's counsel pointed out that the prosecutor was merely engaging in a subterfuge to slip in evidence that had previously been ruled inadmissible. (RT 6937.) After further argument by counsel, the trial judge reaffirmed his earlier ruling that the prejudicial nature of the evidence outweighed any probative value it might have. The judge made the following observations about the proposed evidence:

> Because it didn't take any special knowledge on the part of anyone to know you can kill by severing carotid arteries . . . . my point is – is, that is – that there's nothing so highly unusual about the mode of death. I mean, obviously, it is bizarre and unusual. But in terms of the finesse necessary with which it is done, in my opinion it is not so, in my opinion, so unusual, that it justifies this kind of questioning.
>
> (RT 6940.)[124/]

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124. A number of times during the course of the trial, the judge found it necessary to remind the prosecutor to lower her voice during discussions at sidebar. The defense attorneys were particularly concerned that by talking loudly, the prosecutor was letting the jurors hear about

(continued...)

In flagrant disregard of the trial judge's second ruling that the prosecutor must refrain from suggesting that the victim had died an "instant death," the prosecutor urged in her closing argument to the jury:

> We have purposeful, deliberate acts being done. The location of these stab wounds, as testified to through Dr. Walter, were placed very strategically, almost over vital blood vessels and arteries that supply blood and take blood from the head. That is something known to cause what's called "instant death", if the arteries are actually stricken.

(RT 7553.)

This line of cross-examination and the subsequent reference in closing argument to instant death were deliberate attempts by the prosecutor to circumvent an earlier judicial ruling that such evidence was unduly prejudicial. The prosecutor used her questions on this forbidden subject as a means of putting evidence, previously ruled inadmissible, before the jury. It allowed the prosecutor to testify without being subject to cross-examination in violation of the Confrontation Clause of the Sixth Amendment. (*Douglas v. Alabama* (1965) 380 U.S. 415, 419; *People v. Bell* (1989) 49 Cal.3d 502, 533-534.) The resulting unfairness denied appellant his due process right to a fair trial and his right to a fair and reliable capital trial. (U.S. Const., Amends. 6, 8, and 14; Cal. Const, art. I, §§ 7, 15 and 17.) Because this improper cross-examination was

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124. (...continued)
matters about which they should not hear. Early in the guilt phase, there was an extended conversation at sidebar about the prosecutor's desire to call witnesses to testify about "instant death." During this discussion, the trial judge had to admonish Deputy District Attorney Reed twice to lower her voice. (RT 5050, 5061.) Curiously enough, much later in the guilt phase, when the prosecutor was trying to cross-examine appellant about his knowledge of "instant death," she once again raised her voice during a sidebar conference. Counsel for codefendant Letner asked her to keep her voice down. (RT 6939.)

constitutional error, reversal is required unless the prosecution can show, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

This deceptive circumventing of the trial court's previous order excluding such evidence constituted prosecutorial misconduct. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 504-505.) It is improper for a prosecutor to elicit evidence previously ruled inadmissible. It is misconduct for a prosecutor to continue to engage in a line of questioning after the trial judge has ruled that these questions will not be allowed.[125/] Moreover, it is apparent that the prosecutor's questions

> were asked for the purpose of getting before the jury the fact inferred therein, together with the insinuations and suggestions they inevitably contained rather than for the answers which might be given.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 116, overruled on another point in *People v. Morse* (1964) 60 Cal.2d 631.)

The questions about "instant death" in this case were highly prejudicial because, as the trial judge noted, they tended to portray appellant as a cold-blooded killer whose interest in the martial arts in fact related to an interest in murder. Also, given the lack of evidence connecting appellant to the actual killing, this misled the jury into believing that appellant committed the murder and did so in a deliberate, calculated way.

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125. The decision in *State v. Gore* (Fla.1998) 719 So.2d 1197 is also instructive on this issue. In that case, the Florida Supreme Court reversed a death penalty conviction and remanded for a new trial because, inter alia, the prosecutor improperly questioned the defendant concerning a subject about which the trial judge had ruled pretrial no evidence could be introduced. The appellate court registered its concern with the State's "blatant" disregard of the trial judge ruling, noting that "[t]he foundation of our legal system depends on fidelity to rules." (*Id.* at p. 1199, quoting *Halsell v. State* (Fla. 3d DCA 1996) 672 So.2d 869, 870.)

Because the prosecutor's misconduct described above so infected appellant's trial, reversal of the judgment against him is required.

* * * * *

XXIX.

THE FAILURE OF THE PROSECUTOR TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT JEANNETTE MAYBERRY'S CRIMINAL RECORD VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS

On January 25, 1990, during the penalty phase of the joint trial of appellant and codefendant Richard Letner, counsel for Mr. Letner made an oral motion claiming prosecutorial misconduct on the ground that the district attorney had failed to inform the defense about pending criminal charges against prosecution witness, Jeannette Mayberry.[126/] (RT 8151.) Ms. Mayberry, who had been called as a prosecution witness on three occasions during the trial, had a criminal record which the Tulare County District Attorney's Office had failed to disclose to the defendants. Letner's trial counsel did not receive this information until after the deliberations and verdict by the jury at the guilt phase of the trial. After further investigation, he discovered three items which had not been brought to the attention of the defense. First, Ms. Mayberry had an outstanding warrant from the County of Fresno. In addition, she had two charges, one felony and one misdemeanor, pending in Visalia Municipal Court; both these prosecutions began in May 1989. (RT 8151.)

The misdemeanor charge involved theft of clothing from Mervyn's. After Ms. Mayberry missed an initial court appearance, the court issued a warrant. Thereafter, she pleaded guilty and received a sentence of thirty (30) days in county jail, to be served on weekends. (RT 8152.) On August 18, 1989, she was supposed to begin serving her sentence on weekends; however, after she failed to appear for two weekends in a row

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126. Later in the hearing, counsel explained that he intended his motion to be one for a mistrial. (RT 8160.)

another continuance was granted until January 3, 1990. When she failed to appear that day, a warrant was issued. (RT 8153.)

Meanwhile, on May 1, 1989, Ms. Mayberry appeared in court to answer for a felony charge, under Penal Code section 476, subdivision (a), for bad checks. (RT 8153.) Subsequently, these charges were reduced to a misdemeanor pursuant to Penal Code section 17, subdivision (b). On August 29, 1989, Ms. Mayberry pleaded guilty and received a sentence of thirty (30) days. This matter also was eventually continued for execution of sentence until February 6, 1990. (RT 8153.)

Because the prosecution called Jeannette Mayberry as a witness on January 4, 1990 in the instant case, Letner's trial counsel argued that it appeared that the execution of Mayberry's sentence was intentionally put off in order to ensure her testimony at the joint trial of appellant and Mr. Letner. (RT 8155.) Counsel also questioned the accuracy of statements by the district attorney in Ms. Mayberry's case that the prosecution had not reduced Mayberry's felony charge nor postponed the execution of her sentence as a quid pro quo for her cooperation as a prosecution witness in appellant's case. (RT 8155.) Counsel argued that the facts belied this claim by the prosecution. That is, Ms. Mayberry had received a reduction of sentence from forty-five (45) to thirty (30) days and imposition of the sentence had been delayed several times. Counsel also argued that the continuances of Mayberry's case were meant to ensure her testimony at the trial of appellant and Letner trial. In addition, although defense counsel had requested both the rap sheet and the arrest record of Ms. Mayberry, the prosecution had never provided them with this information. (RT 8157.)

The prosecutor denied knowledge of the Fresno County warrant for Jeannette Mayberry. (RT 8157.) She did acknowledge that earlier in the

trial of the instant case, she learned that Ms. Mayberry was unavailable because she was in court that day on her own case. (RT 8158.)

At this point, the trial judge dealt with the motion by saying there was nothing to be done because Mayberry's testimony had already occurred. (RT 8159.) The judge also accepted the prosecutor's claim that she knew nothing about Mayberry's criminal history because Mayberry's rap sheet indicated that she had no arrest record or pending criminal proceedings. (RT 8160.)

After the conclusion of the penalty phase trial, counsel for Mr. Letner included the arguments that he had made on this point in the motion for a new trial. Subsequently, there was a hearing on the motions for a new trial of both appellant and Mr. Letner. At that hearing, defense counsel pointed out that although the prosecution had referred to Ms. Mayberry as a "minor" witness, she had testified on three occasions during the trial. (RT 26, 4/17/90 hearing.) Further, counsel pointed out that although the district attorney stated that she did not know about Mayberry's pending cases, the law provides that the knowledge of any member of the prosecution team is imputed to the prosecutor. (RT 28, April 17, 1990 hearing.)

While the deputy district attorney acknowledged during the April 17, 1990 hearing that the information about Ms. Mayberry's pending cases should have been turned over to the defense, the prosecutor insisted that neither she nor any member of her office had acted in bad faith. (RT 40-41, 4/17/90.) Moreover, according to the prosecutor, had this information been available to the defense and had it been used to impeach the credibility of Jeannette Mayberry it nonetheless would not have changed the verdicts in the case. (RT 41.)

The trial judge rejected the motions for a new trial of both appellant and his codefendant. On the issue of the misconduct of the prosecutor for failing to provide evidence to the defense about Ms. Mayberry's criminal record, the trial judge commented:

> In the court's opinion Ms. Mayberry was – was not a terribly material witness in this case. She certainly wasn't material in the sense of having any familiarity at all with what happened at the crime scene, or having been party to any admissions by either of these defendants following the commission of this crime, or any admission as to the pre-commission (sic) of criminal intent. She did testify with respect to circumstantial evidence of times, dates, places, specifically and importantly on the issue of residency of – in this house over on Crenshaw where she lived with Tobin before, and who was living in and at the time that he hid out there after the commission of this crime. But she also testified as to the situation the three or four days before this crime, wherein she'd had this scene with Tobin, and the windows were broken out of her apartment, and she'd gotten slapped around, and – and – and Letner was urging on Tobin and doing these things to her. In my opinion, the – the effect of her testimony – certainly that that testimony regarding her situation when windows were broken out in her apartment, was let in to show the defendants had motive to flee, and this came in to show motivation to get Ivon Pontbriant's car, and leave. It also went to prove up this motivation to leave, this plan to go to Iowa because of the fact that basically they didn't have jobs, they didn't have property, they had this situation where Tobin's relationship with her had definitively ended.[127/] But in this court's opinion, those kinds of issues are not terribly material to the issue of the guilt or innocence with respect to the actual killing. Further, and even more importantly than that, is that this sort of evidence that we're talking about here, which was not revealed to the defense in the first place is of extremely questionable character as to impeachment value. Certainly, she might have

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127. This is an entirely different reason for the relevance of Ms. Mayberry's testimony than had been offered by the deputy district attorney and accepted by the trial judge at the time of Ms. Mayberry's testimony. (RT 5397.)

> been asked this in the presence of the jury, whether in fact her sentencing had not been delayed, or her incarceration. But we are talking about misdemeanor charges, and even in this statement that she gives Mr. Wess which was filed here today, indicate she herself – indicates clearly that the people were not promising her anything. . . . And I frankly do not think that even if all this testimony had been presented to the jury, that it would have – it would have been of any significant impeaching character.

(RT 53-54, 4/17/90.)

A. The Failure to Provide the Defense With Information About Jeannette Mayberry's Criminal History Violated Appellant's Due Process Rights

The suppression or withholding of impeachment evidence by the state is prohibited. In *Brady* v. *Maryland* (1963) 373 U.S. 83, the United States Supreme Court observed:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

(*Id.* at p. 87.)

In *United States* v. *Bagley* (1985) 473 U.S. 676-677, the Supreme Court made clear that impeachment evidence falls within the scope of the *Brady* rule. *Brady* requires that a defendant show (1) the prosecution suppressed or withheld evidence that (2) was favorable and (3) material to the defense. (*Brady, supra,* 373 U.S. at p. 87.) In *Wood* v. *Bartholomew* (1995) 516 U.S. 1, the Court noted that *Brady* material is not limited to information that would be admissible at trial.

In *Kyles* v. *Whitley* (1995) 514 U.S. 419, the Court explained that the rule in *Brady* applies to the entire prosecution team,[128/] including the police

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128. See *United States* v. *Woods* (9th Cir. 1995) 57 F.3d 733, 737, where the court of appeals found that information known to the FDA but

(continued...)

and other agencies involved in the prosecution. Moreover, the obligation is an affirmative duty not just to disclose but also to learn of exculpatory evidence in the custody of other members of the prosecution team. (*Id.* at p. 437.) The *Kyles* court observed that the prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Ibid.*) [129]

A critical issue in analyzing any claim under *Brady* is whether the suppressed evidence was "material." In *U.S.* v. *Bagley, supra,* the Court defined material as meaning there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*Id.*, 473 U.S. at p. 682.) In turn, a reasonable probability is a probability "sufficient to undermine confidence in the outcome." (*Ibid.*) The *Kyles* decision further explained that the materiality standard of *Brady* is not an outcome determinative test; thus, a non-disclosure cannot be deemed harmless simply because other evidence is sufficient to convict. Further, the "reasonable probability" prong is not a test of the sufficiency of the evidence; that is, the question is not "whether the defendant would more likely than not have received a different verdict with the evidence but whether in its absence he received a fair trial . . . ." (*Kyles* v. *Whitley, supra,* 514 U.S. at p. 434.)

The *Kyles* decision makes clear that the undisclosed evidence must be evaluated against the record as a whole. In other words, it must be considered cumulatively, not item by item. (*Id.* at pp. 436-437.) In

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128. (...continued)
unknown to the federal prosecutor was required to be disclosed since the "FDA and the prosecutor were one."

129. This Court has also noted the duty of the prosecutor to search affirmatively for material, exculpatory evidence. (See, e.g., *In re Brown* (1998) 17 Cal.4th 873.)

addition, under *Brady* the prejudice analysis is subsumed under the materiality test. If the undisclosed exculpatory evidence is material the inquiry ends there. Thus, while materiality is an element of a *Brady* violation, prejudice is not because the latter is deemed subsumed into the former inquiry. In *Kyles, supra,* the Supreme Court noted "once the reviewing court applying *Bagley* has found constitutional error there is no further need for harmless error review." (*Id.* at p. 435.) Under these principles, the prosecutor in the instant case had a duty to look for and find the information concerning the pending criminal charges against Jeannette Mayberry.

Moreover, applying these principles to the facts of the instant case, it is clear that the failure of the prosecutor to provide defense counsel with information about the criminal history of one of its pivotal witnesses, Jeannette Mayberry, violated appellant's due process rights. The trial judge erred when he ruled that the criminal history was not of significant impeachment value. In fact, it is reasonably probable that the jurors would have viewed Mayberry's testimony with greater skepticism had they known that there were criminal charges pending against her. Furthermore, the charges against her were traditional examples of crimen falsii; that is, the charges involved thefts and fraud which went directly to the question of her honesty. Given that fact, it was unimportant that the charges were reduced to misdemeanors.

This undisclosed impeachment evidence was material because, as the United States Court of Appeals for the Fifth Circuit noted In *East* v. *Johnson* (5th Cir. 1997) 123 F.3d 235, if "the withheld evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be

material." (*Id.* at p. 239, quoting *Wilson* v. *Whitley* (5th Cir. 1994) 28 F.3d 433, 439.)

Ms. Mayberry was a key witness because she alleged that appellant had committed violent acts in an altercation with her the night before the murder. Ms. Mayberry testified that she had argued with him because he had been visiting his ex-wife. (RT 5412-5415.) According to Mayberry, appellant became so upset that he broke her bedroom window and grabbed her by the hair and hit her. (RT 5416.) After neighbors yelled that they were calling the police, appellant purportedly went to Mayberry's car and broke out the windows with the butt of his shotgun. (RT 5418.) This testimony depicted appellant as bad-tempered and violent. The trial court also found that Mayberry's testimony about the altercation provided a motive for appellant to flee and showed motivation to get Ivon Pontbriant's car to do so. (RT 53, 4/17/90.) Mayberry also provided further testimony about appellant's prowess in karate by claiming that appellant was proficient at roundhouse kicks, which supported the prosecution's claim that appellant had kicked Ivon Pontbriant in the face prior to the murder. (RT 5425-5426.)

This testimony made Mayberry a critical witness supporting the prosecution's claim that appellant had planned to flee prior to the murder and wanted the victim's car. Mayberry's testimony also portrayed appellant as a violent person capable of using his martial arts skills to injure the victim. Impeachment of her testimony would have cast doubt on Mayberry's claims and seriously weakened the prosecution's theory of appellant's motive and involvement in the crimes.

For all of the foregoing reasons, this Court should find that the trial judge erred in not granting appellant and his codefendant a new trial on the ground of the prosecutor's failure to provide information about the criminal

history of one of its most important witnesses, Jeannette Mayberry. This failure violated not only the discovery rules of the Visalia Superior Court but the Due Process Clause of the United States Constitution as interpreted by the U.S. Supreme Court in *Brady* v. *Maryland, supra,* and its progeny. It also violated appellant's Sixth Amendment rights to confrontation, cross-examination and effective assistance of counsel and his Eighth Amendment right to reliable guilt and penalty determinations.

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XXX.

AT THE GUILT PHASE, THE PROSECUTOR'S CLOSING ARGUMENT TO THE JURY INCLUDED IMPROPER REMARKS THAT CONSTITUTED PROSECUTORIAL MISCONDUCT

During the prosecutor's closing argument to the jury at the guilt phase, she made several remarks which were improper and constituted misconduct requiring reversal of appellant's convictions.

A. Reference to "Instant Death"

As discussed *supra*, defense counsel objected several times to efforts by the prosecutor to raise the red herring of an alleged phenomenon termed "instant death," by the prosecutor. Despite the fact that the trial judge clearly ruled on two occasions that the prosecutor could not question the appellant about his knowledge of this alleged phenomenon nor could she introduce other evidence regarding it, the prosecutor nonetheless made the following reference to it during her closing argument to the jury:

> We have purposeful, deliberate acts being done. The location of these stab wounds, as testified to through Dr. Walter, were placed very strategically, almost over vital blood vessels and arteries that supply blood and take blood from the head. That is something known to cause what's called "instant death," if the arteries are actually stricken.

(RT 7553.)

This reference was a blatant and cynical defiance of the trial judge's clear ruling that the prosecutor would not be permitted to present evidence regarding so-called "instant death." Although a showing of bad faith on the part of the prosecutor is not necessary to prove prosecutorial misconduct, the evidence of such bad faith in this case makes the misconduct more clear.

B. Slandering Appellant Without Any Basis in the Record

During their closing remarks to the jury during the guilt phase, both defense counsel properly commented on the criminal record of prosecution witness, Earl Bothwell, established during both direct and cross-examination of him at trial. In rebuttal to the perfectly proper argument of defense counsel, the prosecutor asserted:

> I would submit to you that if you have any expectation either one of these defendants are going to be associating, hanging around, socializing with people at the Iowana Motel like your Sunday school teacher, or, maybe, your state senator, you're sadly mistaken. I mean we have a situation here where this is the type of man Christopher Tobin is. Who do you think he's going to be hanging around with? He's going to be hanging around with other criminals and that's what Earl Bothwell is. I have no hesitation in saying that to you, obviously.

(RT 78-01-7802.)

Neither the prosecution nor his codefendant presented any evidence at the guilt phase that appellant was "a criminal." In fact, Mr. Tobin had no history of either misdemeanor or felony convictions. Even at the penalty phase of the trial, virtually the only "aggravating" evidence that the prosecutor could come up with were incidents in which appellant has engaged in fights and arguments with other adolescent boys during his high school years.

At the guilt phase, there was no evidence that appellant was "a criminal," although there was some evidence that he smoked marijuana and drank alcohol when he was minor. Such activity, however, did not support the prosecutor's untruthful and inflammatory charge that appellant was "a criminal." This statement was just another example of the deputy district attorney's disturbing proclivity for misrepresenting the evidence and stretching the truth to obtain a conviction and death sentence.

C. Embellishing the Evidence

The deputy district attorney bent the truth when she described the evidence. First, she claimed that Mr. Rains, the crime scene technician, had testified that there was fresh blood on the doily and the pillow found in Ms. Pontbriant's bedroom and on a rag found in her car. She argued that Rains had testified that the blood was red. (RT 7558-7559.) The record, in fact, does not support this contention. Only after being asked the leading question about whether the blood on the pillow was fresh did Officer Rains agree that it was. (RT 5685.) However, when he was asked another leading question about whether the blood on the doily was fresh, he failed to either confirm or deny that fact. (RT 5686-5687.)[130/] Because appellant and Warren Gilliland shared the same blood type, this point was crucial to the prosecution's case. Thus, the prosecutor tried to convince the jurors that if the blood was "fresh," it could not belong to Mr. Gilliland, although Mr. Gilliland was living in the house with Ms. Pontbriant at the time she died.

During her closing argument, the prosecutor also misrepresented the evidence when she claimed that Mr. Gilliland's testimony had "essentially been backed up by other evidence." (RT 7541.) Apparently recognizing that Gilliland's testimony was full of inconsistencies and contradictions, the prosecutor attempted to bolster his testimony by claiming that other evidence supported Gilliland's statements at trial. However, the district attorney's efforts in that regard were disingenuous. The evidence that she cited as "backing up" Gilliland's testimony did not in fact do so.

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130. Indeed, when defense counsel asked Mr. Rains on cross-examination whether he could say whether the bloodstains were a day old or two weeks old, he said that he couldn't. Rains testified that he could make no determination as to the age of the bloodstains except to say that they "appeared to have been left there some time in the recent past." (RT 5767.)

For example, the prosecutor argued that because the police did not discover any money in the checkbook found in one of the victim's purses at the crime scene, that proved Gilliland's claim that he had given Ivon Pontbriant money which she put in the checkbook in the presence of appellant and codefendant Letner. The prosecutor's rationale was as follows:

> Mr. Gilliland told you that in the presence of one or both of the defendants, he gave Ivon some money, that Ivon put that money flat into her checkbook, that she placed it in her white purse. I would submit, that although there will be great argument on this particular issue, that there is some corroboration of that issue. And that is merely that the checkbook area of the checkbook that was in the white purse, did not contain money, while the other recesses inside the purse did. In other words, it's obvious from the purses in the house that there was ransacking, some searching, for the contents of that purse. I would submit to you that in relation to the white purse, and the checkbook, the defendants, once money, if any, was retrieved from that checkbook, the search for money in the white purse was in fact terminated, was stopped.

(RT 7542.)

This argument by the prosecutor was patently specious and disingenuous. In fact, she was trying to pull something over the eyes of the jurors by arguing because something was not present that meant that the defendants had stolen it. The job of the prosecutor is to do justice, not to go to any lengths in order to win a case. The testimony of Warren Gilliland was completely unreliable. The district attorney's efforts to try to bolster his inherently unbelievable testimony during closing argument violated her duty to seek justice rather than to attempt to secure a conviction by any means possible.

The prosecutor continued with this kind of specious reasoning when she claimed that the fact that Warren Gilliland left town on February 29,

1988, proved he was telling the truth when he testified that he had told the defendants that he was going to be out of town. Deputy District Attorney Reed asserted: "It shows the defendants' knowledge that they were going over to Ivon's home, woman who was there alone." (RT 7543.) Obviously, the fact that Gilliland happened to leave town because he had an argument with Ms. Pontbriant does not prove that he had informed the defendants that he was leaving.

The prosecutor also dwelled on the improper testimony of Jeannette Mayberry regarding a fight she had with appellant on February 29, 1988. She described the fight as follows:

> This fight took place in the evening hours. Tobin hit Mayberry, pulled her hair and broke the windows, both to her apartment, and her car. And despite the fact that Mr. Tobin is having these problems, still, there is no departure from (sic) Iowa.

(RT 7544-7545.)

Continuing to describe this argument, the district attorney stated:

> Mr. Tobin admitted engaging in the slap contest with Jeannette Mayberry. Jeannette Mayberry testified that he hit her several times, Mr. Tobin says twice. But essentially Mr. Tobin admits, there was slapping, and that there was property damage to her car and house.

(RT 7546.)

This evidence had little or no relevance to whether appellant was involved in the murder of Ms. Pontbriant. Rather, the purpose of introducing the evidence and dwelling on it in closing argument was to portray appellant as a violent man who beats up on women. Both the evidence and the argument were improper because they were used to convince the jurors to convict appellant on the basis of alleged violent propensities rather than on evidence actually showing, beyond a reasonable doubt, that he had committed the crimes charged.

D. Prejudice

The prejudice of such improper argument is manifest. As discussed in the insufficiency arguments above (Arguments IV, VI-VIII), *supra*, the evidence of appellant's guilt of the murder and special circumstances was slight, if not non-existent. The prosecutor's misrepresentation of the evidence and her inflammatory descriptions of the appellant during closing argument were intended to, and apparently succeeded in, persuading the jury to relieve the prosecution of its burden of proving appellant's guilt beyond a reasonable doubt.

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XXXI.

THE PROSECUTOR'S RELIANCE ON A RELIGIOUS "PROVERB" TO ADVOCATE FOR THE IMPOSITION OF THE DEATH PENALTY VIOLATED THE FIRST AMENDMENT PROSCRIPTION AGAINST ESTABLISHMENT OF RELIGION AS WELL AS APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court has held on more than one occasion that it is misconduct for a prosecutor in arguing to a jury in a capital case that the defendant deserves the death penalty based on biblical or some other religious authority. (See, e.g., *People v. Sandoval* (1992) 4 Cal.4th 155, 191-194.) This kind of argument violates Penal Code section 190.3 because it asks the jurors to base their verdicts on factors not set forth in that statute, or non-statutory aggravating factors.. (See, e.g., *People* v. *Wrest* (1992) 3 Cal.4th 1088, 1106-1107. Similarly, the federal courts have condemned religious references in death penalty case arguments as tending to create confusion and an inflammatory atmosphere . (See, e.g., *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1020, fn. 24 [improper to compare defendant to Judas Iscariot]; *United States v. Giry* (1st Cir. 1987) 818 F.2d 120 [improper to compare defendant's statement to Peter's denial of Christ].) This kind of argument also tends to diminish the jurors' sense of responsibility for their verdict and imply that another, higher law should be applied, thus displacing the law set forth in the trial court's instructions. (*Caldwell* v. *Mississippi, supra*, 472 U.S. at p. 341.)

In this case, the prosecutor concluded her closing argument to the jury at the penalty phase by stating:

> Lastly, ladies and gentlemen, remember this proverb. Remember that Jesus forgave the thief on the cross next to him, who, by his own admission was justly condemned. He gave the thief a place in paradise. But the thief still had to die

> for his crimes. In the name of the people of the State of California, I ask you to return the death penalty.

(RT 9694.)

Deputy District Attorney Reed argued, in effect, that the jurors should impose the death penalty because Jesus approved of the thief's death sentence. Indeed, in using this particular example, the prosecutor seemed to urge that if Jesus approved of a thief being executed, surely he would approve of someone who has murdered a woman being executed. Further, by telling the jurors that Jesus had forgiven the thief and would allow him a "place in paradise," the prosecutor also appeared to suggest that if appellant were executed by the State of California, he might still hope to be accorded a place in paradise by virtue of Jesus' forgiveness. Moreover, this argument implies that appellant would be more likely to seek Jesus' forgiveness if he were sentenced to death because he would then be forced to confront his responsibility for committing the crimes against Ms. Pontbriant. The prosecutor thus harnessed the religious force of *The Bible* to sanction the death penalty generally and its use against the appellant specifically.

This type of argument is improper for a number of reasons. First, it invites the jurors to impose the death penalty based on factors not established by the evidence nor contained in the court's instructions on the law. Second, it lessens the jurors' sense of personal responsibility for a death verdict by telling them that the responsibility really rests with Jesus or God. Third, it invites the jurors to impose the death penalty based on religious law rather than on secular law. Fourth, it renders the determination of penalty arbitrary and capricious because the decision will depend upon how much weight an individual juror may or may not attach to the religious authority cited by the prosecutor. In addition, such an argument violates the provisions of both the United States Constitution and California Constitution which prohibit the establishment of religion as well

as rights to a fair and reliable guilt and penalty phase trials.. (U.S. Constitution, First, Fifth, Sixth, Eighth and Fourteenth Amends.; California Constitution, article 1, sections 4, 7 and 15.)

Appellant urges this court to adopt the per se rule of the Pennsylvania Supreme Court in capital cases which holds that "reliance upon *The Bible* in any manner during a closing argument during the penalty phase is reversible error per se." (*Commonwealth* v. *Brown* (1998) 711 A.2d 444, 457, citing *Commonwealth* v. *Chambers* (1991) 599 A.2d 630, cert. denied 504 U.S.946 (1992).) [131/]

It is not reasonable to expect jurors to follow the secular law and perform the weighing function required by Penal Code section 190.3 when they have been told that *The Bible* or some other religious authority requires the imposition of the death penalty. Many people would be reluctant to make a penalty determination which they perceived to be against the religious norm of their community. Moreover, an appeal to a person's religious belief or sense of morality, as supposedly dictated by Christianity, carries such emotional impact that an admonition from the judge to disregard such religious references would not cure the prejudice created by this type of argument.[132/]

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131. Although this Court has cited the *Chambers* decision in several different opinions, it has not yet adopted the rule of *Chambers* that references to *The Bible* or other religious authority during a penalty phase argument to the jury is per se reversible. It is important that the Court now do so.

132. [See Duffy, *Note, "Barring Foul Blows: An Argument for a Per Se Rule for Prosecutors' Use of Religous Arguments in the Sentencing Phase of Capital Cases,"* 50 Vand.L.Rev. 1335 (1997). This law review note argues that when a prosecutor appeals to religious authority in support of the death penalty a per se reversible error rule is necessary because the serious prejudicial effect of such an appeal defies harmless error analysis.

A. Prejudice

Because the penalty decision of an individual juror in a capital case is both personal and moral, it is very difficult to determine what factors affect that decision. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044. See also *Clemons v. Mississipp, supra*, 494 U.S. at p. 754 [recognizing that harmless error analysis of capital penalty phase error may be "extremely speculative"]; *Caldwell v. Mississippi, supra,* 472 U.S. at p. 330 [noting that an appellate record rarely will reveal the intangibles affecting the jurors' decisions].)

The standard under *Chapman v. California, supra*, 386 U.S. at p. 24 applies to assessing error in the capital penalty context. Therefore, if the State cannot show that, absent the error, no reasonable juror would have voted for a sentence of life without the possibility of parole, the error cannot be deemed harmless. (See, e.g., *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

Further, *Chapman* requires a determination of whether there is a reasonable possibility the jury's *actual* verdict was affected by error, not a determination by an appellate court of what it believes a hypothetical jury not affected by the error would have done. (*Satterwhite, supra,* 486 U.S. at pp. 258-259.)

Applying this standard to the instant case, the State cannot prove beyond a reasonable doubt that no juror would have voted for a sentence of life without the possibility of parole had the prosecutor not made the improper references to the "religious proverb" about Jesus and the thief. Accordingly, appellant's death sentence should be reversed.

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XXXII.

THE LOWER COURT SHOULD HAVE STRICKEN THE BURGLARY COUNT AND THE BURGLARY SPECIAL CIRCUMSTANCE AFTER THE MAGISTRATE FOUND AN INSUFFICIENT FACTUAL BASIS FOR THE CHARGES

The criminal complaint in this case alleged, inter alia, that appellant and codefendant Richard Letner had committed burglary as well as a burglary special circumstance, within the meaning of Penal Code section 190.2, subdivision (a)(10). The preliminary examination in this case took place between September 19, 1988 and September 27, 1988 before the Honorable Ronn M. Couillard (hereinafter "the magistrate"). On October 11, 1988, the magistrate dismissed the counts dealing with the alleged burglary, stating that he "just can't find sufficient evidence" to show that the defendants had an intent to commit a robbery or a rape before they entered the house. (10/11/88 RT 6.) He reiterated that point again, stating "he had trouble finding any evidence to show there was an intent to commit a felony upon the entry." (10/11/88 RT 7.) He also found that there was no forced entry and that Ms. Pontbriant had invited the defendants into her house. (10/11/88 RT 8.)

Despite the magistrate's factual findings, when the prosecution filed the information in this case on October 12, 1988, it again contained both a burglary charge and a burglary special circumstance allegation. (CT 7-10.) Thereafter, appellant filed on January 17, 1989, a Penal Code section 995 motion to dismiss, raising inter alia this issue. (CT 15-22; 23-24.) The superior court judge denied that motion on March 22, 1989. (CT 118.)

When a magistrate has reached a legal conclusion that an allegation in a criminal complaint is not true, the prosecutor may nevertheless include that allegation in the information. Thereafter, if the defense wishes to

challenge the allegation, it must file a motion pursuant to Penal Code section 995. (*People v. Encerti* (1982) 130 Cal.App.3d 791, 798.) If, however, the magistrate finds an allegation to be *factually untrue*, the prosecution may not charge the allegation in the information. If the prosecution wishes to challenge the magistrate's ruling, it must file a motion to compel the magistrate to reinstate the charges under Penal Code section 871.5. (*Id.* at p. 799; *Jones v. Superior Court* (1971) 4 Cal.3d 660, 666.)

This distinction arises from the different charging procedures used in California. Under article 1, section 14 of the California Constitution, "a felony shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." In California a criminal case normally begins with the filing of a criminal complaint. (Pen. Code § 738.)

Penal Code section 866 provides that a criminal defendant has a right to preliminary examination before a magistrate within ten (10) court days of the date the defendant is arraigned or pleads. Subdivision (b) of section 866 explains that "[i]t is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony." Probable cause, in this context, means "such a state of facts which would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Uhlemann* (1973) 9 Cal.3d 662, 667.) Upon a determination that there is not probable cause to believe the defendant guilty of a felony (or a special circumstance), the magistrate must order the complaint dismissed under Penal Code section 871. Under Penal Code section 739, the prosecutor may charge the defendant with ". . . either the offense or the offenses named in the order of commitment of the Magistrate or any offense

or offenses shown by the evidence taken before the magistrate to have been committed."

This Court consistently has given a narrow interpretation to this language in section 739 because to do otherwise would entirely eliminate the state constitutional requirement of commitment by a magistrate. Thus, this Court stated in *Jones v. Superior Court*, *supra*, that:

> No case has ever indicated that the amendment [to § 739] was intended to allow the district attorney to ignore the magistrate's *findings of fact* and charge the defendant with an offense or offenses which the magistrate has expressly found never took place.

(*Id.*, 4 Cal.3d at pp. 666-667; emphasis added.)

The *Jones* decision, *supra*, points out that if a magistrate has found an allegation or charge to be factually untrue, the prosecutor may not include it in the information filed against the defendant. If the dismissal by a magistrate of a count or allegation was based upon a factual determination[133/] that the evidence did not support the charge, the superior court judge is bound by that finding if such finding is supported by substantial evidence. (*People* v. *Slaughter* (1984) 35 Cal.3d 629, 639; *Pizano* v. *Superior Court* (1978) 21 Cal.3d 128, 133.)[134/]

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133. Recently, in *People v. Seaton* (2001) 26 Cal.4th 598, in discussing the concept of factual insufficiency in the context of the prosecution's theory that the murder had been accomplished by two separate beatings, this Court noted that factual insufficiency meant that "there was no credible evidence that the second beating occurred or that the victim was alive when it took place." (*Id.* at p. 644.)

134. See also *People v. Brice* (1982) 130 Cal.App.3d 201, where the court of appeal observed: "If a magistrate makes a legal conclusion on the insufficiency of the evidence of an offense not named in the complaint, the district attorney may nevertheless, by virtue of section 739, charge that offense in the information. The district attorney is precluded from doing so

(continued...)

The record is clear in this case that the magistrate did determine at the end of the preliminary hearing that there was not enough evidence to support an allegation that the defendants had formed an intent to commit either robbery or rape before or at the time they entered Ms. Pontbriant's house. He specifically found the evidence showed no forced entry and that Ms. Pontbriant had invited the defendants into her house. (RT 8, 10/11/88. After considering the evidence in detail, the magistrate in this case concluded that there was not enough evidence to bind the defendants over for charges involving an alleged burglary. This was a factual determination.

Under California law, a finding on the existence or nonexistence of a special circumstance is *always* a factual determination. The special circumstances are facts or sets of facts the existence of which must be determined by the finder of fact. (Pen. Code § 190.4, subd. (a).)

In this case, the magistrate determined that there was not enough evidence to show that before or at the time the defendants entered Ms. Pontbriant's house they had the intent to commit either a rape or a robbery. The superior court was required to uphold this factual determination by the magistrate if it was supported by substantial evidence. A review of the record at the preliminary examination in this case shows that there was substantial evidence to support this determination. While the prosecutor argued vigorously that the magistrate should infer that appellant and codefendant Letner had an intent to commit robbery and rape when they entered Ms. Pontbriant's house, the magistrate had already rejected this argument. Faced with evidence that a "party" was going on at the victim's

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134. (...continued)
only where factual findings made by the magistrate are fatal to the allegation that the offense was committed. (*Id.* at p. 206, citations omitted.)

house and that Letner and Tobin entered the home with the victim's consent and only later developed the intent to commit crimes inside, the magistrate stated as a factual matter that he "just can't find any evidence that they entered that residence with the intent to commit a felony at the moment of entry." (RT 9 10/11/88.)

The critical issue before the superior court judge was not whether the magistrate's ruling on the burglary count and the burglary special circumstance allegation was the correct one but whether the ruling was supported by substantial evidence. (*People v. Slaughter*, *supra*, 35 Cal.3d at p. 639; *Pizano* v. *Superior Court*, *supra*, 21 Cal.3d at p. 133.)

It appears that the superior court judge in this case erroneously evaluated this issue in accordance with the rules governing most issues raised in a section 995 motion. That is, in most situations where the defense challenges a probable cause finding by a magistrate, the trial court deciding a defense motion under section 995 must draw "every legitimate inference that may be drawn from the evidence" in favor of the prosecution. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 477.)

This rule does not apply, however, if the magistrate has not found probable cause for the inclusion of a count or allegation in the information. The rule flows from the principle that "a reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate . . . ." (*Ibid.*) Accordingly, when a district attorney ignores the magistrate's factual finding that probable cause does not exist to believe a count or allegation is true, the presumption favoring the magistrate's factual findings shifts the burden to the prosecution to show there was not substantial evidence to support the magistrate's finding. In this case, the prosecution did not meet this burden; further, there was substantial evidence supporting the magistrate's finding that the defendants did not have the intent to rob or

to rape at the time of entry into the victim's home. The magistrate properly found that the victim invited the defendants into her home for a little "party" and they did not form any intent to commit crimes prior to drinking substantial amounts of beer. (RT 8 10/11/88.) These factual findings supported by the evidence should have been upheld and the burglary charges should have been dismissed.

Because the prosecutor and the superior court judge in this case arbitrarily violated California constitutional and statutory procedures, in which appellant had a liberty interest, appellant was deprived of due process of the law under the Fifth and Fourteenth Amendments of the United States Constitution and article 1, section 15 of California Constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. at pp. 346-347.) Moreover, appellant's due process rights were also violated by the superior court judge's failure to apply the substantial evidence standard of review to the magistrate's factual finding that there was not sufficient evidence to show that appellant and codefendant Letner had the intent to rape or rob Ms. Pontbriant when they entered her house as invited guests on March 1, 1988.

Petitioner's Eighth Amendment rights were also violated. Under California law, each special circumstance finding can also serve as an aggravating factor in the death penalty weighing process. Once a special circumstance finding is invalidated, the judgment must be reversed and the case remanded for a new penalty trial if there is a reasonable possibility that the jurors would have recommended life imprisonment without the possibility of parole absent the invalidated special circumstance. (*People v. Roberts* (1992) 2 Cal.4th 271, 327; see also *Clemons v. Mississippi, supra*, 494 U.S. at pp. 751-753.)

It is probable that the invalid burglary charge affected the penalty determination. In the guilt phase, the prosecutor argued that the defendants

entered Pontbriant's home with the intent to steal property because they needed the means to get to Iowa. (RT 9591-7593.) She also claimed that they entered with the intent to commit rape and that they had murdered, scattered the purses and taken the car keys. (RT 7591-7594.) In considering this evidence as aggravating, it is likely that the jury gave substantial weight to this invalid aggravation as showing intent and premeditation regarding the murder. Under these circumstances, the death sentence must be reversed.

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XXXIII.

THE TRIAL JUDGE ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE STATEMENTS OF RICHARD LETNER AS ADOPTIVE ADMISSIONS AGAINST APPELLANT

Before the presentation of evidence in this case, appellant's counsel objected to the prosecutor's intent to introduce, through the testimony of Officer Allyn Wightman of the Visalia Police Department, some statements allegedly made by Richard Letner against appellant as "adoptive admissions." (RT 4748-4755.) During this initial discussion, the trial judge stated: "It seems to me the one thing about whether they are adoptive admissions, it is kind of a question of fact, isn't it Mr. Staven [appellant's trial counsel]?" (RT 4753.) Appellant's counsel reminded the judge that he had the duty to determine whether there was "any foundation for admission of the statement." (RT 4753.) The parties and the trial court decided to defer decision about the issue of these alleged adoptive admissions to the time when Officer Wightman actually testified. (RT 4754.)

When Officer Wightman took the stand, there was a very short hearing on the question outside the presence of the jury. The prosecutor identified the disputed adoptive admission as follows: "He [Officer Wightman] advises Letner why he's stopped, and Letner spontaneously says 'I'm taking my friend home.'" (RT 6126.) In support of her claim that this statement should be admitted against appellant as an adoptive admission, the prosecutor argued:

> Tobin is sitting next to him [Letner] in the front seat of the car, obviously in a position to hear this statement. I would submit that is an adoptive admission, or potentially not even hearsay itself because it is being used as circumstantial evidence to show consciousness of guilt. But in any event, I would submit it is an adoptive admission under 1221. It was made under circumstances which call for a response, it's an

> obvious fabrication, and I would submit that it should be allowed for that purpose. I will tell the Court, let me continue, that when defendant Tobin does get out of the car, he is asked where he is going, and he says that he is going home, asked where, home to South Crenshaw to stay with Jeannette. So given that situation, the fact that Letner makes that statement in his presence, I would say clearly it supports, it's an adoptive admission, and it is admissible.

(RT 6126-6127.)

Appellant's counsel argued that the statement was not an admission and that, in any event, there wasn't any evidence that appellant heard it. (RT 6127-6128.) While the trial judge asserted that the statement was an admission, he also noted:

> I don't need to get in my opinion into an adoptive admission analysis at all. It's an admission by defendant Letner, and it is going to come in on that basis. As to whether it should come in against the defendant Tobin or not, I will be glad–I think it is rather a question of fact, and I will be glad to instruct the jury as to when somebody can be deemed to adopt or not adopt an admission like that if you want one.

(RT 6128.)

A. <u>The Law Governing Adoptive Admissions</u>

Evidence Code section 1221 states:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

Section 1221 represents the codification of the adoptive admission hearsay exception "which traces back at least 120 years in California law" and "holds that anyone who fails to deny an accusation . . . under circumstances where denial is reasonably appropriate is considered to have admitted the truth of the accusation." (*People v. Celestine* (1992) 9 Cal.App.4th 1370, 1379.)

As Evidence Code section 403, subdivision (a) provides, the proponent of evidence has the burden of proving the preliminary facts establishing its admissibility. The comments of the Assembly Committee on the Judiciary regarding section 403 state that adoptive admissions require a decision regarding preliminary fact questions and can only be "admitted upon the introduction of evidence sufficient to sustain a finding of the foundational fact."

The trial judge failed to make such a finding in this case. That is, the judge should have determined and placed on the record whether a sufficient foundation established that appellant (1) heard and understood Letner's statement to Officer Wightman that he was taking appellant home; (2) that appellant had knowledge of the content of that statement; and (3) that appellant responded in such a way as to manifest his adoption or belief in the truth of the statement being made.

In *People v. Snow* (1987) 44 Cal.3d 216, 227, this Court held that because there was no accusation, there could be no adoptive admission.[135/] Virtually all of the published opinions of the California appellate courts in criminal cases dealing with adoptive admissions involve a statement that is accusatory in nature. (See, e.g., *People v. Medina* (1990) 51 Cal.3d 870 [sister asked defendant why he shot victims]; *People v. Edelbacher* (1989) 47 Cal.3d 983 [statements to defendant reasonably supported inference that they were accusatory]; *People v. Preston* (1973) 9 Cal.3d 308 [statement accused defendant of being present when burglary and killings took place].) Even *People v. Fauber* (1992) 2 Cal.4th 792, 852, which states "a direct accusation in so many words is not essential," ultimately concluded that the

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135. In the defendant's presence, a statement was made that a witness against him had been killed. He did not react to this news. This Court found that because there was"no accusation made for defendant to adopt or accept," the evidence did not constitute an adoptive admission.

statement in question was admissible because it connected the defendant to the crime. The *Fauber* decision also cited cases which all involved accusations.

The statement at issue in this case did not amount to an accusation. As the California Court of Appeal observed in *People v. Avalos* (1979) 98 Cal.App.3d 701, "An accusatory statement is a 'statement made by another person in the presence of a party to the action, containing assertions of fact which, if untrue, the party would under all the circumstances *naturally be expected to deny* . . . ." (*Id.* at p. 711, quoting *McCormick On Evidence* section 247, p. 528, emphasis added.) Apparently, when Officer Wightman asked Richard Letner where he was going, Letner said he was taking his friend, appellant, home.

Not only was this statement not accusatory, one cannot reasonably argue that the statement was of the kind that would cause a listener to dispute it. It is ludicrous to contend that when this interchange between Letner and Officer Wightman occurred, anyone in appellant's shoes would jump into the conversation and correct Letner's statement. A bystander, which was what appellant was in this situation, reasonably would not interrupt a conversation between the police officer and the driver. The prosecution bore the burden of proving that Officer Wightman's statement was made in appellant's presence "under circumstances that would normally call for a response if the statement were untrue." (*In re Neilson's Estate* (1962) 57 Cal.2d 733, 746.)

In addition, the prosecution also failed to prove that appellant even heard this interchange between Letner and Officer Wightman. The officer testified that when he stopped the car, it appeared to him that appellant was intoxicated. (RT 6171.) The requirement of Evidence Code section 1221 that the party *hear* the statement involves more than merely hearing

something. The party must understand what was said. Given appellant's state of intoxication at the time Officer Wightman stopped the car, the record is not clear on this point. Certainly, the trial judge did not say anything on the record indicating that he found as a preliminary fact, as he was required to do, that appellant heard Letner's statement to Wightman that he was taking appellant home.

B. Prejudice

The trial judge failed to meet the requirements of the Evidence Code and improperly allowed in a statement as an adoptive admission against appellant. This error prejudiced appellant because the prosecutor used the alleged adoptive admission to impeach appellant's testimony at the guilt phase of the trial. During her closing argument to the jury, the deputy district attorney cited Letner's statement, "I'm taking Tobin home," as evidence that Wightman was lied to. (RT 7571.) The prosecutor went further and talked about the allegation that Letner lied to Wightman when he said he did not know the phone number of Ivon Pontbriant. (RT 7572.) She then quoted from her cross-examination of appellant about the inconsistencies between his testimony and Wightman's testimony about the conversation Wightman had with Letner. The prosecutor asked appellant to explain why Letner didn't give Wightman the phone number of Ms. Pontbriant when appellant testified that after the vehicle stop appellant told Letner to telephone Ivon and let her know where her car was. (RT 7573.) This cross-examination portrayed appellant unfavorably by improperly attacking his credibility based on acts by Letner and making appellant appear unworthy of belief. That unfavorable portrait was emphasized by the prosecutor during closing argument. Because of the importance of appellant's testimony to his defense, this error resulted in substantial prejudice.

This improper evidentiary ruling by the trial judge violated appellant's rights, under the Sixth and Fourteenth Amendments and article 1, section 15 of the California Constitution, to confront witnesses against him; his right not to be deprived of his life or liberty without due process of law, as guaranteed by the Fourteenth Amendment and article 1, sections 7 and 15 of California Constitution; and his right to "reliability in the determination that death is the appropriate punishment" in his case. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305) and reliability in the determination of guilt in a capital case (*Beck v. Alabama* (1980) 447 U.S. 625), guaranteed by the Eighth and Fourteenth Amendments and article 1, section 17 of the California Constitution.

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XXXIV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTOR TO QUESTION APPELLANT ABOUT OTHER CRIMES UNCONNECTED TO APPELLANT

During her cross-examination of appellant, the prosecutor asked a series of questions about stolen goods, including a bag of hair products and some fingernail polish, that were found in the victim's car after the murder. (RT 6914-6918.) These items did not belong to the victim, nor were they stolen from her house. Nonetheless, the prosecutor asked whether appellant knew that the hair products and nail polish were stolen and whether Letner, who regularly went to swap meets with appellant, regularly brought stolen items to these swap meets to sell. This cross-examination was improper because it involved a subject matter that (1) was not relevant to any issue before the jury[136/] and (2) was highly prejudicial.

The original complaint in this case included charges against Richard Letner for two commercial burglaries. Before trial, those counts were severed. It was undisputed that appellant was not involved in these crimes. Pretrial, the prosecutor stated her intention to introduce the fruits of the burglaries, the three bags of hair products found in the trunk of the victim's car, as evidence. Counsel for both Letner and appellant moved to preclude this evidence. The prosecutor sought to justify the evidence as relevant to showing that the defendants planned to sell them in order to facilitate their escape. She argued that they were admitted to show consciousness of guilt. (RT 4697-4698.)

While appellant's trial counsel conceded the prosecution's right to use the evidence for the purpose offered by the prosecutor, he argued that

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136. Defense counsel objected to this questioning on the grounds of relevance. (RT 6917-6918.)

there was no need to let the jury know that the items were stolen. (RT 4701.) The prosecutor countered, asserting that the fact that hair products were stolen was relevant to show "the financial gain part of it, and the furtherance of seeking funds in order to facilitate the escape." (RT 4701.) The trial judge ruled that the potential prejudicial impact of the evidence was "slight" because the trial dealt with "a far more serious charge." (RT 4702.) This ruling was erroneous.

Since appellant was not involved in these burglaries and the crimes had nothing to do with the issues before the jury, it was entirely improper to permit the prosecutor to question appellant about the fruits of burglaries in which he had not participated. The trial court's erroneous ruling allowed the prosecutor to try to associate appellant, albeit indirectly, with other crimes and thus present him in a negative light with the jury.

This Court has long recognized the potential for unfair prejudice inherent to the introduction of other crimes evidence. (See, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 314-321.) Professor Wigmore also has noted that such evidence tempts the trier of fact ". . . to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." (I Wigmore, *Evidence* (3d ed., 1940) section 194, at p. 646.) Moreover, it is a longstanding and fundamental tenet of Anglo-American law that a defendant facing criminal charges should be tried only for the offense with which he is charged. (See, e.g., *Trial of John Hampden* (K.B. 1684) 9 Cobbett's State Trials, 1053, 1103; *Michelson v. United States* (1948) 335 U.S. 469, 475-476.) The admission of bad act testimony or evidence of other crimes that are irrelevant to the material issues in the case violates due process by rendering the trial fundamentally unfair. (*Henry v. Estelle* (9th

Cir. 1993) 993 F.2d 1423.) Such arbitrary and unfair evidence also violates the Sixth Amendment right to a fair trial and the Eighth Amendment guarantee of a reliable guilt determination.

The decisions of this Court consistently have held that other crimes evidence is admissible only if: (1) the fact sought is *material*; (2) evidence of the other crime tends to prove or disprove a material fact; and (3) there is not any rule or policy requiring the exclusion of this evidence. (*People v. Sully* (1991) 53 Cal.3d 1195, 1224, citing *People v. Robbins* (1988) 45 Cal.3d 876, 879 and *People v. Thompson* (1980) 27 Cal.3d 303, 315.)

Under this standard, it was clearly improper to allow questioning of appellant about his knowledge of items stolen by his codefendant but which had no relation to the crimes charged in this case. This evidence had nothing to do with any issue, let alone any material issue, before the jury. Given the total lack of relevancy of this evidence which was the subject of this line of questioning, admission of the evidence only accomplished the improper effect of besmirching the character of appellant before the jury. By attempting to show appellant's propensities to engage in violence and other crimes, the improper evidence bolstered an otherwise weak case. No physical evidence tied appellant to the murder; no physical evidence supported the attempted rape claim; and evidence of a burglary or a robbery was highly disputed. Given the paucity of credible evidence tying appellant to the murder and special circumstances charged, appellant was prejudiced by admission of this improper evidence.

Moreover, appellant suffered cumulative prejudice from the admission of this improper "other crimes" evidence together with the improper "other crimes" evidence of the fight appellant had with Jeannette Mayberry on February 29, 1988. (RT 5415-5419.) Ms. Mayberry's testimony about the fight did not bear on whether appellant murdered

Ms. Pontbriant, robbed her or attempted to rape her. But that evidence did portray appellant to the jury, unfairly, as a violent man with a propensity to beat up women. Multiple errors can combine to create prejudice and compel reversal (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.) Even if the questioning of appellant about his acknowledge of items stolen by his codefendant, standing alone, does not warrant reversal, the combined effect of this error together with the error of admitting evidence about the February 29, 1988, fight between appellant and Ms. Mayberry, does require reversal.

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XXXV.

THE TRIAL JUDGE ERRED IN ALLOWING A HIGHLY IMPROPER CROSS-EXAMINATION OF CODEFENDANT LETNER BY THE PROSECUTOR DURING THE PENALTY PHASE TRIAL

Codefendant Richard Letner testified on his own behalf at the penalty phase of the trial and claimed that appellant, not he, murdered Ivon Pontbriant. Before Letner took the stand, appellant's counsel moved for a mistrial and severance, arguing that Letner was going to present, "the worst possible evidence against Tobin." This motion was denied. (RT 8549-8550.) The worst fears of appellant's trial counsel were realized.

As discussed in Arguments II and III, *supra*, the failure to sever the trials of the defendants, at least for the penalty phase, resulted in the jury which decided appellant's fate also considering Letner's testimony which included many irrelevant, inadmissible and unduly prejudicial statements regarding appellant. The most damaging testimony, which would not have been presented if appellant had been tried separately, concerned Letner's claim that appellant murdered and sexually assaulted Ivon Pontbriant. (RT 8646-8676.) Although appellant's jury never should have heard Letner's testimony, the prejudicial effect of this testimony was increased by the improper cross-examination of Letner by the prosecutor in which unreliable and inflammatory hearsay was elicited that provided details about appellant's alleged role in the murder and in other alleged acts of violence.

A. <u>The Prosecutor's Use of Letters in Cross-Examination</u>

On cross-examination, the prosecutor questioned Letner about a series of letters he had exchanged with another Tulare County Jail inmate, Danny Payne, during the period while he was awaiting trial in this case. Purportedly as an aid to the jury, the prosecutor had prepared enlargements of some of the letters which she used to question Letner about the contents

of the letters. (RT 8789.) Not only were some of the letters clearly authored by Danny Payne, but Letner testified that even the letters in his handwriting were prepared with direction from Payne. (RT 8798, 8818, 8820, 8827.) The prosecutor ignored Mr. Letner's repeated assertions that even the letters that were in his handwriting were, in fact, the work of the informant "snitch," Danny Payne. The prosecutor never directly challenged Letner's contention that the letters were really authored by Mr. Payne; instead, she just glossed over this fact.

As Letner explained, Payne had edited many of the statements in the letters "so that it would say things that the DA would like." (RT 8816.) Payne's creative involvement was so extensive that Letner announced after reading one of the letters to the jury that "this was Payne's version of the story." (RT 8847.)

The version of the murder that emerged from reading the letters differed critically from Letner's own direct testimony describing the murder. The letters were particularly prejudicial by providing lurid allegations that Letner had not provided in his direct examination. For example, Letner read from a letter claiming that after leaving Ivon and Letner alone appellant reentered the apartment and questioned whether Letner got "the fucking car yet." (RT 8814.) Appellant allegedly told Ivon, "Listen, bitch, how about you fuck me too. Me and Rick share everything. And he don't mind." (RT 8814.) When Ivon purportedly told appellant to "get fucked," appellant told her, "I planned on it bitch." (RT 8815.) Also differing from Letner's direct examination testimony, the letters claimed that appellant said, "We got to kill her" (RT 8819), and that he had to make sure she was dead. (RT 8823.) According to the letter, before using a knife, appellant kicked her all over, mostly in the face, and kicked a beer bottle up her anus. (RT 8825.) Appellant also supposedly said he had

killed someone else in Napa. (RT 8841.) According to the letter, appellant also threatened to "blow away" Earl Bothwell and would have done so if Letner hadn't intervened. (RT 8847, 8849.)

Admission of this unreliable hearsay evidence resulted in substantial prejudice to appellant.

1. Confrontation Clause Violation

Although the letters of Danny Payne and of Richard Letner (including those which were either copied from Payne's letters or written under Payne's direction) were read to the jury, Danny Payne never appeared as a witness. Therefore, Payne "testified" but was never subject to cross-examination.

The federal Sixth Amendment right to confrontation includes the right to cross-examine witnesses; it is incorporated into the Fourteenth Amendment. (*Olden v. Kentucky* (1988) 488 U.S. 227, 231.) As the U.S. Supreme Court has explained:

> The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witness against him.' The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, 'means more than being allowed to confront the witness physically. Indeed ' [t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*'

(*Delaware v. Van Ardall* (1986) 475 U.S. 673, 678-679, emphasis in original; citations omitted.)

Allowing the prosecutor to question Letner about letters that Payne had authored denied appellant his Sixth Amendment right to confrontation because, in effect, Danny Payne testified without being subjected to cross-examination. The opportunity for cross-examination here was particularly important given that Payne was an unreliable informant. His "testimony"

was unreliable because if included graphic evidence which supposedly described events of which he had no personal knowledge. As noted previously, given the graphically unpleasant description of the alleged murder and sexual assault of Ms. Pontbriant and other alleged acts which showed appellant's violent character and future dangerousness, this evidence was necessarily prejudicial to appellant. The prosecution cannot prove beyond a reasonable doubt that this error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

2. Hearsay

The letters constituted classic hearsay; that is, they were out-of-court statements introduced, at least in part, for the truth asserted in the statements.[137/] Counsel for Letner objected on hearsay grounds to the prosecutor's use of the jail correspondence of Letner and Payne. (RT 8789.) The following colloquy ensued regarding one of these letters (marked as Exhibit 220-A):

> Prosecutor: Well, Your Honor, the witness has the evidence to the communication, and the fact that he wanted to write these letters for purposes of getting a deal. If the Court wants to instruct the jury, *that its content would only be used to provide meaning to what Mr. Letner did*, that's fine.
> Judge: That is the purpose for which this is going to be read. Proceed.

(RT 8789, emphasis added.)

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137. The prosecutor's use of these letters was particularly troubling given that she successfully blocked the defense from introducing into evidence a letter, dated March 1, 1988, written by Ivon Pontbriant and found by the police at the scene. The deputy district attorney argued that this letter was inadmissable hearsay. (RT 6880-6687.) As noted previously, it is the prosecutor's ethical obligation to do justice rather than to win. Moreover, under the Due Process Clause, the trial court has a duty to maintain a "balance of forces" between the defense and the prosecution. (*Oregon v. Wardius* (1973) 412 U.S. 470, 476.)

The trial judge's failure to sustain this hearsay objection by the defense constituted prejudicial error.[138/] Also, the justification offered -- to provide meaning to what Mr. Letner did -- does not fall within any exception to the rule against hearsay. (See Evid.Code §§ 1200-1259.) This justification, even if it provided a basis for admission of the letters against Letner, did not make the letters admissible against appellant. The meaning of this explanation -- "to provide meaning to what Mr. Letner did"-- was also ambiguous. Despite his promise to do so (RT 8789), the trial judge did not attempt to explain to the jury the limited purpose for which the testimony was being admitted.[139/]

The use of this hearsay evidence was highly prejudicial to appellant. It cast appellant in the worst possible light. What the letters did -- and they did it in a rather dramatic way since they had been enlarged so that the jury could read them -- was to describe the events allegedly leading up to the murder of Ms. Pontbriant in the most graphic and offensive way and went well beyond the testimony on direct examination by Letner. The letters also tended to "vouch" for Letner's account of how the murder occured.

3. Exclusion Under Evidence Code section 352

The letters also should have been excluded under Evidence Code section 352 because their prejudicial nature outweighed any probative value they might have had. Section 352 requires the trial judge to weigh the

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138. Hearsay evidence which is inadmissible at the guilt phase is equally inadmissible at the penalty phase of a capital trial. (*People v. Champion* (1995) 9 Cal.4th 879, 938.)

139. The judge's so-called instruction to the jury was limited to the fact that the jury was present during the discussion between the judge and the attorneys about the objection (quoted above) and heard him adopt the prosecutor's justification for the use of the letters.

probative value of evidence against its probable prejudicial effect. In *People v. Farmer* (1989) 47 Cal.3d 888, this Court held:

> Failure of the court to weigh the probative value of challenged evidence against its prejudicial effect is an abuse of discretion [citation omitted]. The weighing must be made explicit in the record [citations omitted].

(*Id.* at p. 906.) (Accord, *People v. Armendariz* (1984) 37 Cal.3d 573, 588-589.) [140/]

Accordingly, when faced with a section 352 objection, a trial judge must expressly balance the probative value of the evidence against its potential for undue prejudice. The record in this case does not show any such weighing by the trial judge.

Moreover, the most important question presented by this evidence, in terms of section 352 analysis, is whether "the risk that the letters would be considered by the jury for improper and highly prejudicial purposes so far outweighed any probative value attributable to them that the trial court must be held to have abused its discretion by permitting extensive quotation from and reading of the letters." (*People v. Coleman* (1985) 38 Cal.3d 69, 81 [murder convictions reversed because the admission of several letters written by one of the victims deemed to be unduly prejudicial].)

The admission of the letters also violated the prohibition in section 352 of admitting evidence which "create[s] substantial danger of . . . confusing the issues, or of misleading the jury." Letner testified that several of the letters in his handwriting were actually copied from letters sent to him by Danny Payne, and the prosecutor never challenged this assertion.

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140. A subsequent case of this Court, *People v. Mickey* (1991) 54 Cal.3d 612, contains contradictory language. The *Mickey* case, however, was decided after appellant's trial. Moreover, the opinion in *Mickey* does not overrule, distinguish or even mention *Farmer, supra,* and *Armendariz, supra.*

Instead, she continued to question Letner about the contents of the letters and even had him read one of the letters to the jurors, thus creating the impression that he wrote them. Given the nature of her cross-examination, it is probable that at least some of the jurors were confused about who actually wrote the letters.

4. Violation of Penal Code section 190.3

The prosecutors used these letters as part of the "aggravating" evidence which she hoped would persuade the jury to sentence both appellant and Letner to death. This "side door" conduct of the prosecutor violated Penal Code section 190.3. Under California law, the State may not introduce aggravating evidence which does not fit within one of the statutory factors listed in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 773; see also *People v. Keenan* (1988) 46 Cal.3d 478, 510 ["Aggravating factors under the 1978 death penalty law are limited to those set forth in the statute."] These letters were not part of the prosecution's case in aggravation but instead came in through the cross-examination of the codefendant when he presented his case in mitigation. Such evidence should not have been considered as aggravation against appellant, especially because of the lack of notice and the lack of opportunity for meaningful cross-examination.

Therefore, the prosecutor's efforts in this case to present highly negative evidence (which did not qualify as statutory aggravators) against appellant and his codefendant before the jury was a purposeful circumvention of the death penalty jurisprudence of this Court. Such misconduct not only violated the prosecutor's duty to seek justice (and not victory[141/] at any cost), it violated appellant's rights under a state-created

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141. Victory for the prosecution was the execution of appellant and (continued...)

liberty interest, to wit, the right to a penalty trial where the prosecution will introduce aggravating evidence as defined and limited by Penal Code section 190.3. (*People v. Boyd, supra;* see also *People v. Davenport* (1985) 41 Cal.3d 247, 289 [wherein this Court held that the aggravating factors are those set forth in subdivisions (a), (b), (c) and (i) of section 190.3]; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

B. Conclusion

The trial judge should have excluded the use of these jailhouse letters in the cross-examination of codefendant Richard Letner because the letters contained such inflammatory and prejudicial material as to undermine the reliability of the trial and render it fundamentally unfair in violation of appellant's federal due process rights. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [admission of evidence of defendant's fascination with and possession of knives violated due process].) These letters would not have been admissible against appellant if his request for a separate trial had been granted.

The erroneous admission of highly prejudicial evidence can also violate a state-created liberty interest (here, the interest in not being sentenced to death based on inadmissible, non-probative, irrelevant and highly prejudicial non-statutory aggravating evidence); such an error violates the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Evitts v. Lacey* (1985) 469 U.S. 387, 401.)

The improper admission of the highly prejudicial and unreliable evidence of the jailhouse letters through the testimony of a codefendant also violated the Eighth Amendment's prohibition against an unreliable,

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141. (...continued)
Letner.

arbitrary and non-individualized sentencing determination. The United States Supreme Court repeatedly has held that the Eighth Amendment to the U.S. Constitution requires heightened reliability in the fact-finding process leading to the death sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

Such federal constitutional error requires reversal unless the prosecutor can prove that it was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) In this case, the prosecution cannot meet this burden as using these letters to cross-examine Letner introduced inflammatory evidence which unfairly prejudiced appellant..

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him of capital murder. Such a procedure is inherently unfair and prejudicial to appellant because memories fade and/or become distorted over time.

In *Ake v. Oklahoma* (1985) 470 U.S. 68, the Supreme Court stated "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." (*Id.* at p. 79.) The unreliability and unfair prejudice inherent in a system that allows the prosecution to introduce evidence about testosterone-driven encounters among teenage boys[142/] which occurred years earlier as "crimes" to be used to persuade the jury to vote for a death sentence creates a "strategic disadvantage" of the type condemned in *Ake*. Such a system places defendant at a disadvantage by creating a presumption that the allegations are true (rather than vice versa) and by forcing the defendant to "try" his alleged crimes before a biased jury on old and unrelated charges.

Finally, allowing the jury to consider evidence of unadjudicated "crimes" eroded the presumption of innocence to which appellant was entitled. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585.) When appellant was convicted of the capital murder charge in the instant case, his conviction only removed the presumption of innocence as to that murder charge. (*Herrera v. Collins* (1993) 506 U.S. 390, 399.) As a matter of law, appellant retained a presumption of innocence with regard to the prior unadjudicated murder because the State had previously failed to adjudicate and prove his guilt as to that crime. However, appellant's presumption of innocence was undercut with regard to the unadjudicated offenses because

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142. How many of us were involved in such conduct as teenagers or are parents of a child who has engaged in such conduct? Although such conduct is wrong, it is common in this age group. It is certainly chilling to consider that it would be used years later by the government to persuade a jury to sentence one to death.

the jury who had just convicted appellant of capital murder was allowed to consider inadmissible evidence of the unadjudicated murder. Here, because they had just found appellant guilty of a capital murder, it is likely that the jurors were primed to presume that appellant was guilty of the unadjudicated offenses presented in the penalty phase. In *People v. Earp* (1999) 20 Cal.4th 826, this Court observed:

> In a state such as California that in capital cases provides for a sentencing verdict by a jury, 'the due process clause of the Fourteenth Amendment of the federal constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.'

(*Id.*, 20 Cal.4th at p. 852, quoting *People v. Williams* (1997) 16 Cal.4th 635, 666.)

In the instant case, jurors who just convicted appellant of first degree murder could not remain impartial with regard to the unadjudicated offenses. (See also *State v. Bartholomew* (Wash. 1984) 683 P.2d 1079 [State Supreme Court held that a jury which has convicted a defendant of a capital crime is unlikely to fairly and impartially weigh evidence of prior alleged offenses].) A jury which believes itself well-acquainted with appellant's ability to commit a capital murder would be more predisposed to believe in his ability to commit other crimes than would a new jury untainted by prior knowledge. Indeed, this is the rationale of the Federal Rules of Evidence disallowing "other crimes" evidence. (See *Weinstein's Evidence Manual* (1992), section 7.01a, p. 7-24.)

Because the ultimate penalty of death is irreversible, the Constitution requires that a state seeking to execute one of its citizens take every step to ensure that its process is free from inaccurate and unreliable results. The use of inadmissible evidence of unadjudicated crimes in the penalty phase of appellant's trial was inherently flawed and does not comport with the

Fourteenth Amendment's due process mandate of accuracy and reliability. (See also *Cook v. State* (Ala. 1979) 369 So.2d 1251, 1257 [the presumption of innocence "prohibits use against an individual of unproven charges in this life or death situation"]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 281 ["the risk that the previously tainted jury will react in an arbitrary manner [when unadjudicated offenses are introduced]) is infinitely greater" than when such offenses are "presented to an impartial, untainted jury"]; *Commonwealth v. Hoss* (Pa. 1971) 283 A.2d 58, 69 ["it is imperative that the death penalty be imposed only on the most reliable evidence . . . ; piecemeal testimony about other crimes for which appellant has not yet been tried or convicted can never satisfy this standard"] *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-953 ["to permit the State to present evidence [of unadjudicated offenses] . . . before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due process of law"]; *Scott v. State* (Md. 1983) 465 A.2d 1126, 1135 [state law permits admission of prior convictions only, not evidence of unadjudicated offenses]; *Provence v. State* (Fla. 1976) 337 So.2d 783, 786 [same]; *United States v. Carranza* (1st Cir. 1978) 583 F.2d 25, 27 [when separate non-capital charges are at issue, "a defendant has a constitutional right not to be tried by any jurors who participated in his conviction in a prior case. [Citations.]]"; see also *Leonard v. United States* (1964) 378 U.S. 544, 545 [*per curiam*]; *United States v. McIver* (11th Cir. 1982) 688 F.2d 726, 728-731; (9th Cir. 1926) 15 F.2d 690, 691.) [143/]

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143. This Court apparently did not consider the principles announced in these cases when it decided *People v. Balderdash* (1985) 41 Cal.3d 144. It, therefore, should not have rejected the defendant's argument on the ground that the argument would "of course" also prohibit "all efforts (continued...)

Allowing the jury to consider evidence of unadjudicated crimes as factors in aggravation violated both the state and federal constitutions. It bolstered the prosecution's theme that appellant was a violent and threatening person. And because the prosecutor heavily relied upon that evidence during his closing argument (RT 9644- 9655, 9659-9662, 9667), these violations cannot be deemed harmless beyond a reasonable doubt. *(Johnson v. Mississippi, supra*, 486 U.S. at p. 586; *Chapman v. California, supra*, 386 U.S. at p. 24.) Appellant's death sentence should, therefore, be vacated.

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143. (...continued)
to try more than one crime to the same jury." (*Id.* at p. 204.) The constitutional prohibition recognized in the federal cases is not a prohibition against two charges being tried together; it is a prohibition against a second charge being tried by biased jurors who have already made up their minds that the defendant is guilty of an earlier charge. (See e.g., *Virgin Islands v. Parrott* (3d Cir. 1977) 551 F.2d 553, 554 ["A juror who has made up his mind that a defendant has committed an offense cannot be open-minded in another case involving a similar charge when the trials are near in time"].)

XXXVII.

THE TRIAL JUDGE DID NOT COMPLY WITH THE MANDATE OF PENAL CODE SECTION 190.9 THAT ALL PROCEEDINGS IN A CAPITAL CASE BE RECORDED BY A COURT REPORTER

Penal Code section 190.9 states in relevant part:

> In any case in which a death sentence may be imposed, all proceedings, conducted in the municipal and superior courts, including all conferences and proceedings, whether in open Court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.

The trial judge in this case did not comply with the clear dictates of section 190.9; the record in this case shows that there were sixty-two (62) incidents of off-the-record proceedings.[144/]

In previous decisions, while this Court has refused to reverse judgments because the trial judge failed to comply with section 190.9, it also has acknowledged the mandatory nature of this statute. For example, in *People v. Freeman* (1995) 8 Cal.4th 450, the Court wrote:

> We emphasize the trial Court should meticulously comply with Penal Code section 190.9, and place all proceedings on the record. It can seem burdensome, as it apparently seemed to the Court and parties in this case, to discuss routine matters and conduct bench conferences on the record before a court reporter. But, in addition to assuring an adequate record for appellate review, . . . following that mandate can ultimately save much time and effort in preparing the appellate record. Here, two substantial record settlement proceedings in superior court were required, proceedings that would not have been necessary had Penal Code section 190.9 been followed. If the trial Court had taken the necessary care, and conducted

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144. The Appellant's Request for Correction and Completion of Record (at pages 244-266), filed by appellant on July 21, 1992, lists the incidents where there were proceedings which were not recorded by a court reporter.

> everything on the record, substantial delay, expense, and squandering of judicial resources could have been avoided.

(*Id.* at p. 511)

This Court has refused, in effect, to enforce the provisions of Penal Code section 190.9. Instead of insisting that trial judges hew to the clear mandate of section 190.9, the Court has placed the burden on the criminal defendant to establish on appeal that the trial court's failure to assure that all proceedings were recorded by a court reporter prejudiced the defendant. (See, e.g., *People v. Freeman, supra; People v. Scott* (1997) 15 Cal.4th 1188, 1203-1204.)

Appellant urges the Court to reconsider its position. Not only does it effectively eviscerate the statute, it also defies logic. In effect, this Court has ruled repeatedly that trial judges are free to violate the provisions of section 190.9 as long as the appellant is unable to identify specifically the prejudice caused by the failure to comply with the statute. In order to show prejudice, however, the appellant must be able to reconstruct what happened during each off-the-record proceeding. More often than not, such reconstruction -- at least *accurate and complete* reconstruction -- is impossible because memories fade with time, and capital trials are usually long and complicated. Indeed, these problems underlie the purpose of section 190.9. It is therefore both illogical and unfair to require appellant to show prejudice when it is the trial court which has made it virtually impossible to do so by failing to meet its obligations under section 190.9.

In this case, appellant's motion to correct and augment the record, including his request for settled statements regarding 62 incidents of off-the-record proceedings, was filed over two years after the end of the trial in this case. In response to the motion, the prosecution took the position ". . . any omissions from

the record are not of consequence and not prejudicial to the defendant."[145/] (Augmented Clerk's Transcript at p. 1285.)

The hearing on the request for settled statements did not occur until five years after the end of the trial. Appellant's trial counsel, Martin Staven, did not attend the hearing because he claimed that he did not remember anything that would be helpful to reconstructing what happened during the unrecorded proceedings.[146/]

A review of the reporter's transcript notes for the April 1995 hearing regarding settled statements demonstrates that the trial judge essentially accepted the representations of the prosecutor, Melinda Reed,[147/] about what occurred during the off-the-record proceedings. (4/18/95 RT at pp. 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 128, 130, 135, 139, 141, 144, 146, 151, 153, 158.) Perhaps the most crucial failure to record the proceedings, as required by section 190.9, involved the conference among the parties and the trial court regarding jury instructions at the guilt phase.

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145. At trial, the prosecutor reminded the judge about the requirements of section 190.9, but tried to claim that since the unrecorded proceedings didn't involve "anything of substance," it was alright that the trial court had not followed the dictates of section 190.9. (RT 6578.)

146. At the April 17, 1995, hearing on the motions to correct, settle and augment the record on appeal, the trial judge stated:

"Judge Staven called me. He was [appellant's] attorney during the trial, and he said that he's tied up in motions. And he said he doesn't have anything to contribute to this hearing. So unless there is some good to have him here, he is not going to be here. He said that he told me just now on the telephone that he would be glad to supply a declaration if requested. He has no present recollection and would have nothing to add with respect to the matters that are in issue." (RT 2, 4/17-18/95 Hearing.)

147. In April 1995, at the time of the hearing on appellant's record correction requests, Ms. Reed was a judge on the Superior Court of Tulare County and thus a colleague of the trial judge in this case. (RT 1, 4/17/95.)

(RT 7430; 7432-7433.) During the hearing on April 18, 1995, the trial judge dismissed the problem created by this failure by asserting that he and trial counsel had "summarized" the contents of this important discussion on the record (RT 7456-7461)(RT 148-149, 4/18/95.). This summary, however, fails to portray the back and forth which would typically occur during a discussion of proposed jury instructions.

As long as this Court does not sanction the trial courts for not following the requirements of section 190.9, this kind of cavalier attitude by trial judges is likely to prevail. If such an important proceeding as the conference on jury instructions need not be recorded and may simply be "summarized," then section 190.9 truly has no meaning.

Not only did the failure to conduct all proceedings in this capital case before a court reporter violate the mandate of section 190.9, it violated appellant's rights to due process and to a fair trial under the Fourteenth Amendment. It also violated his rights to a state-created liberty interest under *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and his Eighth Amendment right to a reliable death penalty adjudication. The United States Supreme Court has held that meaningful appellate review requires an adequate trial record. (See, e.g., *Rushen v. Spain* (1983) 464 U.S. 114, 118.) While it is true that this Court has held that the use of settled statements is a means of reconstructing missing trial records and meets the due process need for an adequate appellate record, the settled statements in this case do not meet this standard. First, there were many off-the-record proceedings (some 62 incidents). Second, there is no guarantee that the parties' memories of the unrecorded portions of the trial are accurate. Third, at least one of the parties (appellant's trial counsel) had no recollection of what transpired during unrecorded portions of the trial.

While appellant concedes that he cannot demonstrate specifically the prejudice he suffered as a result of the failure to comply with section 190.9, he asks this Court to take into account the resulting numerous gaps in the trial record when it assesses the cumulative effect of all of the errors that occurred at his trial. The cumulative error necessitates a reversal of appellant's convictions and judgment of death.

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XXXVIII.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE CALIFORNIA'S DEATH PENALTY STATUTE AND RELATED PENALTY PHASE INSTRUCTIONS ARE UNCONSTITUTIONAL

California's death penalty statute is unconstitutional as formulated and as applied in this case. Not only is the statute itself unconstitutional, but the penalty phase instructions given in this case also failed to protect appellant's constitutional rights and failed to provide the jury with adequate guidance to ensure a fair and reliable penalty determination. The resulting unreliable, arbitrary and unfair selection of the death penalty as the appropriate sentence in this case violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and the state constitutional counterparts. Reversal of the death sentence is required.

Although this Court previously has rejected some of the claims advanced below, this Court should consider these issues in light of the unique circumstances of appellant's case, as well as recent decisions of the United States Supreme Court which have cast doubt on the continued vitality of this Court's rulings.

A. The Failure to Require Proof Beyond a Reasonable Doubt that Death is the Appropriate Sentence

This Court has previously rejected the argument that a jury must be instructed that it can return a death sentence only if it finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. (*People v. Box* (2000) 23 Cal.4th 1153, 1216.) However, the decisions of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) __ U.S. __, 122 S.Ct. 2428 require reconsideration of the holdings in *Box* and other cases rejecting the applicability of the reasonable doubt standard to the death penalty determination.

In *Apprendi*, the Supreme Court held that under the Fifth, Sixth, and Fourteenth Amendments, any fact other than a prior conviction must be proven to a jury beyond a reasonable doubt if the existence of that fact serves to increase the maximum penalty for the crime. (*Apprendi, supra,* 530 U.S. at p. 476.) Applying these principles to appellant's case demonstrates that the jury was not held to this standard.

In California, the capital sentencing scheme is a two-phase process - - the guilt phase, followed by the penalty phase. In the guilt phase, it is only after a defendant has been found guilty *beyond a reasonable doubt* of first degree murder, and after the existence of a special circumstance has been found to be true *beyond a reasonable doubt*, that the sentencing options of the penalty phase - - death or life without parole - - may come into play. Before a person can be sentenced to death, the jury must find both the existence of an aggravating factor and that the aggravating factors substantially outweigh the mitigating factors. Under the rational of *Apprendi,* these ultimate findings of the penalty phase must be made *by a jury based on proof beyond a reasonable doubt.* As the Court stated in *Apprendi*:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

(*Id.* at p. 484.)

Any doubt about the application of the *Apprendi* rationale in the death penalty context was removed by the recent Supreme Court holding in *Ring v. Arizona, supra*. *Ring* addressed the constitutionality of Arizona's two-step capital sentencing structure. In Arizona, similar to California, first

degree murder is punishable by death or life imprisonment. (*Ring, supra,* 122 S.Ct at p. 2434.) Comparing Arizona's statute to California's, this Court recently held:

> "A finding of first degree murder in Arizona [is] the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California; both events [narrow] the possible range of sentences to death or life imprisonment."

(*People v. Ochoa* (2001) 26 Cal.4th 398, 453.) In Arizona, however, the trial judge, rather than a jury, determines the appropriate penalty in a special proceeding which follows the first degree murder conviction. Arizona's procedure requires that the judge find the existence of at least one of several enumerated aggravating circumstances and that "there are no mitigating circumstances sufficiently substantial to call for leniency." (*Ring v. Arizona, supra,* 122 S.Ct. at pp. 2434-2435, citing Ariz.Rev.Stat. Ann. § 13-703(F).) This procedure had previously been upheld as constitutional in *Walton v. Arizona* (1990) 497 U.S. 639.

However, in *Ring* the Court noted that without the "critical finding" that a statutory aggravating factor exists, "'the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.'" (*Ring v. Arizona, supra,* 122 S.Ct. at p. 2440, quoting *Apprendi v. New Jersey, supra,* 530 U.S. at p. 539 (O'Connor, J., dissenting).) Looking to the *effect* of particular findings as dispositive, the Court held:

> "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury *beyond a reasonable doubt*."

(*Ring v. Arizona, supra,* 122 S.Ct. at p. 2439, emphasis added, citing *Apprendi v. New Jersey, supra,* 530 U.S. at pp. 482, 483.)

Ultimately, the Court overruled *Walton* and held the Arizona sentencing scheme unconstitutional in light of *Apprendi* because the required finding

of an aggravated circumstance, which exposed Ring to a greater punishment than that authorized by the jury verdict which made him eligible for the death sentence, must be made by a jury. (*Ring v. Arizona, supra,* 122 S.Ct. at p. 2443.)

The importance of *Ring* to the sentencing selection process in California is manifest in the consistent reiteration that facts which authorize increased punishment must be found by the jury beyond a reasonable doubt. As Justice Scalia plainly stated:

> "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury *beyond a reasonable doubt.*"

(*Id.* at p. 2444, Scalia, J., concurring, emphasis added.)

California's requirement that the jury find the aggravating circumstances substantially outweigh the mitigating circumstances (see CALJIC No. 8.88) has been held to be the functional equivalent of the findings required by the Arizona statute. (*People v. Ochoa* (2001) 26 Cal.4th 398.) *Ring* makes clear that such a determination must be by the jury based on proof beyond a reasonable doubt.

This Court should apply the principles of *Apprendi* and *Ring* and remand this case for a new penalty determination where the prosecution must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

B. The Failure to Require Proof Beyond a Reasonable Doubt of Each Alleged Aggravating Circumstances

The defense requested a jury instruction that all jurors must agree on any aggravating factors and that such factors must be proved beyond a

reasonable doubt (CT 1111), which the trial judge rejected. (CT 1065.) The failure to give this instruction amounted to federal constitutional error.

As discussed in the preceding argument, recent decisions by the United States Supreme Court in *Apprendi* and *Ring* make it clear that findings necessary to increase the maximum punishment must be made by a jury upon proof beyond a reasonable doubt. Because a finding of at least one aggravating factor is critical to a determination in California increasing the maximum punishment for murder to the death penalty, such a finding must be based on proof beyond a reasonable doubt.

Pursuant to *Apprendi* and *Ring*, it is clear that the trial court's failure to require that the prosecution meet such a burden of proof violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Appellant's death sentence must be reversed.

C. The Failure to Require Unanimous Findings as to Each Alleged Aggravating Circumstance

As stated above, the defense also requested an instruction that any findings as to the existence of an alleged aggravating circumstance must be unanimous. (CT 1111.) The trial court denied this request. (CT 1065.) By doing so, the trial court committed federal constitutional error requiring reversal.

This Court has previously rejected such a claim by holding that "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147.) The *Bacigalupo* decision relied on the holding of *Hildwin v. Florida* (1989) 490 U.S. 638 that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) But this proposition from *Hildwin* is no longer sound law. The more recent decisions by the United States Supreme Court in

Apprendi and *Ring* clarify that jury findings based upon proof beyond a reasonable doubt are required for a proper determination of a death penalty. Based on the rationales in *Apprendi* and *Ring*, and on the conjunction of the Sixth, Eighth and Fourteenth Amendments, jury unanimity as to each alleged aggravating circumstance is required as well. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McCoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.)

In this case, the inadequate instructions permitted the jury to find an aggravating circumstance without unanimous juror agreement. Rather, a juror was free to make such a finding even if only that one juror believed that the defendant had committed the alleged aggravating conduct. Such a process violates the Sixth, Eighth and Fourteenth Amendments by failing to require juror deliberation on a critical factual issue.

This failure to require jury unanimity on findings related to aggravating circumstances stands in stark contrast to the rules applicable in non-capital cases where juries are instructed that any findings must be unanimous. (See CALJIC No. 17.50.) This disparate and unfavorable treatment violates the mandate of the United States Supreme Court that procedural protections afforded capital defendants should be more rigorous than those provided to non-capital defendants. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605-606.) California has adopted the opposite approach. Appellant was given less procedural protection that other individuals not charged with a capital offense, thus violating state and federal guarantees of equal protection and due process. (U.S. Const., 14th Amend; Cal. Const., art. I, §§ 7 and 15.)

These errors require reversal of appellant's death sentence.

D. The Failure to Require Written Findings With Respect to Aggravating Factors Prevented Meaningful Appellate Review and Denied Equal Protection of the Law

California's death penalty scheme fails to require that the jury make written findings regarding the aggravating factors it selects in imposing the death penalty. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional.[148/] appellant respectfully requests that this decision be reconsidered. Appellant submits that the failure to require written findings deprives a defendant of his due process and Eighth Amendment rights to meaningful appellate review of his case. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.)

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code § 1170(c).) Because under the Fifth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that the sentencer in a capital case is constitutionally required to identify for the record, in some fashion, the aggravating and mitigating circumstances found and rejected.

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148. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; see also *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1484-1485 [reaching same conclusion regarding the 1977 death penalty law].)

As discussed above, the decisions in *Apprendi v. New Jersey*, *supra*, and *Ring v. Arizona*, *supra*, require that a jury decide unanimously and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know what, if any, of the aggravating factors in this case were found by all of the jurors.

Moreover, this Court itself has stated that written findings are "essential" for meaningful appellate review:

> In *In Re Podesto*, we emphasized that a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable.

(*People v. Martin*, *supra*, 42 Cal.3d at pp. 449-450.)

Indeed, explicit findings in the penalty phase of a capital case are especially critical because of two factors: (1) the magnitude of the penalty involved (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 305); and (2) the need to address error on appellate review. With respect to the latter factor, it should be noted that Maryland's written finding requirement in capital cases enabled the United State Supreme Court not only to identify the error that had been committed under prior state procedure, but also to gauge the beneficial effect of the newly implemented state procedure. (*Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.)

The lack of a written finding requirement with respect to aggravating factors renders meaningful appellate review impossible. California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v.*

California (1984) 512 U.S. 967, 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316; contra, *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.)

The failure to provide written findings makes it extremely difficult to assess the prejudice which results at the penalty phase when a special circumstance is invalidated on appeal. Written findings would enable this Court to determine whether any of the improper aggravating factors were ones on which the jurors actually relied.[149/]

Accordingly, the failure to require written findings with regard to aggravating factors deprived appellant of his Eighth Amendment right to meaningful appellate review and his Fifth and Fourteenth Amendment right to due process of law. It is both reasonably possible (*Chapman v. California, supra*, 386 U.S. at p. 26) and reasonably probable (*People v. Watson* (1956) 46 Cal.2d 818, 836) that the failure to instruct correctly on the need for unanimity regarding aggravating circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 341). Accordingly, appellant's death sentence should be reversed, and hiscase remanded for a new penalty phase trial.

E. The Trial Court's Inadequate Instruction on the Weighing Process Failed to Channel the Jury's Discretion Adequately

CALJIC No. 8.88, the instruction given in this case, is constitutionally inadequate to channel the jury discretion and prevent an

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149. In Argument X, *supra*, appellant explains that a new penalty phase trial is necessary if one or more special circumstances should be set aside because of insufficiency of evidence.

arbitrary and capricious sentencing decision. Appellant requested, without success, various modifications to the standard penalty instructions in order to provide the jury with proper guidance. These modifications concerned the following: fact that the jury should not limit consideration of mitigation to the statutory factors (CT 1089); expanded definition of mitigation (CT 1092); expanded definitions of aggravation and mitigation (CT 1093); specification that any mitigation can be the basis for rejecting the death penalty (CT 1095); fact that jurors may spare the life of the defendant for any reason they deem appropriate (CT 1099); and fact that jurors may consider sympathy. (CT 1101.) The failure to add these modifications but instead to rely on the inadequate standard instructions resulted in an unreliable and unconstitutional penalty determination.

A capital jury that finds that death is not the appropriate punishment in a given case is required to return a sentence of life without the possibility of parole. (Pen. Code § 190.3; *People v. Allen* (1986) 42 Cal.3d 1222, 1277.) Similarly, in weighing the factors in aggravation and mitigation, a jury that finds that aggravation does not outweigh mitigation is required to return a life verdict. (Pen. Code § 190.3.) The sentencing instructions given in this case failed to provide clear direction on these principles.

This Court rejected such an argument, reasoning that, in light of the instruction that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct on the converse situation. (*People v. Duncan* (1991) 53 Cal.3d 995, 998.) But the *Duncan* opinion cites no authority for this position and should be reconsidered in light of the holdings disapproving instructions emphasizing the prosecution's theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014.)

In *People v. Moore, supra,*, this Court recognized the prejudice from the one-sided instructions:

> It is true that the . . . instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.*, 43 Cal.2d at pp. 526-527.)

Contrary to the apparent assumption in *Duncan*, the law does not rely upon juries to infer one rule from the statement of its opposite. The instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life without the possibility of parole was required.

It is well-settled that courts must instruct on any defense theory supported by substantial evidence. (*People v. Glenn* (1991) 229 Cal.App3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this right to appellant violated due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

In addition to violating due process, this instruction also violates the Sixth Amendment right to a fair jury trial because it effectively directs a verdict. The jury impliedly was told that if aggravation outweighed mitigation, a death sentence was compelled. Under California law, however, a penalty jury may return a verdict of life without possibility of parole even if the aggravating circumstances outweigh those in mitigation. (*People v. Brown* (1985) 40 Cal.3d 512, 538-541, rev'd on other grounds,

sub. nom. California v. Brown (1987) 479 U.S. 538.) The instructions requested by the defense would have clarified this important principle.

The requested defense instructions would have also clarified the meaning of mitigation. This Court's prior assumption that "mitigating" is a commonly understood term necessitating no further definition (see, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 702) is refuted by empirical studies. A study of California's capital jury instructions found only 12% of the college-educated subjects able to define mitigation in a legally correct manner. (Haney & Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 420.) A majority of the participants – 53% – attempted to define mitigation by focusing on the nature of the offense. (*Id.* at p. 421.) Similarly, another study based on interviews with actual capital jurors in California found only 13 of 30 jurors interviewed showed "reasonably accurate comprehension of the concepts of aggravating and mitigating." (Haney, et al. *Deciding to Take a Life: Capital Juries, Sentencing Instructions and the Jurisprudence of Death* (1994) J. Social Issues, Vol. 50, No. 2, pp. 149, 169.) The study also noted that "fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a presumption in favor of death." (*Id.* at p. 162.)

A definition of mitigation limited solely to circumstances surrounding the capital crime violates the federal constitutional principle that the jury consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.) The failure to instruct appellant's jury regarding the full scope of mitigation was tantamount to an instruction not

to consider mitigating evidence if not directly related to the crime. Such instructions are unconstitutional. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399.)

For all of these reasons, the inadequate instructions given in this case resulted in a constitutionally flawed penalty determination. Reversal is required.

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XXXIX.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT THE CONVICTIONS AND DEATH SENTENCE BE REVERSED

Even if the errors in appellant's case standing alone do not warrant reversal, the Court should assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn. 15; *Phillips v. Woodford, supra*, 267 F.3d at p. 985.)

The prosecution's case against appellant was extremely thin. While it was undisputed that appellant spent time with the victim at her house the evening before her body was discovered, there was no reliable physical evidence tying him to her murder. The prosecution's case against him, in fact, rested on the implausible testimony of a convicted felon who some months after the fact suddenly claimed that appellant had admitted his participation in a murder of a woman in California. The evidence was not sufficient to sustain the findings against appellant of the felony murder special circumstances of attempted rape, robbery and burglary.

On the night of the murder, appellant and his codefendant, Richard Letner, were stopped by a police officer in the car owned by the victim. Letner was at the wheel and appellant was in the passenger's seat. According to the officer, appellant seemed very intoxicated. That vehicle stop was not based on a reasonable suspicion or probable cause and therefore was unconstitutional. The trial judge erred in denying appellant's motion to suppress all fruits of that unlawful stop and search. He also erred in his determination of various evidentiary issues and in giving improper jury instructions.

The errors in the penalty phase of appellant's trial were equally grave. The failure of the trial judge to sever appellant's trial from that of his codefendant was error which denied appellant a fair trial in both the guilt and penalty phases of the trial. The denial of both defendants' requests for separate penalty trials was particularly prejudicial. Codefendant Letner testified at the penalty phase and alleged, in the most graphic detail, that appellant singlehandedly had murdered Ivon Pontbriant. In addition, Letner put on other evidence to prove that he was supposedly acting under the domination of appellant in the crimes at issue in the case. Because both appellant and Letner were put in the position of acting as second prosecutors against each other, their counsel repeatedly but unsuccessfully requested mistrials throughout the penalty phase trial. In addition, the inadequate instructions to the jury as well as prosecutorial misconduct tainted appellant's penalty phase trial.

Prejudicial Federal Constitutional Errors

The Eighth Amendment and the Due Process Clause of the Fourteenth Amendment require reliability in a capital case. (*Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens, supra*, 462 U.S. at p. 885.) The Fourteenth Amendment also protects a criminal defendant's rights to the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) In a death penalty case, the state-created liberty interest described in *Hicks* means the right to due process in accordance with state law. In a capital case, the principles of the *Hicks* rule also implicate the Eighth Amendment. Just as *Hicks* guards against arbitrary deprivations of liberty or life, so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.)

When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not those of the reviewing court. A reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (See, e.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669.) It certainly cannot be said that the errors in this case had "no effect" on at least one juror. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

Prejudicial Errors Under State Law

The combined errors in this case also compel reversal of appellant's death sentence under state law. In *People v. Brown* (1988) 46 Cal.3d 432, 446-448, this Court held that the standard for penalty phase error in a capital case is the "reasonable possibility" harmless error standard. It is "the same in substance and effect" as the *Chapman* [150] "reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) It is a more exacting standard than that used for assessing prejudice for guilt phase error under *People v. Watson, supra*, 46 Cal.2d at p. 836. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

The decision of whether to sentence a defendant to death or to life without the possibility of parole requires the personal moral judgment of each juror. (*People v. (Albert) Brown* (1985) 40 Cal.3d 512, 541.) In a death penalty case, "individual jurors bring to their deliberations 'qualities

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150. *Chapman v. California, supra*, 386 U.S. p. 24, held that the test for prejudice for federal constitutional error is that reversal is required unless the prosecution can demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained."

of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 311; internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) These differences in the decision-making process in the penalty phase of a capital case necessarily complicate the task of an appellate court in assessing the effect of trial error.

Given the interrelationship and the severity of the trial court errors in this case, their cumulative effect was to deny appellant fair and reliable guilt and penalty determinations. Appellant's convictions and death sentence must be reversed.

* * * * *

CONCLUSION

For all of the foregoing reasons, appellant asks this Court to reverse his convictions and set aside his sentence of death.

Dated: October 28, 2002

Respectfully submitted,

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AL:AP:RFT:geb

DECLARATION OF SERVICE

Name: People v. Richard Lacy Letner, Christopher Allan Tobin **Case No.: Crim. S015384**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my place of employment and business address is: 801 K Street, Suite 1100, Sacramento, California 95814.

On October 28, 2002, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelope/s to be deposited in the United States Postal Service mailbox at Sacramento, California, with postage thereon fully prepaid. There is delivery service by the United States Postal Service at each of the places addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2002, at Sacramento, California.

Kaile E. Brocklehurst

Declarant