SUPREME COURT COPY

SUPREME COURT No. S015384 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	) Tulare County
v.	) Superior Ct. No. TC 26592
RICHARD LACY LETNER, and Christopher Allan Tobin	)
Defendants and Appellants.	)

SUPREME COURT
FILED
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DEPUTY

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Tulare

HONORABLE WILLIAM SILVEIRA, JR., JUDGE

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DEATH PENALTY

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SUPREME COURT No. S015384 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
	)	Tulare County
v.	)	Superior Ct.
	)	No. TC26592
RICHARD LACY LETNER,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Tulare

HONORABLE WILLIAM SILVEIRA, JR. , JUDGE

STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, art. VI, section 11 and Penal Code section 1239, subdivision (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF CASE

On November 28, 1988 appellant Richard Lacy Letner and his co-defendant, Christopher Tobin, were arraigned on an Amended Information. (1 C.T. 14, 13.)[1] The Information charged appellant and Christopher Tobin with five counts. (3 C.T. 691-693.)

Count I alleged that on or about March 1, 1988, appellant and Christopher Tobin murdered Ivon Pontbriant in violation of Penal Code Section 187. This count also alleged three special circumstances: 1) the murder of Ivon Pontbriant was committed while Christopher Tobin and appellant were engaged in the commission or attempted commission of rape within the meaning of Penal Code Section 190.2(a)(17); 2) the murder of Ivon Pontbriant was committed while Christopher Tobin and appellant were engaged in the commission or attempted commission of robbery, within the meaning of Penal Code Section 190.2(a)(17); and 3) the murder of Ivon Pontbriant was committed while Christopher Tobin and appellant were engaged in the commission or attempted commission of burglary, within the meaning of Penal Code Section 190.2(a)(17). (3 C.T. 692.)

Count II alleged that on or about March 1, 1988 appellant and Christopher Allan Tobin attempted forcible rape of Ivon Pontbriant in violation of Penal Code Sections 664/261(2). (3 C.T. 692.)

Count III alleged that on or about March 1, 1988 appellant and

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[1] References to the Clerk's Transcript will be abbreviated as "C.T."and references to the Reporter's Transcript will be abbreviated as "R.T."

Christopher Allan Tobin committed residential robbery in the home of and in the presence of Ivon Pontbriant in violation of Penal Code Sections 211/212.5. (3 C.T. 692.)

Count IV alleged that on or about March 1, 1988 appellant and Christopher Allan Tobin entered the inhabited dwelling of Ivon Pontbriant with the intent to commit burglary in violation of Penal Code Section 459. (3 C.T. 692.)

Count V alleged that on or about March 1, 1988 appellant and Christopher Allan Tobin unlawfully took an automobile belonging to Ivon Pontbriant in violation of Section 1085(a) of the Vehicle Code. (3 C.T. 692-693.)

Appellant and codefendant Tobin entered pleas of not guilty to all charges and denied all special allegations. (1 C.T. 14, 13.)

On February 17, 1989, appellant and Mr. Tobin filed motions to suppress a vehicle stop pursuant to Penal Code section 1538.5. (1 C.T. 74-90.) On June 7 and 8, 1989, in a hearing before the Honorable William Silveira, Jr.[2] of the Tulare Superior Court, the parties argued this and other motions, which were denied. (3 C.T. 416-418.)

Subsequently both defendants filed motions to sever their trials (2 C.T. 275-301; 2 C.T. 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

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

and his codefendant. (2 C.T. 484-493.) Appellant filed a reply. (2 C.T. 495-502.) At a hearing on August 25, 1989, the motions for separate trials and for dual juries were denied. (2 C.T. 503-504.)

During a chambers conference held on Monday, November 20, 1989, the defense protested the fact that the sheriff's department had summarily placed both defendants in leg braces. (31 R.T. 4461.) The trial judge denied the motion, noting that he was "going to defer to the opinion of the sheriff's office." (31 R.T. 4464- 4465.) Eventually, however, the trial court relented and the leg braces were removed. (32 R.T. 4693.)

A jury was sworn to try the case on November 21, 1989. (3 C.T. 688.) Presentation of evidence commenced on December 4, 1989 and continued through January 10, 1990. (3 C.T. 697, 4 C.T. 970.) At the close of the prosecution's case, appellant moved for dismissal of the attempted rape, robbery and burglary charges and the three special circumstance allegations. This motion was denied. (3 C.T. 725-726, 44 R.T. 6563-6570.) This trial was recessed for one week because of the Christmas holidays. (3 C.T. 726.)

On December 27, 1989, the prosecution reopened its case-in-chief briefly and rested again. (3 C.T. 727.)

Mr. Tobin presented his case-in-chief on December 27-29, 1989. (3 C.T. 727-732.) Mr. Tobin testified on his own behalf. (3 C.T. 730-732, 46 R.T. 6823-7119.) Appellant presented his case-in-chief on January 2 and 3, 1990, but appellant did not testify. (3 C.T. 734-737.)

The prosecution's case in rebuttal took place on January 3 and 4, 1990. (3 CT 737-738.) On January 8, 1990, the defense presented its last witness, and the trial judge then read the instructions to the jury. (3 C.T. 772.) Closing statements by counsel were given on January 9 and 10, 1990. (4 C.T. 961, 969.) The jury began its deliberations at 3:40 p.m. on January 10th. (4 C.T. 969.)

Immediately, thereafter, appellant moved for a mistrial on the ground 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. (4 C.T. 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 Tobin as well as true findings on all three special circumstances. (4 C.T. 971-994.) The trial was recessed until January 22, 1990, when the penalty phase trial was to begin. (4 C.T. 974.)

At the penalty phase, itself, appellant renewed his severance motion as well as arguing a motion for a mistrial because the codefendant was making the prosecution's case. (65 R.T. 9526-9527.) The severance motion was again denied. (4 C.T. 1030; 65 R.T. 9527.)

Additionally, over vigorous defense objection, the trial judge allowed the prosecutor to read the prior voir dire testimony of Earl Bothwell to the jury at the penalty phase. (4 C.T. 1031.)

The prosecution presented its evidence in aggravation over the course of three days, January 23, 25, and 26, 1990. (4 C.T. 1034-1035.) On January 25, 1990, appellant moved for a mistrial on the ground that the prosecution failed to provide him with evidence that prosecution witness Ms. Mayberry had a prior felony conviction. This motion was denied. (4 C.T. 1038.)

On January 29, 1990, Mr. Letner began presenting his case in mitigation. (4 C.T. 1041.) Appellant testified on his own behalf. (4 C.T. 1042-1044.)

Codefendant Tobin completed the presentation of his evidence in mitigation on February 6, 1990. (4 C.T. 1052.) Codefendant Letner then moved for a severance and/or mistrial, which was denied. (4 C.T. 1053.)

On February 8, 1990, the lawyers for all parties delivered their penalty phase closing arguments to the jury. (4 C.T. 1158, 67 R.T. 9631-9774.)

The trial judge then instructed the jurors. (67 R.T. 9777.) Jury deliberations began on Friday, February 9, 1990. (5 C.T. 1262.) When the jurors did not reach a verdict, they were dismissed for the weekend. Appellant again moved for a mistrial and severance, which was denied. (68 R.T. 9828-9829.)

Jury deliberations resumed on Tuesday, February 13 (Monday, February 12, was a national holiday) and continued on February 14 and 15. (69 R.T. 9833-9834.)

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 [Tobin] but was hung as to the other. (5 C.T. 1268, 1269, 1274.) After questioning the jury, the judge recessed the trial for the weekend. (70 R.T. 9848.) The jurors resumed deliberations on February 20, 1998. Later that day, they finally reached an agreement on Mr. Letner. The jury returned death verdicts on both defendants. (5 C.T. 1272, 1275.)

On April 17, 1990 both defendants' motions for a new trial were denied. (6 C.T. 1575, 1576.)

On April 24, 1990 the court denied the Applications for Modification of Verdict Imposing Death Penalty and imposed judgments of death on both appellant and Christopher Tobin. (6 C.T. 1598-1603; 1613-1619.) The court sentenced appellant to death as to Count 1 and imposed a consecutive sentence of six years as to Count 3, the robbery count , and eight months as to Count 5, the unlawful taking of a vehicle. The court stayed the middle terms of three years each on Counts 2 (attempted rape) and 4 (burglary.) (6 C.T. 1604-1605.)

This appeal is automatic.

STATEMENT OF FACTS

GUILT PHASE

Prosecution Case-in-Chief

The Crime Scene

On March 2, 1988 Ivon Pontbriant was found dead in her home at 804 North Jacob St. in Visalia. (3 R.T. 4830, 4834.) Responding

to a telephone call, Patrol Officers Edward Chan and Mike Stowe of the Visalia police department arrived at Ms. Pontbriant's home at 8:20 p.m. that evening. (3 R.T. 4837-4838.) The officers entered the house through the unlocked back door. (3 R.T. 4840, 4842.) The front door was locked and the porch light was on. (3 R.T. 4834; 3 R.T. 4842.) A door leading from the driveway/garage into a washroom was also unlocked. From the washroom area a door led into the master bedroom. That door was closed, but not locked. (3 R.T. 4843; 5618-5619.) Officers Stowe and Chan maintained security until the arrival of the crime lab team and detectives. (3 R.T. 4852.)

Identification technician John Rains arrived at 804 North Jacob about 9 p.m. (39 R.T. 5610-5612.) Officers Stowe and Chan were present when Mr. Rains arrived. (39 R.T. 5613.) Ms. Pontbriant was in the living room, face down on the floor between the coffee table and the couch. She was clothed only with a brassiere that had been pulled down around her waist and a white sock on each foot. A telephone cord had been secured around her left wrist, looped around her neck and secured again to her right wrist. (39 R.T. 5620.) An empty Heineken brand beer bottle (People's exhibit 163) was wedged between Ms. Pontbriant's legs, up toward her genital area. (39 R.T. 5622-5623, 5753-5756.) There were feces on the bottle. (39 R.T. 5623.)

From the living room Mr. Rains collected two clumps of hair which appeared to be Ms. Pontbriant's from the sofa and in front of

the sofa (39 R.T. 5640), a pillow with blood on it (People's exhibit 165) that was near her head (39 R.T. 5646), a Heineken beer bottle, one quarter full that was between Ms. Pontbriant and the couch (R.T. 5648), five Marlboro filter cigarette butts, seven Camel filter brand butts, two butts of an unknown brand and a Lowenbrau beer bottle cap (39 R.T. 5648-5650) that were from an ashtray on the coffee table, and a Schaeffer beer can (People's 159), an unsmoked Marlboro filter cigarette, three matchbooks, some cellophane and some foil, all from the coffee table. (39 R.T. 5651-5652.)

A cut on the top of the coffee table measured approximately three quarters of an inch deep. (39 R.T. 5653.) A photograph of Ms. Pontbriant, with a knife thrust through it, was also on the coffee table. Mr. Rains opined that the photograph was on the table when the knife thrust was made. (39 R.T. 5655-5656.)

A pair of pink slippers, a pair of women's boots and a white purse were near Ms. Pontbriant's body. (39 R.T. 5658.) The purse (People's exhibit 131) was on its side with the contents, including her driver's license, spilling out. (39 R.T. 5658; 40 R.T. 5678.) There was a total of $18.29 in the purse, including two five dollar bills, four one dollar bills and some change. (40 R.T. 5745; 5781-5782, 5387.)

A Camel filter brand cigarette butt was next to the purse. (39 R.T. 5659.) A brown purse (People's exhibit 177) was in the kitchen/dining area behind a chair. (40 R.T. 5675.)

Photos of the kitchen area showed Heineken brand beer bottle caps and a beer bottle opener on the counter, as well as a Schaeffer

brand beer can. (39 R.T. 5667-5668.) No knives which could have made a cut similar to the one in the coffee table top were found in the residence. (40 R.T. 5680.)

In the master bedroom a pillow on the floor next to the bed (People's exhibit 178) appeared to have fresh blood splatters on it. (40 R.T. 5685.) A doily on the dresser (People's 142) also appeared to have fresh blood on it. (40 R.T. 5686.) There was a blue baseball hat (People's 141) on the floor in front of the dresser. (3 R.T. 4852; 40 R.T. 5684.) Two samples of carpet which appeared to have semen on them (People's 160) were taken from the bedroom. 40 R.T. 5722.)

In the bathroom, the seat of the toilet was in an up position. Mr. Rains collected a wash rag (shown in photo no. 74) because he could see what appeared to be blood on the top edge. It appeared to Mr. Rains that the rag was used to wipe something up and was then rinsed. (40 R.T. 5692-5693.)

Mr. Rains attempted to lift fingerprints from various places in the house, i.e., the refrigerator, counter top in the kitchen, door jambs, and doorknobs, but was unable to locate any latent impressions. (40 R.T. 5695.)

The Autopsy

Gary Walter (34 R.T. 4868) performed the autopsy on Ms. Pontbriant on March 3, 1988. (34 R.T. 4871.) Several officers of the Visalia police department and the Tulare County sheriff's office were present. (34 R.T. 4872.) Ms. Pontbriant had on a pair of socks and a bra wrapped around her waist. (34 R.T. 4870-4871.) A phone cord

was wrapped around her neck and around both wrists. (34 R.T. 4873.) There were traumatic knife wounds around the facial area, abrasions about the face and some areas of eczema, and some blue discoloration in the left eye. (34 R.T. 4873, 4876.) The bruising injuries were determined to be blunt force induced (34 R.T. 4876), consistent with being kicked by someone wearing a shoe or being hit with a human fist. (34 R.T. 4877.) Dr. Walter opined the injuries occurred while Ms. Pontbriant was alive but near the time of her death. (34 R.T. 4881.)

There were two stab wounds on the left side of Ms. Pontbriant's neck and one on the right side. (34 R.T. 4882.) The stab wound on the right side was one half inch in length and was characterized as superficial, no measurable depth. (34 R.T. 4885-4886.) Beneath the stab wound on the right side were three parallel superficial lacerations. (34 R.T. 4883.) The wounds on the left side were one inch and three quarters of an inch in length. (34 R.T. 4889.) Dr. Walter opined People's 117A (a new buck knife) could have caused the stab wounds. (34 R.T. 4889-4891.) All six wounds to the neck were separate and distinct.

In addition, there was a large gash to the back of Ms. Pontbriant's neck. (34 R.T. 4894.) Dr. Walter opined that it was this latter wound that caused Ms. Pontbriant's death through exsanguination. (34 R.T. 4897-4898.) This wound injured multiple small blood vessels, made a small laceration in the right carotid artery, and severed bone surrounding Ms. Pontbriant's spinal cord.

(34 R.T. 4898, 5021.) Some of the wounds indicated a cutting or sawing effect while other wounds were indicative of straight vertical stabs. (34 R.T. 4902.)

Dr. Walter opined extreme force was necessary to cause transection of the spinal cord. (34 R.T. 4904.) He opined it was conceivable that People's 117A could have caused the spinal injury. A larger weapon may have done so in less time and a smaller weapon may have caused it if more time was available to the perpetrator. (34 R.T. 4905.) Although People's exhibit 117 (appellant's used buck knife) was not as sharp nor as pointed as People's exhibit 117A, given any length of time one could probably do similar damage with People's exhibit 117. Under most circumstances, however, a certain amount of cutting action is required to go through a vertebra. People's exhibit 117 does not have very much cutting surface. (34 R.T. 4906.) Dr. Walter did not believe People's exhibit 124 (sword) could have caused the injuries described and he believed it unlikely that People's exhibit 123 (shears) could have caused the injuries. (34 R.T. 4918-4920.)

Dr. Walter opined that the cord around Ms. Pontbriant's neck caused some hemorrhaging but was insignificant in comparison to the wounds and did not cause death. (34 R.T. 4920-4921.)

While it is not unusual for pain and injury to result in loss of control of the sphincter, Dr. Walter knew of no instance of release of feces after death. (34 R.T. 4934.)

Dr. Walter did not note any injury or trauma to the vagina or

the rectum of Ms. Pontbriant. (34 R.T. 4935-4936.) He noted that Ms. Pontbriant had a blood alcohol level of .29 percent, which he characterized as "moderately high." (34 R.T. 4938, 5015-5016.) He found lividity, broken blood vessels with leakage which settles in portions of the body, consistent with Ms. Pontbriant having been killed in the late evening hours of March 1, 1988. (34 R.T. 4938-4949, 5038.)

Mr. Rains collected the autopsy sheets and the sheets used to transport Ms. Pontbriant from her home to the autopsy site. (40 R.T. 5699-5700.) He also collected fingernail scrapings, finger and palm prints and a blood sample from Ms. Pontbriant. (40 R.T. 5700-5701.) He took autopsy photographs and collected Ms. Pontbriant's sexual assault kit. (40 R.T. 5701-5702.) Mr. Rains did not know the slides containing the rectal and vaginal smears were not in the collection box. (40 R.T. 5703.) Detective Logan testified that those slides remained in the autopsy room for about one month. (40 R.T. 5789-5790.)

Recovery and Search of Ms. Pontbriant's Car

Officer Alan Wightman was on patrol driving a marked unit on March 1, 1988. (42 R.T. 6136, 6138.) About midnight he noticed a red Ford Fairmont with two male occupants approaching a stop sign on Garden Street. (42 R.T. 6139-6140.) The vehicle stopped at the stop sign then turned left to go eastbound on Main Street. (42 R.T. 6140.) Officer Wightman made a U-turn and followed the vehicle until he made a traffic stop on State Route 198, east of County Center

Drive. (42 R.T. 6140.)

Appellant Letner was the driver of the vehicle and Mr. Tobin was the passenger. (42 R.T. 6148-6149.) Officer Wightman observed a six-pack beer container with four capped green bottles in it on the floor of the back seat behind the passenger side. (42 R.T. 6150.) He smelled alcohol on appellant Letner's breath and asked Mr. Letner to step out of the vehicle. Mr. Tobin stayed in the car. (42 R.T. 6151.)

Appellant Letner did not have his driver's license and could not produce the car registration. (42 R.T. 6152, 6154.) He was able to find an insurance card with Ms. Pontbriant's name on it and told Officer Wightman that Ms. Pontbriant lived on North Jacob but he did not know the exact address, nor did he know Ms. Pontbriant's telephone number. (42 R.T. 6152-6153.)

Officer Wightman was attempting to find a current address though a driver's license check when Officer McIntosh arrived at the scene. (42 R.T. 6155-6156.) Officer Wightman then asked Mr. Tobin to exit the vehicle and the officers patted down both men. No weapons were found on Mr. Tobin, but appellant Letner had a common buck knife, similar to People's exhibit 117-A, in his front pants pocket. (42 R.T. 6157.) Officer Wightman took the knife and later examined it. (42 R.T. 6158.)

He also noticed the odor of alcohol on Mr. Tobin. (42 R.T. 6159.) There was an open bottle under Mr. Tobin's seat. (42 R.T. 6160.) Officer Wightman emptied the contents onto the ground and

tossed the bottle over the fence by the freeway. (42 R.T. 6164.)

Responding to the officer's request, appellant gave Officer Wightman the keys to the trunk. (42 R.T. 6168.) Officer Wightman observed an orange basket (People's exhibit 139), some bags, and a sword. (42 R.T. 6169.) He did not remember seeing a shotgun. (42 R.T. 6169-6170.)

Officer Wightman conducted roadside sobriety tests on both Mr. Letner and Mr. Tobin. In his opinion Mr. Letner was okay to drive, but Mr. Tobin, showing more signs of intoxication, was not. (42 R.T. 6170-6172.) Officer Wightman issued appellant Letner a citation for driving without a license, returned his knife to him, and instructed Mr. Letner to secure the vehicle. (42 R.T. 6172, 6185.)

Appellant Letner and Mr. Tobin began walking at Officer Wightman's directive and Officer Wightman stayed with the vehicle about twenty minutes. The time on the citation was 12:10 a.m., March 2, 1988. (42 R.T. 6173.) When Officer Wightman got off duty at 4:00 a.m. he drove past the location where he stopped the vehicle. The vehicle was still there then and remained there until that evening at 5:30 p.m. when Officer Wightman returned to work. (42 R.T. 6174.)

Between 8 and 9 p.m. that evening Officer Wightman heard a radio broadcast regarding 804 North Jacob. The broadcast mentioned a violent crime, a red Ford Fairmont and the name of Pontbriant. (42 R.T. 6175.) Officer Wightman responded to the North Jacob address where he encountered Officers Stowe and Chan. (42 R.T. 6176.)

Officer Wightman then returned to County Center Drive and State Route 198 and stayed with the red Fairmont until it could be impounded. He informed Detective Logan where to retrieve the beer bottle that he previously tossed to the side of the road during the vehicle search. (42 R.T. 6177.)

In the afternoon of March 4, 1988 Mr. Rains and Officer Jay Frame conducted a more thorough search of Ms. Pontbriant's car. (40 R.T. 5705.) From the floor of the car Mr. Rains collected a white cloth which appeared to have fresh blood on it. (40 R.T. 5707-5708.) Among the items in the car were a six-pack of Lowenbrau beer behind the passenger seat, a pair of gloves on the seat, and a baseball cap. (40 R.T. 5710-5711.) The Lowenbrau six-pack container contained three Lowenbrau beer bottles and a Heineken beer bottle. All were unopened. (40 R.T. 5713.) Mr. Rains collected the contents of the ashtray. (40 R.T. 5712.) From inside the vehicle he also collected a red and white squeegie, a pack of Marlboro 100 cigarettes and three books of paper matches. Mr. Rains sent these items as well as the beer carton and bottles and two packs of unopened Winston cigarettes to the lab for fingerprinting. (40 R.T. 5719-5720.)

In the trunk Mr. Rains found a tool box with the initials "IUP" on it. (40 R.T. 5715.) He also found a maroon bag (People's exhibit 135), a gray bag (People's exhibit 137), and a brown bag (People's exhibit 136.) (40 R.T. 5715.) The maroon bag contained 108 bottles of nail polish in various colors; the gray bag had a label on it that read "Estes" with an address of 410 Midland on it and it contained 31

bottles of assorted hair care products; the brown bag contained numerous hair products. The trunk also contained a shotgun (People's exhibit 149) and a sword (People's exhibit 124). (40 R.T. 5716-5717.)

Finally, Mr. Rains collected a pair of tan pants (People's exhibit 154), a blue and gray jogging jacket (People's exhibit 153), a bag containing two cartons of Camel cigarettes (People's exhibit 156), a pair of blue jeans (exhibit 151), a red Pendleton plaid shirt (exhibit 152), a red scarf (exhibit 15), and a brown leather coat (exhibit 150). (40 R.T. 5717-5718.)

Forensic Evidence

Criminalist Rodney Andres (40 R.T. 5799) did testing on blood samples from Ivon Pontbriant, Warren Gilliland, Richard Letner and Christopher Tobin (40 R.T. 5814) and on several items he received from the police department. (40 R.T. 5816.) People's exhibit 184 charts those items on which he found human blood. (40 R.T. 5817-5818.)

Mr. Andres charted his results as to one of four blood types in the ABO system[3] and one of ten blood types in the PGM (protein) system. (40 R.T. 5819.) His attempts to test the items in more than those systems did not achieve successful results. (40 R.T. 5819.) Mr. Andres' test results could exclude donors, but could not identify

[3]Mr. Andres explained that that are four categories in the ABO system; with sub-types there are ten. However, Mr. Andres cannot differentiate sub-types on a blood stain. (40 R.T. 5824.)

donors. (40 R.T. 5815-5816.)

In the ABO system Mr. Andres identified Mr. Gilliland and Mr. Tobin as Type O. Ms. Pontbriant and appellant Letner were identified as Type A. (40 R.T. 5819, 5824-5825.) In the PGM system Mr. Gilliland and Mr. Tobin were identified as two plus one plus, appellant Letner as two plus two plus, and Ms. Pontbriant as one plus one minus. (40 R.T. 5819, 5824-5825.)

Using these qualifiers Mr. Andres tested the stains on the following items and made the following conclusions:

doily on dresser	2+1+	excluded Pontbriant and Letner
pillow case	type O	excluded Pontbriant and Letner
white towel/car	type O	excluded Pontbriant and Letner
Pontbriant's buttock	1+1-	excluded Gilliland, Tobin, and Letner
Pontbriant's sweater	type A	excluded Gilliland and Tobin
tan trousers/from Iowa motel room	2+1+	excluded Pontbriant and Letner
denim jacket (Letner's's)	1+1+	excluded all four
Tobin's shirt	1+1+	excluded all four

(40 R.T. 5825-5841.)

When Mr. Andres tested the following items he found no blood on any of them: appellant's buck knife (People's exhibit 117) or its disassembled parts, wash cloth, white purse, sword and sword sheath, leather jacket, green-handled shears recovered from Ms. Pontbriant's

home, Mr. Tobin's denim trousers or tennis shoes. (40 R.T. 5848, 5851, 41 R.T. 5854-5857.)

Mr. Andres found no semen on the bed sheets. (40 R.T. 5847.) His attempts to analyze fingernail scrapings from Ms. Pontbriant's fingers provided no successful results. (41 R.T. 5858.) In a visual examination under a microscope he found no evidence of spermatozoa on the vaginal and rectal slides. (41 R.T. 5859-5861.)

Using the Louis system (41 R.T. 5864-5866), Mr. Andres tested saliva samples from Mr. Gilliland, Mr. Tobin and appellant Letner. (41 R.T. 5866.) He determined that appellant Letner and Mr. Gilliland were non-secretors and Mr. Tobin was a secretor. (41 R.T. 5867.) Mr. Andres' examination of the semen from the carpet samples was inconclusive but suggested they came from a secretor. (41 R.T. 5879.) Analysis of the cigarette butts found in Ms. Pontbriant's home caused Mr. Andres to conclude that the cigarettes were smoked by a non-secretor. (41 R.T. 5870.)

In summary, Mr. Andres opined that basically the testing told him nothing. (41 R.T. 5872.)

On cross examination Mr. Andres stated that when he received the sexual assault kit things were missing from it, including swabs. To his knowledge the swabs were never recovered. (41 R.T. 5897.) The best procedure to preserve slides is to dry them under forced air then refrigerate or preferably freeze them. (41 R.T. 5899.) Mr. Andres opined that thirty days in room temperature would "compromise" results. (41 R.T. 5899.) The loss of the swabs was

critical; they contain more of the sample and last longer. (41 R.T. 5900.)

Mr. Andres did not try to blood type the slides he received. He destroyed the slides looking for the presence of sperm. (41 R.T. 5826.)

Special Agent Michael Malone, assigned to the hairs and fibers unit, stated that most average hairs have around twenty separate characteristics. (41 R.T. 5940-5941, 5854.) It is possible to positively eliminate donors and to tell whether a hair was removed forcibly or came out naturally. (41 R.T. 5955, 5949-5951.)

In the instant case Mr. Malone received head hairs from Mr. Tobin (police department numbers 2-a through 5-b), appellant Letner (numbers 3 through ten), Mr. Gilliland (numbers 1 through 5), and from Ms. Pontbriant (number 91). (41 R.T. 5960-5961.)

Mr. Malone determined that two head hairs found on the floor near Ms. Pontbriant were her hairs and were removed by force. (41 R.T. 5962-5963.) Another head hair, found on Ms. Pontbriant's buttock, was her hair, forcibly removed. (41 R.T. 5963-5965.) Other hairs in this sample were Caucasian with no match to any of the four test subjects or were animal hairs. (41 R.T. 5964.) Two hairs removed from Ms. Pontbriant's back matched her hairs and were forcibly removed. (41 R.T. 5965.) Clumps of hair on the floor and sofa matched Ms. Pontbriant's hair and were forcibly removed. (41 R.T. 5965-5966.)

Of five hairs from Ms. Pontbriant's chest, Mr. Malone

concluded that two were not suitable for comparison and that three matched the head hairs of appellant Letner. (41 R.T. 5967-5968.) He also found an animal hair on her chest near the other hairs. (41 R.T. 5969-5970.)

Of three hairs removed from Ms. Pontbriant's sheets, two were Ms. Pontbriant's and one was a brown Caucasian head hair which did not match anyone involved in this case. (41 R.T. 5972.) There was no indication of forcible removal of these hairs. (41 R.T. 5972.)

Of seven hairs recovered from the baseball cap, six matched appellant Letner's and one did not match anyone involved in this case. (41 R.T. 5970-5971.) Three head hairs from a black cap matched appellant Letner's. (41 R.T. 5971.)

Latent print analyst Richard Kinney examined the following items for latent fingerprints: a pair of hand shears, a black rotary dial telephone, a wooden coffee table, an empty Schaeffer beer can, two ashtrays, three books of paper matches, three Heineken beer bottles, a paper matchbook, a metal bottle opener, a Schaeffer beer can, a paper sack, a red and white plastic squeegie, a pack of Marlboro 100 cigarettes, a Lowenbrau beer bottle carton containing three Lowenbrau beer bottles and one Heineken beet bottle, all full, two packs of Winston cigarettes, unopened, an ornamental sword and scabbard, and two cartons of Camel cigarettes, one unopened. (41 R.T. 5999, 6009-6010.)

Two prints were found, one on each ashtray. One print belonged to Ms. Pontbriant and the other was Mr. Gilliland's. (41

R.T. 6011-6013.)

John E. Hamman, firearm specialist, examined the cut in Ms. Pontbriant's coffee table. (42 R.T. 6042, 6045.) The cut was about 1/4 of an inch thick, about 3/4 to 8/10 of an inch long and about 8/10 of an inch deep. (42 R.T. 6046-6047.) At the widest point of the cut there was an indication of beveling. (42 R.T. 6048.)

Mr. Hamman also examined People's exhibit 117, a buck knife. (42 R.T. 6047.) He concluded People's exhibit 117 could have produced the cut. (42 R.T. 6048.) The knife blade is beveled. (42 R.T. 6049.)

Testimony of Warren Gilliland

Warren Gilliland is divorced with two sons. (36 R.T. 5092-5093.) He met Ivon Pontbriant in 1981, about seven years before the homicide. (36 R.T. 5098.) When they met, Mr. Gilliland was living in Modesto and Ms. Pontbriant was living in Visalia. (36 R.T. 5098.) Shortly after their meeting, the two began living together on East Mineral King Avenue in Visalia. (36 R.T. 5099.) Ms. Pontbriant, an LVN, was working at the Kaweah Delta Hospital. (36 R.T. 5100.)

In January 1988 the couple moved to 804 North Jacob in Visalia. (36 R.T. 5100.) They were renting the house ($395 per month) and they split the rent and all other living expenses fifty/fifty.[4]

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[4]Sharon Layman managed the property at 804 N. Jacob. (38 R.T. 5333.) She rented the house to Warren Gilliland and Ivon Pontbriant on January 12, 1988 and collected one month's deposit and pro rata rent through January 31st at the time. (36 R.T. 5334-5335.) Ms. Pontbriant paid the rent for February on February 2nd by check. (36 R.T. 5335, 5340.) The March rent was not paid. (38 R.T. 5335.)

(36 R.T. 5101.) Ms. Pontbriant began working at a convalescent hospital in Visalia. (36 R.T. 5101.) Mr. Gilliland was on social security and repaired washers and dryers. He received seventy-five dollars a month from social security. (36 R.T. 5102-5103.) Mr. Gilliland's social security check went to Richard Cuzack, the boyfriend of Mr. Gilliland's first wife. Mr. Cuzack deposited the money into Mr. Gilliland's account at First Interstate Bank in Modesto. (36 R.T. 5103.) In addition to his social security payments, Mr. Gilliland normally made about $140 to $150 per month on his washer-dryer repair/sale business. (36 R.T. 5104.)

In late January 1988, Mr. Gilliland met appellant Letner. (36 R.T. 5107.) Mr. Gilliland was looking for someone to assist him in his repair business and the clerk in The Break Room, a bar, suggested appellant Letner. (36 R.T. 5107-5108.) After their meeting, appellant Letner went to Mr. Gilliland's house two or three times a week to assist Mr. Gilliland. (36 R.T. 5108.)

Through Mr. Gilliland, Mr. Letner met Ms. Pontbriant. (36 R.T. 5112.) Appellant Letner introduced Mr. Gilliland and Ms. Pontbriant to Christopher Tobin. (36 R.T. 5115.) Neither appellant Letner nor Mr. Gilliland had a car. (36 R.T. 5116.) Appellant rode a bicycle and Mr. Gilliland rode a moped. (36 R.T. 5116-5117.) Ms. Pontbriant had a red Ford Fairmont of which she was very protective. She kept the car immaculate. (36 R.T. 5117-5118.)

Once Mr. Gilliland and Mr. Letner took Ms. Gilliland's car to a shop to get the tires rotated. To Mr. Gilliland's knowledge that is the

only time Ms. Pontbriant gave permission for Mr. Letner to drive the car. (36 R.T. 5119-5120.) She kept the keys to the car in her purse. (36 R.T. 5120.)

Mr. Gilliland testified that on Sunday morning, February 28, 1988 Mr. Letner and Mr. Tobin came to visit at the house on North Jacob. The two men arrived in a car purportedly belonging to Mr. Tobin's girlfriend. They brought some Kahlua and a couple of cartons of Marlboro cigarettes. Ms. Pontbriant and Mr. Gilliland invited the two men in for coffee. (36 R.T. 5121.)

Mr. Gilliland further testified that he was getting ready to go to Modesto and mentioned his upcoming trip during coffee. (36 R.T. 5123.)[5] According to Mr. Gilliland, Ms. Pontbriant mentioned that the rent was due in two days, so, in the presence of both defendants, Mr. Gilliland gave Ms. Pontbriant approximately $340-$350 for the rent. (36 R.T. 5124.) Mr. Gilliland testified that he got most of this $340 from his Social Security disability check,[6] and about $20 came

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[5] Before trial, however, Gilliland told Investigator Logan that he left to go to Modesto on Tuesday, March 1, 1988 (not Sunday, February 28th), and that he saw both defendants at his house around 10:00 a.m. (45 R.T. 6669, 6698-6699.)

[6] Etta Gilliland was Mr. Gilliland's ex wife. She was his Social Security payee (not her boyfriend Mr. Cuzack). She testified that social security required a payee other than Mr. Gilliland because Mr. Gilliland had a problem with drinking. (38 R.T. 5362-5363.) She also testified that there were no social security checks paid to Mr. Gilliland while he was in prison before he met Ms. Pontbriant. Further, after Mr.Gilliland's release and subsequent involvement with Ms. Pontbriant, she did not receive his first Social Security disability benefits check until March 11, 1988; eleven days *after* Ms. Pontbriant had been murdered. (38 R.T. 5360-5361.)

from money he made selling appliances. (36 R.T. 5135-5136.)[7] Having been given the money, Mr. Gilliland said Ms. Pontbriant then put the cash in her checkbook and put the checkbook into her purse. (36 R.T. 5124-5125.)[8]

The purses depicted in People's exhibits 131 and 132, white and brown, respectively, looked like Ms. Pontbriant's purses. (36 R.T. 5126.) Ms. Pontbriant kept her purses on a little table in the corner of the kitchen. (36 R.T. 5130-5131.)

After visiting for about an hour Messrs. Letner and Tobin left. (36 R.T. 5137.)

On cross examination, however, Mr. Gilliland testified that both men then returned about midafternoon. It was at that time that they arrived in a car driven by Mr. Tobin. He said it belonged to his

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7 Before trial, Gilliland told Investigator Johnson that he gave Ms. Pontbriant money on February 28, 1988, from a sale of a washer and dryer for $185. (45 R.T. 6791.) Sandra Saulque confirmed that her daughter paid Gilliland $185 by check for the purchase of a washer and dryer on February 12, 1988, two weeks before Ms Pontbriant's death on the night of February 28. (RT 7288-7289; Defense Exhibit D [a check for $185 made out to Warren Gilliland].) The check from Ms. Saulque's daughter, however, cleared her bank on February 16. (49 R.T. 7290-7291.) Further, the check was ultimately deposited in Ms. Pontbriant's account at Wells Fargo Bank, and $85 was taken back as cash – by Ms. Pontbriant while she was still alive. (49 R.T. 7291; see also, 53 R.T. 7700-7701.)

8 District Attorney Investigator Logan testified that during his first meeting with Mr. Gilliland after Ms. Pontbriant's death, Mr. Gilliland said nothing about having given Ms. Pontbriant any money before he left for Modesto. Further, even after Investigator Logan specifically asked Gilliland if there were any large sums of money in the house at the time of the murder, Gilliland replied there were not. (45 R.T. 6647.) Indeed, Gilliland could not provide Investigator Logan with any idea why someone would murder Ms. Pontbriant. (45 R.T. 7154.)

girlfriend. (46 R.T. 5207.) Moreover, it was actually during that second visit that they left the Kahlua and cigarettes. Mr. Letner took the alcohol and cigarettes into the house while Mr. Gilliland and Mr. Tobin stayed in the garage and talked. (36 R.T. 5206-5210.)

After having his memory refreshed from the preliminary hearing transcript, Mr. Gilliland again testified that it was on Sunday in the morning that the defendants brought two quart bottles of Kahlua. Further, during that morning visit, Mr. Letner and Ms. Pontbriant drank about a half bottle of the Kahlua. (37 R.T. 5235-5237.)[9]

After the two defendants left, Mr. Gilliland rode his moped to the Capri Motel in Visalia. (36 R.T. 5137, 5139.) Mr. Gilliland's son was to meet Mr. Gilliland at the motel and drive him to Modesto. (36 R.T. 5137-5138.) Mr. Gilliland's son, Jerry, arrived about 3 a.m.[10] (36 R.T. 5139.) Prior to departing for Modesto, Jerry and Mr. Gilliland went to the house on North Jacob to pick up Mr. Gilliland's

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[9] It should be noted, however, that prosecution witness Jeanette Mayberry and Mr. Tobin's ex wife, Cheryl Williams, testified that early Sunday morning, both defendants were with them at Ms. Mayberry's apartment building and later at a park. (46 R.T. 6830-6835, see also 38 R.T. 5414.)

[10] In February 1988 Becky Thomas managed the Capri Mote located at 1720 East Mineral King in Visalia. (38 R.T. 5341-5342.) People's exhibit 146 is a registration card, dated February 28th, for Warren Gilliland. (38 R.T. 5342.) Ms. Thomas estimated that Mr. Gilliland rented the room around 7 p.m. (38 R.T. 5343.) The next morning a man whom Ms. Thomas believed Mr. Gilliland identified as his son, picked up Mr. Gilliland. (38 R.T. 5344.) Ms. Thomas did not see Mr. Gilliland leave that morning. (38 R.T. 5348.)

small tool box. (36 R.T. 5140.) Mr. Gilliland also took Ms. Pontbriant's puppy; it was not weaned and Mr. Gilliland was hand feeding it. (36 R.T. 5140-5141.)

Mr. Gilliland entered through the back door. Ms. Pontbriant was sound asleep, so he did not wake her. (36 R.T. 5142.) Her car was in the driveway. (36 R.T. 5145.)

Mr. Gilliland arrived in Modesto early Monday morning, February 29th. (36 R.T. 5143, 5179.) He returned to Visalia by bus on March 4th, the following Friday. [11] (36 R.T. 5180.) When he arrived at the bus station he telephoned the house on North Jacob, but no one answered the call. (36 R.T. 5182.) Mr. Gilliland got a ride from a couple who dropped him off downtown. (36 R.T. 5182-5184.) After keeping a doctor's appointment and again getting no answer when he called home (36 R.T. 5185-5186), Mr. Gilliland called Ms. Pontbriant's parents. (36 R.T. 5187.) Ms. Pontbriant's sister, Cleta, informed Mr. Gilliland about Ms. Pontbriant's death. (36 R.T. 5187.)

Mr. Gilliland was stopped by Detective Logan when Mr. Gilliland arrived at the house to drop off his suitcase. (36 R.T. 5188.) Subsequently, Mr. Gilliland spoke to Detective Logan at the Visalia

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[11] Etta Gilliland testified that on February 28, 1988 Mr. Gilliland called her to ask if their son, Jerry, could pick him up (because he was "into it with Ivon...") and bring him to Ms. Gilliland's home in Modesto. (38 R.T. 5334-5335.) Jerry did so. (38 R.T. 5335.) Mr. Gilliland arrived on February 29th while Ms. Gilliland was not home. He had a small dog with him. (38 R.T. 5367-5368. The dog was given away. (38 R.T. 5368.) Mr. Gilliland remained at her home until the following Friday when he caught a 5:30 a.m. bus to return to Visalia. Mr. Gilliland told Ms. Gilliland he had an appointment at Kaweah Delta on March 4th. (38 R.T. 5356.)

police station. (36 R.T. 5189.)

Mr. Gilliland drinks scotch and vodka. (36 R.T. 5104.) Ms. Pontbriant drank vodka and Schaefer's beer. (36 R.T. 51 05.) To Mr. Gilliland's knowledge, Ms. Pontbriant never drank Lowenbrau or Heineken beer. (36 R.T. 5105.) In the early months of 1988 both Mr. Gilliland and Ms. Pontbriant smoked cigarettes; he smoked generic brands and she smoked generic or Pall Mall and sometimes Marlboro. (36 R.T. 5107.)

Telephone Activity the Night of Ms. Pontbriant's Death

Flourene Gentry

Flourene Gentry met Ivon Pontbriant in November 1987 in an apartment complex on Mineral King Street.[12] (39 R.T. 5507-5509.) Ms. Gentry also knew Warren Gilliland. (39 R.T. 5509.) On the first day of every month Ms. Pontbriant would drive Ms. Gentry to the grocery store. (39 R.T. 5512.) Ms. Gentry recognized the red car depicted in People's exhibit 28 as Ms. Pontbriant's car. (39 R.T. 5513.) Ms. Pontbriant kept the car immaculate. (39 R.T. 5513-5514.)

Ms. Pontbriant picked up Ms. Gentry about 11:30 a.m. on March 1, 1988. The two women went to the post office, to Ms. Pontbriant's bank, to Ms. Pontbriant's mother's house on Mooney Boulevard and to the Fairway Market where Ms. Gentry traded. (39 R.T. 5517.) Ms. Pontbriant waited in the car while Ms. Gentry shopped. Ms. Gentry bought Ms. Pontbriant a 12-pack of Schaeffer's

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[12]Ms. Gentry knew that Pontbriant and Gilliland moved to a house on Jacob Street. (39 R.T. 5510-5511.)

beer. (39 R.T. 5518.) Ms. Gentry never saw Ms. Pontbriant drink Heineken or Lowenbrau. (39 R.T. 5521.) When Ms. Gentry returned to the car, Ms. Pontbriant took her straight home. (39 R.T. 5519-5520.)

Ms. Gentry received three telephone calls from Ms. Pontbriant that evening. (39 R.T. 5521.) Ms. Gentry estimated the first call was between 6 and 7 p.m. Ms. Pontbriant told Ms. Gentry that Warren (Gilliland) hadn't come home yet and Ms. Pontbriant was worried. After a few minutes, Ms. Pontbriant said she would call Ms. Gentry later and discontinued the conversation. (39 R.T. 5522.)

About a half hour or so later, probably around 8:30 p.m., Ms. Gentry received a second call from Ms. Pontbriant. Ms. Pontbriant told Ms. Gentry that one of the men who had purchased a stove from Mr. Gilliland brought the stove back and wanted his money back. Ms. Pontbriant said she told the man to come back when Warren was there. (39 R.T. 5523.)

Ms. Gentry estimated the third phone call was between 9:30 and 10 p.m. (39 R.T. 5528-5529.) The phone call lasted only a few minutes. Ms. Pontbriant told Ms. Gentry that she was scared and that Warren was still not home. (39 R.T. 5529-5530.) Then Ms. Pontbriant told Ms. Gentry someone was at the door. (39 R.T. 5531.) Ms. Pontbriant started laughing and said that someone was coming in; she said there were two men, one of which she knew and who reminded her of her son. The man she knew helped Warren work on machines. (39 R.T. 5532.) Ms. Pontbriant said she would talk to

Ms. Gentry later and hung up the telephone. (39 R.T. 5533.)

On cross examination Ms. Gentry testified that Ms. Pontbriant told Ms. Gentry that she was angry with Mr. Gilliland because he took her [Ms. Pontbriant's] dog and because he told her he wouldn't drink anymore. Ms. Pontbriant subsequently found a bottle of vodka on his work shelf. (39 R.T. 5547-5548.)

Edward Burdette

About two months before Ms. Pontbriant was killed, Edward Burdette began working for Mr. Gilliland transporting washers and dryers. (39 R.T. 5556, 5558.) At the time, Mr. Burdette was living with his girlfriend, Kathy Coronado. (39 R.T. 5592-5593.) Sometime in January 1988 Mr. Burdette met appellant Letner at the house on Jacob Street. (39 R.T. 5559.)

The weekend of February 28, 1988, Mr. Burdette went to the Paso Robles area to take inventory for RGIS Inventory Control. Ms. Pontbriant was present when Mr. Burdette told Mr. Gilliland of his plans for that weekend. (39 R.T. 5562.) Mr. Burdette returned late Sunday night, the 28th, and Ms. Coronado told him that Mr. Gilliland had been trying to reach him all weekend. It was late, so Mr. Burdette waited until Monday to call Mr. Gilliland. (39 R.T. 5563; 5594.) When he did so Ms. Pontbriant answered the phone and informed him that Mr. Gilliland had moved out and she accused Mr. Burdette of assisting Mr. Gilliland. (39 R.T. 5563.)

About 8 o'clock, or later, the next evening, Tuesday, March 1st, Mr. Burdette received a call from Ms. Pontbriant. (39 R.T. 5565-

5566; 5595.) Ms. Pontbriant again accused Burdette of helping Mr. Gilliland move and of taking appellant Letner's tools, her dog and other things. Mr. Letner then got on the phone and reiterated Ms. Pontbriant's accusations. Mr. Burdette continued to deny participation in any part of Mr. Gilliland's departure. (39 R.T. 5567; 5597.) After about five angry and obscenity laced calls, Ms. Coronado unplugged the telephone. (39 R.T. 5569; 5599.)

During the calls Ms. Pontbriant sounded upset and intoxicated. (39 R.T. 5571.) Both she and appellant Letner kept referring to his tools. (39 R.T. 5572, 5573.) On Thursday after reading an article about Ms. Pontbriant in the newspaper, Mr. Burdette called the police[13]. (39 R.T. 5575-5576; 5601.)

Testimony of Jeanette Mayberry - Mr. Tobin's Girlfriend

Jeanette Mayberry met Christopher Tobin in October 1984. (38 R.T. 5376, 5378.) When Tobin and his wife separated, Mayberry and Tobin began living together. (38 R.T. 5379.) Ms. Mayberry met appellant Letner through Mr. Tobin. (38 R.T. 5381.)

At some point Messrs. Tobin and Letner moved to Napa and Ms. Mayberry moved to 248 S. Crenshaw in Visalia. She shared the house with Darlene Jolly. (38 R.T. 5382.) At times during the two following months appellant Letner, Mike Kinnett (Ms. Jolly's friend), and Tobin lived at the house with the two women. (38 R.T. 5382-

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[13]When Mr. Burdette spoke with investigator Johnson, Mr. Burdette was confused about the dates. Subsequently, he went over the dates and was sure of them when he testified. (39 R.T. 5577-5578.)

5384.)

A dispute between Ms. Mayberry and Ms. Jolly resulted in Mayberry and Tobin moving to apartment number two at 301 Murray Street. (38 R.T. 5387.) To Ms. Mayberry's knowledge, appellant Letner was living in Los Angeles at this time. Eventually appellant Letner returned to Visalia and moved in with Tobin and Mayberry. After a time the threesome moved from apartment number two to apartment number eleven. (38 R.T. 5389.) They shared apartment number eleven with Burt Arnold. (38 R.T. 5389.)

In March 1987 Ms. Mayberry and Messrs. Tobin and Letner moved to Stevenson Street. (38 R.T. 5390.) Ms. Mayberry was pregnant. The baby was born in May 1987. (38 R.T. 5391.) At that time appellant Letner moved back to Burt Arnold's apartment. (38 R.T. 5391.)

When the baby was two months old Mr. Tobin moved in with appellant Letner. Mr. Arnold subsequently vacated apartment number eleven. (38 R.T. 5391.) Ms. Mayberry moved to 720 Bridge Street. (38 R.T. 5392.) Ms. Mayberry said she and Mr. Tobin split because of appellant Letner. (38 R.T. 5393.) Ms. Mayberry opined appellant Letner was jealous and caused problems. (38 R.T. 5393.) Ms. Mayberry continued to see Mr. Tobin on almost a daily basis, however. (38 R.T. 5393.)

In May 1987 Mr. Tobin began working at Module Air [sic][14], a

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[14] The actual name of the company is Modulaire (42 R.T. 6240.)

prefab building company in Goshen. (38 R.T. 5394.) Module Air later moved to Tulare. (38 R.T. 5394-5395.) In June, appellant Letner began working at Module Air also. (38 R.T. 5395, 5398.) Mr. Tobin was laid off between December 1987 and January 1988. Appellant Letner stayed about another month. (38 R.T. 5398.)

In late December 1987, Mr. Tobin moved out of the apartment he was sharing with appellant Letner and moved in with Ms. Mayberry. Ms. Mayberry and Mr. Tobin were going to try to make it as a couple one more time. (38 R.T. 5406.) Mr. Letner stayed at the apartment on Murray Street. (38 R.T. 5407.)

Ms. Mayberry believed there was no regular employment for either of the two men between the time they left Module Air and March 1, 1988. Neither of the men owned a vehicle during that time. They used either Ms. Mayberry's car, a Ford Maverick, or Mr. Tobin's ten speed bicycle to get around. (38 R.T. 5399.)

Ms. Mayberry knew appellant Letner carried a buck knife in his coat pocket. (38 R.T. 5402.) She opined he did not need the knife for his work. (38 R.T. 5403.) People's exhibit 117A, a new buck knife, is the same type as that which appellant Letner carried. (38 R.T. 5403-5404.) Ms. Mayberry knew Mr. Tobin to carry a knife at times also, a dagger, straight fixed blade, double-sided. (38 R.T. 5404.) Mr. Tobin was into karate. (38 R.T. 5419-5420.)

Appellant Letner smoked Camel cigarettes; Mr. Tobin did not smoke. (38 R.T. 5406.) Ms. Mayberry believed appellant Letner to be an alcoholic. (38 R.T. 5400-5401.)

Break-up of Ms. Mayberry and Mr. Tobin

The evening of February 27, 1988, Mr. Tobin asked to borrow Ms. Mayberry's car to go to the swap meet on Sunday, the 28th. (38 R.T. 5409.) Ms. Mayberry agreed and Mr. Tobin left around 5 a.m. Sunday morning in Ms. Mayberry's car. (38 R.T. 5409-5410.) Later, appellant Letner returned with Ms. Mayberry's car and told her Mr. Tobin was with Mr. Tobin's ex-wife. (38 R.T. 5411.)

Ms. Mayberry took her daughter, Jennifer, and went in search of Mr. Tobin. (38 R.T. 5411-5412.) Twice appellant Letner directed Ms. Mayberry to Mr. Tobin's location. While there, verbal altercations broke out between Ms. Mayberry and Mr. Tobin's ex-wife, Cheryl Williams. (38 R.T. 5412-5414.) Ms. Mayberry returned home and did not see Mr. Tobin again that day or night. (38 R.T. 5415.)

The evening of February 29, 1988 Ms. Mayberry returned home after dark and noted her bedroom window was broken. (38 R.T. 5415-5416.) Messrs. Tobin and Letner were inside the house. Ms. Mayberry assumed Mr. Tobin broke the window when he became aware she had removed his house key from his key ring. (38 R.T.5415-5416.) An argument ensued between Mr. Tobin and Ms. Mayberry. Ms. Mayberry tried to leave and Mr. Tobin tried to grab her by the hair and was hitting her. Mr. Letner watched from the upstairs balcony and was yelling names at Ms. Mayberry. (38 R.T. 5416.) Ms. Mayberry broke loose, left the apartment and ran upstairs to an occupied apartment. She banged on the door and asked for

entry. (38 R.T. 5416.) The people inside called the police. (38 R.T. 5417.)

On Tuesday morning, March 1, 1988, Messrs. Tobin and Letner returned to Ms. Mayberry's apartment. (38 R.T. 5427.) Mr. Tobin was looking for his driver's license. (38 R.T. 5427.) Appellant Letner waited for Mr. Tobin outside the apartment. (38 R.T. 5428.) Ms. Mayberry spoke to Mr. Tobin briefly then left the apartment. (38 R.T. 5429.) Although she returned to the apartment the following day (38 R.T. 5429), Ms. Mayberry did not see or hear from Mr. Tobin again until the middle of April 1988, after he was arrested for the murder of Ivon Pontbriant. (38 R.T. 5431.)

Messrs. Tobin and Letner Lease Apartment at 301 East Murray

During the latter part of 1987 Janet Brandon managed the apartments located at 301 East Murray. (35 R.T. 5077-5078.) Around September she became aware that Messrs. Letner and Tobin occupied apartment number 11 when the previous tenants vacated the apartment. (35 R.T. 5078.) Ms. Brandon had both men sign the rental application (35 R.T. 5079), but as of December 23, 1987 no rent had been paid. (35 R.T. 5080.) Ms. Brandon served notice to pay the back rent or vacate. (35 R.T. 5080-5081.) As of December 31, 1987 when Ms. Brandon ceased to manage the apartments, no rent had been paid. (35 R.T. 5081.) Ms. Brandon last saw both men on December 23, 1987. (35 R.T. 5082-5083.)

Chris Jordan began managing the apartments in January 1988. (35 R.T. 5084.) She again served notice on Messrs. Letner and

Tobin. (35 R.T. 5086.) On March 3, 1988, following non-payment of rent and a court appearance on February 17, 1988, the court ordered Letner and Tobin to vacate the apartment. (35 R.T. 5087.) They did so. (35 R.T. 5088.)

Search of Messrs. Letner's and Tobin's Residences

Detective Richard Logan left Ms. Pontbriant's home about 1 a.m. on March 3rd and proceeded to County Center Drive and state Route 198. (40 R.T. 5791, 5795, 43 R.T. 6285, 6286-6287.) He recovered the Heineken bottle pointed out by Officer Wightman. (43 R.T. 6286-6287.) From there he went to 720 North Bridge, represented to be the apartment of Ms. Mayberry. He arrived at approximately 1:50 a.m. and made contact with Ms. Mayberry. He did not see appellant Letner or Mr. Tobin. (43 R.T. 6287.) There were three or four other individuals in the house, but Detective Logan did not know who they were. (43 R.T. 6287.) Detective Logan then proceeded to 301 East Murray; apartment number eleven, purportedly the apartment of Mr. Tobin and appellant Letner. (43 R.T. 6288-6289.)

Getting no response to his knock at 2 a.m. or again at 8:30 a.m., Detective Logan returned with a search warrant at 1:40 p.m. (43 R.T. 6288-6290.) Again receiving no answer to his knock, he executed the search warrant. (43 R.T. 6290.) Some of the items he noted in the apartment were a metal box containing some Camel cigarette packs, a box containing Camel cigarette packs and Marlboro cigarette packs, and a guest book with both Letner's and Tobin's names in it. (43

R.T. 6291-6293.)

Messrs. Tobin, Letner and Gilliland at the Break Room on 2/28 and 3/1/88

During the early part of 1988, Marilyn Reid played in the Tulare County Pool Shooters League. (39 R.T. 5484, 5486.) In that capacity she frequented the Break Room bar located at 631 West Murray. (39 R.T. 5485-5486.) There were tournaments every Tuesday and Sunday nights and practice some other evenings. (39 R.T. 5488-5489.)

Ms. Reid also lunched at the Break Room about five days a week. (39 R.T. 5489.) Appellant Letner was frequently at the bar when Ms. Reid was there. (39 R.T. 5488.) At some point Ms. Reid became familiar with Warren Gilliland; he was sometimes at the bar with appellant Letner. (39 R.T. 5490.)

Ms. Reid was at the Break Room on Sunday, February 28, 1988. (39 R.T. 5490.) Mr. Gilliland was there and was very intoxicated. He had a very large suitcase on the back of his moped. Appellant Letner was with Mr. Gilliland at the bar. (39 R.T. 5491-5492.) Eventually Mr. Gilliland left alone on his moped and appellant Letner left on his bicycle. (39 R.T. 5492.)

The following Tuesday evening, March 1, 1988, Ms. Reid was again at the bar. (39 R.T. 5492.) When she arrived between 6 and 6:30, appellant Letner and Mr. Tobin were sitting at the bar talking and drinking beer. (39 R.T. 5493-5494.) Ms. Reid estimated that Messrs. Letner and Tobin left the bar sometime between 7:30 and

9:30 p.m. (39 R.T. 5495-5496.)

On Friday of that week, Ms. Reid saw an article in the newspaper regarding the death of Ivon Pontbriant. As a result of that article, Ms. Reid's girlfriend, Sandy, contacted the police. (39 R.T. 5496.)

On cross examination Ms. Reid testified that Mr. Gilliland returned to the Break Room after the homicide at least once. (39 R.T. 5505.) He appeared to be quite intoxicated when he arrived. (39 R.T. 5505-5506.) On at least one occasion Mr. Gilliland said he would "really like to get ahold of these guys and do harm to them." (39 R.T. 5506.)

Departure to Iowa

On March 2,1988 about 4:30 to 5 a.m. Denise Novotny and her neighbor, Pamela Loop, were awakened by appellant Letner and another man. (42 R.T. 6215, 6219; 6234, 6236, 6239.)

Ms. Novotny met appellant Letner at a Modulaire company picnic. (42 R.T. 6240.) She assumed the other man was Mr. Tobin based on a description from her husband and the common knowledge that the two men were always together. (42 R.T. 6251.)

Appellant Letner asked if John (Mr. Novotny) was home and mentioned getting a ride to work. (42 R.T. 6241.) After Ms. Novotny said her husband was not home and turned down appellant Letner's requests for a ride and money for gas, the two men left the premises. (42 R.T. 6244-6245.)

John Novotny supervised appellant Letner and Mr. Tobin at

Modulaire in May or June of 1987. (43 R.T. 6267, 6268-6270.) He recognized a leather electrician's belt from People's exhibit 19 (an orange basket) as appellant Letner's belt. (43 R.T. 6271-6272.)

At some point Modulaire closed its Visalia plant and relocated to Tulare. Messrs. Letner and Tobin worked in Tulare for a short time. During that time Mr. Novotny provided appellant Letner with a ride to work regularly and provided Mr. Tobin with a ride once. (43 R.T. 6274, 6282.)

Appellant Letner left Modulaire in January 1988. Mr. Novotny learned that Mr. Tobin left around that same time period. (43 R.T. 6278.) Mr. Novotny did not see either of the men after they were terminated. (43 R.T. 6279.)

Messrs. Tobin and Letner in Iowa

Appellant Letner arrived at his grandmother's home (Dorothy Letner, 43 R.T. 6297-6298) in Council Bluffs, Iowa on March 6, 1988. (43 R.T. 6303.) Mr. Tobin was with Mr. Letner. (43 R.T. 6303.)

The two men told Mrs. Letner they had been robbed. They had no possessions with them and one of the men told Mrs. Letner they had hitchhiked to Council Bluffs. (43 R.T. 6305.)

After a short visit, Mrs. Letner's husband took the men to the Iowana Motel. (43 R.T. 6308.) Mrs. Letner did not see either appellant Letner or Mr. Tobin again until they were arrested on March 29, 1988. (43 R.T. 6309.)

Rose Russell (43 R.T. 6313) manager of the Iowana Motel

remembered that Mr. Letner, Sr. brought two persons to her motel on March 6, 1988. He introduced the men as his grandson and his grandson's friend and paid for a week's rent. (43 R.T. 6315-6316.) Appellant Letner and Mr. Tobin stayed at the motel in unit number nine until they were arrested on March 29, 1988. (43 R.T. 6318.)

Earl Bothwell, Fred Hare and the Arrest of Messrs. Tobin and Letner

In March 1988 Earl Bothwell was living at the Iowana Motel[15]. (44 R.T. 6416- 6417.) He was sharing a room with Fred Hare. The two were doing home improvement work, roofing, siding, painting, etc. (44 R.T. 6418.) Mr. Bothwell testified that he met Messrs. Letner and Tobin through Mr. Hare and Mr. Tobin started working for Mr. Bothwell. (44 R.T. 6419-6420.)

According to Mr. Bothwell, one morning he went to Mr. Letner's room. The men talked about a woman in California from whom Mr. Letner said he took a small amount of money and got a red and white Ford in real nice condition. (44 R.T. 6421-6422.) Mr. Letner said he stole the car. The police stopped the car because he was driving suspiciously, but let him go. (44 R.T. 6422.) Mr. Tobin entered the room during the conversation. When Mr. Bothwell asked Mr. Tobin if he was wanted for anything in California Mr. Tobin answered, "Yeah. I killed the old bitch. She was hollering and screaming. ..." (44 R.T. 6423.) Prior to this conversation Messrs. Tobin and Letner had asked Mr. Bothwell if he could get false I.D.'s

[15] At the time of his testimony, Mr. Bothwell was serving a state prison sentence in Illinois for security, insurance fraud and other convictions. (44 R.T. 6417.)

for them because there were warrants out for them for murder in California. (44 R.T. 6425.)

During his testimony, Bothwell told the jury that he sought out appellant 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. (44 R.T. 6372-6373, see also, 44 R.T. 6463.) Bothwell went to appellant's room at the motel to "find out if he [Bothwell] should let them go."

Later in his testimony, however, Bothwell admitted that appellant **never** actually worked for him. (44 R.T. 6436) He remembered that appellant found employment with an electrical contractor right away after arriving in Council Bluffs. (44 R.T. 6420, 6456 .)

Additionally, Bothwell testified that when Mr. Tobin made his admissions, Tobin asked about working that day. (44 R.T. 6424.) According to Bothwell, he told Mr. Tobin that he had no work, but if he got some he would let Tobin know. (44 R.T. 6425.)

During Mr. Tobin's case-in-chief, however, Tobin's counsel called one Ms. Brasel to the stand. Ms. Brasel testified that she hired Bothwell to provide painting services. On the day in question, March 28, 1988, Mr. Tobin spent all day painting her house. Ms. Brasel told the jury that Earl Bothwell brought Tobin out to her house early in the morning and picked him up when it was "getting dusk." (51 R.T. 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.) Further, Mr. Tobin had been coming to her house for several days to paint and he finished the paint job that day. (51 R.T.)

On the night of March 28, 1988, Messrs. Letner and Tobin were arrested after a fight in Bothwell's room.[16] (44 R.T. 6426.) Officers Wissler and Stokes of the Council Bluffs police department made the arrest. (44 R.T. 6470-6473.) There were six people in Bothwell's room; two were lying on the floor, one male was sitting in a chair, another male was exiting the bathroom and two females were standing. (44 R.T. 6474.) The four males were Messrs. Letner, Tobin, Bothwell and Hare. The two females were Beth Underwood and Marilyn Foster. (44 R.T. 6476.)

Officer Wissler removed a shotgun laying on the floor just inside the doorway and searched Messrs. Tobin and Letner. (44 R.T. 6477.) He recovered a small folding buck knife (People's exhibit 117) from appellant Letner's pocket. (44 R.T. 6477.)

After checking for outstanding warrants on Messrs. Letner and Tobin and learning they were wanted in California for murder, the officers took both men into custody. (44 R.T. 6480-6481.) 7444-7446.)

On the night that the defendants were arrested in Council Bluffs, both Bothwell and his friend, Fred Hare, went to the Council

[16]When testifying in his own behalf Christopher Tobin stated that an altercation began in the room when he touched a woman's hair and Bothwell took offense. The men began slap-boxing outside the room. Mr. Bothwell was losing so he threatened to shoot Tobin. During the ensuing melee the police were summoned. (46 R.T. 7039-7041.)

Bluffs police station to give statements about the events. Bothwell testified that after the defendants made their admissions to him, he and Hare were "planning on going to the police about it." (44 R.T. 6425.) However, they did not do so while they were at the police station that evening.

Nonetheless, Bothwell testified that he told an unidentified Council Bluffs patrol officer about the defendant's admissions. This discussion occurred in Mr. Bothwell's room at the Iowana Motel approximately one month after the defendants were arrested. (44 R.T. 6427.) According to Bothwell, the patrol officer stopped by Bothwell's room to tell him about Mr. Letner's custody status. (44 R.T. 6427-6428, 6454.) No Council Bluffs police officer testified about any visit with Mr. Bothwell subsequent to the arrest of the defendants.

Instead, Det. Logan testified that when he went with Investigator Johnson to Iowa to bring Mr. Tobin back to California, he and Johnson attempted to locate Earl Bothwell. They went to the Iowana Motel about 2 days after the defendants were arrested. This was on or around March 30, 1988.[17] When Logan and Johnson went to Bothwell's room, Bothwell and all his belongings were gone. Fred Hare was gone too. (45 R.T. 6676-6679.)

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[17] Investigator Johnson testified that a search warrant was executed on March 30, 1988, to search the Iowana Motel room rented by the defendants, and that Johnson thereafter left Council Bluffs with Mr. Tobin. [44 R.T. 6523-6524, 6527.])

Appellant Letner's Escape and Subsequent Apprehension

On April 7, 1988 Gary Dixon, employed by Inter-State Extraditions, was transporting nine prisoners, including Mr. Letner, to California. (44 R.T. 6486, 6489, 6491-6493.) Agent Tom Mobley was with Mr. Dixon. (44 R.T. 6491.)

On April 10th, around midnight, Mr. Dixon parked the van at a Stop-and-Go food mart in San Antonio, Texas. (44 R.T. 6492-6494.) Mr. Dixon went inside to get drinks for everyone and agent Mobley stayed in the van. Mr. Dixon left the keys in the ignition. (44 R.T. 6494.) The handcuff keys and the padlock keys were attached. (44 R.T. 6494-6495.) The prisoners were handcuffed and were wearing belly chains and leg irons. (44 R.T. 6494-6496.)

After a few moments, Agent Mobley came in to help with the drinks. As the clerk was getting a box, the van pulled out of the parking lot. (44 R.T. 6496.) The van was quickly located two blocks away at an apartment complex. Eight of the nine prisoners were still in the van. Mr. Letner was not. (44 R.T. 6497-6498.)

About 9:30 p.m. on April 21, 1988 Jose Martinez was on duty as a border patrol agent in Las Cruces, New Mexico. (44 R.T. 6509-6510.) Mr. Letner arrived at a checkpoint driving a 1972 Ford custom truck.[18] (44 R.T. 6512.) Appellant gave his name as Steven Michael Kennedy and had no identification. (44 R.T. 6514.) Appellant claimed the truck was borrowed. (44 R.T. 6515.)

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[18]There was also a hitchhiker in the truck. (44 R.T. 6513.)

While he spoke with Mr. Letner, Mr. Martinez ran a check for warrants and stolen vehicles. When the warrant check came back positive, Mr. Martinez arrested Mr. Letner. (44 R.T. 6516-6517.) The warrant included the alias of Steven Kennedy. (44 R.T. 6517.)

Codefendant Christopher Tobin's Case-in-Chief

Cheryl Williams

Cheryl Williams testified that she is divorced from Christopher Tobin and they have one child, a daughter. (45 R.T. 6741.) Ms. Williams' daughter had been asking about her father, so early Sunday morning, Feb 28, 1998 she and a girlfriend contacted Mr. Tobin. They met Mr. Tobin near Ms. Mayberry's apartment and then went to a nearby park. (45 R.T. 6744-6745.) Later, Ms. Mayberry located them with a little help from appellant and there was a verbal altercation. (45 R.T. 6745-6746.) After further disturbances and attempts to evade Ms. Mayberry, Ms. Williams and her daughter ended up spending the entire day with Mr. Tobin. (45 R.T. 6746-6751.)

Christopher Tobin

Christopher Tobin testified in his own behalf. (46 R.T. 6823.)

On Sunday the 28th, he and appellant first went to a swap meet. They arrived about 5 a.m. (46 R.T. 6825.) They sold some of their items and left about 7:30 or 8:00 a.m. (46 R.T. 6827.) Appellant was driving Ms. Mayberry's car and they went back to her apartment. (46 R.T. 6827-6828.) When they arrived, they unloaded the items not sold at the swap meet. (46 R.T. 6828.) As they unloaded the car, they

were approached by Carmen Renteria, a friend of Cheryl Williams. 46 R.T. 6829.) Carmen said that Cheryl was downstairs and wanted to talk with Mr. Tobin. (46 R.T. 6830) He went over to talk with Cheryl who had his daughter with her. (46 R.T. 6831-6832.) He arranged to meet them at a nearby park and he walked over while Cheryl drove. (46 R.T. 6832.)

Fairly soon thereafter, Ms. Mayberry arrived at the park in her car. Ms. Mayberry got out of her car and approached the group. She started screaming, yelling, cussing, and chasing Cheryl around the picnic tables. Mr. Tobin tried to restrain her without too much success. Finally he and the others left the park in Carmen's car, but Ms. Mayberry followed in her car. (46 R.T. 6833.)

Tobin exited the car and went into a Catholic church. In the meantime he made arrangements to meet Cheryl at the Oval Park in a little while. (46 R.T. 6834.) He met everyone shortly thereafter at the Oval Park. Eventually, however, Ms. Mayberry showed up and there was another loud altercation before she finally departed. (46 R.T. 6835) When they left the park, Mr. Tobin went to Mr. Letner's house because Ms. Mayberry was still angry. (46 R.T. 6837.)

At the time, Mr. Tobin had $50 to $60 from the swap meet and had cashed a check in the amount of $185 or $187 [from Modulaire]. (46 R.T. 6836.)

Around 11 a.m. the next day Mr. Tobin went to Ms. Mayberry's house to make up. (46 R.T. 6838.) Appellant was with Mr. Tobin at the time. (46 R.T. 6841.) Ms. Mayberry was not home

when Mr. Tobin arrived. The apartment was unlocked, so Tobin entered the apartment. (46 R.T. 6840.) When Ms. Mayberry arrived, there was a physical confrontation. Mr. Tobin slapped Ms. Mayberry, so Ms. Mayberry left. (46 R.T. 6840-6841.) Mr. Tobin then threw a hammer through the window of the apartment and broke a window in Ms. Mayberry's car. (46 R.T. 6842.) He retrieved a shotgun and a sword and the two men left on foot. (46 R.T. 6843.) Mr. Tobin decided to go to Iowa with Mr. Letner. (46 R.T. 6844.) The next day, Tuesday, Mr. Tobin returned to Ms. Mayberry's apartment to either make up or get his clothes. (46 R.T. 6845.) Ms. Mayberry slammed the door in his face. (46 R.T. 6846.)

Later that same day Mr. Tobin and Mr. Letner were at the Break Room. (46 R.T. 6846-6847.) Around 6:30 p.m. Mr. Letner received a telephone call. He said it was from Ivon Pontbriant and she wanted Mr. Letner to come over. (46 R.T. 6847-6848.)

The two men proceeded to Ms. Pontbriant's house with Mr. Letner on foot and Mr. Tobin on his bicycle. (46 R.T. 6849.) The two men arrived at Ms. Pontbriant's house, knocked on the front door and at her direction entered from the back of the house. (46 R.T. 6849.)

Mr. Tobin had been to the house before, but not in the house, only the garage. He did not remember ever taking alcohol and cigarettes to the house or being there when Mr. Gilliland handed money to Ms. Pontbriant. (46 R.T. 6850.)

Messrs. Letner and Tobin went in and they all sat down. (46

R.T. 6851.) Ms. Pontbriant had been drinking and she was "pretty buzzed." (46 R.T. 6852.) Ms. Pontbriant told the men that Mr. Gilliland left, taking her money and her dog. (46 R.T. 6852.) She appeared upset. (46 R.T. 6852.)

Messrs. Letner and Tobin each had one or two Schaeffer's beers. (46 R.T. 6852-6853.) They ran out of beer and Mr. Tobin went to the Oval Liquor store to purchase more. (46 R.T. 6853-6854.) He bought a six-pack of Heineken and a six-pack of Lowenbrau. (46 R.T. 6855.) Ms. Pontbriant and Mr. Letner were sitting on the couch when Mr. Tobin returned. (46 R.T. 6855.)

Mr. Tobin remembered one incoming telephone call during the evening and several outgoing calls. Ms. Pontbriant made the outgoing calls. (46 R.T. 6856.) One of the outgoing calls was to someone named Ed. Ms. Pontbriant thought Mr. Gilliland was at Ed's house. (46 R.T. 6856.) Mr. Letner spoke to Ed after Ms. Pontbriant told Mr. Letner that Ed was being verbally abusive. (46 R.T. 6857.) Mr. Tobin recalled five total calls, maybe less. (46 R.T. 6857.)

The trio again ran out of beer so Mr. Tobin returned to the store and purchased two more six-packs, same brands. (46 R.T. 6858.) On his return to the house Ms. Pontbriant and Mr. Letner were on the couch with their arms around each other. Mr. Tobin opened a beer and the couple on the couch started kissing. (46 R.T. 6859.)

Mr. Tobin left and rode his bicycle back to the Oval Liquor store where he bought a quart of beer. (46 R.T. 6860.) He then rode

to the apartment on 301 East Murray, drank about half the beer and dozed off. (46 R.T. 6860.)

At some point later, Mr. Letner awakened Mr. Tobin to help Mr. Letner take some stuff to Ms. Pontbriant's house for storage while he was in Iowa. (46 R.T. 6861-6862.) Mr. Letner said that Ms. Pontbriant loaned him her car, a red Ford Fairmont, for the purpose. (46 R.T. 6862, 6864.) Mr. Tobin helped Mr. Letner load some tools and bags of hair products into the car and also put the sword and shotgun in the trunk. Mr. Tobin was going to try to sell them. (46 R.T. 6863.) When Mr. Tobin first entered the car, he did not see any of the items under the floorboard. He became aware of the rag [with blood on it] only through discovery in this case. (46 R.T. 6867-6869.)

En route to Ms. Pontbriant's house, Mr. Letner was stopped by Officer Wightman. (46 R.T. 6865.) Officer Wightman released the two men and returned the car keys to Mr. Letner but he told them he would arrest them if they returned to the car. (46 R.T. 6870.) Mr. Tobin admitted he was pretty drunk at this time. (46 R.T. 6870.)

Messrs. Letner and Tobin walked to the Marco Polo, a hotel with a bar. They drank beer and eventually Mr. Tobin told Mr. Letner that Letner should call Ms. Pontbriant and tell her where her car was. (46 R.T. 6871.) It appeared to Mr. Tobin that Mr. Letner made the call. (46 R.T. 6871.) Mr. Letner said there was no answer. The two men finished their beers, left the bar and went to the house on Crenshaw once shared with Ms. Mayberry. The house was vacant

and Mr. Tobin knew the back door was off-centered and did not lock. (46 R.T. 6872-6873.) The two men entered and spent the night in the house. (46 R.T. 6873.)

From Crenshaw they walked to John Novotny's house in search of a ride. (46 R.T. 6874.) Mr. Letner knocked on the door and asked if John was home. (46 R.T. 6874.) When Ms. Novotny responded that he was not, Mr. Letner offered Ms. Novotny money for gasoline for a ride to the bus depot in Goshen. (46 R.T. 6875.)

When Ms. Novotny refused to give them a ride, Messrs. Letner and Tobin left the Novotny residence and hitched a ride to Goshen where they purchased bus tickets to Sacramento. Mr. Tobin paid for the tickets, $27 per ticket. (46 R.T. 6876.) In Sacramento Mr. Tobin purchased tickets to Reno. (46 R.T. 6877.) The men stayed overnight in Reno, bought a sleeping bag and a down jacket and eventually arrived at Mr. Letner's grandmother's house in Iowa. (46 R.T. 6878.)

It did not appear to Mr. Tobin that Mr. Letner's grandparents were happy to see them. Mr. Letner's grandfather did pay for a week's rent at a motel. (46 R.T. 6880.) Mr. Tobin found employment with Earl Bothwell. (46 R.T. 6880.) However, he and Mr. Bothwell did not get along. Mr. Bothwell shorted Mr. Tobin $20 for painting a house. (46 R.T. 6883.) During a fight in Mr. Bothwell's room, Mr. Tobin took a shotgun from Mr. Bothwell and Mr. Bothwell was embarrassed and angry. (46 R.T. 6884.)

Mr. Tobin denied making any statements or confessions to Mr.

Bothwell concerning Ms. Pontbriant. (46 R.T. 6881.) At the time these alleged statements were made in the motel room, Mr. Tobin was actually working elsewhere. (46 R.T. 6883.) Further, he had no intention of removing anything from Ms. Pontbriant's house and had nothing to do with her death. (46 R.T. 6882.)

On cross examination Mr. Tobin stated that until he read about the homicide after he was arrested, he did not know it was Ms. Pontbriant who was killed; he thought it might have been Ms. Mayberry or Cheryl Williams. (46 R.T. 7045-7046.)

Additional Evidence

James Dunham, Mr. Tobin's private investigator, spoke with Mr. Bothwell on October 24, 1989 at the Illinois State prison. (47 R.T. 7119-7120, 7122.) Mr. Bothwell said he did not want to be involved; he was frightened. (47 R.T. 7125-7126.) When Mr. Dunham pointed out discrepancies in the statements made by Mr. Bothwell to investigators Cliff Webb and John Johnson, Mr. Bothwell insisted both statements were true. (46 R.T. 7129.)

Jerry Gilliland, son of Warren Gilliland, remembered picking up his father at the Capri Motel in February 1988. (45 R.T. 6708-6710.) His father had his moped with him. (45 R.T. 6710.)

En route to Modesto, the two men went to Mr. Gilliland's house to pick up some of his belongings. (45 R.T. 6711.) While his father was in the house, Jerry heard a lady yelling; it appeared a one-sided fight was going on. (45 R.T. 6712-6713.) The woman continued to yell even afer Mr. Gilliland came outside. His father

took suitcases, personal belongings, his moped and a tool box from the garage. (45 R.T. 6715-6716.) Jerry did not see or transport a dog to Modesto. (45 R.T. 6714.)

Appellant's Case-in-Chief

Laurie Willis worked at the Break Room bar in February/March 1988. (48 R.T. 7159-7160.) She was not sure about the day, but Ms. Willis remembered a phone message for Mr. Letner from an older lady. (48 R..T. 7162.) Ms. Willis did not see Mr. Letner at the time of the call so she put the message in a jar next to the register. (48 R.T. 7163.) She did not remember if she ever gave Mr. Letner the message. (48 R.T. 7164.) Sometime after March 1, 1988, Ms. Willis saw the message in the jar and told investigator Cliff Webb about it. (48 R.T. 7164.)

Ray Philpot, agent for Greyhound Bus Lines in February and March of 1988, testified that during that period Greyhound offered a special rate from Sacramento to Reno. (48 R.T. 7171-7172.) The rate from Goshen to Sacramento was about $23.20; from Sacramento to Reno was $16 with a rebate from a hotel in Reno. (48 R.T. 7172-7173.) Mr. Philpot guessed that a ticket from Goshen to Council Bluffs, Iowa or Omaha, Nebraska would have been about $109 to $129 at the time. (48 R.T. 7174.)

In November 1989 Gary Sims, criminalist, was present when Mr. Letner's buck knife (People's 117) was disassembled. (48 R.T. 7219, 7222.) Mr. Sims analyzed the knife for any evidence of blood. The results were negative. (48 R.T. 7225, 7231.) Mr. Sims opined

that the knife could be washed such as to remove all detectable traces of blood. However, that thorough a cleaning would probably remove all traces of use, including lint, debris, fuzz, etc. These indications of use, however, were still found on the knife. (48 R.T. 7237-7238.)

Sandra Saulque was employed at Coast Savings and Loan during February and March 1988. (49 R.T. 7288.) Defense exhibit O was the bank records for Warren Gilliland. (49 R.T. 7292.) On February 16, 1988 the balance was $13.11. A deposit of $40 was made on February 25th. (49 R.T. 7293.) There was a withdrawal of $40 on March 1, 1988 leaving a balance of $4.98. On March 16, 1988 there was a deposit of $200. (49 R.T. 7297.)

Cliff Webb, private investigator, met with Mr. Bothwell on October 6, 1989. (49 R.T. 7301, 7303.) Mr. Bothwell told Mr. Webb that prior to Mr. Bothwell giving his statement to Mr. Johnson, Mr. Johnson furnished Mr. Bothwell with details of the murder. (49 R.T. 7324.)

Prosecution Rebuttal

On rebuttal, Mr. Johnson testified he did not provide Mr. Bothwell with any details of the crime which could be incorporated into Bothwell's subsequent statement to the police. (49 R.T. 7363-7364.)

Janette Mayberry testified that she spoke to Mr. Tobin several times after his arrest. (50 R.T. 7417-7418.) Mr. Tobin told Ms. Mayberry that he left Ms. Pontbriant's home twice to purchase beer. When he left for the final time he went back to the apartment on

Murray, fell sound asleep and was awakened two or three hours later by Mr. Letner. (50 R.T. 7240.)

PENALTY PHASE

Prosecution Evidence

Stephen Frame

Twelve years before the instant offense, on June 3, 1978, Stephen Frame and Mr. Letner had an argument on the telephone over some of Mr. Frame's friends. (56 R.T. 7921, 7823.) The two were attending Vintage High School in Napa at the time. (56 R.T. 7922-7923.) On June 5th, the following Monday, Mr. Frame drove his pickup truck to school and parked in the school parking lot. (56 R.T. 7924.)

Mr. Frame's passenger exited the vehicle, followed by Mr. Frame. Mr. Frame walked to the rear of the vehicle where he was confronted by Mr. Letner. (56 R.T. 7925.) Appellant then struck Mr. Frame with his fist and knocked him to the ground. (56 R.T. 7925-7926.) Mr. Frame opined he thought he hit his head on the bumper of the truck on the way down to the ground. He was unconscious for a period of time. (56 R.T. 7926.)

Mr. Frame then claimed that while he was on the ground, Mr. Letner kicked him in the face several times. (56 R.T. 7926.) Eventually Mr. Letner turned and walked away. Mr. Frame got into his vehicle and left the parking lot. (56 R.T. 7927.) He was admitted to the hospital with a concussion, broken nose and broken

cheekbone.[19] (56 R.T. 7929.)

On cross examination Mr. Frame recalled telling the investigating police officer that there was a confrontation a week earlier regarding John Letner, appellant Letner's brother. (56 R.T. 7935.) Bill Lunblad and some other individuals whom he knew were involved in this confrontation, but Mr. Frame asserted that he was not. (56 R.T. 7935.)

David Bendowski and Julie Bryant

In 1979 Julie Bryant was fourteen years old. Her brother, David Bendowski was sixteen. (56 R.T. 7939, 7941, 7942.) At the time Ms. Bryant lived with her mother, father, brother, and sister in Napa. (56 R.T. 7941.) Ms. Bryant attended Justin Sienna, a Catholic school in Napa. (56 R.T. 7941.) Her brother attended Vintage High School. (56 R.T. 7942.) David Bendowski met Mr. Letner in high school. (56 R.T. 7956, 7958. He knew Mr. Tobin from elementary school. (56 R.T. 7959.)

On January 20th, a Saturday, Ms. Bryant was in front of the house with her [future] husband, David Bryant. They were getting into Mr. Bryant's car when Messrs. Letner and Tobin arrived in Mr. Letner's Volkswagen bug. (56 R.T. 7942-7943.)

Mr. Tobin asked where her brother was and Ms. Bryant responded that she didn't think he was home. (56 R.T. 7943-7944.)

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[19] Dr. Leonard Miller (59 R.T. 8404) testified from the medical records (People's exhibit 209) that Stephen Frame had a cerebral concussion, a broken nose, and a break in the left upper jaw. (58 R.T. 8406-8407.)

Mr. Tobin told Ms. Bryant to go in the house and make sure Mr. Bendowski was gone or he would "work [her] over." (56 RT. 7944.) Ms. Bryant did so and confirmed her bother was not at home. Mr. Tobin told her to tell her brother that Tobin was looking for him. (56 R.T. 7945.) Messrs. Tobin and Letner then left. (56 R.T. 7945.)

On another occasion when Ms. Bryant answered a knock on the door Messrs. Tobin and Letner were there. The two entered the house without being asked and walked down the hall. Seeing Mr. Bendowski in the hall, Mr. Tobin turned and kicked him. (56 R.T. 7947; 7962.) Mr. Tobin was angry because Mr. Bendowski was dating an ex-girlfriend of Tobin's, Joanne Schultz.[20] (56 R.T. 7959-7960.)

David Bendowski testified that a couple of months later, Messrs. Tobin and John Letner (appellant's brother) came to the door and told Mr. Bendowski they wanted to see him at the car. (56 R.T. 7963-7964.) Appellant Letner was there also. (56 R.T. 7964.) The three made it clear that Mr. Bendowski was to get into the car. (56 R.T. 7964.) Mr. Letner drove with Mr. Tobin in the front passenger seat and John and Bendowski in the back seat. Mr. Tobin informed Mr. Bendowski that Tobin was going to charge Mr. Bendowski for the three dates Mr. Bendowski had with Tobin's ex-girlfriend. (56 R.T. 7965.)

According to Mr. Bendowski, the trio threatened to hang him

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[20]On cross examination Ms. Bryant admitted that only when she spoke with Detective Johnson, recently, did she learn the incident was over a girl. (56 RT. 7952.)

from a tree and beat him while he was hanging. (56 R.T. 7967.) On Soda Canyon road, outside the Napa city limits, Mr. Bendowski was taken out of the car. However, John Letner talked the other two into giving Mr. Bendowski a chance to pay the money. (56 R.T. 7966, 7969.) The trio then drove away and Mr. Bendowski started walking. He was picked up by a couple who gave him a ride to town. (56 R.T. 7970.) Mr. Bendowski did not report the incident to the police. (56 R.T. 7971.)

Mr. Bendowski also testified that on January 20, 1979, he was walking toward home when he was again confronted by Messrs. Tobin and Letner. Mr. Bendowski was on a corner about a block or two from his house. (56 R.T. 7971.) Mr. Bendowski ran down the side of the street, but Messrs. Tobin and Letner gave chase, caught him, and "intimidated" him into the vehicle. (56 R.T. 7972-7973.) John Dean was also in the car. (56 R.T. 7973.)

Messrs. Tobin and Letner were upset that Mr. Bendowski hadn't paid them any money yet. They threatened to break Bendowski's fingers for every day he was late. (56 R.T. 7974-7975.) Mr. Bendowski said he would get the money somehow and pay them later that evening. (56 R.T. 7976.)

Kenny Warren

Kenny Warren met Messrs. Letner and Tobin at Napa High School. (57 R.T. 8043-8045.) Mr. Warren recalled an incident between himself, Mr. Tobin and Robert Nance on May 29, 1981. (57 R.T. 8045.) Mr. Warren was in an aisle at the Grand Auto Parts store

in Napa when he was approached from one end of the aisle by Mr. Tobin. He was approached from the other end by Mr. Nance. (57 R.T. 8046-8047.)

Messrs. Tobin and Nance wanted Mr. Warren to go outside. One of the men swung at Mr. Warren and the other tried to kick him. (57 R.T. 8047.) When Mr. Warren said they could talk inside the store, Mr. Tobin told Mr. Warren they were not going to jump him, they just wanted to go outside and talk. (57 R.T. 8049.) The trio then went outside. (57 R.T. 8049.)

Once outside, he was assaulted by both men. (57 R.T. 8050-8051.) When he tried to run, he was tackled by Mr. Nance and brought to the ground where he was assaulted again. (57 R.T. 8052-8053.) Eventually, he was relieved of his wallet as well. (57 R.T. 8056.)

Messrs. Tobin and Nance then tried to drag Warren towards a yellow Torino parked in the lot. (57 R.T. 8057.) They gave up the effort, however, and then left. (57 R.T. 8058-8059.)

Mr. Warren admitted that just before Mr. Tobin left the scene, he said, "Don't ever shoot through my house again." (57 R.T. 8061-8062.) Mr. Warren also admitted that there had been a previous incident involving two of his friends who shot through a house. (57 R.T. 8062.)

As a result of the beating at Grand Auto, Mr. Warren went to the hospital emergency room. He had a broken nose, cuts and bruises

and sore ribs[21].

On cross examination Mr. Warren also admitted that the people with whom he associated were having an ongoing war with Messrs. Tobin and Letner. (57 R.T. 8077.) Mr. Warren also confirmed that he was a convicted felon. (57 R.T. 8075.)

Richard Baker testified that he worked at Grand Auto at the time of the assault. He was informed by a customer an assault was in progress. (56 R.T. 7991- 7993.) Mr. Baker instructed one of his employees to call the police and went to investigate. (56 R.T. 7993.)

Mr. Baker saw a person lying on the ground being assaulted. (56 R.T. 7995.) A third individual was nearby in a 1976 yellow Ford Torino. (56 R.T. 7997.) Mr. Baker heard the assailant tell the person on the ground that if he ever shot at his house again, he would kill him. (56 R.T. 7998.)

As the assailant was getting ready to leave, he said to Mr. Baker, "He [Warren] got what he deserved. He shot at my house." (56 R.T. 7998.) The kicker then got into the passenger side of the Ford Torino and the car drove off. (56 R.T. 7999.)

Scuffle with Police Officer in Plain Clothes

On July 21, 1983 about 11:45 p.m., Officer Andrew Emberton was driving westbound on University Avenue in Berkeley. (57 R.T. 8090-8091.) He was heading towards the freeway in a private car and he was not in uniform. (57 R.T. 8091-8092.)

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[21]People's exhibit 212, the medical records of Kenny Warren, documented a strain to the neck and bruising caused by blunt trauma to the ribs. (58 R.T. 8407-8409.)

The officer saw a person standing in the roadway blocking the lane closest to the curb. Subsequently, Officer Emberton learned it was appellant Letner. (57 R.T. 8093.) Mr. Letner was holding a small hand-lettered sign with "Vallejo" printed on it. Officer Emberton stopped his vehicle then motioned for Mr. Letner to get out of the roadway. (57 R.T. 8094.) When Mr. Letner did not move, Officer Emberton motioned again and rolled down his passenger side window. Mr. Letner came to the window. Officer Emberton informed Mr. Letner that he was not going to give him a ride, he wanted Mr. Letner to get out of the roadway. (57 R.T. 8095.)

Mr. Letner's response was some sort of obscenity followed by, "I'm going to kick your ass." (57 R.T. 8095-8096.) Officer Emberton started to drive off and Mr. Letner struck the right rear side of the car. (57 R.T. 8096.) When Officer Emberton pulled over to the curb to check for any damage, Mr. Letner ran up to him on the sidewalk and challenged him to a fight. (57 R.T. 8097.)

Mr. Letner assumed what Officer Emberton would consider to be a martial arts or karate type stance and pushed Officer Emberton in the chest. (57 R.T. 8098-8099.) Officer Emberton told Mr. Letner he (Emberton) just wanted Mr. Letner off the street and onto the sidewalk. (57 R.T. 8099.) Mr. Letner continued to challenge and pushed Officer Emberton a second time. (57 R.T. 8099.)

Suddenly Mr. Letner backed up, turned and started to walk away. Officer Emberton turned around and saw a marked police car pulled up to the curb. (57 R.T.8100.) Mr. Letner was taken into

custody. (57 R.T. 8100-8101.) A juvenile with Mr. Letner was also transported to the police station. (57 R.T. 8103-8104.)

Officer Emberton admitted that at no time during the incident did he identify himself as a police officer. (57 R.T. 8105.)

The Alexander McAdams Incident

Alexander McAdams knew Mr. Letner in 1985 when Mr. McAdams was living in Benicia. (58 R.T. 8162, 8165.) Mr. McAdams believed Mr. Letner was bothering his girlfriend, Susan Forsythe. (58 R.T. 8165-8166.)

On January 14, 1985, Mr. McAdams was driving up First Street in Benicia when he noticed a tan truck with a camper shell coming up very fast in the same lane but from the opposite direction. (58 R.T. 8167-8169.) Mr. Letner was driving the truck. (58 R.T. 8169.) Mr. McAdams switched lanes to avoid a collision, but Mr. Letner also switched lanes. (58 R.T. 8169-8170.) This activity continued until the two vehicles hit each other. Both were going about five or ten miles per hour when the vehicles made contact. (58 R.T. 8177-8178.)

Mr. McAdams put his truck in reverse and backed up. (58 R.T. 8177.) Mr. Letner exited his truck a couple of times as Mr. McAdams backed away. It appeared to Mr. McAdams that Mr. Letner was carrying a rifle. (58 R.T. 8182.) Mr. McAdams drove across a field to another street and Mr. Letner gave chase. Again Mr. Letner exited his truck and Mr. McAdams heard shots fired. (58 R.T. 8183.)

Officer Alfred DelTorchio investigated Mr. McAdams' complaint. (58 R.T. 8210-8212.) As a result, Officer DelTorchio and

another officer went to the residence of Anthony Hockney. They were looking for a 1975 beige Datsun pickup with a camper shell and received information the vehicle was there. (58 R.T. 8214-8215.)

When the officers knocked on the door a young lady answered. (58 R.T. 8215-8216.) The officers heard a noise in a back bedroom and entered the apartment to investigate. (58 R.T. 8216.)

Mr. Hockney was in the bedroom with a Ruger carbine rifle lying on the bed. (58 R.T. 8218.) The officers secured the rifle. Mr. Hockney told the officers the rifle belonged to Mr. Letner. (58 R.T. 8220-8221.)

Officers DelTorchio and McDonald drove to an area about a block away where Mr. Letner's truck was parked. They waited and watched. About ten or fifteen minutes later Mr. Letner appeared and was apprehended as he started to enter the truck. (58 R.T. 8223, 8224.)

Mr. Letner did not deny the traffic incident, but did deny shooting at Mr. McAdams. (58 R.T. 8231-8232.)

The William Healer Incident

Marilyn Quinn was driving down the street around 5 p.m. on November 26, 1986. (58 R.T. 8269, 8270-8271.) She stopped her car to drop off her daughters and saw three men running down the street coming towards her. The man in front was being chased by the other two. (58 R.T. 8272.)

When the man in front reached her car, he pounded on the trunk then continued running. Ms. Quinn watched her daughters

enter the house then continued down the street. (58 R.T. 8274-8275.) When she caught up with the man being chased, he ran in front of then around her car. Keeping the car between himself and the two men he pounded on the trunk then the hood of the car and said, "Help me. Help me. They're going to kill me." (58 R.T. 8275.)

Ms. Quinn let the man being chased into her car. (58 R.T. 8276.) En route to the police station, the man pointed to a house they were passing and said the people there would help him. He jumped out of the car, approached the house, knocked and was given entry. (58 R.T. 8277.) Later Ms. Quinn learned William Healer was the name of the man she helped. (58 R.T. 8277.)

William Healer testified that he met Messrs. Tobin and Letner in high school. (58 R.T. 8284-8285.) In November 1987 Mr. Healer owned an automobile body shop. (58 R.T. 8285.) Mrs. Tobin (Mr. Tobin's mother) brought a car to the shop for repairs. (58 R.T. 8289.) Mr. Healer agreed to fix the car for $850 to be paid by her insurance company. The repair work was to be finished and then the car was to be returned at a later date for painting. (58 R.T. 8290.) Mr. Healer received a check and repaired the car, but did not paint it. (58 R.T. 8291.)

Mrs. Tobin took the car because she needed it. When Mr. Healer asked when she could return the car for painting, Mrs. Tobin said she did not know. (58 R.T. 8291.) Prior to any further contact with Mrs. Tobin, Mr. Healer relocated his shop to a location about two blocks away. (58 R.T. 8292.)

On November 29, 1986, Mr. Healer was at a gas station sitting in a truck he borrowed from a friend when he was approached by Messrs. Tobin and Letner. (58 R.T. 8293.) In an angry tone Mr. Tobin informed Mr. Healer that they needed to talk about the repairs to Mr. Tobin's mother's car. (58 R.T. 8296.)

As Mr. Healer filled the gas tank, Mr. Tobin reached in and grabbed the truck ignition keys and pocketed them. (58 R.T. 8297, 8300.) Messrs. Tobin and Letner then escorted Mr. Healer to the driver's side and gave him the ignition keys. (58 R.T. 8298.) Mr. Tobin told Mr. Healer that he and Mr. Letner were going along with him. (58 R.T. 8296-8297.)

After Mr. Healer paid for the gas he pulled up to the curb and an individual by the name of Lobick approached the truck. (58 R.T. 8300.) Messrs. Tobin and Letner invited Mr. Lobick to join them and Mr. Lobick did so. (58 R.T. 8301-8302.)

At Mr. Tobin's direction, Mr. Healer drove to a K-mart where Mrs. Tobin (Mr. Tobin's mother) was employed. (58 R.T. 8303-8304.) While Messrs. Letner and Lobick stayed in the truck, Mr. Tobin and Mr. Healer entered the store. (58 R.T. 8304-8305.) When a clerk informed Mr. Tobin that his mother was not there, Mr. Tobin directed Mr. Healer back to the truck. (58 R.T. 8305-8306.)

Mr. Tobin then directed Mr. Healer to drive to Sears, another employer of Mrs. Tobin. (58 R.T. 8307.) Mr. Healer shut off the engine in the Sears parking lot and Mr. Tobin took the keys and entered the store in search of his mother. (58 R.T. 8308.)

After a while, Mr. Tobin returned and shortly thereafter Mrs. Tobin arrived. (58 R.T. 8311.) Messrs. Tobin and Letner told Mr. Healer to get out and talk to Mrs. Tobin. Mr. Healer did so. (58 R.T. 8312.) Mr. Healer apologized to Mrs. Tobin and said she must have misunderstood when she picked up the car. Mrs. Tobin said there was no misunderstanding and then asked Mr. Healer if he wanted to ride with her in her vehicle. (58 R.T. 8314.)

Mr. Healer was afraid of losing the valuable tools in the back of the truck and did not want to leave the truck with Messrs. Tobin and Letner. At this point, Mr. Tobin was out of the truck and approaching. (58 R.T. 8314.) Mrs. Tobin again offered Mr. Healer a ride. (58 R.T. 8315.) Mr. Healer refused and re-entered the truck. (58 R.T. 8316.)

According to Healer, as they drove away, both Mr. Tobin and Mr. Letner became physically abusive and threatened to rob him. (58 R.T. 8322-8332.) When the two ordered him to stop, Mr. Healer noticed a vehicle pull up across the street. (58 R.T. 8333.) He jumped from the truck and ran to the stopped car asking the occupants to call the police. (58 R.T. 8337-8338.) Mr. Healer then got into the car. (58 R.T. 8338.) Mr. Tobin was approaching so Mr. Healer exited the car and ran to someone's home and asked them to call the police. (58 R.T. 8339.) [22]

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[22]People's exhibit 219, medical records of William Healer, documented petechia around the neck, bruising due to trauma of some sort and trauma to the ribs at the juncture of bone and cartilage. (58 R.T. 8410-8411.) Mr. Healer conceded, however, that he did not seek medical care for his injuries until two days after the incident. (58 R.T. 8341.)

The prosecutor acknowledged that at the time of trial, Mr. Healer was working as a police informant. (58 R.T. 8255-8256, 8260.) His status as an informant was the result of a plea agreement involving felony drug charges. (58 R.T. 8345-8346.) Mr. Healer also admitted that his nickname was "Healer the Dealer." (58 R.T. 8353.)

The Sheila White Incident

Sheila White testified that she met Mr. Letner at the end of July 1987 in Visalia at the Break Room bar. (58 R.T. 8372-8373.) They developed a sexual relationship. On December 27, 1987 Ms. White and Mr. Letner were in her bedroom. (58 R.T. 8374, 8382.) They had been drinking all day and were preparing to go to bed. (58 R.T. 8375.)

Both Ms. White and Mr. Letner were unclothed and they may have been arguing. (58 R.T. 8375-8376.) Mr. Letner allegedly then began beating and choking her. (58 R.T. 8376-8378.) Ms. White testified that she must have passed out because she did not remember anything else before waking up the next morning. (58 R.T. 8379.)

Ms. White admitted that she did not report the incident to the police nor did she did tell Mr. Letner to leave her apartment. (58 R.T. 8382-8383.)

On New Year's Day Mr. Letner returned to Ms. White's apartment. (58 R.T. 8382-8383.) They started arguing and after about twenty minutes Mr. Letner left. (58 R.T. 8385.)

About an hour later, Mr. Letner returned and they began talking. (58 R.T. 8385.) Then Mr. Letner approached Ms. White and

wanted to kiss her. She resisted, he persisted and they began fighting. (58 R.T. 8386.) She alleged that without her consent, the two had intercourse. (58 R.T. 8388.) Again, however, Ms. White did not report the incident to the police. (58 R.T. 8389.)

The Mike Mohrhauser Incident

Mike Mohrhauser testified that in April 1988, he lived in Las Cruces, New Mexico with his parents. (59 R.T. 8414, 8415.) He was working as a self-employed carpet layer. (59 R.T. 8416.)

On Saturday, April 17, 1988 Mr. Mohrhauser drove to El Paso, Texas for supplies. (59 R.T. 8416.) He was driving a 1972 Ford pickup. As he left El Paso on the way back to Las Cruces, he picked up a hitchhiker, Mr. Letner. (59 R.T. 8417-8418, 8419.)

Mr. Letner was carrying a quart of beer and said his name was Steve Kennedy and he was on the way to San Diego to start a job as an electrician. (59 R.T. 8420.) The two men arrived in Las Cruces and went to Mr. Mohrhauser's parents' house. His parents were out of town. (59 R.T. 8420.) Mr. Letner had no place to stay, so Mr. Mohrhauser offered to let him spend the night at the house. (59 R.T. 8421.)

After drinking beer, the two returned to El Paso, partied, then returned to Las Cruces. (59 R.T. 8421.) En route back to Las Cruces, Mr. Letner was sick on the side of the truck. (59 R.T. 8422.) The next morning when Mr. Mohrhauser awakened, Mr. Letner was outside washing the truck. (59 R.T. 8423.)

On Sunday afternoon, the two men returned to El Paso and

went to a party at the house of Mr. Mohrhauser's cousin. (59 R.T. 8423.) It was about midnight when they started their return to Las Cruces. Mr. Letner was driving because Mr. Mohrhauser was too intoxicated. (59 R.T. 8424, 8246.)

Prior to leaving the city limits, Mr. Mohrhauser asked Mr. Letner to pull over in a little park-like area so Mr. Mohrhauser could urinate. (59 R.T. 8425.) Mr. Letner pulled over and Mr. Mohrhauser exited the truck. He heard Mr. Letner exit the truck also. (59 R.T. 8426.) While Mr. Mohrhauser was urinating, Mr. Letner hit him over the head with something. (59 R.T. 8426.) Mr. Mohrhauser woke up face down in an irrigation ditch about thirty feet from where he was standing when hit. (59 R.T. 8427-8428.) Mr. Mohrhauser was missing his watch, his wallet and his truck. (59 R.T. 8430-8431.) He reported the incident to the police and was taken to Las Cruces the next day. (59 R.T. 8432.)

On April 21, 1988 the truck was recovered. (59 R.T. 8432.) All his carpet laying tools were gone, a monetary value of about $2,500 to $3,000. The tools were in a locked tool box and the key was on the key chain with the truck keys. (59 R.T. 8433.)

Mitigating Evidence-Appellant Letner

William Bothwell

Counsel for Mr. Letner successfully moved to have a portion of Mr. Bothwell's transcript testimony presented to the jury which the jury had not previously heard. In that testimony, William Bothwell confirmed that the disagreement in his motel room began when Mr.

Tobin started for one of the women in the room. (59 R.T. 8463-8464.) When Mr. Tobin grabbed the shotgun, Mr. Hare and Mr. Letner wrestled the gun from Mr. Tobin and Mr. Letner took the clip out and threw it inside the doorway. Mr. Tobin then struck Mr. Bothwell with the gun. (59 R.T. 8466.) Mr. Bothwell told the hotel manager to call the police. She did so and Messrs. Tobin and Letner were arrested. (59 R.T. 8467.)

In Mr. Bothwell's opinion Mr. Letner acted like Mr. Tobin was his idol.[23] (59 R.T. 8469.) Mr. Bothwell told Investigator Johnson that Mr. Letner saved his life that night by grabbing the clip out of the shotgun. (59 R.T. 8469.)

Mr. Letner's Childhood

John Letner, appellant Letner's younger brother, testified that in their childhood years the family (two brothers, a sister and a half-sister and their parents) moved fifteen or sixteen times. (60 R.T. 8470-8471.) They lived in Council Bluffs, Iowa; Iowa City, Iowa; Omaha, Nebraska; Palo Alto, California; Whittier, California; and San Bernardino, Highland, Napa, Mountain View, Santa Barbara and Riverside. (60 R.T. 8472-8473.) The longest time they lived in one place was in San Bernardino, from third grade through the seventh grade. (60 R.T. 8473.)

When appellant Letner was around fifteen years old he had a drinking problem and was smoking marijuana. (60 R.T. 8476-8478.)

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[23]Burt Arnold and Sheila White also testified that in their opinions Mr. Letner idolized Mr. Tobin. (60 R.T. 8531-8532; 8522-8554.)

Moreover, he was always teased about his appearance. (60 R.T. 8478.) Corrective surgery was discussed to correct some of his facial features, particularly the prominence of his lower jaw. It was never done, however. (60 R.T. 8479.)

According to John's mother, every time his father would go on a drinking binge, he would have to get another job in another town. John would characterize his father as an alcoholic. (60 R.T. 8473.) Sometimes Mr. Letner, Sr. wouldn't drink for six or eight months, then for eight or ten months he would drink every day. (60 R.T. 8473.) According to John, Mr. Letner, Sr. was very mean when he drank and he would usually take it out on appellant. (60 R.T. 8474.)

His parents separated a few times with the final time when John was in high school. Appellant was still living at home at the time and would have been 19 years old. (60 R.T. 8479.) Mr. Letner, Sr. died in September 1981 and appellant Letner withdrew even more from society. (60 R.T. 8477.)

In John's opinion appellant never really saw the bad things their father did. Appellant just overlooked them. (60 R.T. 8479.) Nevertheless, John was aware of several suicide attempts by his brother, even before appellant turned eighteen. These attempts occurred after arguments with their father. During these arguments, appellant's father would tell appellant that he was worthless. (60 R.T. 8479.) Additionally, as long as his father lived, he used physical force on both John and appellant. (60 R.T. 8482.)

When Mr. Tobin moved into town in August or September

1977, he and appellant became inseparable. (60 R.T. 8491-8492.)

Indeed, Sheila White observed that during her relationship with appellant Letner, she saw Mr. Tobin on almost a daily basis. (60 R.T. 8552.) In her opinion Mr. Letner idolized Mr. Tobin. (60 R.T. 8553-8554.)

The Steven Frame Incident

Just prior to the Stephen Frame assault, John was in a high school classroom cropping some pictures for the year book. Mr. Frame and two other boys entered the classroom and threatened to beat him up. (60 R.T. 8480-8481.) John didn't tell appellant about the incident, because if appellant didn't fight for John, his father would have beaten appellant. (60 R.T. 8481-8482.) Eventually, however, appellant found out. The Letner brothers called Mr. Frame on the telephone to straighten out the matter. Mr. Frame, however, denied any involvement in the incident. 60 R.T. (8483- 8484.) The conversation quickly degenerated and John heard threats voiced by both parties. (60 R.T. 8485.)

The David Bendowski Incident

John remembered the day he and Messrs. Bendowski, Tobin and Letner went to Soda Springs Canyon. Mr. Bendowski entered the car voluntarily. (60 R.T. 8486.) After Mr. Bendowski entered the car they drove around for a while drinking and smoking marijuana. (60 R.T. 8487.) At some point, Mr. Tobin confronted Mr. Bendowski regarding some money Mr. Bendowski owed Mr. Tobin concerning a girl, and a drug deal. (60 R.T. 8488.) Mr. Bendowski said he

realized he owed the money. (60 R.T. 8489-8490.)

There was no discussion about beating up Mr. Bendowski. The group did stop at Soda Canyon Road and the three left without Mr. Bendowski. (60 R.T. 8489.) Mr. Bendowski said he didn't want to ride with them anymore. (60 R.T. 8490.) They told him to do what he wanted and gave him a dime for the phone booth at the bottom of the hill. (60 R.T. 8490.)

The Incident with Officer Emberton

Darren Clenney (McElroy was his step-father's name) was fifteen years old at the time of the confrontation with Officer Emberton. (61 R.T. 8629, 8630.) Mr. Clenney and Mr. Letner were hitchhiking but were not standing in the street. (61 R.T. 8630.) Mr. Clenney said it was late, around eleven p.m., when the incident occurred. (61 R.T. 8636.) While he and appellant were waiting for a ride, cars came by and threw things at them. (61 R.T. 8636.)

After awhile, a car went by, very close, and Mr. Clenney had to move to get out of the car's way. About twenty to twenty-five feet past Mr. Clenney, the car stopped and the driver, Officer Emberton got out and approached Mr. Letner. (61 R.T. 8631-8632.) Emberton was aggressive. (61 R.T. 8632.)

Appellant assumed a karate stance when Emberton approached him, but Mr. Clenney did not see appellant push the officer. (61 R.T. 8638-8639.) When Emberton and appellant were wrestling, prior to the arrival of the other officers, Emberton struck appellant and appellant struck him back. (61 R.T. 8642-8643.) At some point

during the incident, someone kicked Officer Emberton's car. (61 R.T. 8633, 8636.) At no time during the confrontation, however, did Emberton identify himself as a police officer. (61 R.T. 8633, 8636.)

Appellant Letner's Testimony

The Frame and Bendowski Incidents

Appellant Letner testified in his own behalf. (60 R.T. 8555.) He concurred with his brother's recollection of the incident with Mr. Frame (60 R.T. 8557-8559) as well as the Soda Canyon Road incident with Mr. Bendowski. (60 R.T.8560-8565.)

Mr. Letner was seventeen at the time of the incident with Mr. Frame. His father told him that if he didn't do something about the threat to John, he might as well find a new place to live. (60 R.T. 8557.) John and appellant called Mr. Frame and asked Mr. Frame to apologize. Mr. Frame answered with a threat involving a shotgun kept in his truck. The following Monday, appellant saw Mr. Frame at school. As appellant approached him, Mr. Frame turned towards his truck. (60 R.T. 8558-8559.) Appellant punched Mr. Frame twice. On the second punch, Mr. Frame went down. Appellant kicked him, then walked away. (60 R.T. 8559.)

Appellant was not present on the occasion when Mr. Tobin went to Mr. Bendowski's residence and assaulted Mr. Bendowski. (60 R.T. 8560.) Ms. Bryant was in error when she testified Mr. Letner was there. It was Calvin Johnson who was with Mr. Tobin that day. (60 R.T. 8560.)

With regard to the Soda Canyon allegations, Mr. Bendowski

was invited into the car. He certainly could have declined the offer. (60 R.T. 8560.) The group cruised around, drank some beer, smoked some marijuana and eventually parked on Soda Canyon Road. (60 R.T. 8561-8562.) When they arrived at Soda Canyon Road, they all exited the car and sat on the rocks talking. There was some tension because prior to getting out of the car, Mr. Tobin was talking to Mr. Bendowski about money that Mr. Bendowski owed Mr. Tobin. (60 R.T. 8562.)

Mr. Bendowski owed Mr. Tobin sixty dollars for two quarter ounces of marijuana and fifty dollars because Mr. Bendowski had sex with Joanne Schultz. (60 R.T. 8563.) There was no discussion about hanging Mr. Bendowski from a tree. (60 R.T. 8564.)

When the group left Soda Canyon, Mr. Bendowski said he preferred to walk. (60 R.T. 8565.)

Regarding the third incident with Mr. Bendowski, Messrs. Dean, Tobin and Letner were cruising around when they saw Mr. Bendowski by a church off Trowler Avenue. (60 R.T. 8566.) Mr. Letner, who was driving, pulled over and Mr. Tobin exited the car. (60 R.T. 8567.) Mr. Bendowski started running, so Mr. Tobin chased him. When Mr. Tobin caught Mr. Bendowski, the two talked for a while, then both walked back to the car and got in. (60 R.T. 8567.)

They went to a Texaco station where Mr. Letner worked. Mr. Letner needed to get some gas and wanted to pick up his paycheck. (60 R.T. 8568.) They parked in back of the station and the three

smoked a joint of marijuana. (60 R.T. 8568-8569.) Although Mr. Bendowski still had not paid Mr. Tobin the money owed, Mr. Letner did not recall anyone threatening Mr. Bendowski. (60 R.T. 8570.)

The Officer Emberton Incident

Mr. Letner testified that while he and Mr. McElroy [Clenney] were hitchhiking, a car load of people went around the block twice and threw beer bottles at them. (60 R.T. 8571.) Then Officer Emberton's car drove up on the curb and almost hit Mr. McElroy. (60 R.T. 8572.) Mr. McElroy kicked the car and the car stopped and backed up five or ten feet before the driver exited the car. (60 R.T. 8572.)

The driver grabbed Mr. McElroy by the arm and appellant slapped the man's arm away and told the man to leave the kid alone. (60 R.T. 8573.)

The man (Officer Emberton), took a swing at Mr. Letner, and a physical altercation ensued. (60 R.T. 8574.) When two patrol cars arrived, Mr. Letner was arrested. (60 R.T. 8575-8576.) At that time Mr. Letner was told he had punched a police sergeant. (60 R.T. 8576.)

The McAdams Incident

On the day of the confrontation with Mr. McAdams, Mr. Letner was taking Sue Forsythe, McAdams' girlfriend, to work in his Corvette. (60 R.T. 8577-8578.) They were stopped at a stop light when they saw Mr. McAdams driving behind them. Mr. McAdams was not stopping, so Mr. Letner ran the red light to avoid a collision.

(60 R.T. 8579.) When Mr. Letner dropped Ms. Forsythe at work she got him a plate of oysters. (60 R.T. 8579.) As he left the restaurant about a half hour later, Mr. Letner again saw Mr. McAdams. Mr. Letner went to Mr. Tobin's home, parked his Corvette and got into his four-wheel drive truck. (60 R.T. 8580.)

Back on the street, Mr. Letner drove towards Mr. McAdams in the same lane to scare him. The two never collided and at some point they stopped. (60 R.T. 8581.) Mr. Letner exited his car and Mr. McAdams put his car into reverse, backed up about fifteen feet and drove off across a field. (60 R.T. 8582.)

Mr. Letner did not have a gun with him nor did he fire any shots. At the time, the gun was at Mr. Hockney's house to have the barrel mercuried. (60 R.T. 8583-858.)

The Healer Incident

In November 1986 Messrs. Tobin and Letner were "hanging out" at the USA gas station when they saw Mr. Healer. (60 R.T. 8606.) Mr. Tobin approached and started talking to Mr. Healer. Then Mr. Healer invited them to join him. Mr. Letner got into the truck and Mr. Healer remained in the driver's seat. (60 R.T. 8607.) Mr. Tobin pumped the gas then got into the truck also. (60 R.T. 8607.) The three men went to K-Mart, then to Lawler's liquor store where Messrs. Tobin and Healer got out and bought beer. Mr. Lobrick [sic] approached the truck while Messrs. Tobin and Healer were in the liquor store. (60 R.T. 8609.) With Mr. Healer's approval, Mr. Lobrick joined the group. (60 R.T. 8160.)

Mr. Healer drove to K-Mart where he and Mr. Tobin went inside. They were gone about fifteen or twenty minutes during which Messrs. Lobrick and Letner opened up the bed of the truck and began drinking beer. (60 R.T. 8610.) When Messrs. Tobin and Healer returned the foursome smoked two joints of marijuana and drank more beer. At some point they left K-Mart and went to a Sears catalogue store in search of Mr. Tobin's mother. (60 R.T. 8611.) Mr. Tobin went into the store and returned about fifteen minutes later. (60 R.T. 8612.) While Mr. Tobin was inside the store, Mr. Letner accused Mr. Healer of not finishing Mrs. Tobin's car and slapped him. (60 R.T. 8612-8613.)

Mr. Tobin approached the truck accompanied by his mother. She, Mr. Tobin and Mr. Healer stood behind the truck and talked. (60 R.T. 8613.) Eventually Mr. Healer returned to the truck cab. He was crying and said he was going to pay Mrs. Tobin the deductible but he had to go to his parents and get the money. (60 R.T. 8614.)

At some point all the men were back in the truck and Mr. Healer drove to a grocery store where Messrs. Healer and Tobin purchased another twelve pack of Coors. They cruised around then went to Burger King where Mr. Healer bought Mr. Letner a hamburger and Mr. Tobin bought him some fries. (60 R.T. 8615.) When they left Burger King, the group went to Carl's Hobby Shop. Messrs. Tobin, Letner and Healer exited the truck, went around the corner and relieved themselves and then returned to the truck. (60 R.T. 8616.) No one threatened or struck Mr. Healer. (60 R.T. 8617.)

Mr. Healer then drove to Sean Green's house because Mr. Lobrick wanted some speed. (60 R.T. 8617-8618.) Mr. Healer almost drove past the house and slammed on the brakes. He jumped out of the truck and Mr. Letner followed until Mr. Healer ran to a group of people. (60 R.T.8619.) Mr. Letner went around the corner after Mr. Healer pointed towards him and he didn't see Mr. Healer again that afternoon. (60 R.T. 8619.)

The Sheila White Incident

Appellant testified that Sheila White was his girlfriend for six to eight months in 1987. (60 R.T. 8598.) On December 27,1987 they drank two bottles of cheap tequila and some beer, smoked marijuana and Mr. Letner ingested some cocaine. (60 R.T. 8599.) At some point Mr. Letner invited a friend, Rocky, to join them. When Rocky began flirting with Ms. White, Mr. Letner threw him out. (60 R.T. 8599-8600.)

Then Mr. Letner fell asleep in the bathroom. (60 R.T. 8600-8601.) Ms. White solicited Mr. Tobin's assistance to wake Mr. Letner and put him into bed. (60 R.T. 8601.) Mr. Letner was asleep when someone poked him in the eye. Startled, he woke up swinging. (60 R.T. 8601.) Mr. Letner did not know with whom he was struggling until Ms. White turned on the light. (60 R.T. 8602.) Mr. Letner did not deny the particulars of the struggle, but he did not independently remember them. (60 R.T. 8601-8602.)

On December 31, 1987 Mr. Letner and Ms. White discussed New Year's Eve plans; she was going to an A.A. dance and Mr.

Letner was going out with Mr. Tobin and Ms. Mayberry. On New Year's Day morning Mr. Letner went back to Ms. White's. (60 R.T. 8602.)

The door was unlocked and Ms. White's son was asleep on the couch. Ms. White directed Mr. Letner to the bedroom so they could talk without waking her son. (60 R.T. 8603.) Ms. White told Mr. Letner that unless he was going to quit drinking and go to A.A., it was time for him to move out. He agreed to do so. (60 R.T. 8603.) He reached down to kiss her, she responded, and they engaged in consensual intercourse. (60 R.T. 8603-8604.)

Afterwards, Mr. Letner told Ms. White he was going to get a quart of beer at the store and would be right back. (60 R.T. 8604-8605.) When he returned Ms. White had locked and chained the door. (60 R.T. 8605.)

The Mohrhauser Incident

Mr. Letner recalled that he and another hitchhiker rode with Mr. Mohrhauser to Las Cruces. Mr. Letner was picked up somewhere outside El Paso. The other hitchhiker was already with Mr. Mohrhauser. (60 R.T. 8588.) When they arrived in Las Cruces, Mr. Mohrhauser dropped off the other hitchhiker, got gas and bought some beer. Messrs. Letner and Mohrhauser drank some beer, smoked some marijuana and proceeded to Mr. Mohrhauser's house. (60 R.T. 8589.)

Mr. Mohrhauser changed clothes and picked up his paycheck at the Carpeteria Store and the two went partying. (60 R.T. 8589-8590.)

Eventually they returned to Mr. Mohrhauser's residence. (60 R.T. 8590.) The next morning Mr. Letner washed the truck as he had been sick in it on the way home. (60 R.T. 8590.)

Messrs. Mohrhauser and Letner had breakfast, borrowed a sewing machine and returned to El Paso where they visited Mr. Mohrhauser's cousin. (60 R.T. 8591-8592.) There they drank beer and Mr. Mohrhauser and his cousin's boyfriend ingested heroin. From there Messrs. Letner and Mohrhauser went to Mr. Mohrhauser's brother's house. (60 R.T. 8593.)

Following an altercation between Mr. Mohrhauser and his brother, Messrs. Letner and Mohrhauser left the residence with Mr. Letner driving the truck. (60 R.T. 8595.) They were going to return to the cousin's house, but they got lost. (60 R.T. 8596.) Mr. Mohrhauser was very intoxicated and at some point he tried to punch Mr. Letner. (60 R.T. 8596.)

Mr. Letner pulled the truck over, got out, urinated, and physically removed Mr. Mohrhauser from the truck. Mr. Letner did not hit him, but left Mr. Mohrhauser there and drove off in the truck. (60 R.T. 8597.) Mr. Letner did not take Mr. Mohrhauser's watch and wallet. They remained in the truck in a pouch in the seat cover. (60 R.T. 8597-8598.)

Ivon Pontbriant

On the night Ms. Pontbriant was killed, Messrs. Tobin and Letner went to her house at sunset. (61 R.T. 8645.) Mr. Letner knocked on the door and was told to come in. The door was closed,

but not locked. As he and Mr. Tobin entered the house, Ms. Pontbriant was hanging up the telephone. (61 R.T. 8646.)

Ms. Pontbriant was a little intoxicated and was upset because Mr. Gilliland left her with the bills and took her dog along with Mr. Letner's tools. (61 R.T. 8646.) Before he arrived at Ms. Pontbriant's house Mr. Letner had been drinking at the Break Room, smoked a joint or two of marijuana and "done" cocaine. He had a bottle of cognac with him. (61 R.T. 8647.)

Ms. Pontbriant got beers for the three of them and told Mr. Letner that she thought Ed Burdette moved Mr. Gilliland. (61 R.T. 8647.) She took Mr. Letner to the garage and showed him that Mr. Gilliland's tools were gone and so were Mr. Letner's. (61 R.T. 8647-8648.) They returned to the house through the back door, an entry that requires one to go through the bedroom to the rest of the house. Ms. Pontbriant sat on the bed and was crying so appellant hugged and kissed her and told her it would be all right. (61 R.T. 8648.)

Eventually they went to the living room where Ms. Pontbriant dialed Mr. Burdette's telephone number then handed the telephone to Mr. Letner. (61 R.T. 8648-8649.) Mr. Letner and later Ms. Pontbriant spoke to Mr. Burdette. An argument ensued and profanities were exchanged. (61 R.T. 8650.) There were several separate calls, each of which ended when Mr. Burdette and his girlfriend hung up the telephone. After the last call, Ms. Pontbriant went to the kitchen and brought back three more Schaefer beers. (61 R.T. 8651.)

It was the last of the beers, so Ms. Pontbriant gave Mr. Tobin twelve dollars to purchase a 12-pack of Schaefer's light, a pack of generic cigarettes and a pack of Camel cigarettes. (61 R.T. 8652.) During the thirty to forty-five minutes that Mr. Tobin was gone Ms. Pontbriant and Mr. Letner talked and began hugging and kissing on the couch. (61 R.T. 8652-8653.) Mr. Letner noted that prior to this occasion, he and Ms. Pontbriant had sexual intercourse three times. (61 R.T. 8654.)

When Mr. Tobin returned, they all drank the beer and Ms. Pontbriant brought out a photo album. (61 R.T. 8653.) They ran out of beer again so Mr. Tobin gave Mr. Letner money to purchase another round. Mr. Letner went to the Oval Liquor store on his bicycle. (61 R.T. 8654-8656.) Ms. Pontbriant was careful about her car and Mr. Letner hadn't yet asked her if he could use it to move some stolen shampoo products and cosmetics from his apartment. (61 R.T. 8656.)

Ms. Pontbriant did not like Mr. Tobin, so she told Mr. Letner to hurry. Mr. Letner was gone about fifteen minutes at most and bought Moose head and Lowenbrau beer or possibly Heineken. (61 R.T. 8657-8658.) When Mr. Letner returned, he asked Mr. Tobin to leave for a while as Ms. Pontbriant wanted to be alone with Mr. Letner. (61 R.T. 8658.) Mr. Tobin took five beers and went out to the front yard and sat down. (61 R.T. 8658.)

Ms. Pontbriant and Mr. Letner engaged in sexual intimacies, but no intercourse, on the couch. They had removed their clothes,

decided to wait and had begun to put their clothes back on when Mr. Tobin re-entered the house. (61 R.T. 8659-8660.)

Mr. Tobin asked Mr. Letner if he had Ms. Pontbriant's car yet. Ms. Pontbriant was incensed and slapped Mr. Letner. Reflexively, he slapped her back. (61 R.T. 8661.) Mr. Letner, who is left handed, slapped Ms. Pontbriant on the right side of her face. (61 R.T. 8662.) When Ms. Pontbriant and Mr. Tobin began exchanging verbal obscenities, Mr. Letner went to the bathroom. (61 R.T. 8663.) He heard the arguing continue and heard Ms. Pontbriant say she was going to call the police. (61 R.T. 8663.)

When Mr. Letner returned to the living room, Ms. Pontbriant was sitting on the couch and Mr. Tobin was kicking her in the arm. It appeared to Mr Letner that Mr. Tobin kicked Ms. Pontbriant a few times because there was a good size bruise on her arm. (61 R.T. 8664.) To avoid further confrontation between Ms. Pontbriant and Mr. Tobin, Mr. Letner grabbed Ms. Pontbriant by her hair and turned her towards him. (61 R.T. 8664-8665.) Ms. Pontbriant cursed at Mr. Letner and he backed off. Mr. Tobin attempted to pull off Ms. Pontbriant's sweater and Mr. Letner verbally confronted Mr. Tobin. Mr. Letner noticed Mr. Tobin had Mr. Letner's knife in his hand. Mr. Letner thought the knife must have fallen from his pants pocket when he removed his pants earlier. (61 R.T. 8665.)

Mr. Tobin cut the collar of Ms. Pontbriant's sweater, then ripped the sweater and pulled it off. (61 R.T. 8666-8667.) Mr. Letner stood there, shocked, and did not know what to do. (61 R.T.

8668.) Ms. Pontbriant sat on the couch while Mr. Tobin undressed her. (61 R.T. 8668.) He pulled her pants to her knees and noticed she had soiled them. Ms. Pontbriant laughed and pointed at Mr. Tobin when he noticed it. Mr. Tobin grabbed Ms. Pontbriant by the hair and threw her on the floor. (61 R.T. 8669.) Mr. Tobin then reached in the right rear pocket of his pants and pulled out a telephone cord which he wrapped around Ms. Pontbriant's neck and wrists. (61 R.T. 8670.) Mr. Tobin grabbed the back of the cord and pushed Ms. Pontbriant down with his foot as he pulled her neck upwards with the cord. (61 R.T.8671.) After about a minute, Ms. Pontbriant turned pale blue and Mr. Letner jumped on top of Mr. Tobin. As they wrestled, Mr. Tobin bit Mr. Letner on the top of his head and Mr. Letner jerked his head up and hit Mr. Tobin's nose causing it to bleed. (61 R.T. 8671.) Mr. Letner saw his knife stuck in the coffee table and attempted to work the knife free. As he did so, Mr. Tobin went to the kitchen and returned with a French knife or a butcher knife. Ms. Pontbriant was coughing. Mr. Tobin threatened Mr. Letner and told him not to interfere. (61 R.T.8673.) Mr. Tobin then stabbed Ms. Pontbriant in the back of the neck about three times. (61 R.T. 8673.) Mr. Letner went to the bathroom and vomited. (61 R.T. 8674.)

When Mr. Letner returned to the living room, Mr. Tobin told him to get a couple of rags and clean up. (61 R.T. 8674.) Mr. Letner did so and Mr. Tobin slapped him for not cleaning thoroughly enough. Mr. Letner did not retaliate because he was afraid Mr. Tobin

might kill him, too. (61 R.T. 8674.) Mr. Letner folded his knife and put it into his pocket. Mr. Tobin was picking up cans and bottles and took a bottle and put it between Ms. Pontbriant's legs then "tried to kick it up her backside." (61 R.T. 8675.) When they were finished, Mr. Tobin grabbed Ms. Pontbriant's purse, pulled out the keys and said they didn't need to steal the car now. (61 R.T. 8676.)

Mr. Tobin stalled the car three times in the driveway, so he told Mr. Letner to drive. (61 R.T. 8678.) Mr. Tobin rode his bicycle and Mr. Letner drove the car to a dumpster behind the apartment complex where they discarded the garbage from the house. (61 R.T. 8678.) The unopened beer and the butcher knife went into the car. The knife was later discarded in the dumpster at 301 East Murray. (61 R.T. 8679.) Mr. Tobin's nose was still bleeding, so he wiped it on a rag in the car and shoved the rag under the seat. (61 R.T. 8679.)

Subsequently Messrs. Tobin and Letner were stopped by Officer Wightman. (61 R.T. 8680-8681.)

Later after he was in jail, Mr. Letner wrote several statements regarding Ms. Pontbriant's death. He wrote those letters at the behest of and with the assistance of Danny Payne, a fellow climate.[24] Mr.

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[24] On cross examination by the deputy district attorney, appellant read aloud his letters to Danny Payne. In his first letter, he denied killing Ms. Pontbriant. There was no reason to kill her because he was having an affair with her. He said that Mr. Tobin was the killer and he killed Ms. Pontbriant because she refused to have sex with him. Appellant also stated that he was not present during the actual homicide. (61 R.T. 8793-8796.) In the second and third letters to Payne; appellant admitted that he was present during the murder but continued to maintain that Mr. Tobin was the murderer. Appellant testified that these letters were "the exact truth." (61 R.T. 8797.)

Letner heard that Mr. Tobin was saying that Mr. Letner murdered Ms. Pontbriant. Appellant was scared but Payne assured him that the letters would help. (61 R.T. 8681-8682.)

Psychiatric Evaluation

Dr. Richard Blak, psychologist, met with appellant Letner and later with John Letner in January 1990. (63 R.T. 9079, 9081-9082.) Dr. Blak administered the Rorschach ink blot test, the MMPI (Minnesota Multi phasic Personality Inventory) and portions of the Wetzlar Adult Intelligence Scale, Revised test to appellant Letner.[25] (63 R.T. 9083.)

Dr. Blak found appellant Letner's verbal IQ to be 95, in the average range, and found appellant Letner to be above average in the non-verbal tests. (63 R.T. 9085.)

However, following his tests and interviews with appellant Letner and family members, Dr. Blak concluded that appellant Letner

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The fourth letter was consistent in that appellant stated that Mr. Tobin was the murderer. (61 R.T. 8799-8830.) This letter had more detail noting that Mr. Tobin kicked Ivon Pontbriant all over, but mostly in the face; kicked a beer bottle up her rectum; and stabbed her with knife. (61 R.T. 8825.) This letter also explained that appellant did not intervene because he was afraid of Mr. Tobin. Tobin previously told appellant that he had killed a man in Napa. (61 R.T. 8841-8842.) (These letters are People's Ashes 221A, 222A, 224A.)

[25]Dr. Blak explained that some parts of the Wexler test were not administered because appellant Letner was in restraints. (63 R.T. 9083-9085.) Dr. Blak also explained that he didn't personally administer the MMPI test, but gave the booklet and answer sheet to appellant's counsel and counsel took responsibility for having someone go to the jail and administer the test. (63 R.T. 9367-9372.)

was suffering from a number of emotional or mental disorders. (63 R.T. 9092-9093, 9096-9098.) On Axis I, the first level of diagnostic categories, Dr. Blak found appellant to be suffering from 1) dysthymia, that is, chronic depression over lifetime, 2) alcohol dependence, and 3) polysubstance abuse, including cocaine, amphetamines and marijuana. (63 R.T. 9094-9095.) In 1990 the alcohol and polysubstance symptoms were in remission because Mr. Letner was incarcerated in 1988. (63 R.T. 9095.) The dysthymic disorder was not in remission and Dr. Blak opined it could be partially attributable to a genetic predisposition. It was Dr. Blak's understanding that Mr. Letner was provided with some medication by jail personnel and medical staff for depressive reaction. (63 R.T. 9096-9098.)

Axis II is a diagnostic category that looks at developmental impairment. (63 R.T. 9098.) Dr. Blak opined appellant Letner suffered from Borderline Personality Disorder beginning at three or four years of age, before his Axis I problems developed. (63 R.T. 9098-9100.) In Dr. Blak's experience it would be very difficult to fake this disorder. (63 R.T. 9100-9101.) There are eight criteria of which at least five must be met to diagnose borderline personality disorder. Appellant Letner displayed all eight of the criteria. (63 R.T. 9136.)

Two of the symptoms, mood swings, and a high level of anxiety were also reflected in Mr. Letner's MMPI results. (63 R.T. 9108.) Dr. Blak found evidence of all other criteria also: propensity

to verbosity, inappropriate intense anger or lack of control of anger (63 R.T. 9111-9114), recurrent suicidal threats[26] (9122), marked and persistent identity disturbance manifested by at least two of specific criteria (9124-9129), chronic feelings of emptiness or boredom (9129-9130), and frantic efforts to avoid real or imagined abandonment.[27] (63 R.T. 9130-9134, 9136.)

Dr. Blak distinguished his diagnosis of borderline personality disorder as opposed to anti-social personality disorder in appellant Letner by stating that appellant Letner at times slipped into a state where his reality testing was impaired, when he was not in touch with reality. That quality is not seen in anti-social personality disorder. (63 R.T. 9136-9137.)

In psychological testing Axis III is a category which asks for information about physical or medical conditions that might affect a person's psychological or psychiatric functioning, i.e., diabetes, hypertension, etc. (63 R.T. 9138.) Appellant Letner's participation in a motor vehicle accident at the age of seven was pertinent in this category, but no medical records of the accident were available. (63 R.T. 9139-9140.)

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[26]Appellant Letner exhibited incidence of this at 10 years of age, in the Navy, and continued to do so. (63 R.T. 9123.)

[27]Dr. Blak opined that this symptom combined with ego splitting, characteristic of borderline personality disorder, could explain the episode with Ms. White followed by Mr. Letner's denial of it. (63 R.T. 9130-9134.) Fear of being left (for Rocky or because of Ms. White's involvement with AA) could cause the aggressive behavior (9131-9132) and the borderline personality disorder could cause the denial. (63 R.T. 9133.)

Axis IV is a designation of kinds of psycho social stressors operating on the person at the time of the diagnosis. Dr. Blak placed Mr. Letner in code four, representing severe and extreme stress. (63 R.T. 9142-9143.) He gave examples of a severe stress situation as divorce, birth of a first child, and unemployment. Examples of an extreme stress situation would be death of a spouse, serious physical disability, or being a victim of rape or sexual abuse. (63 R.T. 9143.)

Axis V indicates global assessment on a functioning scale. (63 R.T. 9144.) Given the scale of zero to 90 with 90 indicating minimal symptoms, Dr. Blak would put Mr. Letner at 50 or 51, indicative of serious symptoms including suicidal idealizations, severe obsession with rituals, frequent problems with the law, and serious impairment in social, occupational, or academic functioning. (63 R.T. 9144-9145.)

Dr. Blak opined that someone with a borderline personality disorder might or might not have the capacity to appreciate the criminality of his conduct. (63 R.T. 9249-9250.)

On cross examination he was shown Tulare County jail medical records indicating that the only medical problem expressed by appellant Letner was an inability to sleep or rest without medication. The reports stated that Mr. Letner threatened to beat his head on the wall if denied the medication, but he was not psychotic and had no symptoms of depression. (63 R.T. 8355-9356.) Nonetheless, Dr. Blak stated these reports did not change his opinion. (63 R.T. 9355.)

Dr. Blak also reviewed a report from KingsView Medical

Hospital dated January 15, 1990 that confirmed the Tulare County jail reports of 1988 and opined that Mr. Letner's demands were manipulative. (63 R.T. 9364-9365.)

The results of appellant's MMPI profile from the University of Minnesota included a category entitled "Profile Validity." The first paragraph in this category on appellant's test results reads: "This MMPI profile should be interpreted with caution. There is some possibility that the clinical report is an exaggerated picture of the client's present situation and problems. He is presenting an unusual number of psychological symptoms. ... He may be showing a lack of cooperation with the testing. Or he may be, 'malingering' by attempting to present a false claim of mental illness." (63 R.T. 9372-9373.)

The report continued in a second category, "Symptomatic Pattern", that "Individuals with this MMPI profile tend to be chronically maladjusted. The client is, apparently, immature and self indulgent, manipulating of others for his own ends...." (63 R.T. 9373-9374.)

Dr. Blak obtained another report which interpreted Mr. Letner's answers to this MMPI test. The other report indicated that Mr. Letner's test was valid while also suggesting the testee was immature and self indulgent. (63 R.T. 9376-9377.) In summary, Dr. Blak stated one analysis indicated the test was valid and the other analysis indicated the results should be interpreted with caution. (63 R.T. 9380.)

Under cross examination by Mr. Tobin's counsel, Dr. Blak admitted that it would be consistent for appellant's disorder to attack or even kill Ms. Pontbriant and to fabricate a story implicating Mr. Tobin as the killer. (63 R.T. 9419-9420.)

Mitigating Evidence - Codefendant Tobin

Robert Hernandez & Leo Pike

Robert Hernandez was called as a witness by Christopher Tobin after the prosecution declined to call him as a witness. Mr. Hernandez testified that he was in custody in 1988 and was working as a trustee on Mr. Letner's jail tier, giving him access to Mr. Letner on a daily basis. (65 R.T. 9473, 9475, 9479.) Over time Mr. Letner told him how he [Letner] escaped from the van in Texas (9481-9482) and about the homicide and getting pulled over by the Visalia police. (65 R.T. 9482.)

Mr. Letner told Mr. Hernandez that he and Tobin went over to get $300 and take some stuff. When the lady started yelling, Mr. Letner used the knife on her. Mr. Letner did not say anything about choking her. (65 R.T. 9483, 9487.)[28]

On cross examination, Mr. Hernandez confirmed that on a previous occasion he testified against someone and received a lesser sentence. (65 R.T. 9488-9499.) Mr. Hernandez also admitted that through a guard, he became aware that Mr. Letner escaped in Texas and was being tried for murder in California. (65 R.T. 9500-9501.)

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[28] It should be noted that in his testimony, appellant vehemently denied making any statements to Robert Hernandez concerning this case. (61 R.T. 8697.)

Leo Pike testified that he was in jail at the same time as appellant and Hernandez and on the same jail tier. (65 R.T. 9510-9511) His cell was located such that he could hear appellant and Mr. Hernandez often in conversation. (65 R.T. 9514-9516.)

Testimony of Family Members

Tammy Dudley testified that Mr. Tobin is her older brother. (63 R.T. 9178-9179.) She has maintained contact with her brother throughout his incarceration and would prefer a sentence of life without parole. (63 R.T. 9180.)

Michael Tobin, Sr. testified that Christopher Tobin is his son. (63 R.T. 9174.) He and his wife divorced when Christopher was 14 years old. The defendant lived with his mother except for about one year when he lived with Mr. Tobin, Sr. (63 R.T. 9175.) Mr. Tobin has been in contact with defendant Tobin through telephone, letters and visits since defendant's incarceration. He loves his son and would prefer a sentence of life without parole. (63 R.T. 9176.)

GUILT PHASE ISSUES

INTRODUCTION TO THE ISSUES

Among the most intractable problems of this case are that no one knows what really happened at Ivon Pontbriant's home the night she died, and more importantly, that no one knows who actually caused her death. These evidentiary problems coupled with the multiple alternative theories of criminal liability and the confusing nature of the jury instructions severely undermined the reliability of the fact finding process as well as the death penalty determination.

Here, the defendants, forced to stand trial together, ended up pointing fingers at each other and the forensic evidence did little to sort out the dichotomy. More importantly, the prosecutor even admitted that the evidence could not show which defendant was the perpetrator. Instead, she argued that the jury should simply find both men equally guilty. The prosecution's approach avoided the hard problem of fixing individual responsibility and allowed the jury to simply take the path of least resistance. Doing so, however, deprived appellant of his fundamental right to a jury trial and his due process right to individual consideration.

These already difficult individual responsibility issues were greatly complicated by the prosecution's multiple theories of criminal liability. The prosecution argued that the defendants killed Ms. Pontbriant in order to steal her vehicle so they could drive to appellant's grandparents home in Iowa. Alternatively, they killed Ms. Pontbriant to obtain the rent money that Mr. Gilliland said he gave

her while the defendants looked on. Further, as noted above, the prosecutor contended, it didn't matter who did what – appellant could be convicted of murder as the actual killer, or he could be convicted as an aider and abettor of Mr. Tobin.

The evidence simply will not support any of these theories. The evidence shows a long night of partying and drinking by all involved. During the course of that evening, Ms. Pontbriant and appellant made several obscenity laced telephone calls to witnesses who knew them both. If, as the prosecution argued, the purpose of the defendants' visit to Ms. Pontbriant's home was to steal her car, her money, or both, vehemently making their presence known to witnesses who could easily identify them is a particularly improbable way to begin such an enterprise. Further, stealing the vehicle, which could be readily identified, would have made it much easier for the police to locate them. Moreover, after the vehicle was taken, there is no evidence that the defendants packed it for a trip to Iowa. Instead they put items in the car apparently intended either for sale or for storage. Additionally, even after a police officer stopped the defendants and told them to lock the car and walk away because they were intoxicated, once the officer left the area, the defendants could have simply unlocked the car and driven away. They did not do so.

The evidence was similarly flawed regarding the theory that Ms. Pontbriant had several hundred dollars of rent money in her possession and the defendants knew about it. To establish the predicate for this robbery theory, the prosecution relied exclusively

on the testimony of Warren Gilliland. Mr. Gilliland was a late stage alcoholic with an undisputed reputation for mendacity. Moreover, as Ms. Pontbriant's paramour, he had more than a little incentive to try to convict the persons he held responsible for her death. Significantly, every single source of funds that Mr. Gilliland identified as the basis for the rent money was irrefutably contradicted by testimonial or documentary evidence, often both. Mr. Gilliland simply had no money to give Ms. Pontbriant for the rent. Thus, there could not have been an occasion when the defendants witnessed him giving several hundred dollars to Ms. Pontbriant.

Additionally, after vacillating repeatedly on the date and time when the purported rent money transfer took place, the Sunday morning that Mr. Gilliland ultimately picked was thoroughly discredited by the evidence. On that particular Sunday, the defendants went to an early morning swap meet and then spent the day with Mr. Tobin's ex-wife. Indeed, the prosecution's own witness, Ms. Mayberry confirmed that she lent her car to the defendants to go to the swap meet and that she spent a good portion of that Sunday harassing Mr. Tobin and his ex-wife in an attempt to prevent them from reuniting. She also confirmed that Mr. Letner was present during her efforts.

Similar evidentiary problems plague the prosecution's charges of attempted rape and burglary. The prosecutor conceded that there was no evidence of actual rape, but could not show any intervening cause preventing either defendant from actually completing a rape.

Even under the prosecutor's theory of the case, the two defendants were alone in the house with Ms. Pontbriant for a lengthy period of time. If one or both attempted - or even intended - to rape her, they certainly had the opportunity to complete the act. Further, even if there was some basis for discerning an attempted rape, there certainly was no basis for reliably determining which defendant attempted to commit rape or for reliably concluding that both did. But this didn't matter according to the prosecutor. According to her, appellant could be convicted of attempted rape either as the would be rapist or as the aider and abettor of Mr. Tobin's attempt to commit rape.

Additionally, and inconsistent with the burglary charge, the undisputed evidence is that the defendants were invited into Ms. Pontbriant's house and they spent a long evening drinking and socializing with her. At the time of her death, Ms. Pontbriant's blood alcohol level was .29, more than three times the .08 legal limit for driving. If appellant entered the house with the intent to take her car or steal her money, he could have simply waited for her to pass out and helped himself. It would have made no sense whatever to kill her to obtain these things. This is particularly true as to appellant, since other witnesses who could readily identify him knew that he was present at the house.

Finally, the horrific nature of the killing itself undermines the prosecution's felony murder theories, as well as any possible theory of a deliberate, premeditated homicide. The brief, clumsy effort at strangulation, the multiple blunt force traumas, and the many stab

wounds are consistent only with a fit of rage and a sudden explosion of violence. Certainly that much force would not be required to relieve a drunken woman of her property or even to kill her. The evidence is unclear what sparked that overwhelming rage, but the nature of the injuries leaves no doubt of its sudden explosive violence.

These evidentiary problems were further muddled by instructional errors. The jury instructions were particularly confusing in this case because they did not carefully differentiate between the different defendants and the different theories of guilt. Thus, the jury instructions 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. The prosecution's failure to focus on any particular theory about how the murder occurred resulted in a confusing, misleading and incomplete set of jury instructions

For example, the voluntary intoxication instruction failed to convey that an aider and abettor could have a lesser degree of culpability that the perpetrator because intoxication affected his specific intent to commit a particular crime.

And, as explained in detail, *infra*, many other instructions were faulty because they permitted the jury to draw inferences of appellant's guilt that were overbroad or permitted such inferences from conduct unrelated to the offenses or even acts committed solely by the codefendant.

The prosecutor's inability to fix individual responsibility in this case or even establish a viable theory for this killing along with her ongoing efforts to persuade the jury to convict and condemn the two defendants as a single culpable entity, undermined the validity of the death penalty sanction. Compounded by confusing and misleading instructions that allowed the jury to find guilt without proof of requisite mental states or on proof of irrelevant facts, the reliability of the fact finding process was irrevocably compromised. Given these circumstances, Mr. Letner could face the ultimate penalty when he is factually innocent, a circumstance that is legally indefensible and morally repugnant.

I.

THE TRIAL COURT ERRED IN REQUIRING THE DEFENDANTS TO WEAR LEG SHACKLES DURING THE TRIAL

Introduction

A defendant may not be shackled in the courtroom except on a showing of manifest need and as a last resort in an extraordinary case. Here, despite seven weeks of proper behavior in the courtroom, the trial judge allowed the bailiffs to impose rigid leg restraints based solely on unverified hearsay reports that at some point during their incarceration, the defendants were seen practicing martial arts kicks at the jail. The improper imposition of these restraints violated federal and state due process as well as appellant's Sixth Amendment rights to counsel and to present a defense.

Factual Background

During a chambers conference held on Monday, November 20, 1989 at the end of jury selection, the defense protested the fact that the sheriff's department had summarily placed both defendants in leg braces. (31 R.T. 4461.) Counsel for codefendant Tobin explained to the court that his client did not pose an escape risk and had done nothing to justify these restraints. It was demeaning and was similar to treating the defendant like an animal. (31 R.T. 4461- 4462.) Counsel for appellant joined in the objection. (31 R.T. 4462.)

Counsel for appellant also noted that although appellant escaped from the vehicle returning him from Iowa to California, the trial had been underway for seven weeks and nothing in appellant's behavior warranted the sudden imposition of the restraints. (31 R.T. 4462.) Further, on the first day the defendants were supposed to appear in front of the empaneled jury, they were forced to wear the restraints. (31 R.T. 4462.)

Sgt. Pollack [the Sergeant in charge of the bailiffs] stated for the record that there had been words between appellant and another inmate and that although appellant was in restraints, he attempted to assault this other inmate. (31 R.T. 4463.) Further, Sgt. Pollack asserted there was another problem of which the court was aware. (31 R.T. 4463.)

The prosecutor stated that the leg restraints did not appear to be visible to the jury and that the bailiffs could have the defendants walk in and out of the courtroom without the restraints being visible. (31 R.T. 4463- 4464.)

Counsel for appellant noted that the leg restraint was in fact visible and could easily be seen below his pant leg as he sat at counsel table. (31 R.T. 4464.)

The court responded that although neither defendant wore loose trousers, the brace was not "readily apparent." (31 R.T. 4464.) The court was not aware, however, of whether the brace was uncomfortable. (31 R.T. 4464.) Defendant Tobin blurted out that it was "very" uncomfortable. (31 R.T. 4464.)

The court ruled that the restraints did not appear to be "unduly restrictive" and the defendants were not chained or manacled so there was no possibility of prejudice. (31 R.T. 4464.) For that reason, he was "going to defer to the opinion of the sheriff's office." (31 R.T. 4465.)

Counsel for appellant then asked when the braces were obtained by the sheriff's office. (31 R.T. 4465.) Sgt. Pollack replied that they had been on order for awhile, but they came in just the previous weekend. (31 R.T. 4465.)

The next court day, November 21, 1989, the court noted that Mr. Tobin's leg restraint had been damaged. (32 R.T. 4693.) Without significant further analysis, the court simply noted that the defendants' behavior in the courtroom had been appropriate and they would not have to wear the restraints anymore. (32 R.T. 4693.)

Two months later on January 17, 1990 the prosecution filed a document entitled People's Third Supplemental Notice of Intent to Introduce Evidence in Aggravation. In that document was an incident report concerning the destruction of leg braces. (4 C.T. 1005-1017.) On the same date, the court filed an order restricting the jail sundeck exercise privileges of the defendants. (4 C.T. 1018.)

After the entire trial concluded and the parties were engaged in the record correction process, the issue of leg braces was revisited in an effort to elaborate on what happened at trial. Settling the record for October 18, 1989 (13 R.T. 1639), the record now reflects that the defendants were ordered to stand and face the [prospective] jury.

Neither defendant was wearing a leg brace. (7 Augmented Clerk's Transcript at p. 1536.)

Settling the record for November 20, 1989 (31 R.T. 4463), the parties agreed that the record should reflect that Sergeant Pollack's reference to the "other matter" of which the court was purportedly aware was that both defendants were seen practicing martial arts kicks on the exercise yard [sundeck] of the jail roof. The Sergeant was concerned that because of the reported martial arts practice, one or both of the defendants might try to escape. (7 Augmented Clerk's Transcript at p. 1538.) The Sergeant and the court were concerned that because the courtroom was so small and courtroom personnel were so close to the defense tables that any melee that erupted would likely result in injuries. (7 Augmented Clerk's Transcript at pp. 1538-1539.)

Later, on October 5, 1995, appellate counsel for codefendant Tobin filed a motion to reopen the hearing to settle the record. (8 Augmented Clerk's Transcript at pp. 1569-1571.) In the motion, Mr Tobin's counsel asserted that in fact, Mr. Tobin had not been practicing martial arts kicks at the jail; that the leg braces had been worn for three days, and that although the braces were underneath the trousers of the defendants, they made a significant bulge which the jurors could see and which would alert the jurors to the fact that the defendants were shackled. (8 Augmented Clerk's Transcript at pp. 1569-1571.) Further, counsel asked that Mr. Tobin and Mr. Letner be brought from prison for a hearing on the matter and that a leg brace

similar to the one used at trial be made available for demonstration purposes at the hearing. (8 Augmented Clerk's Transcript at pp. 1569-1571.)

Appellate counsel for Mr. Letner joined the motion. (8 Augmented Clerk's Transcript at pp. 1572-1574.) In his declaration attached to the motion, appellant Letner stated that the jail classified him as an escape risk. Therefore, every time he was taken to the exercise yard, he was confined with both leg and arm shackles. Thus, he never practiced any martial arts kicks. (8 Augmented Clerk's Transcript at p. 1575.) Further, the jail staff never allowed him and Mr. Tobin to be on the roof together. (8 Augmented Clerk's Transcript at pp. 1569-1576.) During the off-the-record discussion of the leg braces, he heard codefendant Tobin tell the court that the leg braces were both uncomfortable and demeaning and that they could be seen by the jury. (8 Augmented Clerk's Transcript at pp. 1576.) Additionally, various jurors could routinely see the defendants in chains as they were transported from the jail to the courthouse [across a parking lot], so those jurors certainly would have been observant enough to see the restraints in the courtroom. (8 Augmented Clerk's Transcript at pp. 1576.) Finally, Mr. Letner asserted that he was unaware of any incident or threat to any court personnel during the pendency of the trial that would justify the imposition of physical restraints. (8 Augmented Clerk's Transcript at p. 1576.)

In its written response to the motion to reopen the hearing to settle the record, the prosecution did not oppose the reopening.

Nonetheless, it urged that the defendants' presence was not required as other persons could demonstrate how the leg braces were worn and what could be seen. (8 Augmented Clerk's Transcript at pp. 1580-1581.)

On December 18, 1995, the trial court issued a written order denying the motion to reopen the hearing to settle the record but allowing certain other corrections to the record. (8 Augmented Clerk's Transcript at pp. 1593-1595.) On the issue of the leg braces, the court attached photographs of a bailiff wearing the leg braces as well as a copy of the original transcript of the discussion of the leg braces. (8 Augmented Clerk's Transcript at pp. 1596-1608.)

In its order, the court opined that the leg braces were not visible to the jury. Further, the court had been advised by the Sheriff's department that the braces were necessary to ensure courtroom security because of the defendants' martial arts kicking skills. The court then incorporated the transcripts of November 20 and 21, 1989 by reference. (8 Augmented Clerk's Transcript at pp. 1595.)

Both defendants filed written objections to the court's order. (8 Augmented Clerk's Transcript at pp. 1629-1636, 1639-1643; 1644-1647; 1648-1649.) In Mr. Tobin's affidavit attached to the motion to reopen, he notes that in addition to the bulge in the pant leg caused by the leg restraint, the straps and metal braces that extended down to the ankle could be seen below the defendants' pants legs when they were seated. (8 Augmented Clerk's Transcript at pp. 1633.)

On June 28, 1996, the trial court issued a supplemental order

again denying the request to hold a hearing on the issue of leg braces. The court reiterated that in its opinion, the jury could not see the restraints and stated that its decision on courtroom security was necessitated by information concerning the defendants' martial arts capabilities. The court incorporated an affidavit by Deputy Stenback. (8 Augmented Clerk's Transcript at pp. 1655-1656.) The declaration averred that jail deputies reported to Deputy Stenback that Mr. Tobin had been seen practicing martial arts kicks in the exercise yard and in his cell. Further Stenback reported this activity to the trial court and urged that the leg braces be employed as a security measure in court. (Declaration of Deputy Stenback filed April 5, 1996 at 8 Augmented Clerk's Transcript at pp. 1650-1651.)

Standard of Review

The standard of review is whether the trial court abused its discretion in ordering the defendant to be shackled. (*People v. Sheldon* (1989) 48 Cal.3d 935, 945)

The Unjustified Restraint Violated Appellant's State and Federal Constitutional Right s

The unjustified shackling of appellant, which impaired appellant's mental faculties and communication with his counsel, caused appellant unwarranted pain and discomfort, created an unwarranted aura of dangerousness and untrustworthiness and impaired the presumption of innocence, as well as the dignity and decorum of the courtroom, undermined appellant's right to due process, to a fair trial, to present a defense, to the effective assistance

of counsel, to a trial by jury, and to fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution. (See *Estelle v. Williams* (1976) 425 U.S. 501, 504-505 [forcing a defendant to stand trial in physical restraints may violate the Due Process clause and the Sixth Amendment right to trial by jury by undermining the presumption of innocence]; *Spain v. Rushen* (9th Cir. 1989) 883 F.3d 712 (Trial court's failure to consider or employ less drastic alternatives to shackling violated due process]; *Rhoden v. Rowland* (9th Cir. 1998) 172 F.3d 633 [unjustified shackling of defendant throughout trial violated due process]; *Riggins v. Nevada* (1992) 504 U.S. 127 [forced medication which may have interfered with defendant's ability to follow the proceedings or communicate with counsel violated due process and Sixth Amendment trial rights]; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [heightened reliability required by the Eighth and Fourteenth Amendments for conviction of a capital offense]; and *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [reliable, individualized capital sentencing determination is required by the Eighth and Fourteenth Amendments]; *Zant v. Stephens* (1983) 462 U.S. 862, 869 [same]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [same].)

California courts also have long recognized the disadvantage a defendant faces when he appears in court shackled like a convict. As far back as *People v. Harrington* (1871) 42 Cal. 165, this court

observed:

> "Should the Court refuse to allow a prisoner on trial for felony to manage and control, in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial should be reversed. In my opinion any order or action of the Court which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf."

(*Id.*, at p. 168.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the shackling issue was addressed by the United States Supreme Court. The court explained that restraining a defendant is a measure that may be employed only "as a last resort" in an extraordinary case. (*Id.*, at p. 344.) Explaining its decision, the court said:

> "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint." (*Ibid.*)

Shortly afterwards in *Kennedy v. Cardwell* (6th Cir. 1973) 487

F.2d 101, 105-106, cert. denied, 416 U.S. 959 (1974), the court discussed five factors supporting the rule against shackling the defendant in th courtroom: (1) physical restraints may prejudice the defendant in the minds of the jury, thus reversing his presumption of innocence; (2) the defendant's mental faculties may be impaired by the shackles; (3) communication between the defendant and his lawyer may be impaired by any physical restraints; (4) the dignity and decorum of the judicial proceedings may suffer; and (5) the restraints may be painful to the defendant. The court further held that a defendant may not be subjected to physical restraints of any kind in the courtroom, while in the jury's presence, unless a manifest need for the restraints has been demonstrated. (*Id.*, at p. 102.)

In *People v. Duran* (1976) 16 Cal.3d 282, 290-291, this court affirmed California's reliance on the federal authorities. The court stated the general rule applicable to physical restraints and "reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." Further:

> "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. (*Id.*, at pp.

291-292.)

Moreover, under the standard set forth in *Duran*, the trial court's discretion is relatively narrow. (*Id.*, at pp. 292-293; *People v. Cox* (1991) 53 Cal.3d 618, 651.) Thus, the "manifest need" required for the imposition of physical restraints "arises only upon a showing of unruliness, an announced attention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' ([*People v. Duran*, *supra*, 16 Cal.3d. at p. 292, fn. 11.) Moreover, '[t]he showing of nonconforming behavior . . . must appear as a matter of record . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.' (*Id.*, at p. 291.)" (*People v. Cox*, *supra*, 53 Cal.3d at p. 651.) The federal standard is even higher -- shackling a defendant is only justified "as a last resort, in cases of extreme need, or in cases urgently demanding that action." (*Wilson v. McCarthy* (9th Cir. 1985) 770 F.2d 1482, 1485.)

Thus, shackling is proper only if there is a serious threat of escape, danger to those in or around the courtroom, or where disruption in the courtroom is likely. (*Ibid.*) Significantly, however, "[T]he determination to impose restraints and the nature of the restraints to be imposed are judicial functions to be discharged by the court, not delegated to a bailiff." (*People v. Jacla* (1978) 77 Cal.App.3d 878, 885; see also *People v. Jackson* (1993) 14

Cal.App.4th 1818.)

No Justification for Shackling

In this instance, the trial judge held only a perfunctory hearing prior to deciding to maintain the restraints on appellant. At the time, the apparent rationale for the restraints was the defendants' purported martial arts kicking practice and the small size or otherwise inadequate facilities for protecting court personnel from a possible violent outburst by the defendants. Inadequate courtroom facilities, however, have been repeatedly rejected as a sufficient reason by itself to impose physical restraints. (See, e.g., *People* v. *Ceniceros* (1994) 26 Cal.App.4th 266, 278; *Solomon* v. *Superior Court* (1981) 122 Cal.App.3d 532, 536; *People* v. *Prado* (1977) 67 Cal.App.3d 267, 276.)

Significantly, prior to being shackled, the defendants had been present for seven weeks of hearings with no courtroom restraints whatsoever. Further, nothing in the conduct of either defendant in court suggested a need for these restraints. Indeed, nothing in any of the court's orders suggested that the defendants had been in any way disruptive during court proceedings. To the contrary, when the shackles were ultimately removed, the trial court noted that the defendants' courtroom behavior had not been a problem.

Additionally, the trial court's ruling was not based on factual matters clearly set forth on the record. (*People v. Mar* (2002) 28 Cal.4th 1201, 1222.) Instead, the bailiff apparently informed the court that there were [unverified] reports that both defendants were

seen practicing martial arts kicks in the exercise yard. Significantly, nowhere in any of these affidavits does the sheriff's department set forth the chronological relationship between the observation of practice kicking and the imposition of leg restraints. That is, there is no showing that the practice kicks were observed shortly before the restraints were imposed. Instead, the bailiff at the original hearing admitted that although the restraints had been on order for some time, they had been received at the jail only the weekend before they were placed on the defendants.

The clear inference from this admission is that although jail personnel allegedly had been concerned about the security risk posed by the defendants for some period of time (hence the purchase order for the leg restraints) nonetheless, the defendants were permitted to appear in court without restraints for that period of time. Significantly, during that period of time as well, there is no showing that the defendants engaged in any untoward behavior in the courtroom.

Further, the affidavits of both defendants flatly contradicted those unverified reports of threatening behavior. Appellant noted that because he was considered an escape risk by the jail, he was always brought to the yard in chains and (presumably for the same reason) he was never allowed on the yard with codefendant Tobin.

Additionally, in context, it appears that Deputy Pollack's report to the court concerning martial arts practice kicking was based on the hearsay report of Deputy Stenback. Deputy Stenback, however, only

reported seeing Mr. Tobin engaged in such practice. Thus it appears that appellant was simply swept up in the deputies' fear of Mr. Tobin. This prejudice to appellant's trial would not have occurred if appellant's trial had been severed from that of Mr. Tobin; a matter discussed a great length in Issue II, *infra*.

In any event, the showing made to the trial court for the need to impose physical restraints must be based "on facts, not rumor and innuendo...". (*People* v. *Cox*, *supra,* at p. 652) Nothing in the evidence presented to the trial court even remotely approached that standard. The inescapable conclusion from the available evidence is that the trial judge simply acceded to the desire of the Sheriff's Department for absolute security, a desire that was in turn based largely on the availability of the restraints rather than any showing of actual need.

The trial judge clearly failed to make an independent factual determination of the necessity for the restraints. Indeed, after Mr. Tobin's leg restraint was damaged, the trial judge simply dispensed with the restraints. If the restraints had been truly necessary, however, then why did the damage to Mr. Tobin's restraints suddenly render them unnecessary? The answer is obvious in the question. There was never any necessity for the leg restraints in the first place.

Finally, nothing in the trial court's comments indicates it was aware of the procedural and substantive requirements established in *Duran* that should have governed its determination of defendants' objection to the leg restraints. (*People v. Mar, supra*, 28 Cal. 4th at p.

1222.) Under these circumstances the reasons cited by the court fail to demonstrate the "manifest need" for shackles, and thus the trial judge abused his discretion as a matter of law. (Cf. *People v. Cox*, *supra*, 53 Cal.3d at pp 650-651.)[29]

Prejudice

In determining prejudice from the error in shackling appellant, the factors set forth in *Kennedy v. Cardwell, supra*, 487 F.2d at pp 105-106, must be considered. (*Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 721.)

First, the physical restraints may prejudice the defendant in the

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[29] In *People v. Cox*, *supra*, 53 Cal.3d 618, defense counsel alerted the trial court to the possibility that the defendant might try to escape. The trial court then ordered that defendant be handcuffed to his chair. The next day, counsel requested that the handcuff be removed because it was uncomfortable. The trial court refused. "A day or so later", defendant arrived in court wearing leg shackles. When defense counsel asked why the shackles were necessary, the court said " 'At least for today, I am going to order that, based on information that has previously been placed on the record in this case, and also based on some information that was imparted to the court today and it is merely by way of rumor. ...' ... '[T]he bailiff informed me there were certain rumors floating through the jail today that he was receiving information through other jail personnel that there was going to be an escape, an attempt today; and that's why there is the use of the shackles today. [¶¶] I don't know that it's anything more than a rumor, but in light of all the information, I felt it was better to be safe than sorry.' " (53 Cal.3d at pp. 650-651.)

On appeal, this court found that the record simply failed to demonstrate "manifest need" within the meaning of the *Duran* standard. (*Id.* at p. 651.) The court observed that: "While the instant record may be rife with an undercurrent of tension and charged emotion on all sides, it does not contain a single substantiation of violence or the threat of violence on the part of the accused. Although the shackling decision was not based on a 'general policy' to restrain all persons charged with capital offenses, neither did it follow 'a showing of necessity' for such measures.[Citation] Accordingly, the trial court abused its discretion in ordering defendant physically restrained in any manner." (*Id.,* at p. 652.)

minds of the jury, thus reversing his presumption of innocence. When an accused is required to appear before jurors in restraints, this presumption is seriously jeopardized. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) In this instance, the trial judge said that the jury could not see the restraints, but defense counsel and the defendants maintained that they could clearly be seen. Moreover as counsel for the defense pointed out, because various jurors apparently saw the defendants being transported to and from the jail in chains, those jurors would be especially vigilant to see if the defendants were restrained in the courtroom. In any event, since the trial court failed to ask the people who matter most, the jurors, whether they saw the restraints, the evidence is at best inconclusive.[30]

The second danger from restraining a defendant is that the defendant may feel confused, frustrated, or embarrassed, thus impairing his mental faculties. While the trial court never actually asked the defendants how they felt about the restraints, nonetheless,

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[30] The trial court attempted to overcome this problem by inserting into the record pictures of a jail deputy wearing a similar leg restraint. The problem with the pictures is that the judge never gave the defense the opportunity to comment on the accuracy of his reenactment with the jail deputies. Indeed, one photo shows the restraint being worn on the outside of the pant leg rather than underneath the pant leg as the defendants wore them. Thus, aside from the trial court's bare proffer, there is nothing in the record showing that the pictures are an accurate reflection of what the restraints would have looked like on the occasion when the defendants were forced to wear them.

Additionally, if the defendants were correct that jurors could surmise from the circumstances that the defendants were wearing leg restraints, the trial court prejudicially erred in failing to sua sponte instruct the jury not to speculate on the reasons for the restraints. (CALJIC 1.04; *People v. Duran, supra,* 16 Cal.3d at p. 292.)

codefendant Tobin dared to blurt out that the leg braces were "very" uncomfortable.

Third, communication between the defendant and his lawyer may be impaired by any physical restraints. While this does not appear directly from the record, given the defendants' obvious discomfort and distaste for the physical restraints, there is little question that they were distracted by the leg braces. Indeed, imagine immobilizing a leg for even 20 minutes while sitting at a desk trying to work. The inability to properly flex the leg and stretch tired muscles and the inability to adjust leg position to increase blood flow causes capillaries and veins to constrict thus making the restraints extremely uncomfortable and unduly distracting.

Fourth, the dignity and decorum of the judicial proceedings may suffer. The United States Supreme Court has stated that trial courts must consider this factor before ordering restraints. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 344.) In this situation, the dignity and decorum of judicial proceedings was destroyed by the totally uncalled for and unnecessary shackling. Indeed, to permit shackling of any defendant without proper due process constraints insults the system as a whole.

Finally, the restraints may be painful to the defendant. Not only did codefendant Tobin complain about how uncomfortable the restraints were, but modern shackles inflict enough pain to call into question the propriety of their use. (*United States v. Whitehorn* (D.D.C. 1989) 710 F.Supp. 803, 840, rev'd on unrelated grounds sub

nom. *United States v. Rosenberg* (D.C.Cir. 1989) 888 F.2d 1406.)

Recently, this court grappled with all of these considerations in *People v. Mar, supra,* 28 Cal.4th 1201. In *Mar*, the issue was whether the trial court's unjustified use of a "stun belt" restraint was prejudicial. The belt was never activated and the facts demonstrate that the jury probably could not see it. More importantly, there was nothing in the record to show what effect the belt had on the defendant while testifying or on his demeanor. (*Id*., at p. 1213.)

Nonetheless, finding that the use of such a physical restraint was prejudicial, this court hearkened back to *Harrington*. This court concluded that even when the restraint is not visible to the jury, it may nonetheless "preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury..." (*Id*., at p. 1219.)

Obviously that was the situation here. The defense urged that the restraints were unnecessary and informed the court that the leg braces were "very" uncomfortable. It is difficult to imagine that despite the defendants' perception that they had done nothing to warrant these special restraints and the obvious discomfort they inflicted, the restraints nonetheless left the defendants' ability to concentrate on the proceedings or participate in their defense unimpaired. As this court noted in *Mar*: "Even when the jury is not aware that the defendant has been compelled to wear a [restraint], the presence of the [restraint] may preoccupy the defendant's thoughts,

make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury...." (*People v. Mar, supra,* 28 Cal.4th at p. 1219.)

Under the circumstances of this case, therefore, appellant was prejudiced by the trial judge's error in requiring him to be shackled and that error was not harmless beyond a reasonable doubt. (*People v. Jacla*, *supra*, 77 Cal.App.3d at p. 891.) Accordingly, appellant's judgment of conviction must be reversed.

II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT MR. LETNER'S MOTION TO SEVER.

Introduction

Severance should be granted where there are mutually antagonistic defenses, where a weak case against one codefendant is joined with a strong case against the other, and where one defendant is prejudicially associated with the other. Here, the evidence is strong that one of the codefendants killed Ms. Pontbriant, but it is not at all clear that both were responsible for her death. More importantly, the evidence showing that Mr. Letner was the actual perpetrator is insubstantial. Nonetheless, the prosecution urged the jury to view the two defendants as a single criminal entity. By denying Mr. Letner's severance motion, the trial court abused its discretion by placing the state's interest in an efficient prosecution above Mr. Letner's constitutional right to individual consideration and a fair trial.

Factual Background

Before trial, both defendants filed motions to sever. (Tobin , 2 C.T. 257et seq, Letner, 2 C.T. 469 et seq.) Mr. Letner specifically joined Mr. Tobin's motion. (2 C.T. 476-477.) The essence of these motions was that each defendant accused the other of killing Ms. Pontbriant and each denied his own involvement.

In his moving papers, Mr. Tobin urged that the murder was solely the fault of Mr. Letner. Mr. Tobin admitted that he was

initially present at Ms. Pontbriant's home on the evening of the homicide and that all three people were drinking. Eventually, however, he left and went back to his apartment after Mr. Letner and Ms. Pontbriant began to display sexual affection for each other. Thus he was not there when the actual homicide occurred sometime later. (2 C.T. 258, 259.)

The moving papers revealed a completely different scenario presented by Mr. Letner. In letters addressed to Danny Payne, Mr. Letner stated that all three people had been drinking heavily during the evening (2 C.T. 270.) Mr. Letner told Mr. Tobin that he would try to borrow Ms. Pontbriant's car but they had to have sexual relations first. (2 C.T. 270.) After he and Ms. Pontbriant became sexually involved, Mr. Tobin left the house. When Mr. Tobin returned later, he became impatient because Mr. Letner had not secured permission to use Ms. Pontbriant's car. When he confronted Mr. Letner about the matter in front of Ms. Pontbriant, the situation quickly deteriorated into physical violence. (2 C.T. 270-271.) Mr. Tobin then killed Ms. Pontbriant to silence her and threatened to kill Mr. Letner if he interfered. (2 C.T. 271.)

The prosecution opposed the motions to sever arguing that the defenses were not antagonistic and, even if they were, the court could empanel dual juries. (2 C.T. 484-493.) Mr. Letner filed a reply noting that the evidence against Mr. Letner was considerably short of substantial. (2 C.T. 496.) There were only a few hairs consistent with Mr. Letner that were found on the decedent, and they were found in

the proximity of several animal hairs that were also found on the body. (See 41 R.T. 5963-5970.)

At the hearing on the motion, the trial court denied both defendants' motions for separate trials and the prosecution's motion for dual juries. (2 C.T. 503-504.)

Once the trial judge denied the motions for separate trials, Mr. Letner's defense team changed its presentation on the merits. Mr. Tobin's presentation, however, remained pretty much consistent with his moving papers.

Interestingly, during the prosecution's case in chief, Mr. Tobin's counsel sought to exclude any testimony from Bothwell to the effect that Tobin committed the homicide. Counsel was concerned that the testimony would violate the *Aranda*[31] prohibition against admitting the confession of a codefendant that implicates a defendant without the ability to cross examine. (44 R.T. 6409-6414) Tobin's counsel was concerned that Bothwell would testify that he asked Tobin if he [Tobin] committed the murder and Tobin admitted he did. Bothwell's question was based on a prior conversation with appellant where appellant purportedly told Bothwell that there was a warrant out for both of them because Mr. Tobin raped and killed a woman. (44 R.T. 6409-6411.)

The court responded that if Bothwell testified that Mr. Tobin admitted the homicide, there is no *Aranda* problem because it is a

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[31] *People v. Aranda* (1965) 63 Cal.2d 518 [*Aranda* was abrogated in part by Proposition 8; see *People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

direct admission by a defendant which does not inculpate the remaining codefendant. (44 R.T. 6411.)

Counsel for appellant noted that in context, Bothwell would testify that appellant Letner told him that both defendants were wanted for murder in California. (44 R.T. 6412.) Thus the purported admissions that Bothwell would likely testify about involved both defendants, not just Mr. Tobin. (44 R.T. 6412.) Further, the prosecution could use Tobin's confirmation as an adoptive admission against appellant. (44 R.T. 6412.)

The court noted that Bothwell's testimony about Tobin's purported admission would not constitute an adoptive admission by appellant. (44 R.T. 6413.) The court further concluded that even if Bothwell testified that Tobin admitted that there was a warrant out for his arrest, that fact still would not amount to an adoptive admission by Mr. Letner. (44 R.T. 6413.) Nonetheless, to the extent that Bothwell would testify that Letner told him that Mr. Tobin committed the homicide and described what happened [that is, that appellant was simply standing there uninvolved], that information was precluded by the *Aranda* prohibition and it would be excluded. (44 R.T. 6413-6414.) Counsel for both defense counsel continued to object and the objections were overruled. (44 R.T. 6414.)

At trial, Bothwell testified that he had a conversation with appellant Letner. Mr. Letner told him that he took some things from a woman in California. (44 R.T. 6422-6423.) Shortly thereafter, when Bothwell confronted Mr. Tobin about the incident, Tobin admitted

killing a woman and taking money from her. (44 R.T. 6423.)

After the prosecution rested, Mr. Tobin's defense team made its presentation first. Mr. Tobin testified that on the night of the homicide, he and appellant were in the Break Room bar. (47 R.T. 6953) They were not intoxicated but they were under the influence. (47 R.T. 6954) During the evening, Mr. Letner got a phone call and they subsequently went over to Ms. Pontbriant's house. (47 R.T. 6955.) Ms. Pontbriant was drinking beer when they got there and during the course of the evening he made two runs to a liquor store for more beer. (47 R.T. 6963-6969.) Mr. Tobin recalled a fight on the telephone that evening between appellant and Ms. Pontbriant on his end and Kathy Coronado and Ed Burdette on the other. There was a discussion about the loss of tools. (47 R.T. 6969-6970.)

Sometime before 10 p.m., appellant and Ms. Pontbriant were on the couch kissing so Mr. Tobin thought it best to leave. (47 R.T. 6971) He stopped by a liquor store and bought a quart of beer, then went to Mr. Letner's apartment where he fell asleep. (47 R.T. 6972-6973.)

At some point later in the evening Mr. Letner showed up with Ms. Pontbriant's car. (47 R.T. 69 73.) Mr. Letner said he wanted to store some things at Ms. Pontbriant's house. (47 R.T. 6976.) Later in the morning they would be leaving for Iowa. (47 R.T. 6977.) Mr. Letner never told Mr. Tobin that he murdered Ms. Pontbriant. (47 R.T. 7002.)

After Mr. Tobin rested, appellant presented his defense.

Appellant never took the stand. Instead, he presented evidence that there was still money and other valuables present and easily accessible at the crime scene after the homicide. (48 R.T. 7147-7149.) Additionally he presented evidence that Mr. Gilliland was not entirely truthful (48 R.T. 7149-7159) and evidence showing that Ms. Pontbriant invited him and Mr. Tobin to her home on the night of the homicide. (48 R.T. 7159-7170.) Appellant also presented evidence concerning how he and Mr. Tobin got to Iowa without a vehicle (48 R.T. 7171, 7257-7264); evidence impeaching the accuracy of the prosecution's forensic evidence showing his presence at the crime scene (48 R.T. 7179-7255); evidence severely impeaching Mr. Gilliland's testimony about his source of funds for the rent money he purportedly gave to Ms. Pontbriant (48 R.T. 7281-7300) and finally, evidence impeaching the accuracy of Earl Bothwell's testimony. (48 R.T. 7301-7331.) There was no mention of Mr. Payne or the letters appellant wrote to him.

After rebuttal evidence was presented, the parties made their closing arguments. Near the very beginning of her closing argument, the prosecution noted that although she could not tell from the evidence which person did which act,[32] that problem was immaterial. The jury could find them equally guilty. (53 R.T. 7582.) Similarly, the prosecutor argued that both defendants could be found guilty of attempted rape because the semen found in the bedroom (indicative of

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[32] The prosecutor said: "And for me to be able to identify to you which time which defendant did what thing is obviously not possible" (53 R.T. 7582.)

secretor status) implicated Mr. Tobin and the hairs on the decedent implicated Mr. Letner. (53 R.T. 7587.)

Mr. Tobin's counsel did not argue directly that Mr. Letner was the perpetrator. Instead, he argued that his client was not present when the crime occurred (53 R.T. 7622); the physical evidence did not tie him to the crime (53 R.T. 7625), and there was virtually no evidence "that [Mr. Tobin] had anything to do with the death of Ivon Pontbriant." (53 R.T. 7663.) Nevertheless, he pointed out that it was appellant who had a relationship with Ms. Pontbriant and appellant was driving her vehicle when it was stopped by Officer Wightman. (53 R.T. 7631.) Further, appellant passed the field sobriety test administered by the officer while Mr. Tobin was too intoxicated to drive. (53 R.T. 7633.)

Counsel for appellant took a different approach. He emphasized that the jury could not consider whether appellant took the stand, and that the prosecution still had the burden of proving guilt beyond a reasonable doubt. (54 R.T. 7672-7674.) Counsel then discussed the evidence showing that appellant's knife was likely not the murder weapon. (54 R.T. 7675-7686.) He also noted there were no latent fingerprints from either defendant found at the scene. (54 R.T. 7687-7691.) Counsel then pointed out that the cigarettes in the living room ashtrays, the semen stain on the carpet, the blood evidence, and the bottle opener were also inconclusive in tying either defendant to the homicide. (54 R.T. 7691-7699.) Defense counsel also explained that Mr. Gilliland could not have given any money to

Ms. Pontbriant because the evidence showed that he had no money to give her. (54 R.T. 7699-7702.) Additionally, the hair evidence does not prove beyond a reasonable doubt that Mr. Letner's head hairs that were found at the scene were forcibly removed in a struggle with Ms. Pontbriant. (54 R.T. 7702-7710.) Finally, counsel urged that none of the prosecution's evidence was inconsistent with Ms. Pontbriant being very much alive and well when the defendant left in her car with her permission. (54 R.T. 7736-7743.)

Standard of Review

The California statute governing joinder and severance is Penal Code section 1098. That statute provides in pertinent part: "When two or more defendants are jointly charged with any public offense, ... they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants. "

Since this is a capital case, however, it is not enough for a reviewing court to simply defer to the trial court's exercise of discretion. In a capital case, Penal Code section 1098 must be applied in a manner consistent with Eighth and Fourteenth Amendment requirements. This is so because there are two considerations unique to capital cases and both are of constitutional dimension.

First, there is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case," (*Gilmore v. Taylor* (1993)

508 U.S. 333, 342.) Further, under the Eighth Amendment and the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama, supra* 447 U.S. at pp. 637-638.)

Second, and perhaps more importantly in this case, there is the requirement of truly individualized consideration prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) It is only where these conditions are met that the United States Supreme Court has been willing to find that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and ... made a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).) Together, these two constitutional concerns demand a much stricter scrutiny of motions for severance in a capital case than is required in a noncapital case. (*People v. Keenan* (1988) 46 Cal. 3d 478, 500 ["Severance motions in capital cases should receive heightened scrutiny for potential prejudice"].)

In this regard, the notion that statutes, and criminal procedural statutes in particular, should be interpreted in light of related constitutional values is of long standing and dates from the earliest

days of this nation's history. *(See United States v. Matthews* (C.C. S.D.N.Y. 1843) 26 F.Cas. 1205, 1206) (recognizing the special need for severance of a capital defendant to avoid spillover prejudice.)

Therefore, whether the operative legal provision is Penal Code section 1098 or the Eighth or Fourteenth Amendment, the danger to be avoided is the same: that the jury will treat the co- defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (*Woodson v. North Carolina*, *supra*, 428 U.S. at 304.) It is against this backdrop of the mandate of the Eighth and Fourteenth Amendments then, that the trial court's exercise of discretion in refusing to sever these trials must be evaluated.

Most significantly, the essential consideration for the reviewing court in determining whether defendants should be separately tried is whether "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." (*Zafiro v. United States* (1993) 506 U.S. 534, 539 [113 S.Ct. 933, 938; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078: *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511.) "The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict." (*Tootick, supra,* 952 F. 2d at 1082.)

In *People v. Massie* (1967) 66 Cal.2d 899, this court identified some of the problems inherent in jointly trying defendants that would

warrant a trial court ordering separate trials for codefendants. They include “[1] an incriminating confession [of a codefendant], [2] prejudicial association with codefendants, [3] likely confusion resulting from evidence on multiple counts, [4] conflicting defenses, or [5] the possibility that at a separate trial a codefendant would give exonerating testimony." (*Id.* at p. 917.)

On appeal, review of denial of a motion for severance is based upon what was before the trial court at the time of the motion. (*People v. Romo* (1975) 47 Cal.App.3d 976, 985, disapproved on another point in *People v. Bolton* (1979) 23 Cal.3d 208.)

Additionally, however, in *People v. Turner* (1984) 37 Cal. 3d 302 (overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104), this court held that, "[a]fter trial...the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at p. 313; see also *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Pinholster* (1992) 1 Cal.4th 865, 933.)

As the Ninth Circuit observed in *Tootick, supra*, "[p]rejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual basis." (*Id.* 952 F.2d at 1082.) Indeed, "the ultimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon

that defendant's own acts, statements, and conduct." (*United States v. Brady* (9th Cir. 1979) 579 F.2d 1121, 1128; *see also United States v. Marshall* (9th Cir. 1976) 532 F.2d 1279, 1282; *United States v. Donaway* (9th Cir. 1971) 447 F. 2d 940, 943.)

For the reasons set forth below, the trial court abused its discretion in refusing to sever the trials of the codefendants. The defenses were antagonistic, the prosecution joined a weak case with a strong one, and, Mr. Letner was prejudicially associated with Mr. Tobin when Mr. Letner's culpability was much less.

Significantly, even though there were brief instructions telling the jury to give each defendant individual consideration, the presumption that limiting instructions can cure any prejudice from joinder is inconsistent with the truth of trial practice. In a case of this magnitude, it is simply unrealistic to expect that a jury could limit its consideration of numerous pieces of evidence to one defendant or the other. This is particularly difficult after the prosecutor told jurors that even she could not tell which defendant did which act. (53 R.T. 7582.)

Antagonistic Defenses

It is important to recognize that when the trial judge made his ruling on the severance motion, the defense had yet to present a single witness. The moving papers were based on the evidence available and obviously incorporated the defense theory of the case. Here, the moving papers show both defendants pointing the finger of blame at each other. Indeed, the trier of fact could not accept one defendant's version of the incident without convicting the other. It was not until

after the trial judge denied the severance motion that Mr. Letner's defense team changed its tactics and asserted that neither defendant was culpable. Therefore, in ruling on the merits of the severance issue, this court must look at the facts as they were presented to the trial judge.

This court has often recognized that severance may be required where defendants have antagonistic defenses. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287; *People v. Hardy* (1992) 2 Cal.4th 86, 170; *People v. Boyde* (1988) 46 Cal. 3d 212, 232, overruled on another point *sub nom. Boyde v. California* (1990) 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316.); *People v. Keenan* (1988) 46 Cal.3d 478, 500; *People v. Massie, supra*, 66 Cal. 2d at p. 917.) While it is certainly true that severance is not compelled by "the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution" *(People v. Boyde, supra*, 46 Cal.3d at 233), nonetheless, severance may be required where acceptance of codefendant's defense would preclude acquittal of defendant. (*People v. Hardy, supra,* 2 Cal.4th at 168 [citing federal precedent as the logical and philosophical basis for state law governing the requirements for severance]; *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362; *United States v. Buena Lopez* (9th Cir. 1993) 987 F.2d 657, 661.)

There is much more to the issue than that, however. Antagonistic defenses have a high probability of distorting the trial

process itself. In *United States v. Tootick, supra*, the court outlined the kinds of distortions that joint trials produce. The court observed that defendants who accuse each other effectively bring another prosecutor into the case. That is, each codefendant's counsel tries to convict the other defendant in order to exonerate his own client. The problem is that a defense counsel playing the part of a second prosecutor is not always held to the limitations and standards imposed on the state's prosecutor. Additionally, "opening statements ... can become a forum in which gruesome and outlandish tales are told about the exclusive guilt of the "other" defendant. ... Counsel can make and oppose motions that are favorable to their defendant, without objection by the government." (*Id.*, at p. 1082.)

Moreover, cross-examination of the government's witnesses becomes an opportunity for each defendant to emphasize the exclusive guilt of the other or to help rehabilitate a witness who has been impeached. Cross-examination of the defendant's witnesses provides further opportunities for impeachment and for undermining the other defendant's case. The presentation of the codefendant's case becomes a separate, additional forum in which the defendant is accused and tried. Closing arguments allow a final opening for counsel to portray the other defendant as the sole perpetrator of the crime.

Joinder can also provide the individual defendants with perverse incentives. Defendants do not simply want to demonstrate their own innocence, they want to do everything possible to convict

their codefendants. These incentives may influence the decision whether or not to take the stand, as well as the truth and content of the testimony.

The joint trial of defendants advocating mutually exclusive defenses produces fringe benefits for the prosecution as well. Joinder in these cases can make a complex case seem simple to the jury: just convict them both. That is, the prosecution's case becomes the only unified and consistent presentation. It presents the jury with a way to resolve the logical contradiction inherent in the defendants' positions. While the defendants' claims contradict each other, each claim individually acts to reinforce the government's case.

The government is further benefitted by the cumulative and intensely prejudicial effects of repetition. Each important point the government makes about a given defendant is echoed and reinforced by the codefendant's counsel.

Finally, joinder of defendants who assert mutually exclusive defenses has an important subtle effect. All evidence that effectively exonerates one defendant implicitly indicts the other. The defendant must not only contend with the government's case against him, but he must also confront the negative effects of the codefendant's case. (*Tootick, supra,* 952 F.2d at 1082-1083.)

In addition to the problems set forth in *Tootick*, joinder presents another problem of great significance to any Eighth or Fourteenth Amendment analysis. When a defendant must attack a codefendant in order to establish his own innocence, the constitutional burden on the

government to prove its case beyond a reasonable doubt is lightened. (*Zafiro v. United States*, *supra* , 506 U.S. at 544 (Stevens, J., concurring) ("joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt"); *see also, State v. Vinal* (Conn. 1986) 504 A.2d 1364, 1368 .)

From these cases, there are four principles that should be kept in mind when evaluating a claim of mutually antagonistic defenses. First, the determination must be based on a practical and realistic assessment of the evidence against the defendants, the defenses realistically available to the defendants given the prosecution's case, and the likely impact of each of the defendants' defenses on the other's case. Thus, a "theoretical possibility that the jury might acquit all defendants," (*United States* v. *Romanello*, *supra,* 726 F.2d at 179) is not enough by itself to defeat a claim of mutual antagonism. (*Ibid.*)

Second, the evil of forcing defendants with mutually antagonistic defenses to stand trial together is that a joint trial will destroy the ability of each defendant to exercise his constitutional right to make a defense to the prosecution's case and lighten the prosecution's constitutional burden by interjecting a "second prosecutor" into the trial. Defenses may be mutually antagonistic even where the prosecution's evidence against each defendant is strong (*United States v. Crawford* (5th Cir 1978) 581 F.2d 489, 492 ["Although the evidence of each defendant's individual guilt was

strong, this joint trial was intrinsically prejudicial"]; or weak. (*United States* v. *Romanello, supra,* 726 F.2d at 179.)

Third, mutual antagonism sufficient to require severance may exist even where only one codefendant directly accuses the other. *(Tootick, supra,* 952 F.2d at 1081 ["Mutual exclusivity may exist when 'only one defendant accuses the other, and the other denies any involvement'"] (quoting *Romanello*, 726 F.2d at 177 [*Romanello* was cited with approval for this point by the Tenth Circuit in *United States v. Peveto* (10th Cir. 1989) 881 F.2d 844, 858].) This rule follows from the fact that where one defendant must prove his codefendant's guilt as part of his defense, the codefendant must respond by attempting to refute the defendant's "prosecutive" defense in order to establish his own innocence, and thus becomes genuinely antagonistic to the defendant insofar as he must also defeat the defendant's only defense as well. *(United States v. Romanello, supra,* 726 F.2d at 181 ("[a]lthough the core of his codefendants' defense was not [the defendant's] own guilt, they nevertheless had to undermine [the defendant's] defense to establish their own innocence"); see also *United States v. Swingler* (10th Cir 1985) 758 F.2d 477, 496 (distinguishing *Romanello* and other cases requiring severance for mutual antagonism because "[i]n each of them at least one defendant made a direct accusation against a specific codefendant").

The problem becomes particularly acute when the defendant either admits some of the elements of the crime or admits being

present at the scene. A defendant's only realistic defense in such a situation is the lack of the required mens rea because the evidence of his participation in the crime is strong, and proof of his innocent mental state depends on proving that the codefendant was guilty. The special risks in this situation are obvious. On one hand, the defendant's admission of conduct that the prosecution will argue is consistent with guilt -- particularly where these admissions directly implicate the codefendant -- gives dramatic force to the prosecution's case against the codefendant, while on the other hand, a defense based on lack of intent is inherently vulnerable to attacks leveled by an admitted co participant in the crime. Where both defendants attempt to demonstrate that their innocent mental states are based on the guilty conduct of the codefendant, the danger is maximized that "'the jury will unjustifiably infer from the conflict alone that both defendants are guilty."' *Peveto, supra,* 881 F.2d at 857 (quoting *United States v. Esch* (10th Cir 1987) 832 F.2d 531, 538).

As the court noted in *Romanello*, "the real question for a court in considering a severance motion is not how convincing a defendant's evidence is, but whether the core of his defense directly implicates the codefendant." (*Id.*, 726 F. 2d at p 179.) Had the trial of appellant and Mr. Tobin been conducted in the manner in which the moving papers suggested, , "no reasonable juror could [have] believe[d] both of their stories." (*United States v. Rucker, supra*, 915 F.2d at 1513.)

Similarly, in *United States v. Tootick, supra*, 952 F.2d 1078,

for example, "the principle defense of each defendant was that the other alone had committed the assaults." The Ninth Circuit held that the defendants should have been tried separately because "[e]ach defense theory contradicted the other in such a way that the acquittal of one necessitate[d] the conviction of the other." (*Id.*, 952 F.2d at 1081.)

The case law is replete with examples of this kind of unfairness. For example, in *United States v. Peveto, supra,* 881 F.2d 844, one defendant, Rodgers, took the position that he had gone to the house where he was arrested, and where drugs were found, to pick up furniture, that he was held at the house against his will, and that he knew nothing about the drugs. The codefendant, Hines, put on evidence to show that he was in the process of becoming an informant and that Rodgers was a drug dealer whom he was setting up. The Tenth Circuit ruled that the trials should have been severed because, "[i]f the jury believed Hines (that he was setting up drug dealers), it had to disbelieve Rodgers (that he was being held against his will)." (Id. 881 F.2d at 858.)

Relying on these principles, *Romanello* established a five-part test for whether severance is mandated: (1) " the core of [the defendant's] defense is the guilt of the codefendant; (2) to disprove his defense would establish his guilt; (3) his defense and the defense of his codefendant are mutually exclusive and irreconcilable; (4) the codefendant actively attacks his defense at trial; and (5) he suffers compelling prejudice as a result." (726 F.2d at 181.)

All of these conditions are plainly met in this case. Here, Mr.

Tobin accused Mr. Letner of the murder and Mr. Letner accused Mr. Tobin of the murder. Since there was no allegation of a third party "phantom" killer in either defendant's moving papers, obviously one of these two defendants committed the homicide. If a jury believed Mr. Tobin, then Mr. Letner was necessarily the killer. If a jury believed Mr. Letner, then Mr. Tobin was the killer. Thus the core of each defendant's defense was that the other party was the killer and he was innocent. Conversely, if either defendant's defense was disproven, he must be guilty. Additionally, both defenses were irreconcilable and mutually exclusive. That is, either Mr. Letner committed the homicide and Mr. Tobin was not physically present, or Mr. Tobin committed the homicide while Mr. Letner watched in horror and fear for his own life. Under neither scenario could both be guilty. Further, without Mr. Tobin's evidence there was virtually nothing tying appellant to the killing. While there was certainly evidence showing that he was at the scene, nothing ineluctably showed that he was the killer.

The trial court's denial of the motion to sever and its subsequent *Aranda* ruling posed a particular dilemma for Mr. Letner's defense team. If it persisted in presenting antagonistic defenses at trial, the defense ran the risk of generating precisely the problems outlined above. That is, the jury would be faced with choosing between one defendant or the other on evidence that was ambiguous, or more likely playing into the hands of the prosecutor by allowing her presentation to be the only cohesive theory of the case.

The trial court's *Aranda* ruling was particularly prejudicial in this regard. It allowed the prosecution to present evidence from Mr. Bothwell that Mr. Tobin admitted being the killer while Mr. Tobin's trial testimony clearly implicated appellant as the perpetrator.

If the trials had been severed, not only would the People be unable to compel Mr. Tobin to testify against appellant, but Mr. Tobin's purported admission to Bothwell would be irrelevant to the prosecution's case against Mr. Letner.

Nonetheless, because of these circumstances, Mr. Letner's defense team ultimately chose a trial strategy that did not implicate Mr. Tobin, but rather put the prosecution to its proof on the issue of whether either defendant was the perpetrator. The record is unequivocally clear that Mr. Letner's defense strategy changed completely after the trial judge's ruling on the severance motion. Moreover, the trial result demonstrates equally clearly that the change was not a successful one. Under any standard, therefore, the trial judge's ruling on the severance motion was prejudicial to Mr. Letner.

Codefendant's Counsel Functioned as a Second Prosecutor

At the actual trial itself, one of the critical portions of the prosecution's case was establishing a motive for these crimes. To accomplish that end, the prosecutor relied on two interrelated theories. First, both defendants robbed and killed Ms. Pontbriant to steal the rent money from her purse. Second, the two went to Ms. Pontbriant's house to steal her car so they could go to Iowa and start a new life.

As to the rent theory, the prosecution relied on Warren Gilliland to establish the predicate facts. As the prosecution well knew, however, Mr. Gilliland was a late stage alcoholic with severe memory problems, constantly changing stories, and a strong dislike of the defendants. Thus, the credibility of his testimony was profoundly suspect. Indeed, as the trial progressed, it became a suspicion well founded. As appellant will explain in greater depth *infra* (at pp. 248-270), virtually every significant portion of Mr. Gilliland's testimony was flatly contradicted by independent evidence, particularly the existence of any rent money in Ms. Pontbriant's purse.

The prosecution's backup theory of a flight to Iowa to start a new life was supported by Mr. Tobin's ex-wife Jeanette Mayberry. When she was called to the stand, she testified that Mr. Letner planned to go to Iowa and start over. (46 R.T. 6820.) She also testified that the defendants had been at her apartment the night before the homicide. During the evening, she had a violent altercation with Mr. Tobin that was so destructive the police had to be called. (R.T. 5412-5418.) Thus, in a later hearing on Mr. Letner's motion for a new trial, the trial judge stated that Ms. Mayberry's testimony provided a motive for the defendants to leave the area and go to Iowa, plus a motivation to obtain Ms. Pontbriant's car to do so. (hearing of 4/1/90, p. 54.)

Nonetheless, since Ms. Mayberry obviously harbored significant animus against both defendants, her credibility was also suspect. To remedy that credibility problem, however, counsel for

codefendant Tobin first called Mike Arnold to the stand. Mr. Arnold testified that two-three weeks before the homicide, Mr. Letner talked about going back to Iowa. (45 R.T. 6631.)

Counsel then called Mr. Tobin's mother to the stand. She testified that well before the homicide, Mr. Tobin told her that he would probably join Mr. Letner for a trip to Iowa. (45 R.T. 6778-6779.)

Effectively, therefore, counsel for Mr. Tobin remedied a significant defect in the prosecution's case by producing two witnesses to testify about Mr. Letner's intent to go to Iowa and start a new life. Thus, this second prosecutor provided at least a reasonably credible basis for believing Mr. Letner had planned to move to Iowa, a plan the prosecution contended was a motive for Mr. Letner to rob Ms. Pontbriant of her automobile.

Further, Mr. Tobin took the stand and testified in a way that effectively laid the blame for the homicide squarely on Mr. Letner. As explained above, Mr. Tobin testified that when he left Ms Pontbriant's house sometime before 10 p.m. on the night of the homicide, appellant and Ms. Pontbriant were on the couch kissing (47 R.T. 6971) After buying some beer, he went to Mr. Letner's apartment where he fell asleep. (47 R.T. 6972-6973.) Later that evening Mr. Letner showed up with Ms. Pontbriant's car saying he wanted to store some things at Ms. Pontbriant's house because they would be leaving for Iowa later that morning. (47 R.T. 6973-6977.)

Mr. Tobin's counsel emphasized these matters in closing

argument telling the jury that his client was not present when the crime occurred (53 R.T. 7622) and that the physical evidence did not tie Mr. Tobin to the crime. (53 R.T. 7625.) Further, he noted that appellant had a relationship with Ms. Pontbriant and appellant was driving her vehicle when it was stopped by Officer Wightman. (53 R.T. 7631.) Additionally, appellant passed the field sobriety test administered by the officer while Mr. Tobin was too intoxicated to drive. (53 R.T. 7633.)

Given this testimony and argument, the jury could easily infer that not only was the prosecutor arguing that appellant was the actual perpetrator, but Mr. Tobin was implicating him too.[33] Even if Mr. Tobin's testimony was patently self serving, it certainly served to reinforce the prosecution's case. Indeed, the prosecutor removed any ambiguity in Mr. Tobin's testimony by arguing to the jury, "Well [Mr. Tobin's testimony] is telling you that Letner committed this murder. {par.} That's basically, what Tobin is trying to tell you." (54 R.T. 7793.)

Finally, at an in camera hearing, Mr. Letner stated that although he was innocent he would not take the stand in the guilt phase because of the impeachment advantage available to the codefendant in a dual trial. If it was a single trial he would have taken the stand. (51 RT 7452-7453.) At the guilt phase, he clarified this statement a

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[33] Additionally, counsel made very explicit in his closing argument in penalty phase what had been more or less implicit in his closing argument in the guilt phase; i.e. that Mr. Letner was the actual perpetrator, not Mr. Tobin. (67 R.T. 9748-9570)

bit, saying that he did not testify at the guilt phase because he knew he would likely go to prison and therefore did not want the consequences of a "rat jacket" while he was there. (61 R.T. 8644.) Since only Mr. Tobin testified at the guilt phase, jurors probably drew very damaging inferences from Mr. Letner's refusal to testify. Tobin's testimony made it much harder for the jurors not to draw adverse inferences against Mr. Letner.

Had the trials been severed, there is simply no way the prosecutor could have compelled Mr. Tobin to testify against appellant. Moreover, as appellant explains below, without Mr. Tobin's testimony, there was virtually no other evidence showing that Mr. Letner was the perpetrator. Additionally, because of appellant's fear of the practical consequences of testifying against Mr. Tobin, the joint trial benefitted the prosecution by keeping him off the stand. Effectively, therefore, counsel for Mr. Tobin not only remedied significant defects in the prosecution's case, but lowered the prosecution's constitutional burden of proving Mr. Letner's involvement. These are precisely the dangers condemned in *Tootick, supra*.

Improperly Joining Weak and Strong Cases

The evidence against Mr. Letner was very weak. As appellant will explain in greater depth in argument IV *infra*, only a few hairs consistent with Mr. Letner were found on the decedent, and they were found in the proximity of several dog hairs that were also on the

body. (See 41 R.T. 5963-5970.)[34] Unquestionably, these were all hairs that were already on the floor of the residence and simply transferred to the decedent after she fell.

Additionally, the only blood stains consistent with Mr. Letner were found on Ms. Pontbriant's sweater. These are hardly incriminating, however, as the stains were also entirely consistent with Ms. Pontbriant's blood. (See 41 R.T. 5884.) Moreover, given the violent circumstances of her death, she was almost certainly the source of the bloodstain.

Finally, the knife used to stab Ms. Pontbriant was clearly not Mr. Letner's buck knife. That knife was completely disassembled (34 R.T. 4868-4869) and not even a trace of blood was found on the blade or any of the internal parts. (40 R.T. 5851, 41 R.T. 5886.) Even the lint and "crud" found inside the knife was analyzed for traces of blood but none was found. (41 R.T. 5894-5896.) Given the extensive knife wounds to the decedent, if Mr. Letner's knife was the murder weapon, it would be quite remarkable that no blood would get into the internal portions of the knife. Moreover, even if one could properly speculate that the knife might have been washed after the incident, it would be extraordinarily difficult to remove the blood, but

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[34] The animal hair found on the Ms. Pontbriant's chest likely came from a dog. 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.) Certainly there is no evidence to suggest that hairs were transferred directly from the dog to Ms. Pontbriant during the homicide as opposed to having simply been on the floor and being transferred to Ms. Pontbriant after she fell to the floor.

not the lint and "crud" found still within the knife casing and mechanism.

Even the coroner testified that although it was possible that a knife the size of appellant's buck knife could have caused the wounds (34 R.T. 4905, 5035-5037), given the nature and depth of the wounds, he was hesitant to say that it was that buck knife. (34 R.T. 5011.) Appellant's buck knife was relatively short and fairly dull so it would be difficult to cut through the decedent's vertebra as was done in this case. (34 R.T. 4906) A larger knife might well have been used. (34 R.T. 5011.)

By contrast, the evidence against Mr. Tobin is much stronger. While the blood on the pillow, the doily and the cleanup towel found in the car is as consistent with Mr. Gilliland as with Mr. Tobin (40 R.T. 5825-5841), there is no evidence that Mr. Gilliland was ever in the car with the cleanup towel. Thus, the blood on the towel from the car likely came from Mr. Tobin. Further, the blood on the pillow and the doily was relatively fresh (40 R.T. 5685-5686) and there was no evidence that Mr. Gilliland had been bleeding recently. Since there is no evidence that Mr. Tobin received any wounds prior to entering Ms. Pontbriant's residence, the only logical explanation is that he received them in his struggle to kill Ms. Pontbriant. Additionally, to the extent that they implicate anyone, the semen stains found in Ms. Pontbriant's bedroom carpet implicate Mr. Tobin. These stains are indicative of secretor status (41 R.T. 5879), thus eliminating both appellant and Mr. Gilliland.

Essentially, therefore, the prosecution used the stronger evidence against Mr. Tobin to bolster its weaker case against Mr. Letner. By refusing to sever these trials and allowing this evidence concerning Mr. Tobin to "spillover" and prejudice the jury's view of Mr. Letner, the trial court severely abused its discretion . *(People v. Smallwood* (1986) 42 Cal.3d 415, 432-433.)

Prejudicial Association with Codefendant

As Mr. Tobin correctly points out in his opening brief, the primary theme of the prosecution was that these two defendants were as inseparable as brothers and the jury should view them as a single entity. (Tobin aob at pp. 60-62.) In closing argument in the guilt phase, one of the very first things the prosecutor told the jury about the defendants was that they lived together as they moved from place to place. And, that they were "tight friends" and had been that way since high school. (53 R.T. 7540.) The prosecutor also told the jury that the two were together continuously from "Sunday, February the 28th, 1988 until their arrest on March 29th 1988." (53 R.T. 7540.)

More importantly, however, she argued that although she could not tell from the evidence which person did which act, that problem was immaterial. The jury could find them equally guilty. (53 R.T. 7582.) Indeed, shortly thereafter, the prosecutor argued that because the semen found in the bedroom (indicative of secretor status) implicated Mr. Tobin and the hairs on the decedent implicated Mr. Letner, both could be found guilty of attempted rape. (53 R.T. 7587.)

The prosecutor's argument here was essentially an appeal to

guilt by association. Because of the close association between the two defendants, the prosecution created an impermissible likelihood that the prejudicial information from Mr. Tobin would implicate Mr. Letner. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454; 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 appellant's brother-in-law and that they were reared in the same neighborhood."]; *United States v. Sampol* (D.C. 1980) 636 F.2d 621, 647 [reversal required when two brothers were tried together and the prosecution failed to make any meaningful distinction between the defendants, resulting in violation of each defendant's constitutional right to a fair trial].

Judicial Economy does not Outweigh Fundamental Fairness

The only announced rationale for joint trials in California is judicial economy. (*People v. Keenan, supra,* 46 Cal.3d at p. 501.) 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.)

Moreover, given the extraordinary requirement for individualized consideration and heightened reliability in capital cases, a procedural rule of joinder predicated on judicial economy must be applied very cautiously. Indeed, the United States Supreme

Court has made it abundantly clear that its concern for heightened reliability extends not only to sentencing, but to the guilt phase of trial as well. Long before the modern era of capital jurisprudence announced in *Furman v. Georgia* (1972) 408 U.S. 238 (overruled in part by *Gregg v. Georgia* (1976) 428 U.S. 153), the Supreme Court recognized that capital proceedings required special procedural rules and protections not extended to noncapital defendants. For example, in *Powell v. Alabama* (1932) 287 U.S. 45, the Court held that at least some capital defendants had a right to effective appointed counsel thirty years before extending that right to others accused of noncapital felonies. (Compare *Gideon v. Wainwright* (1963) 372 U.S. 335; see also *Bute v. Illinois* (1948) 333 U.S. 640, 674 (no obligation on part of state court to inquire whether noncapital defendant wished to be represented by counsel; contrasting due process right of capital defendant to appointed counsel); *Reid v. Covert* (1957) 354 U.S. 1, 45-46 (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.")

More recently, recognizing that "[t]he quintessential miscarriage of justice is the execution of a person who is actually innocent," *Schlup v. Delo* (1995) 115 S.Ct. 851, 866, the current Court also has imposed special procedural requirements on determinations of guilt and innocence in capital cases that it has not imposed in noncapital cases. As Justice Stevens explained in *Beck v. Alabama* (1980) 447 U.S. 625, "we have invalidated procedural rules that tend 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 638 (note omitted).)

As the Court subsequently explained, the *Beck* rationale was not limited to the specific issue of an all-or-nothing jury instruction [the precise issue in that case], but represented a more general principle requiring enhanced reliability in guilt phase determinations: "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." (*Spaziano v. Florida* (1984) 468 U.S. 447, 455.) Later cases have reiterated the Supreme Court's belief that the potential danger of executing the "actually innocent," *Schlup*, 115 S.Ct. at 866, requires special guarantees of reliability where the conviction of a capital defendant is at issue. (See, e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (in capital guilt phase "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case"); *Herrera v. Collins* (1993) 506 U.S. 390, 399 ("[i]n capital cases, we have required additional protections because of the nature of the penalty at stake"); *Gray v. Mississippi* (1987) 481 U.S. 648, 669 (Powell, J., concurring) (declining to find harmless error because "[g]iven our requirement of enhanced reliability in capital cases, I would hesitate to conclude that the composition of the venire 'definitely' would have been the same").

Even aside from the United States Supreme Court case law, the notion that the Eighth Amendment due process values of individualized consideration and extra-reliable verdicts apply at the guilt phase is logically sound. Only defendants who are convicted of capital crimes are eligible in the first instance for the death penalty, and the Eighth and Fourteenth Amendment requirement for heightened protections in capital cases would be virtually meaningless if they only affected the death selection process, but not the death eligibility process. The jury is well aware of the sentencing implications of its decision on guilt or innocence. To a large extent, voir dire dealt with exactly that issue. Thus having committed itself to making the defendant eligible for death, that decision necessarily influenced the penalty phase decision whether to actually impose the penalty. Indeed, empirical research bears out this common sense hypothesis. (See Bowers, "*The Capital Jury Project: Rationale, Design, and Preview of Early Findings*," 70 Ind. L. J. 1043 (1995); see also, Bowers, Sandys, & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L.Rev. 1476, 1486-1496 (1998).) Thus the Eighth and Fourteenth Amendment standards must control at the guilt phase just as they do in the penalty phase. For that reason, judicial economy must give way to the requirement for heightened reliability in the guilt phase.

Curative Instructions Inadequate

Although the trial court gave instructions requiring the jury to

give each defendant individualized consideration, that instruction was hardly sufficient to undo all the prejudice resulting from the improper joinder in this case. Even when jurors conscientiously try to follow instructions, they often have great difficulty in doing so.[35] Additionally, given the prejudicial effect of the antagonistic defenses in this case and the prosecution's exhortation to treat the defendants as a single entity, no cautionary instruction could effectively persuade the jury to evaluate each defendant separately. Moreover, as Justice Jackson trenchantly observed; "[t]he naive presumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440.)

Cumulative Prejudice

Even if none of the problems discussed above may be sufficient to require severance standing alone, they do not stand alone. Cumulatively, they show severe prejudice that prevented Mr. Letner from obtaining a fair trial and individualized consideration by the jury at each phase of the joint trial proceedings . They distorted the fact finding process and lowered the prosecution's burden of proof.

The failure to grant appellant's motion to sever his trial form that of codefendant Tobin thus deprived appellant of his right to due

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[35] See Note, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," 52 Law & Contemporary Problems 325, 333-36 (1989). The author concluded that based on empirical studies, "curative instructions, as used by the courts today, are insufficient to counter the prejudicial effects of joinder." (*Id.*, at p. 336.)

process and to fair, individualized and reliable guilt and sentencing phase verdicts, in violation of the Eighth and Fourteenth Amendment of the federal constitution and article I, sections 1, 7, 15, and 17 of the California Constitution.

Additionally, to the extent that the joinder kept appellant off the stand and forced a change in the defense presentation, thereby forfeiting the right to present the true facts, appellant has been deprived of his Sixth and Fourteenth Amendment rights to present a defense. (*California v. Trombetta* (1984) 467 U.S. 479; *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.)

Under these circumstances, reversal is required as to both appellant's convictions and the sentence of death.

Appellant Joins Codefendant's Brief

Appellant joins and incorporates codefendant's Argument II on this issue except to the extent that codefendant Tobin implicates Mr. Letner as the perpetrator of these offenses.

III.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE FRUITS OF AN ILLEGAL VEHICLE STOP

Introduction

Police may stop a vehicle based on reasonable suspicion that its occupants are engaged in illegal activity. Here, Officer Wightman knew that the vehicle he observed had not been reported stolen. Nonetheless, because the vehicle was traveling at a slow, although legal speed, the officer stopped the vehicle because he suspected the driver might be drunk. Slow speed by itself, however, does not provide a basis for "reasonable suspicion" of criminal activity - like drunk driving - sufficient to justify a stop.

Factual Background

Prior to trial, codefendant Tobin filed a motion to suppress all evidence derived from the illegal vehicle stop by Officer Wightman. (1 C.T. 76-90.) The District Attorney filed an opposition. (1 C.T. 103-111.) Initially, Mr. Letner refused to join codefendant's motion (1 C.T. 113), but later filed his own suppression motion and specifically joined Mr. Tobin's motion. (2 C.T. 262 et seq.)

On June 7 and 8, 1989, the judge heard evidence and argument and denied the motion.[36] (2 C.T. 416-418.)

The facts developed during the hearing are as follows. Shortly

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[36]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, the hearing on the defendants' motions.)

before or after midnight on March 1, 1988, Officer Wightman was in his marked police car patrolling the downtown area of Visalia when he noticed a red Ford Fairmont traveling southbound on Garden Street. (Preliminary hearing transcript at pp. 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. (Preliminary hearing transcript at p. 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." (Preliminary hearing transcript at p. 626.)

As a result of the water, 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." (Preliminary hearing transcript at p. 625.) Although he had not personally responded to any of the used car lot thefts, Wightman had heard about them through daily police bulletins. (Preliminary hearing transcript at p. 625.)

Officer Wightman testified that, based on these water beads and his knowledge of auto thefts in the area, he had a feeling that the Ford might have been stolen. He began to follow the car. (Preliminary hearing transcript at p. 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. (Preliminary hearing transcript at p. 628.)

Undeterred by that information, 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. (Preliminary hearing transcript at p. 629.) Significantly, Officer Wightman admitted 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. (Preliminary hearing transcript at p. 629.)

At the time of this vehicle stop, Mr. Letner was driving. (Preliminary hearing transcript at p. 595.) Mr. Tobin was sitting in the front passenger seat. (Preliminary hearing transcript at p. 597.) During the course of this stop, Officer Wightman observed four unopened bottles of beer on the floor in front of the back seat. (Preliminary hearing transcript at p. 595.) The officer detected a smell of alcohol on Mr. Letner's breath, and Mr. Letner did not have his driver's license. (Preliminary hearing transcript at pp. 597-598.)

When questioned, Mr. Letner told Officer Wightman that the

car belonged to Ivon Pontbriant. Mr. Letner could not provide her exact address but said she lived on North Jacob Street. (Preliminary hearing transcript at p. 602.) Officer Wightman conducted a pat-down search of both Tobin and appellant. He found a buck knife in Mr. Letner's pocket. (Preliminary hearing transcript at p. 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. (Preliminary hearing transcript at p. 605.)

After administering the standard balance test for determining intoxication, Officer Wightman decided that he would not arrest Mr. Letner for driving under the influence. Nonetheless, he cited Mr. Letner for failing to have a driver's license. He also ordered Mr. Letner and Mr. Tobin to lock up the vehicle and leave the area on foot. (Preliminary hearing transcript at p. 608.)

Standard of Review

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu* (2002) 534 U.S. 266, 122 S.Ct. 744, 750, 151 L.Ed.2d 740 (2002) (citing *Terry v. Ohio* (1968) 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889.) Whether an investigatory stop is supported by reasonable suspicion presents a mixed question of law and fact. *(United States v. Garcia-Camacho* (9th Cir.1995) 53 F.3d 244, 245. Review of mixed questions of law and fact is de novo,

United States v. Duarte-Higareda (9th Cir. 1997) 113 F.3d 1000, 1002. Factual determinations underlying this inquiry are reviewed for clear error. (*United States v. Garcia-Acuna* (9th Cir.1999) 175 F.3d 1143, 1146.)

California has a similar standard for reviewing Fourth Amendment suppression motions. 'An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶¶] 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.' " (*People v. Alvarez* (1996) 14 Cal.4th 155, 182)

Law Governing Vehicle Stops

The Fourth Amendment constitutional prohibition against unreasonable search and seizure extends to the brief investigatory stop of a vehicle. (*See United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607. In a free society such

as ours, the "[p]olice do not have unfettered authority to stop people lawfully using public highways." (*United States v. Diaz Diaz* (D. Mont 2002) 211 F.Supp.2d 1252, 1254.) In order to be lawful under the Fourth Amendment, an officer must have "reasonable suspicion" to stop a motorist. (*United States v. Rodriguez* (9th Cir.1992) 976 F.2d 592, 594, *amended at* (9th Cir.1993) 997 F.2d 1306 .) "Reasonable suspicion" consists of specific, articulable facts which, taken together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity. (*Id.*) Reasonable suspicion may not be "based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped." (*United States v. Rodriguez-Sanchez* (9th Cir.1994) 23 F.3d 1488, 1492 , *overruled in part on other grounds by United States v. Montero-Camargo,* 208 F.3d 1122, 1131-32 (9th Cir.), *cert. denied,* 531 U.S. 889, 121 S.Ct. 211, 148 L.Ed.2d 148 (2000).)

In *United States v. Arvizu, supra,* 534 U.S. 266 [122 S.Ct. 744, 151 L.Ed.2d 740], the Court noted that the proper reasonable suspicion analysis considers the "totality of the circumstances." (122 S.Ct. at 750.) Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together. (*United States v. Sokolow* (1989) 490 U.S. 1, 9-10, 109 S.Ct. 1581, 104 L.Ed.2d 1.)

Significantly, however, mere investigatory "experience may not be used to give the officers unbridled discretion in making a

stop." (*Nicacio v. United States INS* (9th Cir.1985) 797 F.2d 700, 705, *overruled in part on other grounds by Hodgers-Durgin v. de la Vina* (9th Cir.1999 (en banc)) 199 F.3d 1037, 1045.) The stop must be based on objective facts, not the "mere subjective impressions of a particular officer," (*United States v. Hernandez-Alvarado* (9th Cir.1989) 891 F.2d 1414, 1416.) Moreover, the inferences drawn by the police officer must be objective and reasonable. (*United States v. Cortez* (1981) 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621.)

When a trial judge errs in denying a Fourth Amendment motion to suppress, reversal is required unless the prosecution can show that the error is harmless beyond a reasonable doubt. (*People* v. *Miller* (1983) 33 Cal.3d 545, 550-56; Penal Code section 1538.5(m).) That is, the prosecution must show beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24; see generally *Yates v. Evatt* (1991) 500 U.S. 391, 402-405 [114 L.Ed.2d 432, 111 S.Ct. 1184][overruled on a different ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72].)

No Reasonable Suspicion of Theft Sufficient to Justify Vehicle Stop

Officer Wightman testified about two distinct but unrelated theories for following and stopping the car. First, he began following the car after he observed water beads on it. He believed that since the rain ceased about two and a half hours before, 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: 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. (R.T. 42, 6/7/89 hearing.) Viewed either objectively or subjectively, his hunch never developed into a reasonable suspicion that the car was stolen. Officer Wightman testified he initiated the investigatory stop because he decided that the slow speed of the car suggested that the driver was drunk. (Preliminary hearing transcript at p. 629.)

Given these facts, the "stolen car" theory could not possibly have developed into a reasonable suspicion. Indeed, 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. (R.T. 43-44, 6/7/89 hearing.) Additionally, 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, simply bordered on the 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." (Preliminary hearing transcript at p. 595.) At the hearing on the motion to suppress, under questioning by the prosecutor about the basis for the stop, Officer Wightman again testified that he made the stop based on a suspicion that the driver was intoxicated because he was driving the car at a slow speed on a highway. (R.T. 10-11, 6/7/89 hearing.)

During cross-examination, Officer Wightman agreed that the *sole* reason for the stop was because of the slow speed of the vehicle. (RT 44, 6/7/89 hearing.) In a desperate attempt to rehabilitate the witness on redirect examination, the prosecutor asked Wightman the following leading question: "But were your suspicions concerning the possible theft of that vehicle part of the reason why you stopped?" (R.T. 47, 6/7/89 hearing.) The officer agreed. (Ibid.) However, it was only under such leading redirect examination that Wightman altered his position that the sole reason why he stopped the Ford Fairmont was because of the slow speed at which it was traveling on State Route 198, raising his suspicions of an intoxicated driver.

Significantly, the trial judge stated during the suppression hearing that Officer Wightman's observation of a car with raindrops on it together with his knowledge of auto thefts in the downtown area did not qualify as a reasonable suspicion:

The officer had a right to be suspicious about the

> movement of cars in that area, when he first encountered the Ford Fairmont in which the defendants were riding but . . . that in itself wouldn't have given the officer any right to stop this car. But he certainly had every right to follow it.

(R.T. 36-37, 6/8/89 hearing.)

When defense counsel attempted to question Officer Wightman about his observations concerning the water beads on the Ford and the officer's knowledge of recent thefts in the area, the judge cut off this inquiry. (R.T. 43, 6/7/89 hearing.) The judge stated that although these factors went to the issue of why Officer Wightman began following the car, they were not relevant to the question of why the officer eventually stopped the car. (*Ibid.*)

Thus, Officer Wightman's admission that his theory that the car may have been stolen was based on a mere hunch, and the trial judge's statement that Wightman would not have been justified in stopping the car based on the water beads and thefts in the area, taken together, establish that a sufficient basis did not exist under that theory to constitute a reasonable suspicion or probable cause to stop the vehicle.

Under All the Circumstances, Slow Speed Did Not Provide Reasonable Suspicion for the Stop

Nothing in the facts of this case gave Officer Wightman a reasonable suspicion that the vehicle's slow speed was indicative of criminal activity. Driving at a speed slower than the posted speed limit is certainly not unlawful on a California highway unless the

slow speed impedes or blocks "the normal and reasonable movement of traffic." (Veh. Code, § 22400.) The speed in this instance presented no such impediment or blockage because the officer testified that there were no other vehicles in sight. (Preliminary hearing transcript at p. 626.) Further, it rained heavily during the night which would have made travel at a slower speed prudent and safe. (Preliminary hearing transcript at p. 594.) Additionally, Officer Wightman observed that the vehicle's engine was running "rough" which provided a further innocent explanation for the slower speed. (Preliminary hearing transcript at p. 626.)

At no time did the officer observe any indication of unsafe driving or any traffic violations. (Preliminary hearing transcript at pp. 595-596.) Under these circumstances, reliance on the slow speed of the vehicle was an insufficient justification for stopping the vehicle. Indeed, "If an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver." (*United States v. Mariscal* (9th Cir.2002) 285 F.3d 1127, 1130)[37]

Nonetheless, in the pleadings filed on the motion, the

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[37] Additionally, "Because most people are not such paragons of driving skill and virtue that they consistently adhere to each one of the complex laws relating to the operation of motor vehicles, there are many opportunities to stop targeted vehicles like the Crown Victoria. But those opportunities are not limitless. Suspicions must be reasonable, and they cannot be if they are not sufficient to cause an officer to believe that the driver has done something illegal." (Mariscal, supra, at p. 1132.)

prosecution took the position that "... slow speed alone may be justification for an officer to temporarily detain." (1 C.T. 108.) In support of its argument, the prosecutor cited: *People* v. *Gibson* (1969) 220 Cal.App.2d 15, 20; *Williams* v. *Superior Court* (1969) 274 Cal.App.2d 709, 712; and *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 claim that slow speed alone was sufficient to justify an investigatory stop of a car under the circumstances of this case.[38]

First, the prosecution's 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 where the robbery occurred, the officers saw a car being 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, 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

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[38]Cf. *People v. Bracken* (2000) 83 Cal.App.4th Supp 1, 14, where the court of appeal found that the police officer acted reasonably when he stopped a car that had been weaving within its lane because he suspected the driver was drunk.

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 an obvious 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.) Significantly, 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. Apparently, the latter acts were not required by traffic congestion or regulation and were highly unusual in any context. 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. Anguiano 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 Vehicle Code violations. The officer then arrested appellant. Under these circumstances, 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 significantly more than just 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.

Of particular note, in none of these cases did the police cite the slow speed of the vehicle as the basis for an inference (or even a "hunch") that the driver was intoxicated. Accordingly, even if the slow speed of a vehicle could suffice as one of the reasons for a police stop, it does not suffice as the sole rationale for the stop in this case.

By way of contrast, 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 specifically 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. Jimenez-Medina, supra,* 173 F.3d at p. 755.)

In *Raulerson 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 *Raulerson* 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 *Raulerson* 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. In accord, *United States v. Mariscal supra,* 285 F.3d at 1132.) The

same was certainly 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.)

Trial Judge Did Not Articulate an Appropriate Theory of Reasonable Suspicion

The trial judge denied the suppression motion on the ground that the officer's early suspicions that the car might have been stolen, together with the slow speed of the car provided a reasonable basis for suspicion of illegal activity justifying the stop. The judge stated:

> . . . this Court has come onto the freeway at that location which these defendants went on it, and which the officer followed. That is a rather long descending ramp onto the freeway. There's adequate opportunity to accelerate, up through the Mooney overcrossing, and the – the speed, plus the location on which these defendants were originally observed, plus the fact that in my opinion the opportunity that they would have had to get this car up to speed but didn't, and the – the fact that the officer was aware of thefts in the area, and all gave the officer reasonable opportunity — reasonable suspicion to stop this car . . . .

(RT 37-38, 6/8/89 hearing.)[39]

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[39]The trial judge improperly based his decision, at least in part, on facts derived from his own experience of conditions on Route 198. These facts, however, were not put into evidence or stipulated to at the suppression hearing. A judge may not base his findings on personal inspection of the scene without giving the parties an opportunity to question those observations. (*Schaeffer v. Jewish Family Services of Los Angeles* (2002)

Unfortunately, the court's ruling improperly fused two entirely separate and distinct theories offered by the officer for the vehicle stop. In this regard, if the trial judge intended to base his denial of the motion to suppress in part on the theft theory he should not have cut off defense counsel's questioning of Officer Wightman about this theory. (RT 43, 6/7/89 hearing.) A defendant has both a federal and state due process right to a full and fair suppression hearing. *(People v. Williams* (1988) 45 Cal.3d 1268, 1304.) A defendant also has state and federal rights to confront and cross-examine the witnesses against him. (See (Cal. Const art. I sections 7 and 15; the Sixth and Fourteenth Amendments to the Constitution of the United States*; see also Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Davis v. Alaska* (1974) 415 U.S. 308.)

More importantly, however, the reasons articulated by the trial judge for his ruling do not withstand scrutiny. First, the underpinning for the theft theory was deeply flawed. The fact that the car had water beads on it several hours after the rain stopped simply does not support a logical inference that the car might be stolen from a nearby

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98 Cal.App.4th 159, 164.) Reliance on such personal inspection violates a defendant's rights to cross-examination and confrontation under the Sixth Amendment and to due process under the Fourteenth Amendment. (See also *United States v. Mariscal* (9th Cir 2002) 285 F.3d 1127, 1131. ["It almost sounds as if the court merely injected some sort of personal driving experience into the case. That would not only be unsatisfactory, [footnote omitted]] but it would also suffer from the defect that nobody can tell if the judge's experience was at the location in question in autumn in the late hours of the night--9:40-9:45 p.m."].)

car dealership. **ANY** vehicle that had not been driven a long distance would have had water droplets on it. Common sense suggests that there was more than one wet vehicle being driven in Visalia at that hour of the night. Such a set of circumstances hardly justifies a reasonable inference that all (or any) of them were stolen. *Whren v. United States* (1996) 517 U.S. 806, 810 requires an objective basis for the stop under all the circumstances. Officer Wightman's rationale does not meet that test here.

Additionally, the trial judge improperly engrafted Officer Wightman's slow speed /drunk driver theory onto the officer's invalid theft theory. The record shows that even the officer himself abandoned the theft theory before he decided that the slow speed of the vehicle might indicate that the driver was drunk. As the officer candidly admitted, by the time he made the stop, he already knew that the vehicle was registered to a private individual (not a used car business) and had not been reported stolen.

All Fruits of the Illegal Stop Must be Suppressed

Given the record in this case, the trial judge erred in concluding that Officer Wightman 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 was based on reasonable suspicion, this court should reverse

all of the appellant's convictions and his sentence of death.

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 Tobin 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. (1 C.T. 76.)

On this record, the State cannot show that the trial court's error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) The defendants' being stopped in possession of Ms. Pontbriant's car on the night of her murder clearly bolstered the prosecution's case that one or both of them had been involved in the circumstances causing her death. Had the evidence of their possession of her vehicle been suppressed, the prosecution would have had a more difficult time connecting them to the homicide, and would have had little basis for proving robbery or burglary or a motive for the homicide. Other than the car itself, the only evidence of anything haven been taken from Ms. Pontbriant was provided by the "rent money" testimony of Mr. Gilliland. As discussed at some length

below,[40] that testimony was patently incredible. Without the evidence of the defendants in Ms. Pontbriant's vehicle, the prosecution would have difficulty attempting to show that the defendants murdered Ms. Pontbriant in order to facilitate a journey to Iowa. Further, in guilt phase closing argument, the prosecutor relied upon evidence found in the stopped vehicle, i.e., property stolen in an unrelated burglary, to argue against the guilt phase defense contention that when stopped, the defendants were in lawful possession of the vehicle and simply driving it back to Ms. Pontbriant's home to store possessions there during their trip to Iowa. (54 R.T. 7793-7795.) If the evidence obtained as a result of the illegal vehicle stop had been suppressed, it is not likely that appellant would have been convicted and sentenced to death.

Appellant Joins Codefendant's Brief

Mr. Letner joins and incorporates codefendant's Argument I on this issue. He does not join Mr. Tobin's briefing, however, to the extent that it implicates Mr. Letner as the perpetrator of any of these offenses.

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[40] See argument V *infra*.

IV.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF ATTEMPTED RAPE, OR TO SUPPORT THE ATTEMPTED-RAPE SPECIAL CIRCUMSTANCE FINDING, BOTH AT THE CLOSE OF THE PROSECUTION CASE-IN-CHIEF WHEN APPELLANT'S SECTION 1118.1 MOTIONS WERE ERRONEOUSLY DENIED, AND AT THE CLOSE OF GUILT PHASE EVIDENCE

Introduction

The evidence is insufficient to show beyond a reasonable doubt that there was any sexual motivation for the assault on Ms. Pontbriant. More importantly, even if the evidence could be construed to support a sexual assault [which it cannot] , there is simply no evidence that appellant attempted to rape Ms. Pontbriant or did anything intended to aid and abet an attempted rape by Mr. Tobin.

Standard of Review

As established in *In Re Winship* (1970) 397 U.S. 358, proof of guilt beyond a reasonable doubt is an essential facet of Fourteenth Amendment due process and required for a constitutionally valid conviction. On appeal, the test of whether the 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. Or, as the United States Supreme Court put it in *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319, explaining the *Winship* due process standard on appeal "The relevant question 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."

To satisfy this due process standard and to avoid an affirmance based primarily on speculation, conjecture, guesswork, or supposition (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543), the record must contain **substantial** evidence of each of the essential elements. In order for the evidence to be "substantial," it must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, 578.) "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, supra*, 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,[41] 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.)

Moreover, because this is a capital case, there are additional considerations that come into play. Even if the evidence were sufficient, in a noncapital context, to support an attempted rape conviction and sentence of imprisonment (which it is not), the evidence of attempted rape is too weak and uncertain to serve as a constitutionally valid basis for establishing death-eligibility and turning a noncapital homicide into capital murder. The evidence cannot satisfy the heightened-reliability requirement mandated in capital cases by the Eighth and Fourteenth Amendments and California state constitutional analogues. Thus, permitting appellant's attempted rape conviction and the attempted rape special circumstance finding to stand would violate not only *Winship*'s due process standard for a criminal convictions, but would also violate the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1,

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[41]Both appellant and his codefendant filed motions for judgments of acquittal on the attempted rape offense at the close of the prosecution's case-in-chief. (3 C.T. 725-726; 44 R.T. 6563-6570.)

sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. at 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

Elements of Attempted Rape and the Attempted Rape Murder Special Circumstance

Forcible rape is defined as "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." (Penal Code section 261, subdivision (2).)

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 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.*

A rape 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).)

Here, the prosecution alleged only attempted rape. Therefore, it had to prove either that appellant Letner possessed the specific intent to commit rape (*People* v. *Craig* (1957) 49 Cal.2d 313, 318; see also *People* v. *Bradley* (1993) 15 Cal.App.4th 1144, 1154; disapproved on

other grounds in *People v. Rayford* (1994) 9 Cal.4th 1.), and took a direct and unequivocal action toward raping Ms. Pontbriant; or it had to prove that codefendant Tobin possessed the specific intent to rape Ms. Pontbriant, took a direct and unequivocal action toward raping her, and appellant knowingly and intentionally aided and abetted Mr. Tobin in his attempt.

Evidence Insufficient to Establish Attempted Rape

At the outset, it is important to recognize that there is no direct evidence of any attempted rape of Ms. Pontbriant. Thus a conviction for this offense necessarily rests solely on inferences. Because this is a capital case with its heightened concern for reliability in both the guilt and penalty phases (*Beck v. Alabama, supra*, 447 U.S. at p. 638), those inferences must be scrutinized with special care.

The prosecution conceded that there was no actual evidence of rape. (53 R.T. 7584.) Instead, it urged that the following factors constituted proof of attempted rape (and the attempted rape special circumstance) beyond a reasonable doubt: (1) the deceased was discovered naked except for her bra and socks; (2) her sweater had been torn down the front; (3) there was a bloodstain on the side of that sweater that might have come from appellant; (4) a beer bottle was lodged between the deceased's legs that was near, although not touching her genital area; (5) hair was found on the deceased's chest (after her body was rolled over) which might have come from appellant; (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 codefendant Tobin, and which might have been deposited in the carpet on the night of the homicide; (7) blood smears were found on a pillowcase and on a doily from the bedroom, as well as on a rag found in Ms. Pontbriant's car and they could have come from codefendant Tobin; and (8) Mr. Tobin testified that "sexual contact was beginning to take place between appellant and the victim." (53 R.T. 7585-7587.)

For the reasons set forth below, none of these factors, either individually or collectively is sufficient to prove either an attempted rape or an attempted rape special circumstance beyond a reasonable doubt.

Viewed as a Whole, the Evidence was Insufficient to Support a Finding Beyond a Reasonable Doubt that an Attempted Rape was Committed

In cases far more compelling than this one, this court has not hesitated to reverse convictions for underlying sex felonies and special circumstances based on sex felonies because the evidence was simply insufficient to prove the charged offenses. (*People* v. *Craig, supra,* 49 Cal.2d 313 ("*Craig I*"); *People* v. *Anderson* (1968) 70 Cal.2d 15; *People* v. *Granados* (1957) 49 Cal.2d 490; *People* v. *Raley* (1992) 2 Cal.4th 870; and *People* v. *Johnson* (1994) 6 Cal.4th 1.)

For example, in *People* v. *Craig (Craig I)*, *supra*, this court reversed a felony murder conviction because the evidence was insufficient to prove either an attempted rape or an actual rape. 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 deceased was lying on her back with her legs spread apart. She was 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 deceased'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 deceased's body. No semen or spermatozoa, however, was found on the clothing of either the deceased or the defendant. Further, the deceased's body did not show any evidence of sexual molestation. (*Id.* at p. 317.)

Reversing the underlying sex based felonies of rape and attempted rape, this court rejected the prosecution's argument that the torn clothing, the position of the deceased'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 deceased. (*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.)

Here, as in *People* v. *Craig, supra,* Ms. Pontbriant was found partly unclothed and with multiple wounds. In both cases, no sperm or semen was found on or near the body of Ms. Pontbriant or on the clothes of either the deceased or the accused. More importantly, in *Craig I*, the evidence of an attempted rape was considerably more substantial than here. In *Craig I*, there were wounds near Ms. Pontbriant's breast. Here, there were no wounds of a sexual nature at all. Indeed, none of Ms. Pontbriant's blood was found in the bedroom, where the prosecution urged that the sexual attack occurred. (42 R.T. 6158-6159.)

Additionally, in *Craig I*, the decedent was found lying on her back with her legs spread apart. (*Id.*, at p. 316.) Here, Ms. Pontbriant's body was located face down on the floor between the coffee table and couch while her legs were together. (39 R.T. 5620.) Defendant Craig said he was going out looking for "a little loving" and later in the evening he scuffled with another woman in a bar who

refused to dance with him. (*Id.,* at p. 315.) Nothing like that occurred in this case. Thus, here, even less evidence supported the attempted rape allegations than in *Craig I.*

This court came to a similar result in *People* v. *Anderson*, *supra*, 70 Cal.2d 15. In *Anderson*, a ten-year-old girl 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 deceased. (*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 child under 14. The prosecution cited the following evidence in support of its claim: "The nature of the wounds and the clothing of the deceased, 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.*)

Rejecting the prosecution's argument, this court concluded that aside from the homicide, there was virtually no evidence relating to a possible section 288 offense; let alone evidence showing the defendant had the requisite intent to commit a sexual assault. Commenting on the argument that the laceration to the vaginal area was relevant to show the intent to commit a sexual offense, the court noted that 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 even less sufficient here. In *Anderson,* not only was the deceased's body partially undressed but there were wounds to her vaginal and anal areas. In addition, the crotch of the decedent's panties had been torn out, and the body was found next to her bed. At least part of the attack occurred on the decedent's bed, as evidenced by a large blood stain found in the center of her mattress.

Further, in *Anderson* the evidence supported an inference that the decedent 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 under this circumstance, this court found the

evidence insufficient to prove anything more than a murderous attack on the decedent, or to support a reasonable inference that the motivation for the attack was sexual.

In the instant case, by contrast, if any struggle did take place, it occurred only in one room, the living room. Even in the living room, however, there was no evidence to support an inference that Ms. Pontbriant resisted a sexual attack so vigorously that she caused her assailant to abandon a sexual attack and instead attack her with a knife. To the contrary, the evidence showed that Ms. Pontbriant was tied up and lying face down on the living room carpet when her assailant cut the back of her neck. These facts simply do not support the prosecution's theory of a sexually motivated attack.

Further, if the assault on Ms. Pontbriant began with an intent to commit a sexual assault, the prosecution presented no evidence explaining why the sexual assault was not completed. Certainly, there was no evidence that the assault was interrupted by any outside agency, or that either defendant was impotent. On the other hand, the simple explanation for the lack of sperm or genital trauma is that no sexual assault occurred or was even attempted. In any event, the physical evidence that the attack or murder of Ms. Pontbriant was motivated by sex was even less substantial than that found inadequate in *Anderson, supra.*

Comparing this case to the facts of *People* v. *Granados*, *supra,* 49 Cal.2d 490 again shows the failure of the prosecution's evidence. In *Granados*, the defendant 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. Granados lived in a common-law relationship with the young decedent's mother. The mother testified that she warned the defendant about bothering her daughter sexually. In response, the defendant threatened to kill her and both of her children if she reported him to the police. (*Id.* at p. 494.)

The decedent was found in her bedroom with her skirt pulled up exposing her genitals. There was blood on the wall, the floor and the decedent's head. A bloody machete was found in the living room. The autopsy, however, did not show any evidence of injury to the vaginal area of the decedent nor was any sperm found on the decedent's body or in the area around the body. Based on a 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 *Granados* case are similar to those here, insofar as the decedent 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 decedent or on the clothes of the decedent or of the accused. However, the evidence of a sexual attack in the *Granados* case was more substantial than here. That is, there was solid evidence that defendant Granados previously made sexual overtures to the decedent, someone who could not legally consent to those overtures. Therefore, since this court found

the evidence of a sexual assault insufficient in *Granados*, it must certainly find the evidence of an attempted rape insufficient in this case.

Similarly, 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, Janine, 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, Laurie 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.)

Raley was found guilty of capital murder and other offenses, including attempted oral copulation by force against Janine. (*Id.* at pp. 889-890.) This court reversed the attempted oral copulation conviction, because although there was "substantial evidence of a forcible sexual attack of some kind on Janine," it would not be appropriate to infer that Raley had committed a forcible oral

copulation against Janine simply because he had attempted to commit the same offense against Laurie. To do so would be to apply "layers of inference far too speculative to support the conviction." (*Id.* at pp. 890-891.)

The evidence supporting the charge of attempted oral copulation with respect to Janine in the *Raley* case was far more substantial than the evidence in the instant case that either defendant attempted to rape Ivon Pontbriant before she was murdered. In the instant case, Ms. Pontbriant's body was unclothed and a beer bottle was found lodged between her legs. Even assuming arguendo that such evidence suggested some kind of sexual attack took place or was attempted, it certainly did not show that the crime committed was an attempted rape.

Significantly, in *Raley,* this court held that the evidence must be sufficient to support a conviction of *the specific type of sexual offense alleged.* As appellant pointed out previously, if the prosecution wished to urge the presence of the beer bottle as evidence of a sexual assault, it should have alleged a violation of Penal Code section 269 (penetration by a foreign object). The beer bottle was not evidence of an attempted rape. In *People v. Craig* (1994) 25 Cal.App.4th 1593 (*Craig II*), the court of appeal summarized this court's holding in *Raley, supra,* on this precise point:

> In *Raley,* the question was not limited to the defendant's intent but extended to what his actual conduct was. The only evidence of *any* sexual attack of Janine was an inference drawn from all the circumstances, but those

> circumstances did not reveal the nature of the sexual assault. There was no evidence as to what precisely occurred between the defendant and Janine while they were outside Laurie's presence, and there was no physical evidence of an attempted oral copulation. Without knowing what the defendant did or tried to do to Janine, the *Raley* jury could only speculate on whether his conduct was consistent or inconsistent with an attempt to accomplish forcible oral copulation.

(*Id.*, 25 Cal.App.4th at p. 1601)

Further, as the court in *Craig II* noted, "Even if the *Raley* defendant's intent to commit forcible oral copulation could be inferred from his 'fool around' statement, he could not be convicted of an attempt to commit that crime without substantial evidence of a direct but ineffectual act done toward its commission." (*Ibid.*)

Here, the prosecution failed to prove *either* an intent on the part of either defendant to rape Ivon Pontbriant, *or* a direct act done toward the commission of a rape. Even assuming arguendo that one or both defendants made Ms. Pontbriant remove her clothes involuntarily, just as in the *Raley* case, this act alone could not constitute grounds to sustain an attempted rape conviction. This is especially true when nothing else was known about what either defendant "did or tried to do" to Ms. Pontbriant.

Finally, in *People* v. *Johnson, supra,* 6 Cal.4th 1, the defendant was convicted of murdering a mother and her adult daughter in their home. The prosecution relied on both a premeditated murder and a felony-murder theory. The latter theory was based on the allegation that the defendant committed a burglary and a rape or attempted rape of the mother, Ms. Holmes. (*Id.* at p. 38.) This court found

insufficient evidence of a rape or an attempted rape of Ms. Holmes.

Firefighters found the bodies of the two decedents in their home. Two fires had been intentionally set, apparently to cover up the crimes. Ms. Holmes had been severely beaten and kicked; an autopsy determined that her death was the result of 12 or more blows to her head and face. Defendant Johnson told the police that on the night of the murders he visited the daughter, Ms. Castro, at the house she shared with her mother. He admitted that he encouraged Ms. Castro to drink to the point of intoxication, and then had "sex" with her. Defendant Johnson also made the observation (to the police), "Rape is hard to prove because it is [sic] if she gave up the pussy or didn't she." (*Id.* at p. 39.)

The prosecution argued that the mother had been sexually assaulted, because at the time of her death she was only wearing a sweatshirt and bra and was naked from the waist down. The officers found a pair of pantyhose on the floor of her room. Blood was found on the floor, sofa cushions and a love seat in the room. Based on the blood and the fact that Ms. Holmes had been beaten severely, this court found that the evidence supported the prosecution's theory that any sexual activity was nonconsensual. (*Ibid.*)

However, there was no evidence of sexual trauma, and no seminal traces or other evidence of penetration, forced or otherwise, as to Ms. Holmes. The prosecution specifically argued that evidence of trauma to the genitals is not necessary to establish attempted rape. This court disagreed, finding that *Anderson* and *Craig* were

controlling. (*People* v. *Johnson*, *supra*, 6 Cal.4th at p. 41.)[42] Applying the analyses of those decisions to the facts of *Johnson*, this court concluded that "other than victim Holmes' partly clothed body, there was no evidence of a sexual assault on her" and therefore "the evidence was insufficient to support a finding of first-degree murder based on rape or attempted rape of victim Holmes." (*Id.* at pp. 41-42.)

The evidence in *Johnson*, as to the attempted rape of Ms. Holmes, was far stronger than that offered against either defendant here. As in *Johnson*, Ms. Pontbriant was found partially disrobed. As in *Johnson*, there was no semen evidence (connected to Ms. Pontbriant's body). Moreover, even though the defendant in *Johnson* admitted that he had had "sex" with Ms. Castro, in her home on the evening she was found murdered, this court still held the evidence of attempted rape of Ms. Holmes insufficient.[43]

Here, Deputy District Attorney Reed argued to the jury that the brutal manner in which Ivon Pontbriant was killed substantiated that she was sexually assaulted before she died. (53 R.T. 7593-7594; 7616.) But in none of the cases cited above did this court consider the level of violence against the decedent as itself "evidence" that a

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[42]This court also noted that it had cited both *Craig* and *Anderson* with approval also in *People v. Thomas* (1992) 2 Cal.4th 489, 526-527 and *People v. Hernandez* (1988) 47 Cal.3d 315, 347, in regard to whether evidence in those cases was sufficient to sustain sexual offenses underlying a felony-murder charge.

[43] In contrast to the statement made by the defendant in *Johnson*, here neither appellant nor codefendant Tobin stated at any time during the guilt phase of the trial that they engaged in any sexual activity with Ms. Pontbriant. Mr. Tobin testified that he left the home when he observed appellant and Ms. Pontbriant kissing, but he testified that the kissing was consensual. (46 R.T. 6859-6860, 6956, 6967, 6971, 6984-6985.)

sexual assault occurred or that a sexual motive was involved in the murder. The jurors here were undoubtedly angry that Ivon Pontbriant had been murdered in such a brutal manner, and may have been ready to accept the prosecutor's "brutality equals sexual motive" argument. But, as a matter of law, the fact that Ms. Pontbriant here was nearly decapitated and bled to death did not prove or support the theory that she was also sexually attacked before she was murdered.

In sum, considered in its totality, the evidence offered to prove that an attempt to rape Ivon Pontbriant occurred before her death was far too equivocal to sustain appellant's conviction of attempted rape or the special circumstance finding of attempted rape-murder. The prosecution theorized that the motivation (or one of the motives) for Ms. Pontbriant's murder was sex. The substance of the prosecution's evidence was a naked Ms. Pontbriant, semen (of an undetermined age) in another room, and a beer bottle found near Ms. Pontbriant's genital area. None of this evidence was of solid value in proving attempted rape. As this court emphasized in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, it is not enough to present evidence of motive, opportunity and means of committing a particular act. Such evidence merely allows speculation about the defendant having committed the particular act. "Speculation, however, is not evidence." (*Id.* at p. 864.)

As the descriptions of the facts in the *Craig I*, *Granados*, *Anderson*, *Raley* and *Johnson* cases show, the *facts* here (as opposed to speculation based on suspicion) were not sufficient to establish that an attempt to rape Ms. Pontbriant occurred. Therefore, this court

must reverse appellant's attempted rape conviction and the special circumstance finding of attempted rape-murder.

The Evidence Did Not Prove Beyond a Reasonable Doubt That Each Defendant Separately Committed Attempted Rape or That Appellant Committed Attempted Rape

Assuming arguendo that the totality of the evidence was sufficient to prove an attempted rape of Ms. Pontbriant, the prosecution failed to present sufficient evidence on which to base an inference that each defendant *separately* attempted to rape Ms. Pontbriant. It also failed to present sufficient evidence to ground an inference that if only one defendant attempted to rape Ms. Pontbriant, that person was appellant Letner.

The prosecution's theme throughout the guilt trial was that appellant and codefendant Tobin were so close that whatever one of them did, the other was also involved in that act. Ms. Reed argued that Ms. Pontbriant was killed by two persons, not one person acting alone. (53 R.T. 7555.) She argued that because the semen in the bedroom "pointed to" Mr. Tobin, while the hair on Ms. Pontbriant's chest matched appellant, this meant that both defendants attempted to rape Ms. Pontbriant. (53 R.T. 7587.) This argument, however, is unsupported by either common sense or the evidence in this case. The prosecution presented no evidence which might explain why even one attempt to rape Ms. Pontbriant failed to be completed. Certainly, the trier of fact could not reasonably infer that *each* defendant separately attempted to rape Ms. Pontbriant, but *neither* carried their action forward sufficiently to commit an actual rape. If both defendants had attempted to rape Ms. Pontbriant, surely at least

one or the other would have succeeded and *some* physical evidence would have been found at the crime scene to underpin charges of actual rape.

Nonetheless, the prosecutor based her argument for conviction of both defendants on the nature of Ms. Pontbriant's injuries.[44] While the prosecution was correct that Ms. Pontbriant suffered multiple injuries, nothing about the injuries suggested they were inflicted by two different people. The stab wounds to the front of the neck were all superficial and close together. Further, the facial abrasions did not indicate Ms. Pontbriant had been repeatedly kicked or hit from different angles by two people.

Additionally, Ms. Pontbriant did not suffer a variety of wounds and abrasions over 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 as that person knelt over Ms. Pontbriant's prone body.

Moreover, even assuming arguendo that *one* of the defendants attempted to rape Ms. Pontbriant, the prosecution presented no evidence of solid value that appellant was the assailant.

The only physical evidence of a sexual nature was the semen stain on the carpet. Assuming arguendo that the stain was sufficiently probative of a sexual assault, the stain was NOT consistent with appellant or Mr. Gilliland (41 R.T. 5879), but was at least arguably consistent with Mr. Tobin. (41 R.T. 5867.)

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[44]The prosecutor argued: "You have a great amount of force and violence with numerous different things being applied to this Ms. Pontbriant." (53 R.T. 7555.)

With regard to the prosecution's argument that the hairs found on Ms. Pontbriant's body showed that appellant committed a sexual assault, nothing could be farther from the truth. They got on Ms. Pontbriant's body the same way the dog hairs did. They were deposited on the body from the carpet after Ms. Pontbriant fell.

Nor does Mr. Tobin's self-serving testimony support a finding beyond a reasonable doubt that if an attempted rape was committed, it was committed by appellant (and not Mr. Tobin). Mr. Tobin testified that he saw appellant and Ms. Pontbriant start to kiss and that he then left the house. (46 R.T. 6852-6868.) The jury, of course, rejected this testimony — at least insofar as Mr. Tobin claimed that he left the house. Having rejected Mr. Tobin's claim to have departed, it's also unlikely that the jury would — or reasonably could – have placed any confidence in Mr. Tobin's asserted reason for leaving the house, i.e., his claim that appellant and Ms. Pontbriant had started kissing. More importantly, given that the jury rejected Mr. Tobin's testimony that he was absent when any crime occurred – and rejected it beyond a reasonable doubt[45] – that same testimony can't be deemed substantial evidence supporting a contrary finding beyond a reasonable doubt, i.e., a finding that appellant was alone in the house with Ms. Pontbriant when the crimes occurred and accordingly must have committed the attempted rape (if one occurred). Further, of course, since Mr. Tobin's testimony was not part of the prosecution's

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[45]In order to convict Mr. Tobin, the jury had to find beyond a reasonable doubt that Mr. Tobin was present at the time of the crimes. No other factual theory supporting Tobin's liability was suggested by the evidence or the prosecutor.

evidence, it cannot be considered at all in evaluating the sufficiency of the evidence to sustain the attempted rape and attempted rape special circumstance allegations against the section 1118.1 motion to strike made by appellant at the close of the prosecution case-in-chief (*People v. Trevino* (1985) 39 Cal.3d 667, 695; *People v. Belton* (1979) 23 Cal.3d 516, 519-523; *People v. Camp* (1980) 104 Cal.App.3d 244, 247), and hence, even if Tobin's testimony could somehow make up for the insufficiency of the prosecution's evidence against appellant, the attempted rape conviction and special circumstance finding would have to be set aside.

The Evidence Did Not Prove Beyond a Reasonable Doubt That Appellant Aided or Abetted Codefendant Tobin in an Attempted Rape

Assuming arguendo that the evidence was sufficient to convict codefendant Tobin of attempted rape, the prosecution failed to present sufficient evidence that appellant aided or abetted him in that attempt. The prosecutor argued that appellant and Mr. Tobin 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." (53 R.T. 7540.) But this argument for guilt-by-association could not substitute for actual proof that appellant aided and abetted an attempted rape by Mr. Tobin.

The evidence showed that appellant and codefendant Tobin arrived at Ms. Pontbriant's house together on the evening of March 1, 1988 when she was still alive. (39 R.T. 5532-5533 [Testimony of Flourene Gentry].) It showed that appellant and codefendant Tobin were riding in Ms. Pontbriant's car together later that evening,

arguably after Ms. Pontbriant had been murdered. (42 R.T. 6148-6149 [Testimony of Officer Wightman].) But other than drinking, smoking and making a few telephone calls, no evidence established what appellant or Mr. Tobin did at Ms. Pontbriant's house between those times. Establishing merely that appellant was present in Ms. Pontbriant'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 Tobin were, there was not any evidence that appellant aided and abetted Mr. Tobin in committing any crime before each of them was charged in the instant case.

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 decedent, though only one of the defendants fired the fatal bullet].) 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, Ms. Pontbriant knew appellant Letner reasonably well. So there was nothing unusual in appellant and his friend visiting Ms. Pontbriant at her house, nor in Ms. Pontbriant socializing with appellant and Mr. Tobin during the evening of March 1, 1988.

Additionally, appellant and Ms. Pontbriant also made a series

of telephone calls together that evening. They talked several times with Edward Burdette and Kathy Coronado over a span of one-half hour to an hour. (39 R.T. 5581 [Testimony of Edward Burdette].)[46]

These telephone calls proved unequivocally that if an attempt to rape Ms. Pontbriant occurred, it occurred *after* these telephone calls were made. Ms. Pontbriant did not tell either Mr. Burdette or Ms. Coronado that anyone had sexually assaulted her or attempted to assault her.

It was also significant that Ivon Pontbriant initiated the series of telephone calls, not Mr. Burdette or Ms. 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 appellant would get on the telephone to speak to someone who knew him and argue about his tools being missing if he planned to rape Ms. Pontbriant. The only reasonable inference from this evidence is that prior to the time the phone calls were made to Burdette and Coronado, neither defendant harbored any intent to murder, rob or sexually assault Ivon Pontbriant.

Moreover, appellant's behavior while talking on the telephone directly contradicted any inference that appellant possessed the intent to murder, rob and rape Ms. Pontbriant when he and Mr. Tobin arrived at her house. Indeed, appellant's remarks to Burdette and Coronado were sufficiently provocative that Ms. Coronado might well have called the police instead of simply unplugging the

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[46] See 39 R.T. 5557-5591 [Edward Bourdette]; and 39 R.T. 5593-5609 [Kathy Coronado] for the full description of the content of these telephone calls.

telephone.[47]

In sum, the telephone calls show that neither appellant nor Mr. Tobin took any direct action toward raping or assaulting Ms. Pontbriant before the telephone calls concluded. If either defendant planned to rape, rob and murder Ms. Pontbriant when they arrived at her house, they certainly behaved in a way contrary to such a plan. They socialized with Ms. Pontbriant, drank beer with her, then appellant got on the telephone with her to argue with people who knew him. The behavior of both defendants 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. (R.T. 7593-7594.) Contrary to the prosecution's arguments, however, 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

[47] Ms. Coronado testified that during the phone conversations she kept hanging up, and Ms. Pontbriant and appellant kept calling back and "threatening." Appellant "wanted to meet Ed in the street and beat him up and stuff. And I got kind of mad." (39 R.T. 5598.) Ms. Coronado then got on the phone and told appellant not to call anymore. She told him that Ed did not have his tools and to just leave them alone. Appellant purportedly replied, "Shut up, you loud-mouth bitch, before I stick my dick in your mouth." Ms. Coronado responded that if he did, "he wouldn't see daylight." (*Ibid.*) Ms. Coronado then hung up the telephone and unplugged it. (39 R.T. 5599.)

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 Ms. Pontbriant's house at the time the defendants were stopped by Officer Wightman in Ms. Pontbriant's car.[48] If either of these crimes were planned, why did the defendants let Ms. Pontbriant telephone Ed Burdette 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 appellant nor Mr. Tobin 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). (46 R.T. 6897-6900.) Certainly 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.

The circumstances of the murder do not suggest that a rape, robbery or murder was planned, but rather that a murder was

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[48] Appellant sets forth in detail *infra* why the evidence was also insufficient to sustain appellant's robbery conviction. (See Argument V, infra)

unexpectedly committed by someone in a state of rage. Ms. Mayberry provided testimony about Mr. Tobin's prowess in karate by claiming that he was proficient at roundhouse kicks, which supported the prosecution's claim that Mr. Tobin kicked Ivon Pontbriant in the face prior to the murder. (38 R.T. 5425-5426.) The one scenario which fits all the known facts in this case is that whatever the cause, Mr. Tobin's anger 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 Tobin in attempting to rape Ms. Pontbriant. Therefore, this court must reverse appellant's conviction of attempted rape and the attempted rape-murder special circumstance finding against appellant.

Additionally, Individual Factors Such as Partial Nudity are Insufficient to Prove Attempted Rape Beyond a Reasonable Doubt

This court has not sustained a rape or attempted rape conviction based solely on the fact that a deceased 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].)[49]

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[49] By way of comparison, even when merely "slight" corroboration is necessary to comply with the corpus delicti rule, evidence of the nude body of a deceased found in a remote rural area was described by this Court as "thin" corroborating evidence for the charge of rape. (*People v. Jennings* (1991) 53 Cal.3d 334, 369.)

Additionally, the position of the body in this case does not correspond with that of a typical sexual attack. For example, in *People v. Chambers* (1982) 136 Cal.App.3d 444, the deceased 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 by comparison, Ms. Pontbriant was found lying face down with her legs 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. Moreover, although Ms. Pontbriant's clothes had been removed, they were not found in a jumble, partly on the body and partly off, as in *Chambers*. They were placed in a pile some distance from her body. Moreover, her bra was not pushed up above the breasts, another indication that this was not a forced sexual assault.

Additionally, the injuries Ms. Pontbriant received do not suggest a sexual attack. There is no showing of any bruising of the genitalia. (34 R.T. 4935.) Further, the major wound to her neck was inflicted from the rear and its nature does not suggest any sexual motivation or sexual orientation. (34 R.T. 4902-4903.)

While there were hairs found on Ms. Pontbriant's chest that were "possibly" fringe pubic hairs, FBI hair expert Malone stated that these hairs did not possess sufficiently unique characteristics to permit them to be matched to anyone. Indeed, he could not even say with any degree of certainty that they were in fact fringe pubic hairs.

(41 R.T. 5967, 5970.) He also found an animal hair on her breast. (41 R.T. 5969-5970.)

Further, even if the jury could fairly infer that sexual activity occurred, there is no evidence that it was forcible. The evidence from Ms. Pontbriant's telephone call with Flourene Gentry showed that Ms. Pontbriant was pleased that appellant came to visit her. (39 R.T. 5532-5533.) Moreover, her blood alcohol level of .29[50] and the number of beer containers found at the scene shows that a long evening of drinking by all parties preceded the homicide. (34 R.T. 4938.)

In short, nothing in the circumstances of Ms. Pontbriant's nudity or the positioning of the body suggests attempted forcible sexual activity. As an appellate court pointed out more than three decades ago in *People v. Bamber* (1968) 264 Cal.App.2d 625, 631:

> "'While the fact that an accused has an opportunity to commit the crime with which he is charged may be a circumstance from which guilt may be conjectured, it is nevertheless an established precept of law that an incriminating circumstance from which guilt may be inferred must not rest on conjecture. And by the same rule it is not permitted to pile conjecture on conjecture. [Citation.] That the circumstances were suspicious may be conceded, but mere surmise and conjecture are not enough.'"

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50 Defense toxicologist 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. (45 R.T. 6766-6768.)

The Blood Stain Evidence Did Not Support a Finding of Attempted Rape

The blood stain found on Ms. Pontbriant's sweater was as consistent with Ms. Pontbriant's blood as with appellant's. (41 R.T. 5884.) Moreover, because the blood stain was pretty much "insoluble" during testing, the prosecution expert, Mr. Andres determined that it was probably "an aged or degraded specimen." (41 R.T. 5884.) Thus he did not even try to do a PGM typing test to determine more accurately who might have been the actual source of the blood. (41 R.T. 5884-5885.) Given the specimen's insolubility, however, it is unlikely that it was deposited on the sweater on the night of the homicide. Even if it was, the violent circumstances of Ms. Pontbriant's death make it more likely that the blood belonged to her rather than appellant.

With regard to the blood on the pillowcase and doily found in the bedroom as well as the blood on the rag found in Ms. Pontbriant's car, the testing on those items showed a blood type that was just as consistent with Mr. Gilliland as it was with Mr. Tobin. (41 R.T. 5824-5825.) Since Mr. Gilliland lived in the house, the blood on the pillowcase and the doily could easily have been his. Further, if the blood on either of these items was Tobin's blood, it likely resulted from his being cut during his lethal knife attack on Pontbriant in Pontbriant's living room. The fact that his blood appeared on items found in any other part of Pontbriant's residence (including the bedroom), doesn't suggest that it was shed during an attempted rape or that such a crime was ever committed.

The rag was apparently used to clean up AFTER the homicide. Thus, even if it could be fairly inferred that the blood on the rag came from Mr. Tobin, once again, the most likely scenario is that it resulted from a cut he received during his struggle to kill Ms. Pontbriant and then was deposited on the rag as he was cleaning up the scene. Thus, the blood smear on the rag has no bearing on whether Ms. Pontbriant was the victim of an attempted rape.

In short, the blood evidence does **not** provide support for a finding of attempted forcible rape, much less prove it beyond a reasonable doubt.

The Beer Bottle Found on the Body Did Not Prove Attempted Rape

During closing argument, the prosecutor urged that the Heineken beer bottle found lodged between Ms. Pontbriant's legs indicated that the defendants intended a sexual assault on Ms. Pontbriant. (53 RT 7585-7586; 7616.) The prosecutor reminded the jurors of Dr. Walter's testimony that feces can be released involuntarily 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 [Ms. Pontbriant's] death." (53 RT 7586.)

Significantly, however, the prosecutor's argument 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 is pure speculation.

Police technician Rains testified that the beer bottle was "securely placed between the victim's legs" (40 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. (40 RT 4951-4952.) Because Ms. Pontbriant's body was not discovered until the evening of March 2, 1988, rigor mortis had set in (see, e.g., 35 R.T. 5038), 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 in which she was found. (53 R.T. 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." (40 R.T. 5757.) Rains also stated that a portion of the bottle was underneath the victim before her body was turned over. (40 R.T. 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.*)

Thus the prosecution's own witness testified directly contrary to 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.

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.

Most importantly, however, Dr. Walter found *no evidence* either of penetration or of sexual trauma to the victim's genital area. (34 R.T. 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. (35 R.T. 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 Tobin, the trier of fact still could not reasonably infer from the location of the bottle or its condition that appellant – or codefendant Tobin – 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 Tobin 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].)[51]

The significant prejudice from prosecutor's argument here was the unwarranted attempt to inflame the jury against the defendants. Indeed, the prosecutor's argument was "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a

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[51]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).

prejudice which would preclude a fair and dispassionate consideration of the evidence." (*Quercia v. United States* (1933) 289 U.S. 466, 472.). Unfortunately, however, it was an argument that apparently succeeded.

The Hair Evidence Did Not Prove Attempted Rape

Hairs from Ms. Pontbriant were found on her buttocks, her back, and on the floor and sofa near her. All of these hairs appeared to have been removed by force. (41 R.T. 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 appellant were found on Ms. Pontbriant's chest. (RT 5967-5969.) Two other hairs found on the her chest were not suitable for comparison. The prosecution's hair expert stated 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 appellant were found on Ms. Pontbriant'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 appellant's hair, and several hairs inside a cap located in Ms. Pontbriant's car also matched his hair. (RT 5970-5972.) This latter evidence might prove that appellant left a cap in Ms. Pontbriant's bedroom, and left another cap inside Ms. Pontbriant's car. But appellant had been to Ms. Pontbriant's home many times, not just the night she died. Moreover, Jeannette Mayberry testified that appellant

had driven Ms. Pontbriant's car on previous occasions. (RT 5408-5409.) These facts obviously were not in dispute, and just as obviously, they did not prove that appellant or Mr. Tobin attempted to rape Ms. Pontbriant.

Certainly, no evidence showed that anyone attempted to rape Ms. Pontbriant in her car. Further, there was no evidence that anyone attempted to rape Ms. Pontbriant in the bedroom.[52]

The most significant hair evidence was the hairs found on Ms. Pontbriant's chest that matched appellant. As explained previously, however, not only don't these hairs support an inference that appellant murdered Ms. Pontbriant, but they certainly don't tell the jury that appellant or Mr. Tobin intended to rape her. These hairs were clearly transferred to Ms. Pontbriant's chest from the carpet where she fell, along with the animal hair that was also found on her chest.

Additionally, the two possible "fringe hairs" found on Ms. Pontbriant's body are not probative of anything. Agent Malone testified that these hairs were unsuitable for comparison and could not include or exclude anyone. (41 R.T. 5967.)

Finally, the fact that hair found near or on Ms. Pontbriant's body was forcibly removed was not evidence that a *sexual* attack occurred either prior to her murder or that sex was a motive for her

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[52] There was a purported semen stain which investigators located in the bedroom carpet two months after the murder. Nonetheless, to the extent that it was relevant at all, that stain pertained solely to Mr. Tobin. Moreover, for the reasons explained below, the purported semen stain was not probative of any issue in this case.

murder. Although this evidence permits an inference that Ms. Pontbriant resisted an assault that culminated in her death, it does not support an inference that appellant or codefendant Tobin intended to rape her as well.

The Semen Stain in the Bedroom Carpet Did Not Prove Attempted Rape

In her closing argument, the prosecution argued that codefendant Tobin's semen was found in a stain on the bedroom carpet. She urged that this stain, together with the other blood evidence found in the bedroom proved that Mr. Tobin "was in the bedroom perpetrating robbery, burglary and what appears to be very definitely attempted rape." (53 R.T. 7560-7561; see also, 54 R.T. 7806.)

The semen evidence, however, was neither reliable nor probative. Police technician Rains did not collect the two carpet samples from Ms. Pontbriant's bedroom until May 5, 1988, more than two months after the murder. The evidence shows that Mr. Rains and another technician went to Ms. Pontbriant'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.[53] 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

[53] Apparently, the owner or the property manager had the house cleaned subsequent to the initial police investigation.(40 R.T. 5721.)

possibility that the carpet sections contained semen. (40 R.T. 5721-5722.) However, they did not collect any other areas of the carpet to serve as controls for testing purposes, 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. (40 R.T. 5724)

A year later, Mr. Andres tested the carpet fibers which Rains collected. (41 R.T. 5872-5874.) The carpet fibers from one of the two carpet sections contained no material of evidentiary value. (41 R.T. 5875.) Andres located semen on the carpet fibers from the second carpet section. (41 R.T. 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. (41 R.T. 5876-5879.) Reasons for these negative results included "the age of the specimen" and the "lack of sufficient sample." (41 R.T. 5875.)

Andres was also unable to date the semen stain. (41 R.T. 5880.) 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. In this regard, after March 2, 1988, Warren Gilliland and a friend, James Wright, lived in the Jacob Street house for at least a couple of days. (43 R.T. 6355-6356 [James Wright].)[54] Mr. Wright might well

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[54] Warren Gilliland stayed at the house longer than just a day or so. Although he testified that he moved after Ms. Pontbriant's death (37 R.T. 5229), nonetheless, he also testified that he had a conversation with Detective Logan at the North Jacob Street house.

have been the source of the semen stain. (37 R.T. 5523-5524.) 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". (37 R.T. 5287.)

Given these facts, the prosecution expert, Mr. Andres could not say *when* the semen was deposited in the carpet. The most that Mr. Andres 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." (41 R.T. 5879.)

Significantly, Mr. Andres's testimony on whether the semen could be identified as coming from a secretor or a non-secretor was hedged so significantly that there is no solid basis to conclude that the semen found in the bedroom carpet came from a secretor (which would have made it consistent with Mr. Tobin).

The semen also could have been deposited in the carpet *before* Warren Gilliland and Ivon Pontbriant ever moved into the house. In fact, Mr. Andres admitted, it could have been deposited even years before the time of testing. (40 R.T. 5726, 41 R.T. 5880.) This last possibility was all the more likely, given that all the testing Andres performed on the carpet fibers for identifying markers yielded only negative or inconclusive results. PGM markers deteriorate over time. (41 R.T. 5885, 5899-5900.)

Because the testing of the semen for sub-typing markers was

(37 R.T. 5225, 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. (45 R.T. 6649-6650.) So Mr. Gilliland apparently lived at the North Jacob Street house from March 4, 1988 through at least March 11, 1988.

negative, and Mr. Andres 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 either defendant.

Further, in addition to stating as his professional opinion that his testing of the sperm for secretor/non-secretor markers was inconclusive, Mr. Andres 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). (41 R.T. 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. (41 R.T. 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. (41 R.T. 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, Andres 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.[55]

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. Andres 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 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.

(41 R. T. 5878-5879.)

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[55] Compare *People v. Alvarez* (1975) 44 Cal.App.3d 375, 380. In *Alvarez,* a prosecution criminalist testified 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. He noted that the contamination would have come from many sources including, (1) the panties were 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. Andres 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. (41 R.T. 5877.)

Therefore, the evidence shows unequivocally that the process by which this evidence was obtained and the results obtained by testing rendered the semen stain devoid of any evidentiary value.

However, Deputy District Attorney Reed turned Mr. Andres's testimony on its head when she argued to the jury: "Now, it is true that Mr. Andres said that he could not be for sure [sic] that there was evidence of secretion [sic] in that semen." Despite this, "Mr. Andres testified, essentially, that it gave indications of being a secretor status." (53 R.T. 7560-7561.) Therefore, Ms. Reed argued, the semen found in the bedroom was consistent only with Mr. Tobin, and inconsistent with Warren Gilliland or appellant. (53 R.T. 7560.) However, the testing conducted on the semen did not support the prosecution's argument.

Even assuming arguendo that the antigenic activity detected in the semen specimen could actually link the specimen to a secretor, all this means is that Mr. Tobin could not be excluded as the donor. Secretor/non-secretor status is not a very discriminating marker, however. Indeed, the prosecution failed to present any testimony regarding the relative percentages of secretors and non-secretors in the general population. Since this marker discriminates between only two possibilities, secretors must make up a huge percentage of the population.[56] This fact might not have been significant if the carpet stain could have been dated. As the testimony of Mr. Andres made abundantly clear, however, it could not.

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[56] Actually, 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. The police did not find semen anywhere in the living room. Obviously, the semen located on the bedroom floor was an isolated phenomenon. Certainly, a great deal of blood as well as other evidence relating to the murder was located throughout the living room. Nevertheless, 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 Ms. Pontbriant 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 Ms. Pontbriant started or finished in the bedroom. More than likely, it was blood deposited by Mr. Gilliland as a result of his hemorrhoids (36 R.T. 5185) or some other minor scrapes or cut.

By way of comparison, although the wounds inflicted on Ms. Pontbriant produced a large amount of blood and blood splattering, no blood belonging to Ms. Pontbriant was found in the bedroom. Moreover, all of Ms. Pontbriant'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. (40 R.T. 5739-

5740.) There were feces on Ms. Pontbriant's jeans, on her panties, and on her legs. (RT 5623, 5661.) There were 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. Therefore, 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.

For these reasons, the semen evidence, either considered alone or in combination with Ms. Pontbriant's nakedness, the blood evidence, the hair evidence, and the beer bottle between Ms. Pontbriant's legs did not establish that either defendant attempted to rape her before she was murdered.

Mr. Tobin's Testimony Concerning Consensual Sexual Activity Did Not Show Attempted Rape[57]

The prosecutor also argued that Mr. Tobin's testimony that appellant engaged in sexual activity with Ms. Pontbriant before Mr. Tobin left her house provided grounds for the jury to infer that an attempted rape occurred. (53 R.T. 7566, 7586.) Significantly, however, Mr. Tobin specifically testified that the sexual activity he observed was consensual; that Ms. Pontbriant and appellant were

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[57] While Mr. Tobin's testimony has little probative significance on the issue of whether an attempted rape occurred, it should be borne in mind that his testimony was not part of the prosecution's evidence, and hence cannot be considered at all in evaluating the sufficiency of the evidence to sustain the attempted rape and attempted rape special circumstance allegations against the section 1118.1 motion to strike made by appellant at the close of the prosecution case-in-chief. (*People v. Trevino* (1985) 39 Cal.3d 667, 695; *People v. Belton* (1979) 23 Cal.3d 516, 519-523; *People v. Camp* (1980) 104 Cal.App.3d 244, 247.)

sitting on the couch with their arms around each other, and then started kissing. Mr. Tobin therefore felt it was time for him to leave. (46 R.T. 6859, 6971.) This testimony simply does not support an inference that either appellant or codefendant Tobin attempted to rape Ms. Pontbriant. This is particularly true since there was no clear physical evidence supporting the prosecution's claim of attempted rape.

Nevertheless, the prosecutor attempted to discredit Mr. Tobin's testimony on the point throughout her cross-examination of him and again in her closing argument. (See, e.g., 46 R.T. 6965, 6971-6972, 53 R.T. 7562-7565, 7785-7794.) Noteworthy in this regard, the prosecution urged the jury to accept Mr. Tobin's assertion of the likelihood of sexual activity, but reject his testimony that it was consensual. Yet, absent Mr. Tobin's testimony on the point, there is little physical evidence that would support a jury finding of any sexual activity at all. The physical evidence shows a violent struggle, not attempted rape. Essentially therefore, the prosecution urged the jury to make what amounted to an unexplained rejection of part of Mr. Tobin's testimony so that the rest of his testimony would fit the prosecution's theory. Such a quixotic assertion hardly supports the proof beyond a reasonable doubt standard .

The Condition of Ms. Pontbriant's Clothing Did Not Prove an Attempted Rape

Finally, the prosecution urged that because Ms. Pontbriant did not remove her clothes voluntarily, there must have been an attempted rape. In support of her argument, the prosecutor noted that Ms. Pontbriant's sweater was cut, the legs of her jeans were inside out

with her underwear wrapped inside the pants, and all of her clothes were in a pile about four feet away from her body. (53 R.T. 7585.)

It is certainly true that the condition and position of a deceased's clothing could 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 decedent's pants and underpants were removed from one leg and bunched up around the foot of the other leg. (*People v. Chambers, supra*, 136 Cal.App.3d at 454.) Here, however, Ms. Pontbriant's clothing was found stacked in a pile several feet away from the body. (39 R.T. 5661.) While the condition of the clothing and the feces on some of the garments did suggest Ms. Pontbriant removed the garments hurriedly, the stacking of the jeans and panties suggested that she removed them methodically and laid them down one on top of the other.

Additionally, although Ms. Pontbriant's sweater appeared to have been ripped or cut at the neck (39 R.T. 5662), this hardly constituted evidence proving beyond a reasonable doubt that Ms. Pontbriant was sexually assaulted or that sex was the motive for the murder. This failure is particularly apparent when other more direct evidence of sexual assault was conspicuously absent.

Given these circumstances, the evidence of sexual assault was insufficient to support an inference of attempted rape. Indeed, 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 before soiling herself. Moreover, there is a distinct possibility that the sole reason she took off her clothes was because she defecated on them.

Even assuming arguendo that the removal of the clothing constituted at least some evidence that one of the defendants intended to commit a sexual act with Ms. Pontbriant, there was no evidence suggesting that the assailant specifically intended to commit the crime of rape as opposed to any other sexual offense. Nevertheless, in order to sustain a conviction, the prosecution had to present evidence proving beyond a reasonable doubt that the defendant had the specific intent to commit the specific crime. (*People v. Raley, supra,* 2 Cal.4th at pp. 890-891.)

In sum, although the condition of the clothes may have raised suspicion that a sexual attack was attempted or intended, suspicion is not enough. Even considered as a whole, Ms. Pontbriant's nakedness, the "clothes" evidence, the blood evidence, the hair evidence, the beer bottle and the semen evidence was insufficient to support a finding *beyond a reasonable doubt* that either defendant specifically intended to rape Ms. Pontbriant.

Because the Evidence Was Insufficient to Convict Appellant of Attempted Rape, His Murder Conviction and 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." (53 R.T. 7585.) The prosecutor invited the

jury to base a finding of felony murder on the attempted rape evidence. (53 R.T. 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.[58]

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 *Clemens v. Mississippi* (1990) 494 U.S. 738, 751-753.)

It is probable that the invalid attempted rape conviction and special circumstance finding affected the penalty determination. For example, in the penalty phase, speaking of Ms. Pontbriant, the prosecutor argued that this was a case "where two macho men rip off her clothes, and rip out her hair." (67 R.T. 9690.) According to the prosecutor, the stab wounds to the neck were evidence that Ms. Pontbriant 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." (67 R.T. 9691.)

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[58]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, a matter discussed in greater detail *infra* in Argument XI.

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. Moreover, 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.

Even If the Evidence Was Sufficient to Support a Conviction of Attempted Rape in a Noncapital Context, it Was Not Sufficient to Uphold a Conviction of Capital Murder [First Degree Murder plus Special Circumstances] or a Sentence of Death, Particularly in Light of the Need for Heightened Reliability to Support a Capital Conviction and 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 non capital guilt verdict on appeal is insufficient to also uphold a conviction of capital murder and 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 capital murder conviction and 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 appellant's murder conviction, the attempted rape special circumstance finding or the sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant

Tobin's argument IV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of either the sex offense or the homicide.

V.

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

Introduction

The defendants were known to have transitory possession of some of decedent's property, but not property normally taken in a robbery. Property that would be normally stolen in a robbery was left behind. Further, testimony that the defendants were aware that prior to her death, Ms. Pontbriant had $340-$350 in her possession was completely refuted by undisputed evidence showing that the decedent had no such sum. Given this paucity of evidence, the robbery and the robbery murder special circumstance cannot stand.

Summary of Argument

The prosecution pursued the robbery and robbery murder special circumstance charges on three theories. First, the defendants murdered Ms. Pontbriant to steal her car and use it to relocate to Iowa where work might be more plentiful. Second, they murdered her in order to take rent money that was purportedly in her purse. Third, the defendants did both. None of these theories has support in the evidence.

Law enforcement testimony showed that the defendants were riding in Ms. Pontbriant's car subsequent to her demise. Any inference that she was murdered in order to gain possession of the car, however, was contradicted by the evidence. If the purpose of getting the car was to go to Iowa, killing Ms. Pontbriant to get it was

a highly risky venture, particularly under the circumstances of this case. On the evening of the homicide, the defendants first went to a bar for a few hours and then went to Ms. Pontbriant's house. Once there, the defendants spent most of the evening drinking with Ms. Pontbriant. Moreover, during the course of the evening, appellant and Ms. Pontbriant had been involved in heated exchanges on the telephone with people who knew appellant. Thus, if the defendants intended to kill Ms. Pontbriant to steal her car, they certainly made it easy for law enforcement to discover their identities.

Additionally, after the car was taken from the residence, there was no evidence showing that the defendants intended to use it as transportation for their relocation to Iowa. Items owned by the defendants that could be sold were placed in the trunk, but most of the defendants' personal possessions that normally would be transported in any relocation were left behind.

Most importantly, however, if a vehicle was so critical to the defendants' plans for relocation that they were willing to commit murder to get it, why did they not steal another after they were released by the police or why did they not simply recover the same vehicle after the police left the area? Certainly there was nothing preventing them from doing either. Additionally, since Ms. Pontbriant was so very drunk, why wouldn't the defendants eliminate the risk altogether and simply wait until she passed out and take the keys? Given the state of the prosecution evidence, the only reasonable conclusion is that taking the vehicle was an afterthought rather than a means of executing a preconceived relocation plan.

The evidentiary support for the purported theft of property and cash is even more tenuous. Earl Bothwell testified that the defendants admitted to him that they killed Ms. Pontbriant and took some of her property. At the time of his testimony, Mr. Bothwell was serving a prison sentence on an unrelated charge, but nonetheless denied that he expected any benefit from testifying for the prosecution in a capital case. Moreover, the evidence shows that at the time the defendants' admissions were purportedly made to Mr. Bothwell in his motel room, appellant was employed full time as an electrical contractor and was at work, while codefendant Tobin was in another town painting a house. Additionally, when the defendants were arrested, Mr. Bothwell had the opportunity to tell the police about these purported admissions to robbery and murder, yet he failed to do so. The first time he even mentioned these matters was when he made contact with law enforcement after he was imprisoned on an unrelated offense. Further, the defendants' purported admissions concerning stolen property do not correspond to any property found missing from Ms. Pontbriant. Rather, they correspond fairly closely to property the police found and inventoried at Ms. Pontbriant's home.

Finally, under no circumstances could a rational trier of fact conclude that the defendants stole any rent money from Ms. Pontbriant. The sole basis for concluding that Ms. Pontbriant was missing any rent money was the testimony of Mr. Gilliland. Mr. Gilliland testified that several days before the homicide, the defendants saw him give $340-$350 to Ms. Pontbriant for the house rent. Moreover, at that time, according to Mr. Gilliland, he told the

defendants that he was leaving for Modesto. Allegedly this took place in Ms. Pontbriant's home.

The evidence, however, does not support Mr. Gilliland's tale in ANY particular. At the outset, it is important to note that Mr. Gilliland was an alcoholic and was inebriated on virtually every occasion he spoke with the police about this incident. He provided police with multiple dates on which this alleged transfer of funds took place, and on each of those dates, the defendants were undeniably elsewhere. Moreover, when queried about the source for the funds he purportedly gave to Ms. Pontbriant, every single source cited by Mr. Gilliland was unequivocally repudiated by incontrovertible evidence.

Additionally, neither Ms. Pontbriant nor the defendants was aware that Mr. Gilliland was going to Modesto and would not be at the residence on the night of the homicide. In fact, on the night of the homicide, appellant and Ms. Pontbriant accused Mr. Bourdette of harboring Mr. Gilliland in Visalia. Further, Mr. Gilliland's ex-wife, with whom he was staying, testified that it wasn't until the evening before he left that Mr. Gilliland even called to ask if he could stay at her house in Modesto.

Further, the evidence presented by Mr. Gilliland was so inherently incredible, so completely contrary to the facts and so inconsistent with the previous stories he told law enforcement, that his presentation as a witness at least bordered on the knowing or reckless use of false testimony.

In any event, given the evidence in this case, no rational trier of fact could reasonably infer that either defendant intended to rob Ms.

Pontbriant of any rent money at the time of her death.

Elements of Robbery and Of a Robbery-Murder Special Circumstance

Robbery is defined 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." (Penal Code section 211) 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 constitutes at most 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* (1980) 27 Cal.3d 1, 52-54.)

A robbery-murder 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.)

Standard of Review

As explained in the previous argument, 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; *In Re Winship* (1970) 397 U.S. at 364; *Beck v. Alabama, supra,* 447 U.S. at 637-638; *People v. Marshall, supra,* 15 Cal.4th at 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, supra,* 15 Cal.4th 619, 667; see also, *Jackson* v. *Virginia, supra,* 443 U.S. at pp. 318-319 [The relevant question 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].) To satisfy this due process standard, applicable to all criminal convictions, there must be evidence of "solid value" that reasonably supports an inference of guilt. (*People* v. *Johnson, supra,* 26 Cal.3d at p. 562.)

Further, because the robbery finding served as the basis for appellant's conviction of capital murder and death sentence, the evidence in support of the robbery conviction and robbery special

circumstance finding must also satisfy the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. 637-638.)

The Evidence Is Insufficient to Show That the Defendants Had an Intent to Take Ms. Pontbriant's Property Before Her Death

The prosecution failed to present any credible evidence that Ms. Pontbriant was murdered in order to take property from her, or that any of the force or violence inflicted upon her was motivated by a larcenous intent. The crime scene evidence showed that various types of property that are typically the objects of a robbery were *not* taken. The decedent's television, VCR, cable TV converter, and stereo, as well as her personal jewelry (both jewelry inside jewelry boxes and jewelry worn by Ms. Pontbriant) were not taken from the house. (45 R.T. 6675-6676 [Detective Logan]; 39 R.T. 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. (45 R.T. 6676, 7148 [Logan]; 39 R.T. 5664, 5731-5732 [Rains].)[59] A small amount of money also remained

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[59] At 40 R.T. 6676, Logan stated that he did not know if there were any coins inside the slot machine bank, but at 49 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, appellant's attorney, James Wainwright, estimated that $25 to $30 in quarters was visible in the "bank." Mr. 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. (39 R.T.

sitting on top of a dresser in the bedroom. (39 R.T. 5688-5689.)

A larger amount of money remained in the bottom of Ms. Pontbriant's purse, which, along with her second purse remained in the house. (40 R.T. 5783-5784, 5896 [Logan]; 39 R.T. 5676-5677 [Rains].) Detective Logan counted out $18.29 in bills and coins. (40 R.T. 5787.)[60] Also still in Ms. Pontbriant's purse was her ATM card, together with a piece of paper with her ATM card PIN number written on it. (39 R.T. 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 her car, they found property belonging to appellant or to codefendant Tobin (39 R.T. 5710, 5714-5718), and a tool chest belonging to Ms. Pontbriant (the initials "IUP" were on the outside) (39 R.T. 5715.) The prosecution did not claim the tool chest had been taken from inside the house. The property belonging to codefendant Tobin included a shotgun inside a shotgun case and a Japanese ornamental sword. (39 R.T. 5718.)

Appellant and codefendant Tobin had access to the Murray Street apartment where appellant was living on the night of the murder. Mr. Tobin also had access to Jeannette Mayberry's

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5664.)

[60] 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. (39 R.T. 5745-5746.)

apartment. However, no property belonging to Ms. Pontbriant or to Warren Gilliland was found inside the Murray Street apartment (43 R.T. 6291-6292), or inside Jeannette Mayberry's apartment. (43 R.T. 6288.)

No rational trier of fact could find appellant or codefendant Tobin 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, i.e. Gilliland's alleged rent contribution, may have been taken - a matter addressed below - the evidence of theft was so incredible that it fell well below the "solid value" standard. Nothing was taken on the night of March 1, 1988, belonging to Ms. Pontbriant except her car and the keys to that car. Further, no property from the house wound up inside the car, inside the apartment on Murray Street, or inside Jeannette Mayberry's apartment.

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 decedent's house and placed inside the decedent'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 decedent's house, and the only property found inside the car which could easily be resold (i.e., the shotgun) belonged not to Ms.

Pontbriant, but to Mr. Tobin.[61]

The only evidence which conceivably was relevant to an inference that Ms. Pontbriant's car itself was the object of the robbery (rather than having been taken as an afterthought) consisted of the facts that: (a) a police officer stopped appellant and Mr. Tobin in the car shortly after midnight on March 2,1988 (42 R.T. 6138-6140, 6148-6149); (b) prior to the evening of the murder appellant, and Mr. Tobin discussed leaving Visalia to go to Iowa (46 R.T. 6844-6845, 6919 [Mr. Tobin]; 45 R.T. 6778 [Mr. Tobin's mother]; 45 R.T. 6630-6632 [Burt Arnold][62]; and (c) appellant and Mr. Tobin in fact traveled to Iowa, starting their travel early on the morning of March 2, 1988. (46 R.T. 6873-6876 [Mr. Tobin].)

Without more, this evidence provided no real basis to conclude that codefendant Mr. Tobin 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 the defendants did not go to Iowa in Ms. Pontbriant's car. Certainly there was no basis for finding beyond a reasonable doubt that either defendant had planned to take the car prior to the homicide, rather than just taking the car as an afterthought, perhaps to flee the scene,

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[61] Even in *Turner, supra,* the robbery-murder theory was supported by significant additional evidence, such as the victim's and the telephone cords 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, both Ms Pontbriant and appellant used her telephone to make outside calls prior to her murder.

[62]Actually, Arnold testified that he remembered appellant and Mr. Tobin talking about going to Oklahoma where appellant had relatives.

after an angry, drunken, lethal assault triggered by something unrelated to Ms. Pontbriant's car.

In addition, an inference that appellant and Mr. Tobin planned to steal Ms. Pontbriant's car so they could drive it to Iowa was implausible in light of the following facts:

(1) The defendants stopped at the Murray Street apartment or at Jeannette Mayberry's apartment, or at both apartments while in possession of the car. Mr. Tobin put his shotgun and ornamental sword into the car trunk, and appellant put a bag containing hair products, plus a laundry basket of clothes, a tool box and a few other miscellaneous possessions into the car trunk (40 R.T. 5714-5718 [Rains]; 46 R.T. 6862-6864 [Tobin]; 38 R.T. 5438-5439 [Mayberry]), but neither defendant packed up any other belongings like warm clothing and put *those* possessions into the car.[63]

(2) Officer Wightman ordered the defendants to lock the car and leave it on the side of Highway 198. Even though they had the opportunity to do so after waiting for Officer Wightman to leave, the defendants did not thereafter return to the car, unlock it and drive it away. Instead, they abandoned the car. This evidence directly contradicted any inference that taking the car was important enough to murder Ms. Pontbriant to get it.

(3) 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.

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[63] Mr. Tobin had clothes and personal possessions at Ms. Mayberry's apartment. (46 R.T. 6945-6946 [Tobin]; 43 R.T. 6288 [Logan].) Both defendants had clothes and possessions at the Murray Street apartment. (43 R.T. 6290-6293 [Logan]; 38 R.T. 5465-5466 [Mayberry].)

Murder would be an extravagant and risky criminal enterprise simply to obtain a car that might be more easily obtained in other ways. Moreover, if the object was to steal Ms. Pontbriant's car, the defendants would not have sat around for two hours or more inside the house drinking beer with Ms. Pontbriant and then killed her. 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.[64]

(4) The prosecution offered no evidence that either defendant had been charged with any kind of crimes, was about to be arrested for any crimes committed before the evening of the homicide or was facing some other sort of personal danger if he remained in Visalia. Thus, there were no external circumstances which might explain a purported need to steal a car that very night, in order to leave Visalia quickly. Therefore, the prosecution offered no evidence to support the inference that either defendant had a reason to be desperate to leave Visalia that very evening. To the contrary, the evidence shows that neither defendant was in a hurry to leave Visalia that evening. What the evidence shows is that the defendants spent the early evening at a bar (46 R.T. 6847, 6951-6952 [Tobin]; 39 R.T. 5492-5494 [Marilyn Reid]), then spent two or more hours at Ms. Pontbriant's home, then drove around Visalia to pick up Mr. Tobin's shotgun and sword, plus some of appellant's possessions, but they did not pack up their belongings nor drive out of town.

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[64] Ms. Pontbriant's blood/alcohol level at the time of her autopsy was .29 percent. (34 R.T. 4938.)

(5) The prosecution offered no evidence that after leaving Visalia, either appellant or codefendant Tobin stole or attempted to steal another car in order to get to Council Bluffs, Iowa. According to Mr. Tobin, after sleeping in the vacant house on Crenshaw (46 R.T. 6872-6874), they 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 in winter weather. (46 R.T. 6876-6878.) Whether or not Mr. Tobin's description of the travel is accepted, that the defendants were able to get to Iowa without stealing a car contradicts the inference that they intended to steal Ivon Pontbriant's car in order to get there.

(6) As described in detail in the previous argument, Ms. Pontbriant, subsequently joined by appellant, 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. (39 R.T. 5566-5573, 5580-5581.) The exchanges on the telephone grew heated. Both Ms. Pontbriant and appellant accused Bourdette of helping Warren Gilliland move things out of the house on North Jacob Street and of harboring Gilliland. (39 R.T. 5567-5573.) During these angry conversations, appellant was seeking information on where Gilliland was and where appellant's tools were. (RT 5583-5584.) 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 evidence certainly contradicted the prosecution theory that the defendants came to Ms. Pontbriant's house on March 1, 1988, knowing that Gilliland was out of town. (53 R.T. 7542-7543

[prosecutor's closing argument].)

No rational trier of fact could conclude that either defendant had planned to steal Ms. Pontbriant's car, or anything else for that matter. The evidence was uncontradicted that (a) the defendants allowed Ms. Pontbriant to telephone Ed Bourdette several times; (b) appellant got on the telephone to talk with Bourdette who would recognize his voice because Bourdette had met appellant on three to five previous occasions (39 R.T. 5559-5560); (c) appellant told Bourdette he wanted his tools back, thus in no uncertain terms identifying himself to Bourdette; and (d) appellant apparently 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 speaking in an obscene manner to Bourdette's girlfriend, Kathy Coronado. (39 R.T. 5571-5572, 5598.) If the defendants had any plan to steal Ms. Pontbriant's car, it is hard to imagine that either one would have let Ms. Pontbriant initiate this series of phone calls, or become involved in the heated exchanges.

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

Further, any inference that the defendants intended to use force or fear to take Ms. Pontbriant's car in order to drive it to Iowa must

be based solely on speculation. The defendants 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. (40 R.T. 5712.)

Earl Bothwell's Testimony Was Not Sufficiently Credible to Constitute "Substantial" Evidence

Earl Bothwell testified that on March 28, 1988, appellant told him about "an incident" involving a woman in California, in which appellant purportedly took a small amount of money, about $12-14, and her car. (44 R.T. 6421.)[65] Appellant supposedly also told him that he and Mr. Tobin would have "got to Iowa in it" if they "had not been stopped by the police in Visalia." (44 R.T. 6422.) Subsequently, Mr. Tobin then came into the room and admitted that he was also 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. Mr. Tobin allegedly told Bothwell the woman "was hollering, and screaming." She "would have called the cops, or had them there." Mr. Tobin then asked Bothwell, "What would you do?" (44 R.T. 6423.)

This testimony by Bothwell did not make the evidence sufficient to support an inference that the defendants went to Ms. Pontbriant's house with a plan to steal her car, or that the car keys and

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[65]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 Mr. Tobin got into a fight. (44 R.T. 6426). Council Bluffs police were called to the Iowana Motel about 2:00 a.m. on March 29, 1988, and arrested both defendants at that location. (44 R.T. 6470-6472, 6480-6481.) Thus the admissions, if made, were made on the morning of March 28, 1988.

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. (44 R.T. 6416-6417.) He had a history of using aliases and admitted to having used at least five. (44 R.T. 6438.) He had gotten into a fight with Mr. Tobin on the evening of the day he said appellant and Mr. Tobin each made the alleged admissions to him. (44 R.T. 6434-6435.) Mr. Tobin bested him in the fight and broke four of his ribs. Nonetheless, he testified he was not angry about the matter. (44 R.T. 6458-6459.)

For the following reasons Bothwell's testimony was untenable as evidence to support a finding beyond a reasonable doubt that a robbery was committed:

(1) The amount of money Bothwell said the defendants told him they took was less than the amount that Detective Logan found *still in Ms. Pontbriant'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 simply incredible the defendants would kill Ms. Pontbriant in order to steal a small amount of money, while leaving an open, obvious and even larger amount of money behind.

(2) Neither defendant could have made any admissions to Bothwell in the Iowana Motel on the morning of March 28, 1988. At the time of trial, Mercedes Brasel was an 86-year-old woman who lived in Carter Lake, Iowa, with her elderly sister. She testified that Mr. Tobin was at *her* house on that date from early morning onward.

Further, her testimony proved that Mr. Tobin worked all that day painting her house on assignment from Bothwell. Her testimony contradicts not only Bothwell's testimony about when the defendants purportedly made their admissions, but his testimony as well that after they made their admission, he told Mr. Tobin he had no work for Mr. Tobin to perform.

With respect to appellant, Bothwell's testimony that appellant made his admission in the context of looking for work in Bothwell's employ are contradicted by Bothwell's own testimony. Appellant never worked for Bothwell and on the morning that appellant purportedly made these admission, appellant was at work with an electrical contractor.

The record reveals that Bothwell testified that appellant made his admissions sometime between 9:00 a.m and noon, in appellant's room at the Iowana Hotel. (44 R.T. 6463.) According to Bothwell, Mr. Tobin was not there because he was out buying a six-pack of beer at the store. (44 R.T. 6421.)

Bothwell testified that he sought out appellant 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. (44 R.T. 6372-6373, see also, 44 R.T. 6463.) Bothwell went to appellant's room at the motel to "find out if he [Bothwell] should let *them* go" [italics added]).

Later in his testimony, however, Bothwell admitted that appellant **never** actually worked for him. (44 R.T. 6436.) Indeed, he admitted that appellant found employment with an electrical

contractor right away after arriving in Council Bluffs. (44 R.T. 6420, 6456.) Significantly, therefore, appellant was likely at work at the time he purportedly made these admissions to Bothwell.

Additionally, after Mr. Tobin returned, and supposedly made his admissions to Bothwell, Tobin supposedly also asked about working that day. (44 R.T. 6424.) Bothwell testified he told Mr. Tobin that he had no work for him, but if he got work he would let Tobin know. Bothwell told the jury that during that conversation, he just wanted "to get away from him [Tobin]." (44 R.T. 6425.)

However, Mr. Bothwell's testimony about Mr. Tobin's alleged admissions was completely contradicted by Ms. Brasel. Ms. Brasel testified that she hired Bothwell to provide painting services, and that Mr. Tobin spent all day on March 28, 1988, painting her house. Earl Bothwell brought Tobin out to her house early in the morning and picked him up when it was "getting dusk." (51 R.T. 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.) Mr. Tobin had been coming to her house for several days to paint, and he finished the paint job that day. (51 R.T. 7444-7446.)[66]

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.) Therefore, her testimony proved that Mr. Tobin did not speak with Bothwell in the motel room he shared with appellant between 8:00 a.m. and 9:00 a.m., or between

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[66] Mr. Tobin also testified that he worked all day on March 28, 1988, painting the house in Carter Lake. (46 R.T. 6882-6883.)

9:00 a.m. and noon (the two different time frames Bothwell testified to) on March 28, 1988, as Bothwell claimed.

(3) On the night that the defendants were arrested in Council Bluffs, following the fight between Tobin and Bothwell, both Bothwell and his friend, Fred Hare, also went to the Council Bluffs police station to give statements about what had happened. According to Bothwell, Hare was present at least part of the time during which the defendants made their alleged admissions. (44 R.T. 6424.) Nonetheless, the prosecution offered no testimony by Mr. Hare. The omission is conspicuous. Clearly, Mr. Hare did not tell the Council Bluffs police that he heard any admissions by either defendant. If he had, the prosecution certainly would have called Hare as a witness or would have attempted to admit his statements to the police into evidence.

More importantly, Mr. Bothwell did not tell the Council Bluffs police about the alleged admissions either. Although Bothwell knew while he was at the police station that California murder warrants had been issued for both defendants (and that therefore both defendants would be sitting in the Council Bluffs jail until they could be returned to California) (44 R.T. 6427, 6434-6435, 6440), he said nothing to the police about any admissions by either defendant relating to the California murder. Instead, Bothwell testified that after the defendants made their admissions to him, he and Hare were "planning on going to the police about it" (44 R.T. 6425), although curiously, neither man did so when they had the opportunity.

When pressed further to explain why he did not tell the Council

Bluffs police about the alleged admissions, Bothwell lamely claimed: (a) he was afraid that appellant or Mr. Tobin 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]." (44 R.T. 6427.)

The first reason given by Bothwell can be generously described as absurd. Both defendants 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 is simply preposterous. Bothwell had numerous arrests and convictions and had served time in various state prisons. (44 R.T. 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 reasonable conclusion from Bothwell's failure to tell the Council Bluffs police about the alleged admissions was that *no admissions had been made to him.*[67]

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[67] Bothwell claimed that he *did* tell a Council Bluffs patrol officer, **about one month later**, about the alleged admissions. (44 R.T. 6427.) This allegedly occurred when the patrol officer stopped by Bothwell's room at the Iowana Motel to tell Bothwell that Letner had escaped. (44 R.T. 6427-6428, 6454.) Bothwell did not know this patrolman personally, but he knew the patrolman's father. (44 R.T. 6455.) Bothwell did not name the patrolman, and the prosecution offered no witness or any documentary evidence from 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. (44 R.T. 6454.) However, Detective Logan testified that when he went with Investigator Johnson to Iowa to bring Mr. Tobin back to California, he and Johnson attempted to locate Earl Bothwell. They went to the Iowana Motel about **2 days** after the defendants were

Bothwell clearly piled lie upon lie, and was tripped up when Ms. Brasel turned up as a defense witness. Bothwell's testimony was rife with internal inconsistencies; it was contradicted in its particulars; it was given by a person with no credibility; and it made no 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. (See, e.g., *People v. Barnes* (1986) 42 Cal.3d 284, 306 [testimony inherently incredible where physically impossible or falsity otherwise apparent without resort to inference or deduction].) 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."

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arrested. 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 the defendants, and that Johnson thereafter left Council Bluffs with Mr. Tobin. [44 R.T. 6523-6524, 6527.]) When Logan and Johnson went to Bothwell's room, Bothwell and all his belongings were gone. Fred Hare was gone too. (45 R.T. 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.

(*Ibid.*) The courtconcluded:

> 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 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 courtfound that "no reasonable trier of fact could have found her testimony credible." (*Ibid.*)

Similarly, here, Earl Bothwell did not call or contact the police about the admissions by either defendant. 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 courtacknowledged 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 precisely the situation here. This court can only conclude that Earl Bothwell had no credibility, and that his testimony provided no evidence relevant to proving that a robbery occurred.

But even if Bothwell's testimony were to be accepted as credible, it still failed to establish that either defendant actually *intended* to steal Ms. Pontbriant's car or cash before she was murdered. Bothwell testified only that appellant told him he "stole the car" and took $10-$12 in cash. Thus, Bothwell's testimony did not establish that the object of the murder was to take Ms. Pontbriant's car or cash. Absent proof that the defendants killed Ms. Pontbriant in order to obtain her car or her cash, this sequence of events could not support appellant's conviction for robbery, or the robbery-murder special circumstance finding, both of which required substantial evidence that the intent to take the Ms. Pontbriant's car arose before she was killed. None of the evidence, as described

above, supported such an inference.

The Testimony of Warren Gilliland Was So Incredible That its Presentation Bordered on the Knowing Use of False Testimony

The remaining basis for concluding that a robbery occurred was the theory that the defendants were after, and took, the $340 to $350 in cash which Warren Gilliland testified he had given to Ms. Pontbriant in the defendants' presence before leaving town early Monday morning, February 29, 1988. For a multitude of reasons - including the fact that on virtually every point at which his testimony could be independently corroborated, it was contradicted - Mr. Gilliland's testimony possessed absolutely no evidentiary value whatsoever.

The evidence shows that Warren Gilliland was perpetually drunk; that he vowed to "punish" the defendants, and, out of whole cloth he simply manufactured the "fact" that he had given Ms. Pontbriant $340-$350 in cash which she placed in her checkbook. Contrary to Mr. Gilliland's claim that he gave Ms. Pontbriant money to cover his share of the rent, the evidence showed that none of his claimed sources for the money was genuine: (1) Gilliland had not yet received the Social Security disability checks that he originally 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.[68]

The reality is that Gilliland had *no money* to give to Ms. Pontbriant, and he lied about every source he ever identified for the money. Gilliland's claim that he gave money to Ms. Pontbriant, and that this was the object of the robbery should be compared to the undisputed fact that *nothing else* was taken from the dead woman's house before she died, and the defendants were so destitute after the homicide that they tried to borrow rides, obtained a very low cost bus ticket to Reno, Nevada and then hitchhiked all the way from Reno to Council Bluffs, Iowa in virtually winter weather. (46 R.T. 6876-6878.) All the real, tangible evidence in this case pointed away from the occurrence of a robbery. Significantly, Warren Gilliland's testimony was not just unverifiable, it was flatly contradicted in all its fundamentals.

Gilliland testified that on Sunday, February 28, 1988, appellant and Mr. Tobin came over to the house on North Jacob with some Kahlua and two cartons of cigarettes. Gilliland, Ivon Pontbriant, appellant and Mr. Tobin then all sat at the kitchen table and drank coffee. (36 R.T. 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

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[68] 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. (38 R.T. 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. (46 R.T. 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. (46 R.T. 6808-6809.)

put the money in her blue checkbook which was inside her white purse. (36 R.T. 5124-5126.)

According to Gilliland's first story, he got most of this $340 from his Social Security disability check, and about $20 came from money he made selling appliances. (36 R.T. 5135-5136.) On cross-examination, Gilliland testified that after he got out of jail on December 19, 1987, his Social Security benefits were reinstated within a few weeks. (36 R.T. 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. (36 R.T. 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. (36 R.T. 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. (37 R.T. 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, ten days *after* Ms. Pontbriant had been murdered.

(38 R.T. 5360-5361.)[69]

Additionally, before trial, Gilliland told prosecution Investigator Johnson that he gave Ms. Pontbriant money on February 28, 1988, from a washer and dryer he just sold for $185. (45 R.T. 6791.) That was not true either. Sandra Saulque testified that her daughter, Kelly Saulque, paid Gilliland $185 by check for the purchase of a washer and dryer, however, the sale occurred on February 12, 1988, two weeks before 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. (49 R.T. 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.* (49 R.T. 7291; see also, 53 R.T. 7700-7701 [closing argument by Wainwright].) Thus, the evidence is incontrovertible that Mr. Gilliland gave the money to Ms. Pontbriant more than two weeks before the murder, not two days as he testified. Moreover, this money could not have been in Ms. Pontbriant's checkbook two days before the homicide [when the defendant's purportedly saw it] since it was in the bank two weeks prior to Ms.

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[69] 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. (38 R.T. 5360-5361.) She deposited the money into her own account, and never put any money into Warren's account at First Interstate Bank. (38 R.T. 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. (38 R.T. 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. (37 R.T. 5103-5104.)

Pontbriant's death.

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. (49 R.T. 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 was missing after her murder 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).[70]

In addition to lying about the key allegation that he gave money to Ms. Pontbriant on February 28, 1988, Gilliland's "facts" changed every time he spoke with a police investigator. Detective

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[70] Additionally, Bothwell testified that the defendants only admitted that they took $12-$14 from Ms. Pontbriant. (44 R.T. 6421.) Assuming arguendo that Bothwell's testimony was credible (an unwarranted assumption on the facts of this case), why would the defendants brag about taking Ms. Pontbriant's car but conceal the fact that they took several hundred dollars in rent money? The inconsistency makes no sense unless they never actually took any rent money from Ms. Pontbriant.

More importantly, Bothwell's testimony directly contradicts that of Gilliland. Since both were prosecution witnesses whose testimony was important on critical points to the prosecution's theory, the unexplained contradiction reinforces the impression that the prosecution knowingly or recklessly condoned the use of false testimony.

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, soon after Gilliland had returned to Visalia. Gilliland appeared to Logan to have "been drinking quite a bit." If Gilliland was not actually intoxicated, he was very near the point of intoxication. (45 R.T. 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. (45 R.T. 6645.) Nonetheless, 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. (45 R.T. 6695.) Logan recounted one example of the confusion which reigned when Gilliland was intoxicated: two or three times during their first conversation at 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. (45 R.T. 6694-6695.)

During this first interview, Gilliland asked Logan several times to turn the tape-recorder off. (45 R.T. 6643.) During the times that Gilliland was not being recorded, Gilliland more than once threatened to kill both defendants. (*Ibid.*)

Gilliland also told Logan that the day he left to go to Modesto

was Tuesday, March 1, 1988, and that he saw both defendants at his house around 10:00 a.m. At that time, he purportedly told appellant and Mr. Tobin that he was going to Modesto. (45 R.T. 6669, 6698-6699.)

Of critical importance, during that meeting, Gilliland said nothing to Logan about having given Ms. Pontbriant any money before he left for Modesto. Not only that, but 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. (45 R.T. 6647.) Further, Gilliland could not even provide Logan with any idea of a motive for the murder of Ms. Pontbriant. (45 R.T. 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. (45 R.T. 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. (45 R.T. 6650.) At trial, however, Warren Gilliland's son, Jerry directly contradicted this assertion. 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 resided. (45 R.T. 6727-6729.)

Four conclusions are possible here. First, Warren Gilliland

made up the claim that his toolbox was taken. Second he was confused about what was happening when Jerry Gilliland took him to the North Jacob house to get his belongings. Third, his recollection of the event was confused. Fourth, all of the foregoing 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. (45 R.T. 6650.) Gilliland then admitted, however, that Ivon did not allow him to use the car. (45 R.T. 6651.) This is but one example of Gilliland making directly contrary statements without either knowing or caring about the contradictions.

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 appellant and perhaps Mr. Tobin were present when he gave her this money. (45 R.T. 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. (45 R.T. 6670.) Later in the interview, Gilliland claimed that in addition to the $185 in cash that he gave Ivon in front of appellant, he had given her $150 in cash a few days earlier. (45 R.T. 6672.)

During the March 11 interview, Gilliland also said he saw the defendants on Monday morning (February 29, 1988). (45 R.T. 6652,

6673.) They showed up in a white Cutlass which belonged to Mr. Tobin's ex-wife. Appellant gave Warren and Ivon each a carton of cigarettes. (45 R.T. 6651.) This statement contradicted what Gilliland previously told Logan on March 4, 1988. On the prior occasion Gilliland said he saw appellant and Mr. Tobin on *Tuesday* morning, March 1. Either way, however, Gilliland still was lying or confabulating because as explained below, he left for Modesto *on the previous Sunday night.*

Jerry Gilliland testified that he picked his father up between 4:00 a.m. and 5:00 a.m. from the Capri Motel in Visalia to take him to Modesto. (45 R.T. 6709-6710.) Gilliland stayed at the Capri Motel on Sunday night, February 28, 1988 (38 R.T. 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 left Visalia). (45 R.T. 6697.) Unquestionably, therefore, the evidence shows that Gilliland could not have seen the defendants on either Monday or Tuesday morning.

Gilliland was also confused about the car used by appellant and Mr. Tobin 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. (45 R.T. 6673.) On March 4, 1988, Gilliland told Logan that they drove up in an old Dodge Dart. (45 R.T. 6671.) But on March 11, Gilliland said the car was an Oldsmobile Cutlass.

It did not require an expert witness to know that an Oldsmobile Cutlass is a very different looking car than a vintage Dodge Dart.

Even more importantly, however, neither of Gilliland's car descriptions could have been accurate, since the only car either defendant had access to at that time was the brown and white Maverick owned by Jeannette Mayberry. (46 R.T. 6831; 45 R.T. 6750 ; 38 R.T. 5409-5410.) The reason Gilliland could not accurately describe the car was because he never saw either defendant 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. (45 R.T. 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. (45 R.T. 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. (45 R.T. 6785-6786.) Despite the date discrepancies with his prior statements to Detective Logan, this new date sequence became the one Gilliland testified to at trial. Moreover, by the time of this interview, Gilliland recalled that the defendants came to the North Jacob house on *Sunday* morning, February 28, 1988. (45 R.T. 5121,

5138-5139.)

Gilliland told Johnson that about a week before Ivon's death, appellant showed up at their house with Mr. Tobin, introducing him as a cousin from Arizona. Gilliland claimed he saw Mr. Tobin a second time with appellant, when they came over to the house in a car and gave Ivon some Kahlua and two cartons of cigarettes. (45 R.T. 6787-6788.) Mr. Tobin stayed in the garage while appellant 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, Ms. Pontbriant already had $180 in her purse. (45 R.T. 6789-6790.) Of the $340 Gilliland gave to Ms. Pontbriant , Gilliland had obtained $185 the day before when he sold a washer and dryer. (45 R.T. 6791.)[71]

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. (45 R.T. 6793-6795.)

Unfortunately, Gilliland's new time frame for the alleged visit by the defendants to the North Jacob house faced another problem. A Sunday morning visit simply could **not** have happened. Jeannette Mayberry and Cheryl Williams, appellant's ex-wife, both corroborated Mr. Tobin's testimony that he and appellant went very early Sunday morning to the Visalia swap meet in Jeannette

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[71] As Sandra Saulque testified (49 R.T. 7288-7289), and Defense Exhibit D showed, Gilliland received this $185 on February 12, 1988, not February 27, as he told Johnson. Further, Ms. Pontbriant deposited this money in the bank weeks before her death. (49 R.T. 7291; see also, 53 R.T. 7700-7701.)

Mayberry's car. (46 R.T. 6824-6825.) They returned to appellant's Murray Street apartment between 7:30 a.m. and 8:30 a.m. and shortly thereafter Carmen Renteria, a friend of Cheryl Williams, told Mr. Tobin that Cheryl was outside and wanted to talk with him. (46 R.T. 6830-6832.) Mr. Tobin 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 Mr. Tobin spending time with Cheryl and Jaime, and who repeatedly tried to attack Cheryl and had to be restrained by Mr. Tobin and others. (46 R.T. 6833-6835.) Ms. Mayberry also said that appellant was present during at least part of these confrontations because he was the one who showed up at her house and told her where to find Mr. Tobin and Cheryl Williams. (38 R.T. 5414.) Obviously, appellant could not have known where Tobin and Williams were unless he spent time with them that morning. Thus, he could not have been at Ms. Pontbriant's residence as Gilliland claimed.

Ms. Mayberry corroborated Mr. Tobin's description of these events. (38 RT 5409-5415, 5461-5462, 5466-5467.) So did Cheryl Williams. (45 R.T. 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 no contact with appellant for months prior to Sunday, February 28, so she had a distinct recollection of the date and of the events of that day.

Gilliland's claim that he saw the defendants at the North Jacob

Street house on February 28 was also contradicted by his tying the date of the visit to the fact that appellant had a cut on his right wrist when he visited. During their March 11, 1988 interview, Gilliland told Logan that Ms. Pontbriant had cleaned up appellant's cut and told appellant to go to the hospital to have it taken care of. (45 R.T. 6652-6653.) Logan thereafter checked with the Kaweah Delta Hospital and confirmed that appellant had been treated in the emergency room. (45 R.T. 6653.) However, the date that appellant 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]; 48 R.T. 7256, 49 R.T. 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. (38 R.T. 5353.) Ms. Gilliland described her former husband as a "closet type drinker." (38 R.T. 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." (38 R.T. 5374.) Unfortunately, this was, most of the time,

because Warren was "always drinking." (38 R.T. 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. (38 R.T. 5370.)

Martin Danny Mendoza owned a furniture store where Warren Gilliland sometimes repaired washing machines. (45 R.T. 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." (45 R.T. 6738.)[72]

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." (45 R.T. 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. (49 R.T. 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

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[72] 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. (45 R.T. 6736-6737.) Obviously this fight could not have happened, because the defendants already left Visalia.

the remaining $50. (49 R.T. 7285-7287.)[73]

As previously explained, Warren Gilliland's general reputation for untruthfulness was borne out in his specific testimony at trial. That testimony 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.

Lies and confusion characterized Gilliland's testimony in all aspects. 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. (36 R.T. 5092-5095.) That testimony simply was not true. As described earlier, Etta Gilliland testified that it was Gilliland's alcoholism that entitled him to Social Security disability benefits. (38 R.T. 5353.)

Further, when describing Ivon Pontbriant's relationship with appellant, he initially denied that Ivon had ever said that appellant reminded her of her son. (36 R.T. 5112-5114.) After prompting from the prosecutor, however, Gilliland suddenly agreed that Ivon had said that appellant reminded her of her son. (36 R.T. 5114.)

Gilliland also testified that when the defendants came to the North Jacob house on Sunday morning, February 28, they told him that the car they came in belonged to appellant's girlfriend. (36 R.T.

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[73] 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.

5121.) But Gilliland told Detective Logan that the defendants told Gilliland the car belonged to Mr. Tobin's ex-wife. (45 R.T. 6651.)

Additionally, 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." (38 R.T. 5354-5355.) Before this telephone call, Etta received no warning that Warren intended to make a trip to Modesto. (38 R.T. 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." (38 R.T. 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. (38 R.T. 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 the night of the incident between Ivon Pontbriant and Ed Burdette and between Richard Letner and Ed Burdette. In these conversations, Ms. Pontbriant and Letner each asserted a belief that Warren was in Visalia, and was staying at Burdette's house. (39 R.T. 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. (36 R.T. 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." (45 R.T. 6712-6713.) Jerry then saw his father come out of the house, but the yelling from the woman continued. (45 R.T. 6715-6716.)

At trial, 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. (36 R.T. 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?" (36 R.T. 5190.) On cross-examination, Gilliland again denied that he had been drinking on March 4, 1988. (36 R.T. 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." (36 R.T. 5194.) But he continued to maintain that he was not under the influence of alcohol when he made his statement at the police station. (36 R.T. 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 a 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 courtfound this evidence to be "unsatisfactory," and reversed. (*Id.* at p. 672.)

Pellegrino was cited and followed in *People v. Broome* (Ill. 1970) 130 Ill.App.2d 227, 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 *Broome*, 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 appellant and Mr. Tobin 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 Burdette several times on the telephone and for good measure, appellant decided to also talk on the phone with Burdette 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 very 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. (45 R.T. 6647, 7154.) Certainly there was no basis for concluding beyond a reasonable doubt that his testimony was true

California courts have long recognized that a prosecution witness may offer testimony so uncertain, physically impossible, conflicting or inherently suspect in content that no matter how sincerely it was delivered, it would not inspire the confidence of a reasonable trier of fact. (See *People v. Lang* (1974) 11 Cal.3d 134, 139; *People v. Headlee* (1941) 18 Cal.2d 266, 267-268. ["To be improbable on its face, the evidence must assert that something has occurred that it does not seem possible could have occurred under the

circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable."] Allowing improbable testimony to infest the courtroom under the usual rubric that only the jury will assess the credibility of the witness is, as Justice Frankfurter observed: "to be ignorant as judges of what we know as men." (*Watts v. Indiana* (1949) 338 U.S. 49, 52 [93 L.Ed. 1801, 69 S.Ct. 1347].) The testimony of both Bothwell and Gilliland certainly fall within that caution here.

There is a more disturbing aspect of this prosecution, however. The testimony of Warren Gilliland is so incredible, so contradictory and so completely at variance with the facts, that the prosecution either knew or should have known that it was untrue. (See, *United States v. Agurs* (1976) 427 U.S. 97, 103 [49 L.Ed.2d 342, 349-350, 96 S.Ct. 2392][a conviction will be reversed if it was obtained by evidence that the prosecution knew or should have known was false].) Indeed, the prosecution has a basic duty to refrain from presenting testimony that it knew or should have known, was false or misleading. (*In re Jackson* (1992) 3 Cal.4th 578, 595, disapproved on a slightly different ground in *In re Sassounian* 9 Cal.4th 535, 545.)

In circumstances where a prosecutor knowingly, recklessly, or negligently uses false testimony, a Constitutional Due Process violation occurs because the reliability of the verdict is compromised. (Cf. *United States v. Duke* (8th Cir. 1995) 50 F.3d 571, 577; see also *Imbler v. Craven* (C.D.Cal.1969) 298 F.Supp. 795, 801-808, aff'd sub nom. *Imbler v. California* (9th Cir. 1970) 424 F.2d 631, cert. denied,

400 U.S. 865, [91 S. Ct. 100, 27 L. Ed. 2d 104].)

As explained above, Mr. Gilliland's stories to law enforcement were inherently inconsistent. Moreover, even when law enforcement tried to verify some of the particulars in Gilliland's tales, such as the date appellant was treated at the hospital for the cut on his hand, Gilliland was proven wrong. Additionally, even the most minimal investigation into the sources of Mr. Gilliland's funds would have showed that he had no money to give Ms. Pontbriant for the rent. Further, Jeanette Mayberry was the prosecution's own witness and she gave the lie to Gilliland's story concerning the whereabouts of the defendants on Sunday when the cash transfer to Ms. Pontbriant purportedly took place. Under these circumstances, it is hard to imagine that the state simply had no inkling that Mr. Gilliland's testimony was patently untrue.[74]

Nonetheless, even if this case does not involve the knowing or reckless use of false testimony, it certainly 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

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[74] In fact, at the preliminary hearing, the defense presented a fair amount of the impeachment evidence contradicting Mr. Gilliland's alleged sources for the money he purportedly gave to Ms. Pontbriant. (See volume 2 of the preliminary hearing transcripts at pp. 547-548) Thus, even if the prosecution's own investigation failed to turn up these problems with its robbery theory predicated on Gilliland's testimony, the People were certainly aware of these problems well before trial.

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 on Tuesday night, three days later. 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 Flourene Gentry to the market on Tuesday afternoon. (39 R.T. 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. (38 R.T. 5340.)

Therefore, in order to cover her rent check, Ms. Pontbriant could have made a bank deposit on either Monday or Tuesday of any money given her by Warren Gilliland the previous Sunday. After all, the whole reason why Gilliland gave Ms. Pontbriant the cash (assuming he gave her any cash) was to cover the rent.

Thus, the theory that appellant and Mr. Tobin took rent money from Ms. Pontbriant's checkbook rests on a foundation no firmer than rank speculation.

Additionally, 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. Nonetheless, 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. Further, Mr. Tobin had just received a severance check from his employment at Modulaire (46 R.T. 6836-6837), and he had sold items at the flea market in Visalia on Sunday, February 28, 1988. (46 R.T. 6827-6828, 6836.) Mr. Tobin testified that he purchased bus tickets for himself and appellant to Sacramento and then to Reno. (46 R.T. 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.

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 appellant and Mr. Tobin took any cash from Ms. Pontbriant's possession.

The Evidence Was Insufficient to Establish Either that Appellant Robbed Ms. Pontbriant or Aided or Abetted Codefendant Tobin

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 Mr. Tobin in robbing Ms. Pontbriant. The prosecution put forth a "guilt by association" theme that whatever criminality codefendant Tobin was involved in, appellant was also involved. That theory, however, was not supported by the evidence.

Appellant had no motive to rob Ms. Pontbriant. They were

friends, and he had been to Ms. Pontbriant's house an several occasions. Moreover, Mr. Tobin testified that appellant and Ms. Pontbriant were engaged in consensual amorous activities on the evening of her death. Further, appellant had been in a heated telephone argument with Mr. Burdette and Ms. Coronado that evening, so if he intended to rob, rape, or murder Ms. Pontbriant, his identity would be well known.

Mr. Tobin on the other hand, kept his presence at the residence concealed from Mr. Burdette and Ms. Coronado. Additionally, blood found in the residence was consistent with Mr. Tobin as if he had been injured during the struggle to subdue Ms. Pontbriant. Further, Mr. Tobin's testimony that appellant showed up after the homicide with Ms. Pontbriant's car and suggested that they load some of their possessions into the car and store them at Ms. Pontbriant's house is simply incredible, thus implying some consciousness of guilt. By contrast, the primary evidence implicating appellant was the few hairs found on Ms. Pontbriant's body in proximity to the animal hairs also found there.

On this evidence, the jury had no rational basis to conclude that appellant aided or abetted Mr. Tobin in any crime which Mr. Tobin 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, however, show that the murderer was *not* thinking rationally, and that the murder was committed by one person. That person was Christopher Tobin. Unfortunately, appellant was Mr. Tobin's friend, and took him along to Ivon Pontbriant's

house that ill-fated night. Nonetheless, the evidence was insufficient to prove that he shared Mr. Tobin's state of mind regarding either the murder or any intent to take Ms. Pontbriant's car or any money from her.

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 non capital guilt verdict on appeal is insufficient to also uphold a conviction of capital murder and sentence of death. Thus, even assuming arguendo the robbery conviction can stand, something more than the bare minimum of sufficient evidence must be required before a capital murder conviction and sentence of death can also stand. The evidence that Ms. Pontbriant was robbed was utterly equivocal. The physical evidence did not establish that any such robbery 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 a robbery was insufficient to support appellant's murder conviction, the robbery special circumstance finding or the sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument VI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

VI.

THE TRIAL COURT SHOULD HAVE STRICKEN THE BURGLARY COUNT AND THE BURGLARY SPECIAL CIRCUMSTANCE AFTER THE MAGISTRATE FOUND AN INSUFFICIENT FACTUAL BASIS FOR THE CHARGES

Introduction

If a magistrate finds an insufficient factual basis for the charges or special circumstances, that factual determination is binding on the trial court if supported by substantial evidence. Here, the magistrate found insufficient evidence to support the burglary charge and burglary special circumstance. The magistrate's finding is supported by substantial evidence, and accordingly, the trial court had no authority to reverse the magistrate's decision and allow the prosecution to reinstate these charges in superior court.

Factual Background

The criminal complaint in this case alleged, inter alia, burglary and 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 (hereafter "the magistrate").

The evidence adduced at the preliminary hearing foreshadowed the actual trial testimony and showed the following: Criminalist John Rains identified items from the crime and crime scene photos (Preliminary Hearing Transcript at pp. 20-57), including numerous beer bottles and bottle caps (Preliminary Hearing Transcript at pp. 44-

45, 56-57, see also 78-79), all of which were indicative of a considerable amount of drinking.

Jacklynn Tobin (Christopher Tobin's mother) testified that Mr. Tobin told her that he and appellant were just visiting with Ms. Pontbriant all evening and they were there drinking and talking about an upcoming trip to Iowa. (Preliminary Hearing Transcript at pp. 734-735.) Indeed, they went to Ms. Pontbiant's house simply to visit. (Preliminary Hearing Transcript at p. 735.) She also testified that it was **NOT** the defendants' intent to take Ms. Pontbriant's vehicle to Iowa nor did they go to Ms. Pontbriant's home with the intent to obtain the vehicle in order to use it to travel to Iowa. (Preliminary Hearing Transcript at pp. 736-737, 739.) Instead, they were going to use the car to take some items to a friend's house to sell in order to obtain money for the trip. (Preliminary Hearing Transcript at pp. 737-738, 743.)

The trial court also admitted People's exhibits 70-78 which were letters that appellant wrote to Danny Payne, an informant. (Preliminary Hearing Transcript at p. 988.) These letters assert that on the night of the homicide, the codefendants were simply visiting Ms Pontbriant at her invitation. The evening was spent drinking beer and conversing. The defendants wanted to borrow Ms. Pontbraint's car, but appellant told Mr. Tobin that he [Letner] had to have sex with Ms. Pontbriant before she would let him borrow her vehicle. When appellant and Ms. Pontbriant began to become intimate, Mr. Tobin went outside the house. When he returned, Ms. Pontbriant was only partially clad. Mr. Tobin was intoxicated and wanted to know if

appellant had been able to borrow the car. Ms. Pontbriant became angry and a physical confrontation ensued. Ms. Pontbriant threatend to call the police and Mr. Tobin lost control. He began to kick, strangle and stab Ms. Pontbraint and threatened to kill Mr. Letner if he interfered. Mr. Letner was very much afraid and did not prevent the killing. Afterwards, at Mr. Tobin's direction, he helped wipe up the blood and any possible fingerprints. The defendants then left the scene in Ms. Pontbriant's car and were later stopped by Officer Wightman.

On October 11, 1988, the magistrate dismissed the burglary count and the burglary special circumstance 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 Preliminary Hearing Transcript, pg. 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 Preliminary Hearing Transcript, p. 7.) He also found that there was no forced entry and that Ms. Pontbriant invited the defendants into her house. (10/11/88 Preliminary Hearing Transcript, p. 8.)

Despite the magistrate's factual findings, when the prosecution filed the information in this case on October 12, 1988, it contained both a burglary charge and a burglary special circumstance allegation. (1 C.T. 7-10.) Thereafter, on January 17, 1989, Mr. Tobin filed a Penal Code section 995 motion to dismiss, raising inter alia this issue. (1 C.T. 15-22.) Appellant joined the motion on January 26, 1989 (1 C.T. 23-24.) The prosecution opposed the motion arguing that the

magistrate's ruling was a legal conclusion rather than a factual finding and thus it was not binding on the trial court. (1 C.T. 65.) The superior court judge denied the defense motion on March 22, 1989. (1 C.T. 118, see also 1 C.T. 209)

Nature of the Findings

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. If the defense wishes to challenge the allegation further, it must file a motion pursuant to Penal Code section 995. (*People v. Encerti* (1982) 130 Cal.App.3d 791, 798.) If, the magistrate finds an allegation to be *factually untrue*, however, 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 between legal and factual findings 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 a 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 has given a consistently 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, in *Jones v. Superior Court*, *supra*, this court stated:

> 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 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.)[75]

The record is clear in this case that the magistrate determined at the end of the preliminary hearing that there was not enough evidence to support an allegation that the defendants 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. (10/11/88 Preliminary Hearing Transcript, p. 8.)[76] 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.

In this case, the magistrate determined that there was not enough evidence to show that appellants had the intent to commit a rape or a robbery either before or at the time the defendants entered

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[75]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 only where factual findings made by the magistrate are fatal to the allegation that the offense was committed. (*Id.* at p. 206, citations omitted.)

[76] The magistrate specifically stated:

" ...but I just can't find any evidence that [the defendants] entered that residence with the intent to commit a felony at the moment of entry. In other words there is no forced entry. It appears that there was a party going on and thus it would be a situation where they were invited in." (Preliminary hearing transcript of 10/11/88., p. 8.)

Ms. Pontbriant's house. 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 Tobin had an intent to commit robbery and rape when they entered Ms. Pontbriant's house, the magistrate specifically rejected this argument. Faced with evidence of a long evening of drinking and socializing at Ms. Pontbriant's house and that evidence that the codefendants entered the home with her 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." (10/11/88, Preliminary Hearing Transcript, p. 8.)

Significantly, the critical question before the superior court judge was not whether the magistrate's ruling on the burglary count and the burglary special circumstance allegation was correct, but rather, was the ruling 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 used the wrong standard. Apparently he 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 Ms. Pontbriant's home. The magistrate properly found that the decedent 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. (10/11/88, Preliminary Hearing Transcript, p. 8.) These factual findings supported by the evidence should have been upheld and the burglary charges should have been dismissed.

Remedy

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* (1980) 447 U.S. 343, 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 findings that any felonious intent was formed after the defendants entered Ms. Pontbriant's house as her invited guests.

Appellant'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* (1990) 494 U.S. 738, 751-753.)

It is probable that the invalid conviction and special circumstance finding affected the penalty determination. In the guilt phase, the prosecutor argued that the defendants entered Ms. Pontbriant's home with the intent to steal property because they needed the means to get to Iowa. (53 RT 7591-7593.) 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. (53

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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXII on this issue except to the extent that codefendant implicates Mr. Letner as the perpetrator of these offenses.

VII.

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

Introduction

The burglary count and the burglary special circumstance were predicated on the underlying felonies of rape and robbery. That is, the prosecution contended that the defendants entered Ms. Pontbriant's residence with the intent to rape or rob. As appellant explained in prior arguments, there was no proof that the defendants entertained either intent at the time of entering the residence or at any time thereafter. Absent proof of either intent at the time of entry, the jury's findings on the burglary charge and the burglary special circumstance must be reversed.

Elements of Burglary and Of a Burglary-Murder Special Circumstance

Burglary, as relevant here, is defined 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)). In this case, the felonies alleged to have been intended were attempted rape and/or robbery.

Standard of Review

As explained in the previous argument, and similarly

controlling with regard to the sufficiency of the evidence to sustain appellant's conviction of burglary and the jury's burglary-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; *In Re Winship* (1970) 397 U.S. at 364; *Beck v. Alabama, supra,* 447 U.S. at 637-638; *People v. Marshall, supra,* 15 Cal.4th at 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, supra*, 15 Cal.4th 619, 667; see also, *Jackson* v. *Virginia, supra,* 443 U.S. at pp. 318-319 [The relevant question 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].) To satisfy this due process standard, applicable to all criminal convictions, there must be evidence of "solid value" that reasonably supports an inference of guilt. (*People* v. *Johnson, supra,* 26 Cal.3d at p. 562.)

Further, because the burglary finding served as the basis for appellant's conviction of capital murder and death sentence, the evidence in support of the burglary conviction and burglary special circumstance finding must also satisfy the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and

14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. 637-638.)

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 Tobin Entered Ms. Pontbriant's Home

For the reasons set forth in arguments IV and V (insufficient evidence to sustain attempted rape conviction or attempted rape-murder special circumstance and insufficient evidence to sustain robbery conviction or robbery-murder special circumstance), the evidence was insufficient to prove that appellant robbed or attempted to rape Ms. Pontbriant.

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 Tobin and appellant arrived together at Ms. Pontbriant's house and entered the house at the same time. (39 R.T. 5532-5533 [Flourene Gentry]; 46 R.T. 6849-6850 [Tobin].) The evidence also showed that Ms. Pontbriant was pleased that appellant had come to her house (39 R.T. 5532-5533), and that Ms. Pontbriant and both defendants spent a considerable portion of the evening of February 28/March 1, 1988, talking and drinking. Ms. Pontbriant's blood alcohol level at the time of her autopsy was .29 percent. (34 R.T. 4938.) Beer bottle caps and beer bottles were found inside Ms.

Pontbriant's house. (39 RT 5647-5648, 5651, 5667-5672.) Many cigarette butts were also found. (39 RT 5648-5650). This physical evidence corroborated Mr. Tobin's testimony that Ms. Pontbriant and the defendants talked and drank together after the defendants were invited inside the house by Ms. Pontbriant. (46 RT 6851-6860).[77]

As described in detail in arguments IV and V, some time after appellant and Mr. Tobin entered Ms. Pontbriant's house, Ms. Pontbriant placed a telephone call to Ed Burdette, and then Ms. Pontbriant and appellant together made a series of follow up calls, speaking with both Burdette and Burdette's girlfriend, Kathy Coronado. This sequence of telephone calls occurred over a period of at least one-half hour. (39 R.T. 5566-5573, 5580-5581.)

Clearly, the evidence was insufficient to prove that appellant or Mr. Tobin broke into Ms. Pontbriant's house, or were trespassing when they entered her house. Indeed, at the close of the preliminary hearing in this case, the magistrate dismissed the burglary charge because the defendants were invited into the house. (10/11/88 R.T. 6-8.) The prosecution resurrected the burglary charge for trial on the theory that appellant and Mr. Tobin possessed an unrevealed intent to

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[77] In addition, Florene Gentry corroborated Mr. Tobin's testimony that Ms. Pontbriant invited both defendants 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." (39 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 appellant. Ms. Pontbriant then said, "I'll talk to you later," and she hung up. (39 RT 5533.)

rape and/or rob Ms. Pontbriant when they entered her house. (1 CT 7-10.) For the reasons set forth in Argument VI (the superior court erred in denying appellant's 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 clearly rejected this "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 appellant nor Mr. Tobin possessed an intent to rape or rob Ms. Pontbriant when they entered her house. If they had such an intent, certainly they would not have permitted Ms. Pontbriant to telephone Ed Burdette several times before they carried out their alleged secret plan. Moreover, appellant would not have gotten on the telephone with Burdette or Kathy Coronado. Mr. Tobin would not have gone out twice to buy more beer during the evening. (46 RT 6853-6855, 6856, 6859, 42 R.T. 6104-6105, 6113.) Moreover, neither appellant nor Tobin knew that Warren Gilliland had gone to Modesto. Unless appellant was performing an elaborate as well as pointless charade when he spoke angrily with Burdette on the telephone, both Ms. Pontbriant and appellant believed that Gilliland was at Burdette's house. (39

RT 5567-5573.) So far as appellant and Mr. Tobin knew, Gilliland could walk into the North Jacob house at any time.

Given these facts, the jury could not reasonably conclude that appellant and Mr. Tobin intended to rape and/or rob Ms. Pontbriant before they entered her house, or before the telephone calls were made to Burdette 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 Burdette and Coronado, or aided or abetted Mr. Tobin in any such plan.[78] No one would hatch such a plan once Burdette and Coronado knew that appellant was at Ms. Pontbriant's house, or at least was with Ms. Pontbriant, wherever Burdette and Coronado might have thought appellant 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.

Because the Evidence was Insufficient to Convict Appellant of Burglary, the Burglary-Murder Special Circumstance Finding Also 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

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[78]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, after forming the requisite criminal intent. Here, Ms. Pontbriant was found in the living room, the same room appellant came into when he entered her house at her invitation.

burglary-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.)

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.[79]

Even assuming arguendo that the courtcan uphold appellant's murder conviction, the courtmust 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, supra*, 2 Cal.4th at p. 327; see also *Clemons v. Mississippi, supra*, 494 U.S. at pp. 751-753.) There is a probability that the invalid burglary conviction and special circumstance finding affected the

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[79]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, as explained in greater depth, *infra*, in Argument XI.)

penalty determination. In the guilt phase, the prosecutor argued that the defendants entered Ms. Pontbriant's home with the intent to steal property because they needed the means to get to Iowa. (53 RT 7591-7593.) 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 with the intent to commit a rape. (53 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.

In Light of the Heightened Need for Reliability to Support the Capital Conviction and Death Verdict, Even If the Evidence Was Sufficient to Support a Conviction for Burglary in a Noncapital Context, it Was Not Sufficient to Uphold a Conviction of Capital Murder (First Degree Murder with Special Circumstances) or His Sentence of Death

As appellant explained in previous arguments, in *Beck v. Alabama* (1980) 447 U.S. 625, the United States Supreme Court 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 necessarily includes 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 noncapital guilt verdict, but which is equivocal, or comes from witnesses whose reliability is in serious doubt, is nonetheless insufficient to uphold a conviction of capital murder and a sentence of death.

Thus, even assuming arguendo that appellant's burglary conviction can stand, the questionable evidence of an intent to rape and or rob cannot be held sufficiently reliable to uphold appellant's capital conviction and sentence of death. The evidence was completely equivocal that there was either an attempt to rape Ms. Pontbriant, or that she was robbed before she was killed, or that appellant or Mr. Tobin possessed the intent to commit either of these crimes at the time they entered the house. Moreover, the testimony of prosecution witnesses Earl Bothwell and Warren Gilliland was both inherently unreliable and contradicted in every important respect by virtually incontrovertible evidence. For these reasons, this court must reverse appellant's conviction of murder, the burglary special circumstance and the sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument VII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

VIII.

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 Tobin were each charged with three felony murder special circumstances: burglary, robbery and attempted rape. As established in arguments IV, V and 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, and also insufficient to show that if any of these offenses was committted, it was committed or aided and abetted by appellant. Therefore, each of the special circumstances findings against appellant 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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument IX on this issue.

IX.

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

Introduction

If one or more of the special circumstances is set aside, the validity of the sentence of death is called into question. This court has previously determined that it has the power to determine whether the penalty is still appropriate under the totality of the circumstances. After the United States Supreme Court's recent decision in *Ring v. Arizona Ring v. Arizona* (2002) ___U.S___, 122 S.Ct. 2428 that power belongs solely to the jury. Even aside from *Ring*, the defendant has a constitutionally protected liberty interest that prohibits the reviewing court from reimposing sentence.

Special Circumstance Findings

Under California's death penalty scheme, a special circumstance finding has two potential roles – one, to trigger a penalty trial, and two, to be weighed as a possible aggravating factor in determining sentence. If the jury at the guilt phase of trial, after finding a defendant guilty of first degree murder, finds a special circumstance allegation to be true, the case proceeds to a penalty phase trial to determine whether the defendant will be sentenced to death or life without the possibility of parole. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467.) This sentencing determination, in turn, is

based upon the "weighing" of any aggravating factors found by the jury at the penalty phase trial against any mitigating factors it discerns. At the penalty phase, the jury, in its discretion, may weigh any special circumstance found true as an aggravating factor 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.

In Light of Ring v. Arizona, if a Special Circumstance Finding is Invalidated, this Court Should Not Attempt to Reweigh the Aggravating and Mitigating Factors, But Must Instead Remand For a New Penalty Trial

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, 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) 536 U.S. 584, 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 determined guilt or innocence but did not participate in the sentencing proceedings. Before a capital defendant could be sentenced to death, the trial judge had to find that at least one aggravating circumstance existed, and then find "there [were 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.)

In light of *Jones, Apprendi*, and *Ring*, California's capital sentencing scheme requires that the existence 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 dicta from the *Clemons* case inapplicable in California. Pursuant to *Ring*, any factual findings prerequisite to a death sentence must be made by the

jury applying the "beyond a reasonable doubt" standard. 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 courtmay 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 may have considered each of 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).[80]

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[80] That is, should this Court reverse one or more of the special circumstances in this case for insufficiency of the evidence, the jury's erroneous conclusion(s) – findings of underlying felonies not shown by the evidence – would have to be taken out of the mix of factors lawfully supporting the death sentence. As the U.S. Supreme Court pointedly observed in *Stringer v. Black, supra*, the reviewing court "may not assume it would have made no difference if the thumb had been removed from death's side of the scale." (*Id.* at

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.[81] In *People v. Marshall* (1990) 50 Cal.3d 907, this court stated that the role of the trial judge under section 190.4(e) is

> '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.)

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p. 232.) Since the jury's erroneous finding(s) went to the heart of the jury's understanding of the capital offense, there is no way to be confident that the jury, but for those errors, would have returned a sentence of death. Further, since the jury's erroneous findings reflect a misreading of the evidence and/or the applicable legal standards, the jury's death verdict can't be deemed sufficiently reliable to satisfy the heightened reliability standards which the Eighth and Fourteenth Amendments require for capital sentencing determinations.

[81] 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."

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 courtnoted:

> 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***. (Bold and 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 courtshould 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 [82] 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 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

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[82]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.)

while *Clemons v. Mississippi, supra*, 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 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.)

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 review the effect of invalidated aggravators (such as special circumstances) under a harmless error standard, it must employ "close appellate scrutiny." (See, e.g., *Stringer v. Black, supra,* 503 U.S. at p. 230.) To date, the decisions of this court do not exhibit such close appellate scrutiny. (See *People v. Sanders* (1990) 51 Cal.3d 471; *People v. Benson* (1990) 52 Cal.3d 754; and *People v. Pensinger* (1991) 52 Cal.3d 1210.)

In each of these three opinions, the Court has cited to *Zant v. Stephens* (1983) 462 U.S. 862 in analyzing the effect of the invalidation of one or more special circumstances on the viability of a death sentence. However, this court's reliance on *Zant, supra,* was misplaced. The capital sentencing procedure at issue in *Zant*, unlike the California system, did not involve weighing. In *Tuggle v. Netherland* (1995) 516 U.S. 10, the U.S. Supreme Court observed: "We noted [in *Zant v. Stephens, supra,*] that our holding did not apply

in States in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty." (*Tuggle, supra,* 516 U.S. at p. 11.) Since California indisputably is a weighing state, this court cannot rely upon the analysis and reasoning of the *Zant* decision to determine the harmlessness vel non of an invalidated special circumstance on the decision to impose the death penalty in appellant's case.

For all of the foregoing reasons, if one or more of the special circumstances in this case is set aside for insufficiency of evidence, appellant is entitled to a new penalty phase trial.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument X on this issue.

X.

APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER MUST BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION AND DELIBERATION

Introduction

Here, since there was no evidence of planning, no viable evidence of motive and the manner in which Ms. Pontbriant was killed did not support a finding of premeditation and deliberation, the first degree murder conviction must be reversed.

Requirements of Proof for First Degree Premeditated Murder Conviction

Count I alleged that appellant willfully, unlawfully, and with malice aforethought murdered Ivon Pontbriant in violation of Penal Code section 187. (1 CT 7.) The evidence, however, was not sufficient to support a finding of premeditation and deliberation. Therefore, the verdict of first degree murder violated appellant's right to due process, to present a defense, and to reliable guilt and penalty phase verdicts. (U.S. Const. Amends. 6, 8, and 14; Cal. Const., art. I, §§ 7, 15, 16, and 17; *Jackson* v. *Virginia* (1979) 443 U.S. 307; *Beck* v. *Alabama* (1980) 447 U.S. 625.)

In *People* v. *Anderson* (1968) 70 Cal.2d 15, this court identified three types of evidence which generally must be present in order to sustain a jury finding of premeditation and deliberation. The court described these categories as follows:

> (1) Facts about . . . what defendant did prior to the actual killing which show that the defendant was engaged in

> activity directed toward and explicable as intended to result in the killing which may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with the facts of type (1) or (3), would . . . support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed'; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take the victim's life in a particular way for a 'reason' 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.*)

Standard of Review

As noted previously, 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, supra,* 15 Cal.4th 619, 667; see also, *Jackson* v. *Virginia, supra,* 443 U.S. at pp. 318-319 ["The relevant question 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"].) To satisfy this due process standard, there must be 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 premeditated and deliberated the killing. (*People* v. *Johnson, supra,* 26 Cal.3d at p. 562.) Further, because this was a capital murder proceeding and a death sentence was imposed, the evidence in support of a finding of deliberate, premeditated murder must also satisfy the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. 637-638.)

There Was No Evidence of Planning

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 (53 R.T. 7593-7594), the conduct of appellant and codefendant Tobin on the night of Ms. Pontbriant's murder did not show careful planning. First, the defendants were aware that other people knew that appellant was at Ms. Pontbriant's house on the evening of February28/March 1. Both Kathy Coronado and Edward Burdette testified that they talked on the telephone with appellant and Ivon Pontbriant that evening. (39 RT 5557-5591 [Edward Burdette]; RT 5593-5609 [Kathy Coronado].) Indeed, both of these witnesses testified that Ms. Pontbriant and appellant initiated the first telephone call as well as the subsequent calls. This conduct was highly inconsistent with a plan or design to

murder Ms. Pontbriant later that night because the identity of the likely suspects would be available to law enforcement quickly.

Second, although the prosecutor argued that appellant and Mr. Tobin intended to kill Ms. Pontbriant, steal her money and take her car in order to go to Iowa (53 R.T. 7593), nothing found in her 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 appellant's apartment (shared on and off by Mr. Tobin) showing preparation for flight. Indeed, the prosecutor essentially conceded to the jury that appellant and Mr. Tobin did not appear to have even packed clothing for this trip to Iowa. (53 R.T. 7570-7571.) It was undisputed that both men arrived in Iowa with nothing but the clothes on their backs. (43 R.T. 6305-6309, 46 R.T. 6878-6880.)

As appellant established in prior arguments, the evidence was insufficient to prove that appellant or codefendant Tobin attempted to rape Ms. Pontbriant, or robbed her of any money, or planned to do so, and there was no evidence suggesting that either had a plan to kill her. Therefore, there was no evidence establishing the kind of planning described in the *Anderson* decision, *supra*, required to prove premeditation and deliberation.

There Was No Evidence of Motive

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 relatively brief prior contact with Ms. Pontbriant, and what there was, was obviously favorable. The night that Ms. Pontbriant was killed, both defendants were in her house for several hours drinking beer with her. (46 R.T. 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 (or Mr. Tobin) to the police was contradicted by the fact that appellant and Ms. Pontbriant initiated telephone calls to Burdette and Coronado, before she was killed, thus already identifying appellant as being present with her that night. Moreover, as appellant has established, the evidence was insufficient to prove that either appellant or Mr. Tobin attempted to rape Ms. Pontbriant or robbed her. Since appellant 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.) That kind of evidence was not introduced in this case.

Evidence of Manner of Killing

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. (53 R.T. 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.)[83] Nonetheless, the reasons offered by the prosecutor here for finding a premeditated and deliberated murder were not adequate.[84] 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.

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 of the three felony-murder theories.

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[83] 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[overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82], 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.

[84] 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." (53 RT 7615-7616.)

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XI.

BECAUSE THE JURY MAY HAVE RELIED EXCLUSIVELY ON AN INVALID FELONY-MURDER THEORY TO CONVICT APPELLANT OF FIRST DEGREE MURDER, APPELLANT'S MURDER CONVICTION MUST BE REVERSED

Introduction

Even if the evidence were sufficient to support the first degree murder conviction on a theory of premeditation and deliberation, since the felony murder theories are unsupported by the evidence and there is no way of knowing which theory the jury relied upon to convict, the murder conviction must be reversed.

Reversal Required

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. Appellant also established that there was insufficient evidence to sustain his conviction of robbery, as well as 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. In the present case, this court cannot ascertain whether the jury relied exclusively 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 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.].) Further, in this case it is clear that the jury did not reject and, indeed, affirmatively embraced the three factually unsupported felony murder theories. The jury not only convicted appellant of each of the three unsupported felonies (robbery, attempted rape, and burglary), it also found true three

unsupported felony murder special circumstance allegations (robbery murder, attempted rape murder, and burglary murder). (4 C.T. 971-994.)

As discussed herein, there was insufficient evidence of burglary, robbery and attempted 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. Even when 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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XII.

THE GUILT PHASE JURY INSTRUCTIONS CONCERNING AN AIDER AND ABETTOR'S SCOPE OF LIABILITY WERE BOTH INCOMPLETE AND CONFUSING

Introduction

The trial judge instructed jurors that an aider and abettor is liable not only for the crime he intentionally aided and abetted, but also for the natural and probable consequences of that originally contemplated crime. The instruction given was erroneous for three reasons. The instruction failed to identify (and define) any potential, originally contemplated target crime that could have served as a basis for such expanded liability, thereby, in effect, failing to define an element essential for conviction of the charged crimes, in violation of the Sixth, Eighth, and Fourteenth Amendments. The instruction was ambiguous and confusing about the specific mental state the prosecution was required to prove with regard to each defendant. And finally, the instruction made an aider and abettor liable for various charged felonies, felony murder, and a death sentence, even if he did not share the intent needed for those felonies, for felony murder, or for capital murder, in violation of both Due Process and the Eighth Amendment.

Erroneous Instruction

In the instant case, the instructions regarding the crucial issue of the role, if any, each of the defendants played in the murder, were 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.[85] 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. (3 C.T. 815-818; 3&4 C.T. 846-876.)

The trial judge gave the following instruction at the guilt phase:

> 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 and intentionally aided and abetted. 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, and five, and the lesser included offenses were natural and probable consequences of such originally 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

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[85] 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 . . . .*" (53 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.*" (53 RT 7582; italics added.)

> the killing of a human being in order to find the special circumstance to be true.

(3 C.T. 817)[86]

This instruction is incomplete, ambiguous and confusing in several respects.

The Instruction Was Incomplete

The trial court instructed the jury that it was to "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 originally contemplated crimes." (3 C.T. 817.) The court neglected, however, to identify (and define) any potential, "originally contemplated crimes" that could have served as a basis for natural and probable consequence liability, and left the jury on its own to discern and define such offenses.

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.

[86]The oral version of this jury instruction varied slightly from this text. The second sentence inadvertently inserted the word "charged" in front of the word "contemplated". (51 RT 7489-7490.)

(*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 urged that the jury could find either defendant guilty of murder as an aider and abettor on a natural and probable consequences theory (53 R.T. 7582), the trial court erred when it failed to identify the "target crimes" and explain the theory adequately. Indeed, the jurors could have assumed that given the evidence of the relationship between appellant and Ms. Pontbriant plus the alcohol involved, the target crime was actually fornication.

The Instruction Was Ambiguous and Confusing

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 were applied in a way that violates the Constitution.

The confusion caused by the various instructions in this case was similar to that caused by the disputed instructions in *Smith v. Horn* (3rd Cir. 1997) 120 F.3d 400,[87] 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 coconspirator 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 jurors could find that the defendants were liable for each other's misdeeds under the doctrine of

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[87] Certiorari denied sub.nom. *District Attorney of Bucks County v. Smith* (1998) 118 S.Ct. 1037.

accomplice liability.[88]

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 proved every fact necessary to constitute the crime beyond a reasonable doubt. (*Id.* at p. 415, citing *In re Winship* (1970) 397 U.S. 358, 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

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[88]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.

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).

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. 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. (3 C.T. 817, 4 C.T. 872.) This confusing instruction made it reasonably likely the jurors misunderstood and misapplied the applicable law.

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 unlawful taking of a vehicle alleged 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 various felonies, 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 an 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 operates as an irrebuttable presumption that a non-killer (i.e., an aider and abettor to some contemplated offense) has malice and/or some alternative mens rea sufficient to establish guilt of murder, 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 the concurring opinion in *People v. Luparello* (1986) 187 Cal.App.3d 410, 452 observed, 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 instructions on the natural and probable

consequence doctrine permit 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 violated due process. 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. 238, 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.)

Accordingly, for all of the foregoing reasons the erroneous instruction on the natural and probable consequences doctrine requires reversal of appellants convictions, the specific circumstances findings, and appellant's sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XIV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XIII.

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.

Introduction

The jury instructions were particularly confusing in this case because they did not carefully differentiate between the different defendants and the different theories of guilt. Exacerbating this overall problem was the failure of the voluntary intoxication instruction to convey that an aider and abettor could have a lesser degree of culpability that the perpetrator because intoxication affected whether he formed the specific intent to commit a particular crime.

Improper Instruction

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 two defendants and multiple theories of culpability, the trial court refused to sever the trials of the defendants. Further confusing the matter, the prosecutor argued that the jury could find either defendant guilty of first degree murder as an aider and abettor, or as the actual killer. (53 R.T. 7582.) 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. (53 R.T. 7607-7611; 3 C.T. 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. (See 51 R.T. 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 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 beyond a 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.

(51 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 and erroneously encouraged the jury to treat them as fungible entities. Appellant had a constitutional right under the due process clause of the Fourteenth Amendment and the Eighth Amendment to have the jurors consider each of the charges against him on an individual basis particularly in a capital case. (See, e.g., *People v. Massie, supra*, 66 Cal.2d at pp. 922-923; *Beck v. Alabama, supra*, 447 U.S. 637-638.)

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 [89] rather than the actual killer.[90] 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 of one of the codefendants, Juan Manuel Valdez, who had been charged

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[89] At the guilt phase, the trial judge also instructed the jury about the definition of aiding and abetting. (51 RT 7489-7491.)

[90] 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." Nonetheless, because the judge recognized that intoxication was an issue in the case, the question should have been put to the jury. (See *People v. Baker* (1954) 42 Cal.2d 550, 573. Further, since the judge recognized that there was at least some duty to instruct on intoxication, he had the concomitant responsibility to fully instruct on the matter and to do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [analyzing whether the pinpoint instruction on voluntary intoxication had to specify both the specific intent necessary for a murder conviction as well as the additional mental states of premeditation and deliberation].

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 courtnoted 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.[91] 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 opinions regarding how voluntary intoxication affects the mental states required for certain crimes. Earlier opinions of this court

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[91]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.

distinguished between "specific intent" and "general intent" crimes for purposes of determining the relevance of voluntary intoxication to the determination of whether the defendant acted with the requisite state of mind. 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, on appellant's possible liability for having aided and abetted the crimes charged. This error affected appellant particularly because the evidence pointed to codefendant Tobin as Ms. Pontbriant's killer, and suggested that if appellant participated in any crimes at all, it was only as an aider and abettor. There was no evidence upon which to base a finding that it was appellant rather than Mr. Tobin who committed any of the crimes.

Standard of Review

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 were 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.

Prejudice

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 in violation of the Sixth Amendment right to trial by jury. (*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) and undermine defendant's Eighth and Fourteenth Amendment right to a reliable capital guilt and sentencing determination. (*Beck v. Alabama, supra*, 447 U.S. 637-638.) 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.)

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XIV.

THE TRIAL JUDGE VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS BY INSTRUCTING ON FELONY MURDER WHEN THE INFORMATION CHARGED ONLY PREMEDITATED MALICE MURDER, AND, HAVING DONE SO, BY FAILING TO REQUIRE JURY UNANIMITY AS TO THE BASIS FOR ANY FIRST DEGREE MURDER VERDICT.

Introduction

Premeditated malice murder and felony murder have different elements. Yet jurors were not instructed that they had to be unanimous with respect to the elements proven. Further, only malice murder was charged, thus violating the defendant's right to proper notice of the felony murder offense as well as subjecting him to conviction for felony murder, an offense that was not charged. Under these circumstances, appellant was denied his rights to due process, to be informed of the nature and cause of the accusation against him, to a unanimous jury verdict on his guilt or innocence, and to reliable capital guilt and sentencing determinations, in violation of the Sixth, Eighth and Fourteeenth Amendments to the United States Constitution, and article 1, sections 1, 7, 14, 15, 16, and 17 of the California constitution.

Murder Instructions Improper

Both defendants were charged in Count 1 of the amended 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.

(3 CT 691.)

As noted previously, the trial judge instructed the jury on both premeditated murder (3 CT 850-852; 51 RT 7508-7512; 7516) and on felony murder (3 CT 853-858; 51 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 (53 RT 7548-7554; 7598-7600) or felony murder (53 RT 7600-7602).

Because appellant was not charged with felony murder and because the jurors were not instructed that they were required to reach a unanimous verdict as to which theory they accepted and thus which elements they believed were proven beyond a reasonable doubt, 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 reliable guilt and sentencing determinations.

Confusion Regarding the Legal Definitions of Felony Murder and Premeditated Murder

The law of California governing first degree murder is extremely muddled.[92] First, there appear to be significant gaps in

[92]Appellant acknowledges that this court has rejected several arguments concerning the contradictory positions in California law regarding malice murder and felony murder (see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 369-370); however, appellant asks the court to revisit the issue.

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 defining murder and its core elements of malice 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 provides in pertinent part:

> 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 murder under Penal Code section 187 violated appellant's Sixth Amendment rights as well as his state and federal due process rights to a jury determination on every element of the charged crime, to adequate notice of the charges

against him, and to a unanimous verdict.

In *People* v. *Dillon, supra,* 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, supra,* 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," but that there was still only "a single statutory offense." (*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 [93] did not apply because the 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. (Cf. *Blockburger v. United States* (1932) 284 U.S. 299, 304 [52 S.Ct. 180, 76 L.Ed. 306]) [the test to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.] 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

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[93]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 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.

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 in a capital case arises both from federal constitutional law as well as from the state constitution and state statutes. (Sixth, Eighth, and Fourteenth Amendments as well as Cal. Const. art. I, § 16; Pen. Code §§ 1163, 1164.)

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.)

If It Was Going to Instruct on Felony Murder at All, 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 or a Deliberate Premeditated Malice 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 relieve 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,* however, 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.

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 and the Sixth Amendment right to a jury trial is violated. (*Schad v. Arizona, supra,* 501 U.S. at p. 632.)

Accordingly, the trial court's failure to require unanimity as to

the elements underlying the first degree murder conviction which violated due precess and the Sixth Amendment as well as the Eighth and Fourteenth Amendments. The heightened reliability requirement for capital cases requires setting aside appellant's conviction.

The Trial Court Should Not Have Instructed at All on Felony Murder

1. *The Trial Court Lacked Jurisdiction to Try Appellant for the Uncharged Crime of First Degree Felony Murder*

As noted above, the information in this case charged appellant and codefendant Tobin with willful and premeditated murder. In California, a court lacks subject matter jurisdiction to convict a person of an 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 foregoing discussion shows, this 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 courtexplained 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 offenses 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.

Conclusion

The improper instruction on the uncharged crime of felony murder allowed the jury to convict appellant on an invalid ground. Appellant's murder conviction and death sentence must be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XVI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XV.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

Introduction

The consciousness of guilt instructions given at appellant's trial were constitutionally infirm for two reasons. First, they created permissive inferences that were overbroad. They allowed the inference of guilty mental state from conduct unrelated to the mental state; they permitted an inference of guilt of many offenses from a single untoward act or statement, and the jury could draw adverse inferences about a defendant's guilt based solely on untoward conduct or statements by the codefendant.

Second the instructions are impermissibly argumentative. They highlight particular evidence for the specific purpose of inferring consciousness of guilt. Effectively, they focused the attention of the jury on evidence favorable to the prosecution, thus lightening the prosecution's burden of proof. Compounding the problem, they placed the trial judge's imprimatur on the prosecution's evidence.

Instructions Improper

At the request of the prosecutor, the trial judge instructed the jury on so-called consciousness of guilt.[94] The first instruction was CALJIC No. 2.03, which reads as follows:

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[94] Because the conference concerning jury instructions was not recorded, it is impossible to know what discussion took place regarding those objections. (50 RT 7430; 51 RT 7432-7433; 7456-7461.)

> 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.

(51 R.T. 7472; 3 C.T. 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.

(51 R.T. 7472; 3 C.T. 784.)

For the reasons which follow, the trial court erred in giving each of these instructions.

The Instructions Create Improper Permissive Inferences

CALJIC Nos. 2.03 and 2.06 authorize permissive inferences;[95] that is, they each permit the jury to infer one fact (an elemental fact) -

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[95]As the United States Supreme Court noted in *Francis v. Franklin* (1986) 471 U.S. 307, 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, however, the conscious-of-guilt instructions created *improper* permissive inferences.

- appellant's consciousness of guilt[96] -- 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 inferred 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. (3 C.T. 783-784.) It would appear that the prosecutor requested CALJIC No. 2.03 in regard to

[96] "Consciousness of guilt" is not literally an element, but a lay jury is likely to understand the phrase as referring to "consciousness of guilt of the charged offense" and hence as the equivalent of an element – and, indeed, all the elements of the charge offense.

misstatements by the defendants allegedly made shortly after the homicide. 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.

(53 RT 7583.) [97]

The problem with these allegedly false statements by appellant and his codefendant is that none of them concerned the crimes charged against them. Even assuming that they were lies, as the prosecutor argued, the statements were about matters collateral to the murder of Ivon Pontbriant.

That is, the so-called misstatements related to why appellant and Mr. Tobin needed a ride to the bus station and where they were going when Officer Wightman stopped them in Ms. Pontbriant's car. Accordingly, these "facts" did not provide the basis for a logical and rational inference that appellant or Mr. Tobin killed Ms. Pontbriant.

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[97] The record is not as clear concerning the evidence to which CALJIC No. 2.06 applied, but it was likely intended to apply to evidence showing that after the homicide, the perpetrator attempted to wipe up some evidence at the homicide scene. (see e.g. 40 R.T. 5693 .) The jury, however, could not have found that appellant (or Tobin) engaged in such activity without having found that appellant (or Tobin) was involved in the commission of the homicide; and hence, a reasonable jury would likely have understood the instruction, if it had any purpose, as authorizing an inference of the mens rea essential to the charged first degree murder (i.e., an intent to commit robbery, rape or burglary or a deliberate premeditated intent to kill). Such an inference, however, would have been irrational and highly improper, since someone who, in a rage, had committed voluntary manslaughter or second degree murder, having regained control of himself, would have been every bit as likely as a first degree murderer to wipe up evidence in the hope of avoiding arrest and conviction.

Thus because the alleged false statements did not relate to the charged crimes or provide any basis for inferring the requisite mens rea, the instruction was inappropriate. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 435-436 [in Rankin, the defendant's false statement about where he got a stolen credit card was irrelevant to the charged crime of using a stolen card. Indeed, the defendant never denied knowing that the card was stolen].)

The instructions were also misleading, especially in light of the prosecutor's argument. That is, the instructions 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 Mr. Tobin. This situation created a likelihood of unjust convictions for appellant.

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 Mr. Tobin 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, supra,* 70 Cal.2d 15, this court pointedly observed that while 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.[98] Because these instructions permitted the jury to draw irrational 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 and to reliable capital guilt and sentencing determinations in violation of the Sixth, Eighth

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[98] 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 Fourteenth Amendments to the U.S. Constitution and article I, section 1,7, 15,16, and 17 of the California Constitution.

These Instructions Were Impermissibly Argumentative

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" infer another more ultimate fact. 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*, 6 Cal.4th at p. 128, the courtfound 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. Moreover, if the language concerning the "weight and significance of the evidence" somehow confers a benefit on the defense as the *Kelly* opinion suggests, then the defense ought to be able to waive that benefit and preclude the instruction from being given at all. (Cf. *Cowan v. Superior* Court (1996) 14 Cal.4th 367, 371 ["Permitting waiver.... is consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights. [Citation]"].) Obviously, however, that is not the case with these two instructions.

Not only did the consciousness of guilt instructions focus the attention of the jury on evidence favorable to the prosecution and lighten 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 capital guilt and penalty determinations. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17).

Because these instructions violated federal constitutional guarantees, the appellant's convictions 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 supporting appellant's convictions[99], the prosecutor's argument which relied on these instructions, the lack of any reliable evidence which shed light on 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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XVII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

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[99] See argument IV, V, VII and VIII, *supra*.

XVI.

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

Introduction

If a defendant is found in possession of recently stolen property, CALJIC No. 2.15 permits an inference that the defendant committed a robbery. There is no logical reason, however, why the permissible inference should be limited to robbery rather than theft. Additionally, the instruction functions as an improper pinpoint instruction prejudicially highlighting prosecution evidence and suggesting how the jury should interpret it.

Instruction Improper - Improper Inference

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 to 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.

(3 C.T. 791; 51 R.T. 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 Ivon Pontbriant. Appellant was driving the vehicle, and Mr. Tobin was sitting in the front passenger seat.

Although CALJIC No. 2.15, quoted *supra*, begins with a negative, i.e., conscious possession of recently stolen property "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 plus "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 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 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 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, 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.

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 he 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.)[100]

Instructional Error - Improper Pinpoint Instruction

Related to the foregoing, CALJIC 2.15 is also an improper pinpoint argument. A pinpoint jury instruction is one which isolates and illuminates a party's evidence or theory of the case. (See e.g., *People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Castellano* (1978) 79 Cal.App.3d 844, 852-858.) In a proper pinpoint instruction, "'what is pinpointed is not specific evidence as such, but the theory of the ... case.'" (*Wright, supra*, at p. 1137, quoting *People v. Adrian* (1982) 135 Cal.App.3d 335, 338, emphasis in original.)

On the other hand, an instruction is improper if instead it focuses a jury's attention on specific evidence and implies the conclusion the jury should draw from that evidence. (*People v. Harris* (1989) 47 Cal.3d 1047, 1098, fn. 31, citing *Wright, supra*, at p. 1137;6 in accord *People v. Daniels* (1991) 52 Cal.3d 815, 870; see also *People v. Benson* (1990) 52 Cal.3d 754, 805 [instructions are argumentative which invite the jury to draw inferences favorable to one of the parties from specified items of evidence].) Moreover, it is fundamental that there be "absolute impartiality as between the

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[100]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 cannot substitute for proof of the corpus delicti of the crime, and the State failed to prove beyond a reasonable doubt that an aggravated robbery, in fact, occurred in that case.

People and the defendant in the matter of instructions...."[101] (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; in accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) A one sided instruction that favors the prosecution over the defense deprives the defendant of his Fourteenth Amendment due process right to a fair trial. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474, 37 L.Ed.2d 82, 93 S.Ct. 2208 ["[T]he Due Process Clause ... speak[s] to the balance of forces between the accused and his accuser."]; see also *Washington v. Texas* (1967) 388 U.S. 14, 24, 18 L.Ed.2d 1019, 87 S.Ct. 1920 [J. Harlan, conc.].)

CALJIC 2.15 is improper under the foregoing authorities because it singles out particular prosecution evidence, stolen property, and implies that it is the fruit of a robbery committed by the defendant. While similar arguments have been rejected by this court (see, e.g., *People v. Holt, supra,* 15 Cal.4th 619, 676- 677) those claims have been based on the language of the instruction to the effect that such evidence is "not sufficient by itself" to support a robbery conviction. Thus the defense benefits from part of the instruction. (See, e.g., *People v. Kelly, supra,* 1 Cal.4th 495, 531-532.)

The court's reasoning, however, is unpersuasive. The question is whether the instruction should be given at all, not whether part of

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[101] *Moore* found reversible error where the trial court gave two instructions on self-defense stated from the viewpoint of the prosecution and refused to give two defense-oriented instructions on the same issue. (*Moore, supra*, at pp. 526-531.) Where the case was closely balanced, this prosecution slant to the instructions may have resulted in a miscarriage of justice, and required remand for a new trial. (*Ibid.*)

the language would be acceptable to the defense. Because the instruction as a whole constitutes a comment on specific evidence and implies the conclusion to be drawn therefrom, it is improper.

Instructing the Jury Pursuant 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 and Fourteenth Amendments

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 than not standard." (*Ibid.*) Similarly, in this case, the authorized inference, based on appellant's alleged possession of recently stolen property, that a robbery, as opposed to a theft, had been committed, does not pass the "more likely than not" standard, and the instruction accordingly

violated due process.

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 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 and Fourteenth Amendment requirement of heightened reliability in capital cases. (See, e.g., *Beck* v. *Alabama, supra*, 447 U.S. at p. 638.)

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, and the evidence supporting a robbery verdict was weak. Indeed, as appellant has already argued, the evidence was in fact insufficient to support a robbery verdict, and more specifically, was insufficient to support a

finding beyond a reasonable doubt that a larcenous intent arose prior to the lethal physical assault, and hence insufficient to show that any taking was robbery rather than the lesser offense of theft. (See Argument V., *supra*) By instructing the jury that if it 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 any evidence "tend[ing] to connect" appellant to "the crime charged," i.e., robbery, would suffice to convict him of that offense. The instruction directed the jurors that if they found that appellant or his codefendant consciously possessed recently stolen property (that is, Ms. Pontbriant's automobile), only "slight" "corroborating evidence" was needed to warrant a robbery conviction. The instruction listed categories of such evidence which, when added to appellant's possession of the car, would be enough for a robbery conviction. That listing included evidence no more probative of robbery than of theft – for example, evidence that appellant "had an opportunity to commit the crime charged." (2 C.T. 350.) To the extent appellant had an opportunity to commit robbery, he also had an opportunity to commit theft. Hence, this opportunity evidence, like the evidence of appellant's being in possession of the car, was as consistent with appellant's having committed theft as with his having committed

robbery. In effect, the instruction authorized a conviction of robbery on the basis of evidence that proved no more than 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. 62, 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 an undermining appellant's right to trial by jury and reliable capital guilt and sentencing determinations

in violation of the Sixth, Eighth, and Fourteenth Amendments.

The Instructional Error Requires Reversal

Under the appropriate harmless error analysis, reversal is required. The circumstantial evidence presented by the prosecutor to prove robbery was weak. Further, the slim evidence presented was a matter of major dispute. The defense contended that appellant and Mr. Tobin 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 decedent 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, and hence requires the setting aside of the robbery conviction and robbery special circumstance finding. Further, because there is no basis for concluding that appellant's first degree murder conviction is not based upon a robbery-felony-murder theory and because, as demonstrated above (see Arguments V,VI,VII and XI), none of the other available theories of first degree murder was supported by sufficient evidence, the instructional error also requires reversal of

appellant's first degree murder conviction. Finally, even if that conviction and a special circumstance finding other than the robbery special could be upheld, this error tainted the penalty phase verdict because the robbery special circumstance finding was reached improperly because of the faulty instruction and the invalid findings skewed the death penalty determination.

For all of the foregoing reasons, the court should reverse appellant's convictions for robbery and first degree murder, the robbery special circumstance finding, and appellant's sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XVIII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XVII.

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE TRIAL JUDGE INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.50

Introduction

CALJIC 2.50 is constitutionally overbroad because it allows a jury to draw a permissive inference of guilt from evidence of other uncharged offenses that are completely unrelated to the charged offenses. In this case, the instruction allowed the jurors to convict appellant because of Mr. Tobin's prior assaultive behavior on his girlfriend or because appellant might have been involved in unrelated criminal activity. Despite some minor cautionary language, the practical effect was the instruction allowed jurors to convict on the basis of evidence that amounts to nothing more than criminal disposition.

The Instruction Improperly Failed to Identify the Evidence to Which it Referred and Failed to Require the Jury to Apply the Instruction Separately as to Each Defendant

The prosecution requested that the trial judge instruct the jury at the guilt phase of appellant's trial pursuant to CALJIC No. 2.50. (4 C.T. 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.

(51 R.T. 7479-7480.)

Because 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 appellant was involved in before the murder of Ivon Pontbriant. (38 R.T. 5435-5438) On the other hand, the prosecution also presented the testimony of Jeannette Mayberry about a physical confrontation between her and Mr. Tobin a couple of days before Ms. Pontbriant's killing. (38 R.T.5415-5416.) 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, and thus the necessity for flight.

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. She mentioned the burglaries as a motivation for appellant to want to leave town. (53 R.T 7570.) The prosecutor also argued that Mr. Tobin had reason to want to leave Visalia because of his argument with Ms. Mayberry. (53 R.T. 7544-7546, 7570.) 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 Mr. Tobin 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 (53 R.T. 7540) and the prosecutor's tendency to fail to distinguish between the conduct of the two defendants. (53 R.T. 7582.)

CALJIC No. 2.50 Also Involved a Permissive Inference Which Violated Appellant's Due Process Rights

CALJIC No. 2.50 permitted appellant's jury to draw an inference of guilt from evidence of "other crimes" and therefore created 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 the previous argument, a permissive inference is one which suggests 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 involving

possession of property stolen from commercial establishments, this evidence of "crimes" could not lawfully provide the basis for an inference of motive with respect to any of the crimes of which appellant was charged in the instant case. 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) Mr. Tobin's assaultive conduct with Ms. Mayberry. 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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XIX on this issue except to the extent that

codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XVIII.

THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

Introduction

CALJIC 2.51, as given in appellant's case was constitutionally infirm because it placed a burden on the defense to show absence of motive in order to demonstrate innocence. Further, it was defective because it did not clearly tell the jury that motive alone is insufficient to prove guilt.

Instruction Improper

The trial court instructed the jury under then CALJIC No. 2.51 (5th Ed. 1988):

> 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.

(51 R.T. 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 appellant to show an absence of a motive in order 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.

The Instruction Allowed the Jury to Find Guilt Based on Motive Alone

CALJIC 2.51 stated that motive may tend to establish that 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, supra,* 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., *U.S. 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 instructions that covered an individual category of evidence included an admonition that it was insufficient to establish guilt. (See 51 R.T. 7472 [CALJIC No. 2.06 (Efforts To Suppress Evidence): "However, this conduct is not sufficient by itself to prove guilt . . . ."]; see also CALJIC 2.03, 2.06, 2.15 and 2.52 [as modified] containing similar language. 51 R.T. 7472-7475, 7480.)

Because CALJIC No. 2.51 was startlingly anomalous in this context, it prejudiced appellant during deliberations. The instruction intentionally omits any caution about the sufficiency of motive evidence and allows the jury to determine guilt based solely upon motive. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would have said 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 of the instruction highlighted the omission. Thus the jury would have understood that if it found the defendants had a motive to commit any or all of the charged offenses, 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 verdicts unreliable in violation of the Eighth and Fourteenth Amendment.

The Instruction Shifted the Burden of Proof to Imply That Appellant had to Prove His Innocence

CALJIC 2.51 told the jury that the absence of motive could be

used to establish innocence. Unfortunately, that language 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. That is, the instruction confirmed that the jury could establish or defeat the charges through the presence or absence of motive.

Prejudice

The instructional error was particularly prejudicial in this case because the evidence supporting the verdicts against appellant was so weak. More importantly, since appellant did not testify, the jury may well have concluded that he failed to carry the burden to prove that he had an innocent motive. Moreover, the prosecutor's closing arguments focused on the allegedly culpable motives of appellant and codefendant Tobin (53 R.T. 7544-7545, 7570, 7584-7585, 7592-7596, 7616-7618, 54 R.T. 7779-7785), making it highly probable that the jury improperly applied this instruction to find appellant guilty. Additionally, as explained above, the version of CALJIC 2.50 given here [other crimes evidence] created confusion as to the scope and significance of possible motive evidence, thus exacerbating an already untenable situation.

Reversal is Required

As discussed previously, 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 and Fourteenth Amendment requirements 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 the reasons discussed above, the error is not harmless beyond a reasonable doubt. Reversal of appellant's convictions and death sentence is required.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XIX.

THE TRIAL JUDGE ERRED AT THE GUILT PHASE BY FAILING TO GIVE ACCOMPLICE INSTRUCTIONS SUA SPONTE.

Introduction

An accomplice is one who is equally liable for prosecution for the same offense as the defendant. Here, Mr. Tobin was not only liable, but actually prosecuted and convicted for the same offenses as appellant. The trial court erred in failing to give sua sponte accomplice instructions, particularly instructions that required the jury to view his testimony with caution.

Improper Failure to Instruct Sua Sponte

The trial judge erred in this case by failing to give accomplice instructions at the joint guilt phase of this trial. Mr. Tobin testified on his own behalf at the guilt phase and placed all blame for the murder on appellant.

As explained at length in the statement of facts, Mr. Tobin admitted that he and appellant spent the evening partying and drinking with Ms. Pontbriant at her house. Nonetheless, he testified that he left the premises when appellant and Ms. Pontbriant became amorous. (46 R.T. 6852-6868.) He didn't know anything about the homicide until later when he read about it in the paper. (46 R.T. 7045-7046.)

Despite the fact that under the prosecution's various theories of

the case Mr. Tobin was clearly appellant's accomplice [102] and that his testimony at the guilt phase of their joint trial clearly prejudiced appellant, the trial judge failed to give the standard accomplice instructions to the jury. The instructions should have been given sua sponte as they were "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 accomplice instructions does not waive the issue because the error "affected [appellant's] right to a fair trial." (*Id.* at p. 843, fn. 8.) In a situation where the applicable legal principles are at issue the appellate court reviews CALJIC 3.18 independently. (*People v. Alvarez, supra,* 14 Cal.4th 155, 218)

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. Guiuan* (1998) 18 Cal.4th 558, 564, citing *People v. Williams, supra* 45 Cal.3d 1268, 1314.) Accomplice

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[102]The prosecutor repeatedly urged that the two defendants worked in tandem; therefore, they were each an accomplice of 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."

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 *Guiuan, supra*, is not workable because neither the prosecutor nor appellant called Mr. Tobin as a witness. Rather, Christopher Tobin testified as his own witness, hoping to save his own skin at the expense of appellant's.[103] 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 own 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.

Under every theory of this case proffered by the prosecution,

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[103] As discussed in Argument II *ante* (which describes the problems created by the trial court's failure to grant the defendants' requests for separate 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.

Christopher Tobin was an accomplice to appellant. 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 prosecution for the identical offense charged against the defendant in trial in the cause in which the testimony of the testimony of the accomplice is given.

The term accomplice thus includes aiders and abettors, coconspirators 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 *People v. Terry* (1970) 2 Cal.3d 362, 398 [overruled on another ground in *People v. Carpenter* (1997) 15 Cal.4th 312], where one defendant testified against another, this court determined that no sua sponte instruction was required because "the very question submitted to the jury was whether [the defendant who testified] was an accomplice." Subsequently, however, in *People v. Alvarez*, *supra,* 14 Cal.4th at p. 218, this court concluded that, even over defense objection, it was proper to give the standard version of CALJIC 3.18. Citing *Terry*, this court observed that when a defendant testifies in his own behalf and lays the entire blame on the codefendant, the instruction is proper. (*Ibid.*) Moreover this court noted that "each [defendant] was an accomplice of the other, inasmuch as he or she was "liable," and actually subject, "to prosecution for the identical offense[s] charged against" the other, specifically, the robbery and

murder of [the decedent]" (Id., at p. 217 [citing Penal Code section 1111].) This court further observed that a codefendant must be treated the same as any other witness when he testifies and specifically disapproved an older line of cases holding that a codefendant should be treated differently than other witnesses. (*Id.*, at pp. 218-219, specifically, fn 23.)

Here, since Mr. Tobin was liable for and actually prosecuted for the same offenses as appellant, he was an accomplice as a matter of law. Indeed, in order to be chargeable with the identical offense, the witness must be considered a principal under Penal Code section 31. That statute defines principals to include "[a]ll persons concerned in the commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission...." (See also *People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834.) If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court **must** instruct the jury on accomplice testimony. (*Horton, supra*, 11 Cal.4th 1114.) Unquestionably, Mr. Tobin was an accomplice as a matter of law. More importantly, since a codefendant witness must be treated the same as any other witness, the trial judge had a sua sponte duty to instruct in accordance with CALJIC 3.18.[104]

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[104] In order to place CALJIC 3.18 in an appropriate and understandable context, the trial court, of course, should also have instructed the jury with CALJIC 3.10 (Accomplice - Defined), 3.11 (Testimony of Accomplice Must Be Corroborated), 3.12 (Sufficiency of Evidence to Corroborate an Accomplice), and 3.16 (Witness Accomplice as Matter of Law).

Additionally, 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 Mr. Tobin's 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. Indeed, it is hard to imagine any testimony which could have been more prejudicial to appellant than Mr. Tobin's testimony which laid the blame for the homicide entirely on appellant.

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 Mr. Tobin'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 Tobin's testimony would have substantially affected the verdict.

Accordingly, appellant is entitled to a reversal of his conviction and sentence of death.

XX.

THE TRIAL JUDGE ERRED IN GIVING INSTRUCTIONS WHICH DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Introduction

In addition to CALJIC 2.90 which defines reasonable doubt, the trial court gave numerous other instructions that defined the way jurors were to view various types of evidence. Individually and cumulatively, these other instructions lessened the prosecution's burden to prove the offenses beyond a reasonable doubt.

Additional Instructions Improper

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." (3 C.T. 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.

(3 C.T. 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 federal and state 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 CALJIC 2.90, 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 were: CALJIC No. 2.01, sufficiency of circumstantial evidence generally – guilt of crimes (3 C.T. 780-781); CALJIC No. 2.02, sufficiency of circumstantial evidence to prove specific intent or mental states of crimes charged (3 C.T. 782-783); CALJIC No. 8.83, sufficiency of circumstantial evidence generally--special circumstances (4 C.T. 887-888); and CALJIC No. 8.83.1, sufficiency of circumstantial evidence regarding mental state for special circumstances (4 C.T. 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." (3 C.T. 780, 782, 4 C.T. 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. This was inconsistent with the requirement that guilt must be proved beyond a reasonable doubt. (*Cage v. Louisiana* (1990) 498 U.S. 39.) 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.)

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." (51 R.T. 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 language just quoted from 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. Moreover, as appellant explained in the previous issue, Mr. Tobin's willingness to testify and appellant's refusal to testify exacerbated this problem. (See Argument XIX, above.) The jury could have surmised that appellant's failure to testify resulted in the defense failure to carry its affirmative burden to rebut the prosecution's theory.

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 did or did not prove that appellant was guilty beyond a reasonable doubt. Other instructions phrased the issue before the jury in the same misleading way. 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.*" (3 C.T. 774; 51 R.T. 7466; emphasis added.)

Another instruction, CALJIC No. 2.51, not cited above but given during the guilt phase of appellant's trial (3 C.T. 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*." (3 C.T. 802; 51 R.T. 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." (3 C.T. 795; 51 R.T. 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.

(43C.T. 796; 51 R.T. 7477-7478.)

This instruction 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[105] could be proven by evidence that a juror finds to have somewhat greater "convincing force," this instruction undermined 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 beyond a reasonable doubt 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.

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 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

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[105]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.)

Amendment; and the heightened reliability requirement of the Eighth and Fourteenth Amendments in death penalty cases.

For these reasons, appellant's convictions and death sentence must be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXI.

TISON V. *ARIZONA* SETS A MINIMUM LEVEL OF CULPABILITY FOR ALL DEFENDANTS CHARGED WITH THE FELONY-MURDER SPECIAL CIRCUMSTANCE, INCLUDING "ACTUAL KILLERS"; MR. LETNER DOES NOT MEET THAT STANDARD, SO THE SPECIAL CIRCUMSTANCE FINDING MUST BE STRICKEN

Introduction

Tison v. Arizona (1987) 481 U.S. 137 applies to every defendant charged with the felony-murder special circumstance. This Court has never squarely confronted the question, but Mr. Letner's position, that the *Tison* standard applies to "actual killers," has been adopted by other courts and is the only one which will withstand analysis. Moreover, to the extent that the jury concluded that appellant was the actual killer, the failure to instruct that it must also find that he was a major participant and that he acted with reckless indifference to human life constituted clear error.

Special Circumstances Instructions Improper

A central precept of death penalty jurisprudence at 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.)

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.)

Significantly, however, nothing in that instruction deals with the mens rea required for the special circumstances as they apply to actual killer. It applies the *Tison* mandate only to aiders and abetters.

The* Tison *Gloss on the Special Circumstances Applies to All Offenders, Not Just Aiders and Abetters

The felony murder special circumstance reads as follows:

> "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, . . . [r]obbery, in violation of Section 211 or 211.5. [or] [r]ape in violation of Section 261" (§ 190.2, subd. (a)(17)(A)&(C).)

Subdivision (d) of section 190.2 is also of relevance to the present inquiry, and provides in pertinent part:

> "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor,

> shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4. . . ."

The court explained the provenance of the "reckless indifference" and "major participant" language just quoted:

> "The portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court's decision in *Tison* v. *Arizona* (1987) 481 U.S. 137 (hereafter *Tison*). In *Tison,* the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree felony murder who was a 'major participant' in the underlying felony, and whose mental state is one of 'reckless indifference to human life.' (*Tison, supra,* 481 U.S. at p. 158 & fn. 12.) The incorporation of *Tison*'s rule into section 190.2(d)--in express terms--brought state capital sentencing law into conformity with prevailing Eighth Amendment doctrine. [Citations.]
>
> ". . . .*Tison* is the source of the language of section 190.2(d), and the constitutional standards set forth in that opinion are therefore applicable to all allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole. We therefore begin our inquiry into whether the import of section 190.2(d) is adequately conveyed by its express statutory terms by looking to *Tison* for the meaning of the statutory phrase 'reckless indifference to human life.'" (*People* v. *Estrada* (1995) 11 Cal.4th 568, 575-576.)

The *Tison* standard is meant to be the equivalent of the culpable mental state of implied-malice murder referred to in the Model Penal Code (MPC) as "extreme indifference to the value of

human life." (*Tison*, 481 U.S. at p. 157.) This concept in the MPC, in turn, incorporates the common law of implied-malice or "depraved heart" murder. (1 *Model Penal Code and Commentaries, Part II,* § 210.2, pp. 22-23 (ALI 1980).) So do the California murder statutes. (See *People* v. *Dellinger* (1989) 49 Cal.3d 1212; *People* v. *Wiley* (1976) 18 Cal.3d 162, 170; *People* v. *Phillips* (1966) 64 Cal.2d 574, 588, fn. 13, overruled on an unrelated point in *People* v. *Flood* (1998) 18 Cal.4th 470, 490, fn. 12.) A blow with the fist or hand is insufficient to establish implied malice under this standard. (*People* v. *Munn* (1884) 65 Cal. 211, 213; *People* v. *Spring* (1984) 153 Cal.App.3d 1199, 1205; *People* v. *Teixeira* (1955) 136 Cal.App.2d 136, 150.)

The *Tison* standard also requires subjective appreciation of the grave risk to life. (*People* v. *Estrada*, *supra*, 11 Cal.4th at pp. 577-578.)

Additionally, the *Tison* limitation ("with reckless indifference to human life and as a major participant") applies to *all* offenders charged with California's felony-murder special circumstances, "actual killer" or not.

In *Hopkins* v. *Reeves* (1998) 524 U.S. 88, the Supreme Court granted certiorari and decided in what manner and at what stage of a capital case a finding of the applicability of the *Tison* standard must be made. It did so in a case involving "an actual killer," a single offender who committed the felony-murder alone, without accomplices or co-defendants. If, *Tison* did not apply to "actual killers," the question the Supreme Court decided in *Reeves* would not

have been presented by the facts of that case, and one can be confident the Supreme Court would not have decided the issue in *Reeves*.

The Eighth Circuit in *Reeves* is one of several courts to have held that *Tison* applies to all felony-murder defendants, including "actual killers." (*Reeves* v. *Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, *rev'd on another issue* (1998) 524 U.S. 88.)[106] The Supreme Court reversed the Eighth Circuit's holding on another issue in *Reeves*, but this particular holding was, as just discussed, the predicate which the Supreme Court's decision presupposed. (See also *State* v. *Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345 [*Tison* analysis applies to all offenders].) The Court of Appeals for the Armed Forces put it this way:

> "Neither *Enmund* [v. *Florida* (1982) 458 U.S. 782] nor *Tison* involved an actual killer. Thus, left unanswered after *Enmund* and *Tison* is the question whether a person who 'actually killed' may be sentenced to death absent a finding that the person intended to kill. As highlighted by Justice Scalia in the *Loving* oral argument, the phrase 'actually killed' could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to

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[106]Reeves was denied jury instructions on lesser included offenses. The state (Nebraska) argued that under its law there were no lesser included offenses to felony murder. The Eighth Circuit concluded that the state's position was an artifact of a minimum culpable mental state for felony murder which was too low to satisfy *Tison*. Certiorari was granted to consider whether the denial of the lesser offense instructions violated *Beck* v. *Alabama* (1980) 447 U.S. 625. The Supreme Court concluded that the state could make the *Tison* determination at the penalty phase, so it did not impact the *Beck* question. The Supreme Court's decision therefore does not call into question the Eighth Circuit's interpretation of *Tison*. Indeed, the Supreme Court assumed that interpretation of *Tison* without discussion.

> situations where the accused intended to kill or acted with reckless indifference to human life. . . . Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, 'actually killed,' as used in *Enmund* and *Tison,* must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life." (*Loving* v. *Hart* (C.A.A.F. 1998) 47 M.J. 438, 443.)

The Ninth Circuit has applied *Tison* to actual killers. In *Woratzeck* v. *Stewart* (9th Cir. 1996) 97 F.3d 329, 335, the Ninth Circuit applied a *Tison* analysis to a case involving a sole perpetrator, and in *United States* v. *Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, it applied a *Tison* analysis to all offenders in a multi-defendant case.

This court has not squarely addressed the question, and the Court's references to it have not been consistent:

People v. *Dennis* (1998) 17 Cal.4th 468, 511, a case involving an actual killer, held that there was no *Tison* issue because the defendant had the specific intent to kill, implying that a *Tison* issue would have been presented in the absence of such a specific intent. The Court earlier found "unpersuasive" an argument that the *Tison* limitation applies only to offenders other than the actual killer. (*People* v. *Whitt* (1990) 51 Cal.3d 620, 637.) On the other hand, the Court has said, without discussion and apparently without the issue being squarely presented, that actual killer status, without more,

satisfies *Tison*. (*People* v. *Murtishaw* (1989) 48 Cal.3d 1001, 1037;[107] accord, *People* v. *Smithey* (1999) 20 Cal.4th 936, 1016 [dictum in a case in which the defendant intended to kill]; *People* v. *Hayes* (1990) 52 Cal.3d 577, 632.)

The recent discussion of the question in a footnote in *People* v. *Earp* (1999) 20 Cal.4th 826, 905, fn. 15, continues to leave the issue unresolved. In *Earp*, the Court applied *Tison* to an actual killer in a single-offender case, then said that the felony-murder special circumstance applies to accidental killings, a proposition wholly inconsistent with *Tison*. (See *Loving* v. *Hart, supra,* 47 M.J. at p. 443 [quoted earlier; notes Justice Scalia's concern with this proposition].) The Court cited cases addressing the first-degree felony-murder rule, not the special circumstance. (*People* v. *Washington* (1965) 62 Cal.2d 777, 781; *People* v. *Pulido* (1997) 15 Cal.4th 713, 725.)[108] It cited *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1146-1147, for the proposition "that the Eighth Amendment posed no impediment to subjecting the actual killer in a felony murder to the death penalty." But the cited passage of *Anderson* does not discuss the definition of "actual killer" or the question whether *Tison* applies to such

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[107]This reference in *Murtishaw* is dictum in any event. In *Murtishaw*, the multiple murder special circumstance under the former 1977 death penalty law was found true. (48 Cal.3d at p. 1007.) That finding required proof of a specific intent to kill. (Former § 190.2, subd. (c); *People* v. *Rich* (1988) 45 Cal.3d 1036, 1113-1114.) Such a finding manifestly satisfied the *Tison* standard without regard to whether Murtishaw was an actual killer or not.

[108]In *Washington*, the only actual killer was a victim resisting armed robbery. So *Washington* is, to say the least, an odd case to cite for the proposition that an actual killer necessarily meets the *Tison* standard or necessarily is more culpable than persons who are liable for murder but are not actual killers.

offenders.

It might be argued that subdivision (b) of section 190.2 eliminates the need to apply *Tison* to actual killers. Such an argument would not withstand analysis, however. Subdivision (b) is negative. It merely codifies *Anderson*'s (and *Tison*'s) holding that an actual killer need not be shown to have a specific intent to kill. It does not state what culpable mental state *is* required for an actual killer. The answer to that question is found in *Tison* and *Estrada*: reckless indifference to human life, subjective appreciation of the grave risk to life, and major participation in the underlying felony.

People v. *Berryman* (1993) 6 Cal.4th 1048, 1088 [overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800], seemingly stands for the proposition that the first-degree felony-murder rule and the felony-murder special circumstance are coextensive. *Berryman*, however, actually holds differently. *Berryman* occurred during the so-called "*Carlos* window period," and the judge erred by failing to instruct that specific intent to kill was an element of the special circumstance. The question was whether the *Carlos* error was harmless, and the Court concluded that it was, because in response to another instruction the jury found that the killing was intentional. (6 Cal.4th at pp. 1089-1090.) *Berryman* did not cite *Tison*, which is not surprising given that *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 imposed a higher *mens rea* requirement for the special circumstance than *Tison* does, so *Tison* is irrelevant for cases governed by *Carlos*. (Indeed, for cases like *Berryman* governed by *Carlos*, the special circumstance and the first-degree felony-murder rule are even less

similar than they are in cases such as the present one governed by *Tison*.)

The special circumstance as interpreted in *Tison* cannot be coextensive with the felony-murder rule. (See *Jackson* v. *State* (Fla. 1991) 575 So.2d 181, 192 [*Tison* not satisfied in the absence of evidence that offender "any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder"]; *id.* at p. 193 [interpreting *Tison* in a way that it is satisfied by every defendant convicted of felony murder would violate Eighth Amendment]; Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for* Furman? (1997) 72 N.Y.U. L. Rev. 1283, 1295, fn. 68.)

Further, an argument that the *Tison* limitation applies only to accomplices and not "actual killers" is based on false assumptions. It assumes that an actual killer is necessarily more culpable than an accomplice. It assumes that an actual killer is necessarily a major participant in the underlying felony and necessarily acts with reckless indifference to human life, or is otherwise morally culpable to at least an equal degree as a major participant or a person who acts with reckless indifference. In the context of felony murder, however, whether or not a person is the actual killer does not necessarily reflect upon that person's relative culpability. This is so because the felony-murder rule has no causation or foreseeability elements. (See *People* v. *Escobar* (1996) 48 Cal.App.4th 999, 1018-1019; *People* v. *Pock* (1993) 19 Cal.App.4th 1263, 1276.) Felony-murder liability is imposed regardless of whether the killing was unforeseeable,

accidental or even in self-defense. (See *People* v. *Loustaunau* (1986) 181 Cal.App.3d 163, 170; *People* v. *Stamp* (1969) 2 Cal.App.3d 203, 210.)

A hypothetical set of facts illustrates the point: An accomplice plans and carries out an armed robbery. The defendant does not participate in the planning or commission of the robbery but merely serves as the driver in the getaway car. While the defendant is driving from the scene of the robbery, at a safe and normal speed, a pedestrian unexpectedly darts out from behind a car, without affording the defendant driver any chance to apply the brakes or avoid hitting the pedestrian, and the pedestrian is killed. In this situation the actual killer -- the driver of the car -- was neither a major participant in the underlying felony nor did he harbor any intent to kill or have reckless indifference to human life. It would therefore be absurd to say that the actual killer would be more culpable than the accomplice. The accomplice who personally planned and committed the robbery would be the more culpable of the two. Yet, if the *Tison* limitation did not apply to "actual killers," the accomplice could not be death-eligible without the major participant and reckless indifference findings while no added elements would have to be found as to the actual killer. (*Forecite* (May 1999) § 8.80.1d.; see *Loving* v. *Hart, supra,* 47 M.J. at p. 443 [quoted earlier; notes Justice Scalia's concern with this issue].)

Another situation in which the felony-murder special circumstance might be applicable to another person but is manifestly not applicable to the "actual killer" is a "provocative act" doctrine case in

which a robber is held liable for murder when someone is killed by a victim or police officer resisting the robbery. (*People* v. *Washington, supra,* 62 Cal.2d 777.) The robber in such a case has been held to come within the felony-murder special circumstance as interpreted in *Tison*. (*People* v. *Kainzrants* (1996) 45 Cal.App.4th 1068, 1079-1082.)

The passage of *Tison* which concludes that the presence or absence of intent to kill is a "highly unsatisfactory" measure of comparative culpability in homicide cases (481 U.S. at p. 157) simultaneously establishes that whether one's physical acts did or did not cause the death is an equally unsatisfactory measure, because all of *Tison*'s examples of both greater and lesser culpability involve "actual killers" in the physical causation sense. A person who kills in self-defense or with provocation, two of the examples cited of a killer of lesser culpability, is (like the person resisting the robbery in a "provocative act" case) an "actual killer" as well as an intentional killer, yet his state of mind is less culpable than that of a "major participant" in a felony who does not kill but acts with reckless indifference to human life.

Looked at another way, if the structure of subsection (d) of section 190.2 were to compel the conclusion that "actual killer" status, without more, brings an offender within the felony-murder special circumstance, then the phrase "actual killer" in that subsection cannot be defined in merely physical causation terms. Given the structure of the *Tison* paradigm, a person can be labeled an "actual killer" only if his or her physical acts vis-a-vis the person killed mani-

fest a level of personal turpitude equivalent to the *Tison* standard of reckless indifference and major participation, that is, a level of personal turpitude equivalent to the implied-malice standard without regard to the felony-murder rule. This is the approach taken by the Armed Forces court in *Loving* v. *Hart, supra,* 47 M.J. at p. 443, quoted earlier. The present case shows that to define "actual killer" in mere physical causation terms would be inconsistent with the rationale of *Tison* which *Estrada* holds is the measure of this special circumstance.

Inadequate Instructions

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. (51 R.T. 7522-7526.)

As discussed in several previous arguments, there was much confusion in the prosecution of this case about whether appellant or his codefendant, Christopher Tobin, was the actual killer, or whether appellant or Mr. Tobin was an aider and abettor. In her closing argument, the prosecutor urged *both* scenarios. That is, 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.

(53 R.T. 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.

(53 R.T. 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.*

(53 R.T. 7613-7614; emphasis added.)

These statements by the prosecutor simply misstate the law under *Tison.* That is, she argued that the jurors could find the felony murder special circumstances true so long as appellant was the actual killer without any finding that he possessed the minimal requisite mental state: reckless indifference to human life.

Moral Culpability is a Jury Question

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,[109] 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 reasonable doubt. In

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[109]See, e.g., *Cabana v. Bullock, supra*, 474 U.S. at p. 386.

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.

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 both defendants "confessed" to him, 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 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 Mr. Tobin and appellant was not consistent. On the one hand, he claimed that appellant told him that both he and Mr. Tobin were wanted for murder in California. On the other hand, Bothwell claimed that Mr. Tobin told him that he 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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXIV on this issue.

XXII.

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, in the failure to comply with discovery and *Brady* obligations, and during closing arguments to the jury. Individually and cumulatively these instances of misconduct deprived appellant of a fair trial as well as a fair and reliable death penalty determination.

1. Prosecution Standards

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 the prosecutor 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[110], 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, supra,* 47 Cal.3d 1047: "A prosecutor's rude and intemperate

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[110] *Brooks v. Kemp,* 762 F.2d 1383, 1409 (CA11 1985) (en banc)vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

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. Gionis* (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 and Fourteenth 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.

2. No Waiver

Despite the repeated incidents of prosecutorial misconduct and the prejudice created by this misconduct, in many instances appellant's trial counsel failed to make appropriate objections. Generally, in order to preserve the issue for appellate review 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 Frankfurter 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 portion of this argument discussing specific instances of prosecutorial misconduct will establish, appellant's convictions and death sentence should be reversed.

B. *The Prosecutor Engaged in Misconduct During Her Cross-examination of Mr. Tobin at the Guilt Phase in a Way That Prejudiced Appellant*

The trial court specifically ruled that Mr. Tobin could not be examined on the issue of "instant death" as it was not relevant to this case. Subsequent to the ruling, the prosecutor cross-examined Mr. Tobin on the matter and mentioned it again in closing argument. This misconduct impinged on the reliability of the death verdict and each of appellant's convictions.

As noted above, 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. Lo Cigno* (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. (34 R.T. 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. (35 R.T. 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 appellant and Mr. Tobin in high school and claimed that they had heard Mr. Tobin talk about the instant death method of stabbing someone at the base of the skull and on the sides of the neck. Appellant was present on these occasions and the witness subsequently saw the two defendants practice these techniques in appellant's front yard. (35 R.T. 5049.)

Mr. Tobin'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. (35 R.T. 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. (35

R.T. 5055.) Third, there was no evidence that the victim in this case actually had died an "instant death." (35 R.T. 5053-5054.) Indeed, the pathologist testified that the primary cause of her death was exsanguination or bleeding to death, certainly not an "instant death." (35 R.T. 5063.)

Pursuant to Evidence Code section 352, the trial judge ruled that the prejudicial value of the proffered testimony outweighed any probative value it might have because it had a tendency to suggest that the defendants had a "murderer's disposition." (35 R.T. 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." (35 R.T. 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 defendants of a so-called instant death phenomenon, the prosecutor attempted to cross-examine Mr. Tobin about this subject when he testified at the guilt phase of the trial. While inquiring about Mr. Tobin's knowledge of martial arts, the prosecutor asked him: "There is a term in karate that is known as instant death, isn't there?" (46 R.T. 6936.) After defense counsel's objection was overruled, Mr. Tobin answered: "I don't know if there is or not." (46 R.T. 6936.)

Undaunted by Tobin's answer, 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?" (46 R.T. 6936.) After objections by both defense counsel, the trial judge declared a recess so that the objections could be discussed outside the presence of the jury. Mr. Tobin's counsel pointed out that the prosecutor was merely engaging in a subterfuge to slip in evidence that had previously been ruled inadmissible. (46 R.T. 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. (46 R.T. 6940.)[111]

In flagrant disregard of the trial judge's second ruling that the prosecutor must refrain from suggesting that Ms. Pontbriant died an "instant death," the prosecutor urged in her closing argument:

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[111]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 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. (35 RT 5050, 5061.) Curiously enough, much later in the guilt phase, when the prosecutor was trying to cross-examine Mr. Tobin about his knowledge of "instant death," she once again raised her voice during a sidebar conference. Counsel for the defense asked her to keep her voice down. (46 RT 6939.) The prosecutor was apparently set on having the jury hear her "instant death" theory regardless of any ruling by the trial court.

> 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.

(53 R.T. 7553.)

This deceptive circumventing of the trial court's previous order 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.[112] 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.)

Unquestionably, the prosecution's cross-examination and the subsequent reference in closing argument to instant death were deliberate attempts by the prosecutor to circumvent an earlier judicial

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[112]The decision in *Gore v. State* (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.)

ruling that such evidence was unduly prejudicial. The prosecutor used her questions on this forbidden subject as a means of putting blatantly inadmissible evidence before the jury. Moreover, this technique 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 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.)

The questions about "instant death" in this case were highly prejudicial because, as the trial judge noted, they tended to portray both Mr. Tobin and appellant as cold-blooded killers whose interest in the martial arts was related to their purported interest in murder. Given the prosecution's repeated insistence that the jury could find both defendants were the actual killers and that both defendants were involved in the martial arts, the error necessarily affected appellant. Additionally, this misconduct likely misled the jury into believing that the killing was pre-planned and deliberate and that appellant was guilty of deliberate, premeditated murder, whether as the actual killer or an aider and abettor. Further, by providing an improper and inflammatory basis for finding that the murder was planned, the

misconduct necessarily also provided an improper and inflammatory basis for finding that the other charged offenses (robbery, burglary, attempted rape, and vehicle taking) were planned and committed. Given the weakness of the legitimate evidence that any of the charged offenses were committed, or if any were committed, that appellant was guilty of any of them (see Arguments V, VI , VII, and X, *infra*), the misconduct was prejudicial on all counts.

Because the prosecutor's misconduct described above so infected appellant's trial and distorted the fact finding function, reversal of appellant's conviction and death sentence is required.

C. 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

One of the primary prosecution witnesses, Jeanette Mayberry, testified three times in this case. She provided evidence of the defendants' intent to leave Visalia, as well as painting both defendants as having a propensity for violence along with other undesirable personalty traits. Despite defense requests, the prosecution failed to disclose Ms. Mayberry's criminal record. This misconduct was material to the defendants' trial because it deprived the defense of the ability to substantially impeach her credibility.

Procedural History

On January 25, 1990, during the penalty phase of the joint trial, counsel for appellant 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.[113] (58 R.T. 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. Appellant's trial counsel did not receive this information until after the guilt phase verdicts were returned. 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. (58 R.T. 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. (58 R.T. 8152-8154.) 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 another continuance was granted until January 3, 1990. When she failed to appear that day, a warrant was issued. (58 R.T. 8153.)

Meanwhile, on May 1, 1989, Ms. Mayberry appeared in court

[113]Later in the hearing, counsel explained that he intended his motion to be one for a mistrial. (58 RT 8160.)

to answer for a felony charge, under Penal Code section 476, subdivision (a), for bad checks. (58 R.T. 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. (58 R.T. 8153.)

Because the prosecution called Jeannette Mayberry as a witness on January 4, 1990 in the instant case, appellant'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 the defendants. (58 R.T. 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 this case. (58 R.T. 8155.) Counsel argued that the facts belied this claim by the prosecution. That is, Ms. Mayberry 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 these defendants. In addition, although defense counsel previously requested both the rap sheet and the arrest record of Ms. Mayberry, the prosecution never provided them with this information. (58 R.T. 8157.)

The prosecutor denied knowledge of the Fresno County

warrant for Jeannette Mayberry. (58 R.T. 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. (58 R.T. 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. (58 R.T. 8158-8159.) 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. (58 R.T. 8160.)

After the conclusion of the penalty phase trial, counsel for appellant 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. Tobin. 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. (1 R.T. 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. (1 R.T. 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. (1 R.T. 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. (1 R.T. 41, 4/17/90.)

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. 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 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.

(1 R.T. 53-54, 4/17/90.)

2. *The Failure to Provide the Defense With Information About Jeannette Mayberry's Criminal History Violated Appellant's Due Process Rights*

Under the due process clauses of the federal and California Constitutions, the state always has an obligation to disclose material evidence favorable to a criminal defendant. (U.S. Const., 5th & 14th Amends.; Cal Constitution art. I, § 15.) "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to either guilt or to punishment." (*Brady v. Maryland* (1963) 373 U.S. 83, 87; *United States v. Bagley* (1985) 473 U.S. 667, 676; *United States v. Agurs, supra,* 427 U.S. 97, 107; *In re Brown* (1998) 17 Cal.4th 873.) "Favorable" evidence includes not only evidence that is exculpatory but also evidence that serves to impeach the credibility of government witnesses. (*Giglio v. United States* (1971) 405 U.S. 150, 154.)

In addition, the prosecution has a duty to disclose any favorable evidence that could be used "in obtaining further evidence." *(Giles v. Maryland* (1967) 386 U.S. 66, 74.) Favorable evidence need not be competent evidence or evidence that would be admissible in court. (*United States v. Gladding* (S.D.N.Y. 1967) 265 F. Supp. 850, 886; *Sellers v. Estelle* (5th Cir. 1981) 651 F.2d 1074, 107, fn.6.)

Under the federal Constitution, the intentional or inadvertent suppression of material evidence, whether or not specifically requested by the defense, requires reversal of a conviction. (*Giglio v. United States*, *supra,* 405 U.S. at p.153.) Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley, supra*, 473 U.S. 667, 682.)[114]

More recently, the United States Supreme Court observed that a "reasonable probability" of a different result is shown when the non-disclosure "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the jury verdict." (*Kyles v. Whitley* (1994) 514 U.S. 419, 506 (footnote omitted)].) "[A] showing of materiality does **not** require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." [Emphasis added]

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[114] Prior to *Bagley*, federal cases applied a different test depending on whether the defense had made a specific request for the suppressed evidence. (See *United States v. Agurs* (1976) 427 U.S. 97, 103-104, 112 [49 L.Ed.2d 342, 96 S.Ct. 2392].) In *Bagley*, the Court decided that a single test should be applied in all cases of suppressed evidence.

(*Id.* at p. 506.)

The materiality standard for disclosure of favorable evidence is the same under the state Constitution as under the federal Constitution. (*In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) The prosecution has a duty to disclose all evidence that is favorable to the defendant and material to guilt or to punishment. (*Ibid.*)

There are Sixth Amendment concerns in this case as well. These include the impairment of the right to confront and cross examine (cf. *Delaware v. Van Arsdall* (1986) 475 U.S. 673) as well as the right to present evidence in one's own defense. Indeed, "*Brady* does not require disclosure for the mere sake of disclosure. Rather, the requirement is a means to ensure that the defendant is afforded the opportunity to effectively present evidence in his or her defense." (*United States v. Boyd* (N.D. Ill. 1993) 833 F.Supp. 1277, 1354, affd. (7th Cir. 1995) 55 F.3d 239.)

Requirement to Search for Exculpatory Evidence

This court grappled with the scope of the prosecution's duty to search for exculpatory information in *In re Brown, supra,* 17 Cal.4th 873. Commenting on the broad constitutional mandate, this court observed: "Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. [Quoting *Moore v. Illinois* (1972) 408 U.S. 786, 809-810, conc. and dis. opn. of Marshall J.] This obligation serves to justify trust in the

prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*In re Brown, supra,* 17 Cal.4th at p. 883 [citations, internal quotation marks and fn. omitted].)

That mandate, however, has proved somewhat difficult to implement. In *United States v. Auten* (5th Cir.1980) 632 F.2d 478, the defense requested a new trial because the prosecution failed to disclose that one of its most important witnesses had been convicted more than once. The prosecution responded that it did not withhold or suppress evidence because it was unaware of the information. Significantly, the prosecutor chose **not** to run an NCIC check on the witness because of the shortness of time. The appellate court concluded that under those circumstances the prosecutor's claim of ignorance did not excuse the *Brady* violation. The court noted that "the prosecutor has ready access to a veritable storehouse of relevant facts and, within the ambit of constitutional, statutory and jurisprudential directives, this access must be shared 'in the interests of inherent fairness ... to promote the fair administration of justice.' [Citation.] If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the [government]." (*Id*., at p. 481.)

In *United States v. Perdomo* (3rd Cir.1991) 929 F.2d 967, the court reviewed the *Auten* decision and concluded that it stood for the proposition that "non-disclosure is inexcusable where the prosecution has not sought out information readily available to it." (*Id at p.* 971;

see also *United States v. Brooks* (D.C.Cir.1992) 966 F.2d 1500, 1502-1503.) This means that the prosecution is deemed to have knowledge of exculpatory information that can be revealed by a routine check of FBI and state criminal databases. (See *East v. Scott* (5th Cir.1995) 55 F.3d 996, 1003.) More significantly for the issue presented here, the *Perdomo* court held that "**the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.**" (Emphasis added. *United States v. Perdomo, supra* 929 F.2d at p. 971.)

Certainly there is no *Brady* obligation on the government to conduct an exhaustive open-ended investigation on a fishing expedition for the defense. (*See United States v. Joseph* (3d Cir. 1993) 996 F.2d 36, 41 (holding that general request for *Brady* materials does not require prosecutor to search unrelated case files for conflicting statements of government witnesses.) Nonetheless, an honest, reasonable search of evidence that is readily available to the prosecution is most assuredly within the ambit of *Brady*. (*United States v. Bermea* (5th Cir.1994) 30 F.3d 1539, 1574; *United States v. Marrero* (5th Cir. 1989) 904 F.2d 251, 261).

Moreover, applying these principles to the facts of the instant case, it is clear that the failure of the prosecutor to provide the defense 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 significantly 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 Mr. Tobin 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. (38 R.T. 5412-5415.)

Moreover, she also testified that appellant was aware of her jealousy towards Mr. Tobin's ex-wife and it was he who told her where she could find Mr. Tobin and his ex-wife. (38 R.T. 5411-5412.) After the first encounter between Ms. Mayberry and Mr. Tobin produced nothing more than a verbal altercation, and Ms. Mayberry went home, appellant showed up a little later, laughing and saying that Mr. Tobin and his ex-wife were together again in a nearby park. (38 R.T. 5414.) Another confrontation between Ms. Mayberry, Mr.

Tobin and Mr. Tobin's ex wife took place in the park. (38 R.T. 5414.) This evidence portrayed appellant as emotionally insensitive, manipulative and prone to stir up controversies which he knew would end in violence.

According to Ms. Mayberry, she did not see either defendant again until the next night. On that occasion, she saw both men at her apartment complex. (38 R.T. 5414.) Mr. Tobin was so upset that he broke her bedroom window and grabbed her by the hair and hit her. (38 R.T. 5416.) After neighbors yelled that they were calling the police, Mr. Tobin purportedly went to Mayberry's car and broke out the windows with the butt of his shotgun. (38 R.T. 5418.) This testimony depicted Mr. Tobin as bad-tempered and violent and appellant as the instigator as well as an aider and abetter of this violence.

More importantly, the trial court also found that Mayberry's testimony about the altercation provided a motive for both defendants to flee and thus the motivation to get Ivon Pontbriant's car to do so. (1 R.T. 53, 4/17/90.) Additionally, Ms. Mayberry provided further testimony about Mr. Tobin's prowess in karate by claiming that he was proficient at roundhouse kicks, which supported the prosecution's claim that Mr. Tobin kicked Ivon Pontbriant in the face prior to the murder. (38 R.T. 5425-5426.)

This testimony made Mayberry a critical witness supporting the prosecution's claim that both defendants planned to flee prior to the murder and wanted Ms. Pontbriant's car. Impeachment of her testimony would have cast doubt on Ms. Mayberry's claims and

seriously weakened the prosecution's theory of 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. Accordingly, appellant's convictions and sentence to death must be set aside.

D. *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.

1. *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 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.

(53 R.T. 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.

2. *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.

(54 R.T. 7801-7802.)

Neither the prosecution nor codefendant Tobin presented any evidence at the guilt phase that either man was "a criminal." In fact, appellant had no history of felony convictions.

By portraying both defendants as criminals associating with criminals, 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.

3. *Embellishing the Evidence*

The deputy district attorney bent the truth when she described the evidence. She claimed that Mr. Gilliland's testimony had "essentially been backed up by other evidence." (53 R.T. 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.

For example, the prosecutor argued that because the police did not discover any money in the checkbook found in one of the Ms. Pontbriant'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 Tobin. 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.

(53 RT 7542.)

This argument by the prosecutor was patently specious and disingenuous. In fact, she was trying to fool 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, a woman who was there alone." (53 R.T. 7543.) Obviously, the fact that Gilliland happened to leave town because he had an argument with Ms. Pontbriant does not prove that he told the defendants that he was leaving. In fact, appellant's telephone calls to Mr. Burdette and Ms. Coronado (both prosecution witnesses) on the evening of the homicide when he was trying to locate Mr. Gilliland simply belie the prosecutor's own argument.

4. Prejudice

The prejudice of such improper argument is manifest. As discussed in the insufficiency arguments above, 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. Accordingly, the prosecutor's improper statements during closing argument, alone and in combination with other misconduct described above, requires the setting aside of appellant's convictions and sentence to death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Arguments XXVII, XXVIII, XXIX, and XXX on prosecutorial misconduct except to the extent that codefendant Tobin

argues that appellant was the actual perpetrator of any of the offenses.

XXIII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTOR TO QUESTION MR. TOBIN ABOUT OTHER CRIMES

Introduction

Before trial, the charges relating to appellant's purported burglary of commercial establishments were severed from the charges in the instant case. Nonetheless, the prosecution cross-examined Mr. Tobin about those purported burglaries by asking a series of questions about stolen merchandise. This improper "other crimes" evidence severely prejudiced appellant and impinged on the reliability of the death penalty determination.

Other Crimes Evidence

During her cross-examination of codefendant Tobin, the prosecutor asked a series of questions about stolen goods, including a bag of hair products and some fingernail polish, that were found in Ms. Pontbriant's car after the murder. (46 R.T. 6914-6918.) These items did not belong to Ms. Pontbriant, nor were they stolen from her house. Nonetheless, the prosecutor asked whether Mr. Tobin knew that the hair products and nail polish were stolen and whether appellant, who regularly went to swap meets with Mr. Tobin, 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[115] and (2) was highly

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[115]Defense counsel objected to this questioning on the grounds of relevance. (46 RT 6917-6918.)

prejudicial.

The original complaint in this case included charges against appellant for two commercial burglaries. Before trial, counsel for appellant moved to sever those counts on the grounds of undue prejudice. (1 C.T. 26-41.) The motion was granted and those counts were severed. (2 C.T. 418.) At pretrial, the prosecutor stated her intention to introduce the fruits of the burglaries, the three bags of hair products found in the trunk of Ms. Pontbriant's car, as evidence. Counsel for both defendants moved to preclude this evidence. Counsel for appellant specifically objected on the grounds that the evidence was irrelevant to the current charges and was being introduced solely for the purpose of showing that appellant was a burglar. (33 R.T. 4699-4700.) The prosecutor sought to justify the evidence as relevant to showing that the defendants planned to sell these items in order to facilitate their escape. She argued that they were admitted to show consciousness of guilt. (33 R.T. 4697-4698.)

Mr. Tobin's counsel argued that even if the prosecution's rationale was appropriate, there was no need to let the jury know that the items were stolen. (33 R.T. 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." (33 R.T. 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." (33 R.T. 4702.) This ruling was erroneous.

Since these burglary charges had been severed, the crimes had

nothing to do with the issues before the jury. Thus it was entirely improper to permit the prosecutor to question Mr. Tobin about the fruits of burglaries purportedly perpetrated by appellant, but which had never been proven. The trial court's erroneous ruling allowed the prosecutor to try to associate appellant with other unproven crimes similar to the charged crimes. To say that such evidence presented appellant in an unfavorable light with the jury is an understatement.

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, opinion amended and superceded on denial of reh'g en banc, 33 F.3d 1037 (9th Cir.1993), and *cert. granted and judgment rev'd on other grounds sub nom.,*

Duncan v. Henry (1995) 115 S.Ct. 887.).) Such arbitrary and unfair evidence also violates the Sixth Amendment right to a fair trial and the Eighth and Fourteenth Amendment guarantee of reliable guilt and penalty determinations in a capital proceeding.

The decisions of this court consistently have held that other crimes evidence is admissible only if: (1) the fact sought to be proved or disproved is *material*; (2) evidence of the other crime tends to prove or disprove the 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 867, 879 and *People v. Thompson, supra,* 27 Cal.3d 303, 315.)

Under this standard, it was clearly improper to allow questioning of a codefendant about his knowledge of items purportedly stolen by the appellant 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. The prosecutor's theory that the presence of nail polish and hair products in the trunk of the car reflected consciousness of guilt as to the crimes against Ms. Pontbriant was extremely strained and speculative. But even if those items in the trunk indicated an intent to raise money to flee, and this in turn reflected a consciousness of guilt as to the crimes against Ms. Pontbriant, the amount (if any) that appellant had paid for these items – i.e., the potential margin of profit if the items were sold – was simply irrelevant. Either appellant was attempting to raise money to flee or he wasn't; nothing further was at issue. Given the total lack of

relevant evidence that the nail polish and hair products were the fruit of the prior burglaries, admission of this evidence only accomplished the improper effect of besmirching the character of appellant before the jury.

In this regard, the improper admission of "other crimes" evidence is different than most evidentiary errors. "Other crimes" evidence is highly prejudicial because it paints a defendant as having criminal disposition.

Of critical importance, the admission of irrelevant "other crimes" evidence subverts the jury's basic fact finding process and violates the federal Due Process guarantee of a fair trial. "'An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.'" (*People v. Castro, supra,* 38 Cal.3d 301, 313-314, quoting *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [20 L.Ed.2d 476, 88 S.Ct. 1620]; see also (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386 and *People v. Valentine* (1986) 42 Cal.3d 170, 177-178.) Fundamental errors such as the one in the instant case strike at the heart of a fair trial because they so infect the trial process that they undermine the validity of the fact finding process itself. (Cf. *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [116 L.Ed.2d 385, 94 S.Ct. 1868].)

Even if the evidence was admissible, "admission of other crimes evidence cannot be justified merely by asserting an admissible purpose." (*People v. Thompson, supra*, 27 Cal.3d 303, 319.) That is, mere admissibility does not mean the court's ruling was proper.

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Other crimes evidence is inherently prejudicial and always involves the risk of undue prejudice to the defendant. Certainly here, the commercial burglary charges were originally severed because they were prejudicial in the context of this case.

The evidence was overwhelmingly prejudicial because it portrayed appellant simply as an individual with a criminal disposition. Moreover, by attempting to show appellant's propensities to engage in criminal activity, 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 supporting appellant's convictions and the special circumstances findings, appellant was overwhelmingly prejudiced by admission of this improper evidence. Accordingly, the convictions, the special circumstances findings and the sentence to death must be set aside.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXIV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

PENALTY PHASE ISSUES

XXIV.

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

Introduction

Appellant has previously shown that the trial court prejudicially erred in failing to sever appellant's guilt phase trial from that of codefendant Tobin, and appellant incorporates that argument herein. (See Argument II, *infra.*) The prejudicial impact of the improperly joint guilt phase trial, which prevented the jury from reliably evaluating the conduct and culpability of the individual defendants continued into the penalty phase, where it likely deprived appellant of the benefit of the lingering doubt jurors would have likely otherwise harbored even had they convicted him at a separate guilt phase trial. The trial court erred again in denying appellant's motion to at least accord him a separate penalty phase trial, and the joint penalty phase trial which ensued reinforced the prejudicial impact of the joint guilt phase trial and independently undermined appellant's right to a fair and reliable penalty determination.

As will be shown below, the trial court's refusal to sever the penalty phase trials of the two defendants violated appellant's Eighth and Fourteenth Amendment rights to individualized consideration and his Fifth and Fourteenth Amendment rights to due process and a fair trial. Here the codefendants' defenses were mutually antagonistic, evidence relating to the codefendant was presented that otherwise

would have been inadmissible at a separate trial for appellant, the codefendant augmented the prosecution's case against appellant and attacked appellant's case in mitigation, thereby lowering the prosecution's burden of proof. Further, the prosecutor, as she had done in the guilt phase, encouraged the jury to judge and condemn the two defendants as a single entity.

Factual Background

Before the trial in the instant case, appellant filed a motion to sever his trial from that of Mr. Tobin. (2 C.T. 469 et seq.) The parties, and certainly the prosecution, understood that the severance motion included severance at the penalty phase. (2 C.T. 547.) The prosecution opposed the motion for separate penalty phase trials, and the trial judge denied the defense request. (2 C.T. 569-570.) At the penalty phase, itself, appellant renewed his motion as well as arguing a motion for a mistrial because the codefendant was making the prosecution's case. (65 R.T. 9526-9527) The severance motion was again denied (4 C.T. 1030; 65 R.T. 9527.)

Summary of Argument

The failure to grant appellant's motion for a separate trial constituted reversible error because (1) it violated the Eighth and Fourteenth 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 *People* v. *Ochoa* (1998) 19 Cal.4th 353, the law governing capital sentencing determinations "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.) Relying on the Eighth and Fourteenth Amendments, 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." (*d.,* 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 (C.T. 1467) and because the prosecutor encouraged the jury to view the defendants as a single entity.

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 violates a defendant's due process rights to a fundamentally fair trial and lessens the prosecution's burden of proof. (*Zafiro v. United States , supra,* 506 U.S. at p. 539, see also p. 544, Stevens J. concurring); *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362.) Further, the joinder of cases with antagonistic defenses prejudicially affects a defendant's decision on whether to exercise his Fifth Amendment right to remain silent. Once a codefendant takes the stand implicating the defendant and exonerating himself, the defendant has virtually no choice but to take the stand in his own defense.

Additionally, as appellant pointed out in his argument on severance at the guilt phase, "[p]rejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual basis." (*United States v. Tootick, supra,* 952 F.2d at 1082.) Indeed, "the ultimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct." (*United States v. Brady, supra,* 579 F.2d at p. 1128; *see also United States v. Marshall, supra,* 532 F.2d at p. 1282; *United States v. Donaway, supra,* 447 F. 2d at p. 943.)[116]
All of these problems were present in the penalty phase of this case.

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[116] The prosecutor reinforced the impact of this error by improperly asserting in closing argument that appellant was a criminal who would naturally tend to hang around with "other criminals." (54 R.T. 7801-7802; see Argument XXII.D, *infra.*

Antagonistic Defenses

One effect of the trial court's erroneous refusal to sever the defendants' guilt phase trials was that the error compelled appellant to waive his Fifth Amendment right to remain silent and take the stand at the joint penalty phase trial. At the guilt phase Mr. Tobin took the stand to lay the entire blame for the homicide on appellant. While appellant chose to remain silent at the guilt phase because of his fear of Mr. Tobin and to avoid a "rat jacket," by the time the penalty phase arrived appellant clearly recognized that silence was no longer a realistic option. He explained that he had to take the stand in order to present the jury with the truth; that he did not kill Ms. Pontbriant. (61 R.T. 8644-8645.) That is, since Mr. Tobin's testimony essentially made the prosecution's case against him, appellant had no choice but to testify to avoid the death penalty.

Not only did this circumstance amount to cumulative prejudice resulting from the trial court's error to refuse severance in the guilt phase, but it provided codefendant's counsel with additional opportunities through cross-examination to exonerate Mr. Tobin at appellant's expense as well as reinforcing the state's case. Thus appellant was unfairly placed in the awkward position of defending himself against both the state and the codefendant.

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, supra,* 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, if there was any doubt about the matter, even the trial judge 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." (65 R.T. 9595.) This statement by the judge constituted an admission that appellant's constitutional rights had been violated under the principles set forth in *Sandstrom*.

Evidence Relating to Codefendant that Would Have Been Inadmissible at a Separate Trial for Appellant, and the Prosecutor's Continued Treatment of the Two Defendants as a Single Entity to be Convicted and Sentenced as a Unit

The prosecution presented a considerable amount of evidence against codefendant Tobin that would not have been admissible at a separate penalty phase trial for appellant. The incidents involving David Bendowski, Kenny Warren, and Willy Healer showed Mr. Tobin to be a physically abusive and brutal antagonist. Despite a brief instruction that the evidence should be considered against each defendant separately, when summarizing the acts in aggravation, the prosecutor again lumped the defendants together. (67 R.T. 9666-9667.) 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." (67 R.T. 9684.) She also argued that "two men committed this murder," that "two macho men rip[ped] off her clothes, and rip[ped] out her hair," and that these brutal acts "were committed for their

enjoyment." (67 RT 9690-9691.)[117] And, as she approached her conclusion, she asked the jury to decide whether "the defendants deserve the death penalty" and urged the jury to consider "the choices they have voluntarily made" and "what they did to Ivon Pontbriant." (67 RT 9693-9694.)

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 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

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[117]There was in fact no evidence permitting a reliable determination as to who did what to Mr. Pontbriant, as to how her clothes came to be removed or her hair pulled, and no evidence that the lethal assault was committed for the enjoyment of either defendant, let alone both.

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 mentioned 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.

(68 R.T. 9825-9826.)

Under the well-established tenets of Eighth and Fourteenth Amendment law and under California law, appellant was entitled to have evidence of the codefendant's bad acts excluded from consideration by the jury deciding whether he would be sentenced to death. (*People v. Boyd* (1985) 38 Cal.3d 762, 773; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [the jury must focus on the defendant as a "uniquely individual human being"].)

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.

Further, 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.)

Given the highly damaging and inflammatory nature of this evidence, plus the prosecution's continued exhortation to treat the defendants as a single entity, the brief instruction to consider the evidence separately as to each defendant was insufficient to overcome the prejudice resulting from the joinder of the penalty phase trials.

Codefendant Augmented the Prosecution's Case Against Appellant

When the prosecution determined that it would not call Mr. Hernandez to testify against appellant in the penalty phase, counsel for codefendant Tobin remedied this omission. (61 R.T. 8626, see also appellant's argument in support of his mistrial motion 65 R.T. 9526.) The defense objected vehemently on the ground that Mr. Hernandez was an informant of questionable veracity. Moreover, because of the way the prosecution structured its deal with Mr. Hernandez for his testimony in a prior unrelated case, the defense did not have full access to interview him prior to trial. (65 R.T. 9453-9458.) The objection was overruled. (65 R.T. 9458.)

At the behest of Mr. Tobin's counsel, Mr. Hernandez testified that he was a trustee in jail, had access to the area near appellant's cell while appellant was awaiting trial, and often chatted with appellant. (61 R.T. 9475-9476, 9479.) According to Hernandez, during their conversations, appellant admitted that he was the killer and not Mr. Tobin. Appellant purportedly described the homicide saying that he "messed up" and got pulled over by the Visalia police.

(65 R.T. 9482.) Hernandez testified that appellant stated that he and Tobin went over to get $300 and take some stuff from an old lady and that when she started yelling, he killed her. Appellant also purportedly showed Hernandez how he did it; how he shut her up using a knife. (65 R.T. 9484-9485.) Appellant did not tell Hernandez what part Christopher Tobin might have played in the homicide, saying only that Tobin was there. (65 R.T. 9487-9488.)

After Mr. Hernandez placed the blame for the entire incident squarely on appellant, counsel for codefendant Tobin called Leo Pike to the stand. Leo Pike was crucial to Mr. Tobin's strategy of casting the blame entirely on appellant. During his own testimony, appellant denied ever having a conversation with Mr. Hernandez about the incident. (61 R.T. 8697.) Leo Pike testified, however, that Mr. Hernandez was a trustee and had access to the area around appellant's cell. More importantly, he testified that he often saw appellant and Mr. Hernandez in conversation. (65 R.T. 9513-9514.)

This evidence showcased the precise problem condemned in *Tootick.* Mr. Tobin distorted the fact finding process and lowered the prosecution's burden of proof by presenting evidence of highly questionable veracity that condemned appellant and exonerated him. Indeed, although not specifically set forth on the record, in context, it appears that the reason the prosecutor refused to call Mr. Hernandez in the guilt phase of the trial to place appellant's purported "confession" on the record was precisely because Mr. Hernandez was of such questionable veracity. Thus, although the codefendant played the part of the prosecutor, he was not held to the same limitations or

standards as the prosecutor. (*United States v. Tootick*, *supra*, 952 F.2d at p. 1082.) Under these circumstances, appellant was improperly denied his rights both under California law[118] and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Closing Argument

After presenting evidence in an attempt to persuade the jury that appellant was the actual perpetrator not Mr. Tobin, Mr. Tobin's counsel argued at length that (1) that appellant lied on the stand (67 R.T. 9762, 9764-9770) (2) that appellant killed Ms. Pontbriant, (67 R.T. 9750-9764, 9770) and (3) that appellant (unlike Mr. Tobin) was not seriously intoxicated because he passed the field sobriety test when stopped by Officer Wightman (67 R.T. 9756-9757). Thus, counsel for Mr. Tobin was able to attack appellant in a more focused way than the actual prosecutor. Indeed, of the 28 pages of transcript that encompassed the closing argument for Mr. Tobin's counsel in the penalty phase (67 R.T. 9746-9774), fully 20 of them were devoted specifically to attacking Mr. Letner's credibility and urging the jury to find that Mr. Letner was the sole perpetrator (67 R.T. 9750-9770) .

By contrast, the prosecutor was stuck with an evidentiary record that didn't permit any reliable determination as to who did what. Moreover, rather than acknowledge the weakness in her case,

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[118]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.)

the prosecutor opted to treat the two men as a single entity. From Mr. Letner's perspective, therefore, the prosecutor got to have her cake and eat it too. That is, she could argue that the two defendants could be judged and condemned as an undifferentiated duo, and, if that didn't persuade the jury, Tobin's counsel was there to argue that Mr. Letner did it.[119] This is just one more example of the problems condemned in *Tootick, supra.*

Prejudice

On February 16, the fifth day of penalty phase deliberations, the jurors indicated that they reached a verdict regarding one of the defendants but were "hung" regarding the other. (72 R.T. 9837; 5 CT 1274.) After inquiring about the numerical split, the judge determined that further deliberations might prove fruitful and recessed the trial for a three day weekend to allow jurors to think about the matter. (72 R.T. 9849). After deliberations resumed on February 20, the jury ultimately reached a death verdict on both defendants. (5 C.T. 1274, 1275.) Despite the enormity of the prejudicial material improperly admitted in the penalty phase, the record shows from the dates of the verdicts that the jury was comfortable with its relatively quick condemnation of Mr. Tobin but severely split over the fate of appellant. (5 C.T. 1274-1275.) (Cf., *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury evidence of a close case].)

Thus, the prosecution cannot show beyond a reasonable doubt that the error of compelling a joint penalty trial of appellant and

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[119] Even Mr. Tobin's counsel admitted that at times the jury might think there were two prosecutors in this case (67 R.T. 9750.)

codefendant Tobin 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) 472 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 unattributable to the errors." (*Id.* at p. 279.) Here, because the jury was exposed to prejudicial evidence that would not have been admitted in a separate trial of appellant, because appellant's hostile codefendant bolstered the prosecution's case against appellant and attacked appellant's case in mitigation, and because the prosecutor, as she had done at the guilt phase, continued to treat the two defendants as a single entity to be jointly judged and condemned, the erroneous failure to grant appellant a separate penalty phase trial cannot be considered harmless beyond a reasonable doubt. Further, even if the impact of the erroneous denial of severance were appraised solely as a matter of state-law penalty phase error, there is "a reasonable (i.e., realistic) possibility" that had appellant been accorded a separate penalty phase trial, appellant would not have been sentenced to death. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

For all of the foregoing reasons, this court should reverse

appellant's death sentence.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument III on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT WAS TO PRESUME THAT ITS SENTENCING DETERMINATION WOULD BE CARRIED OUT

Introduction

The defense requested an instruction that explained the meaning of a sentence of execution and a sentence of life without parole. The trial court, however, refused to give it. Telling jurors that they had to presume the sentence they imposed would be carried out would have helped ensure the sentencing decision was made with a full appreciation of the gravity of the decision and an appropriate sense of responsibility. The trial court's error deprived appellant of a reliable death penalty determination.

Error to Refuse the Explanatory Instruction

The defense requested the following penalty phase instruction:

> "You are to presume that if a defendant is sentenced to life without the possibility of parole, he will spend the rest of his life in state prison.
>
> You are to presume that if a defendant is sentenced to death, he will be executed in the gas chamber." (4 C.T. 1074.)

The trial court declined to give this instruction. (4 C.T. 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 and Fourteenth 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, supra,* 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 here 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.)

Similar arguments have been rejected by this court in *People v. Smithey* (1999) 20 Cal. 4th 936, 1009. Since *Smithey*, however, the United States Supreme Court decided *Shafer v. South Carolina* (2001) 532 U.S. ____ [121 S. Ct. 1263, 149 L. Ed. 2d 178]. *Shafer* reaffirms *Simmons* and makes clear that in situations where the jury might not understand that a life sentence does not include the possibility of parole, the trial court has an affirmative duty to make sure the jury actually understands the defendant's parole ineligibility. (149 L.Ed.2d. at p. 192.) Significantly, the high court explained that is **not** enough to tell the jury that "life imprisonment means until the death of the defendant." The jury might still assume that there were circumstances under which a convicted capital defendant might become eligible for parole. (149 L.Ed.2d. at p. 188.)

More recently in *People* v. *Prieto* (2003) 30 Cal.4th 226 , this court reaffirmed the validity of CALJIC 8.84 and distinguished *Shafer*. This court concluded that the ambiguity in *Shafer* which might allow a jury to assume the possibility of parole simply does not exist in the California instruction. The language of CALJIC 8.84 is unambiguous and the jury's choice is either death or life without parole. (*Id*., at p. 270.)[120]

The defense submits that this court has drawn a distinction without a difference. While it is certainly true that CALJIC 8.84 says that a defendant will be confined for "life without parole", the language of the defective South Carolina instruction [imprisonment until death] permits exactly the same conclusion.

The problem that neither instruction fully addresses is the empirical research showing that juries believe that through some formula, even a capital defendant might become eligible for parole. That is, most citizens believe that a sentence "to life" (e.g., "15 years to life") means that technically there will be no parole. Nonetheless, similarly sentenced defendants are routinely paroled. Thus, there is great skepticism that any "life" sentence absolutely precludes parole. It is for that reason that *Simmons* and later *Shafer* require that a jury be instructed that a sentence of life without parole means that there is, in fact, no possibility of parole. CALJIC 8.84 does not resolve that

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[120] At the time of appellant's and Prieto's trials (see respectively, 5 CT 1178 and *People* v. *Prieto, supra,* 30 Cal.4th at 270-271) CALJIC 8.84 provided in relevant part: "It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances alleged in this case have been specially found to be true."

fundamental problem. Additionally, since the empirical research indicates that the problem with misperception of the reality of the penalty is so widespread, there is certainly no drawback to requiring a better definition of life without parole. A better definition of "life without parole" would eliminate this problem once and for all.

While it is true that this court has rejected proposed instructions stating that the defendant will never get out of prison or never be executed because they are technically inaccurate (.i.e. the Governor could grant clemency or the defendant could escape.),[121] the defense proposed instruction avoids that problem. There is nothing inaccurate about telling the jury what it should presume in choosing between its sentencing options. The jury is not supposed to speculate about possible escapes or commutations. A rational and reliable determination of the appropriate sentence is best achieved if the jury refrains from such speculation and presumes that the sentences will actually be carried out. That's the choice the proposed instruction would have given the jury in this case. (See, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 249-250 (footnote omitted).)[122] Further, here,

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[121] See, e.g., *People v. Hines* (1997) 15 Cal.4th 997 (1997) (proposed instruction telling the jury that a sentence of life imprisonment without the possibility of parole meant that appellant could never get out, and a sentence of death meant that appellant would be executed was properly rejected since it is inaccurate); *People v. Osband* (1996) 13 Cal.4th 622 (trial court properly refused to instruct the jury that a sentence of life without possibility of parole meant that appellant would "remain in state prison for the rest of his life and [would] not be paroled at any time," and that a sentence of death meant that appellant would be executed, because such an instruction is not completely accurate)

[122] In *Fierro*, this court observed:

> First defendant claims the court erred in refusing to give a proposed

unlike *Prieto*, the issue is not whether the trial court had a *sua sponte* obligation to further instruct the jury concerning its sentencing options. Here, a perfectly appropriate supplemental instruction was requested. There was no reason to refuse it.

Execution Portion of CALJIC 8.84 Similarly Flawed.

CALJIC 8.84 as it was given here suffered from the same flaws in its description of the imposition of a sentence of execution as it did

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instruction which provided: "You are instructed that if your decision in the penalty phase of this trial, is that the defendant should be put to death, the sentence will be carried out. On the other hand, if you determine that life without the possibility of parole is the proper sentence, you are instructed that the defendant will never be released from prison." In response to the court's observation that the instruction was untrue, defense counsel proposed to modify the instruction to provide that the jurors must "assume that the sentence that they impose will be carried out." The prosecutor opposed both the original and the modified instruction, noting that the jury had not manifested any concern about the issue. The trial court refused to give the instruction in either form.

The trial court properly refused the proffered instruction. In *People v. Thompson*, *supra*, 45 Cal.3d 86, we affirmed a trial court's decision to reject an instruction virtually identical to that presented here. As we there observed, the proposed instruction contains the twin vices of misstating the facts and inviting "the same sort of speculation as to whether unidentified officials will in the future perform their job" which we cautioned against in *People v. Ramos* (1984) 37 Cal.3d 136. (*People v. Thompson, supra*, 45 Cal.3d at p. 130; accord *People v. Johnson* (1989) 47 Cal.3d 1194, 1245, fn. 13.) The jury here received no information and raised no question as to whether the sentence would in fact be carried out. Accordingly, the requested instruction was properly refused.

Defendant's alternative request to instruct the jury that they should assume the sentence they imposed would be carried out, was not similarly misleading, and, as we have previously observed, should have been given. (*People v. Thompson, supra*, 45 Cal.3d 86, 131 .)"

(But see *People v. Arias* (1996) 13 Cal.4th 92 (no reasoning; no mention of *Fierro* or *Thompson*.)

with the sentence of life without parole discussed above. Indeed, since at the time of appellant's penalty trial no one had been executed in California since Aaron Mitchell's execution in 1967,[123] the jurors, or at least some of them, were likely to doubt that a death sentence would be carried out. The proposed instruction remedied that flaw by telling jurors that they were to presume that a sentence of execution would be carried out. Thus the proposed instruction corrected the federal due process problem that *Simmons* and *Schafer* addressed with respect to jurors perceptions of the efficacy of their sentencing decisions and conformed to this court's direction in *Thompson* and *Fierro* concerning the appropriate language necessary to counter these perceptions.

The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's somewhat similar Argument XXVI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

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[123] Robert Alton Harris was not executed until April 21,1992, more than two years after jury deliberations concluded here.

XXVI.

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

Introduction

During closing argument, the prosecutor told the jury that Jesus approved of the execution of the thief nailed to the cross next to him, and, indeed, that the execution was an essential step in the thief's salvation as a prerequisite to receiving a place in heaven. Effectively, the prosecutor conveyed the notion that the Christian faith compelled the jurors to impose death, but the burden of that decision would be lightened by the knowledge that the defendants might then receive forgiveness in heaven. The prosecutor's argument introduced improper sentencing factors into the jury's deliberations and diminished the jury's individual and collective responsibility for the ultimate verdict.

Improper Argument

On several occasions, this court has held that it is misconduct for a prosecutor to argue that a 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 jurors to base their verdicts on factors not set forth in that statute, i.e., on 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 violates due process and the Eighth Amendment by diminishing the jurors' sense of responsibility for their verdict (*Caldwell* v. *Mississippi, supra*, 472 U.S. at p. 341; *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 777 ("[a]rgument involving religious authority . . . undercuts the jury's own sense of responsibility for imposing the death penalty") and by implying that another, higher law should be applied, thus displacing the law set forth in the trial court's instructions. (*Sandoval v. Calderon*, *supra*, 241 F.3d at 776 ("the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict").

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.

(67 R.T. 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. In using this particular example, the prosecutor clearly implied that if Jesus approved of a thief being executed, surely he would approve of executing someone who has murdered. Further, by telling the jurors that Jesus had forgiven the thief and would allow him a "place in paradise," but the thief still had to die for his crimes, the prosecutor suggested that if appellant were executed by the State of California, he might then hope to be accorded a place in paradise by virtue of Jesus' forgiveness. This argument clearly implied that appellant would be more likely to obtain Jesus' forgiveness if 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 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 the United States and California Constitutions both of which guarantee the right to a fair and reliable capital sentencing determination as well as prohibiting the establishment of religion. (U.S. Constitution, First, Fifth, Sixth, Eighth and Fourteenth Amends.; California Constitution, article l, 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) 528 Pa.558, 599 A.2d 630, cert. denied 504 U.S.946 (1992).) [124]

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 inconsistent with their religious faith or against the religious norm of their community. Moreover, an appeal to a

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[124] 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.

person's religious belief, as supposedly dictated by Christianity,[125] 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.[126] Further, as in the present case, a defense objection to a prosecutor's argument urging the jury to remember what Jesus did in an allegedly analogous context would have risked offending religious jurors, and likely served only to further damage appellant's chances for a life sentence. The defense should not have to risk alienating the sentencing jury in order to be protected from such improper prosecution appeals to religious authority.

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

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[125] While the prosecutor clearly should not have been appealing to religious belief or authority to support imposition of a death sentence, the prosecutor's argument, on its own terms, appears also to have been misleading. There is nothing in the New Testament verses in which the exchange between Jesus and the thief is described suggesting that Jesus approved or condoned anyone's execution. (See, Luke 23:39-43.) Indeed, just a few verses earlier, Jesus importuned on behalf of the executioners, "Father, forgive them, for they know not what they do." And, in the gospel of John, chapter 8, when asked by the Pharisees what to do with a woman taken in adultery, a crime for which the penalty under Mosaic law was death by stoning, Jesus responded: "Let anyone among you who is without sin be the first to throw a stone at her." And after having so responded to the Pharisees, Jesus stated to the woman, "Neither do I condemn you."

[126][See Duffy, *Note, "Barring Foul Blows: An Argument for a Per Se Rule for Prosecutors' Use of Religious 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.

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 beyond a reasonable doubt that the error did not contribute to the sentencing decision. Thus, 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 that 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 the prosecutor's improper references to the "religious proverb" about Jesus and the thief did not influence the sentencing jury. This is particularly true since the jury was at an impasse as to the appropriate sentence for appellant after 5 days of deliberations, and did not agree on a verdict until the 6th day of deliberations, which took place after a 3-day break. The appropriate sentence for appellant was clearly a difficult question for the sentencing jury, and it is impossible to say beyond a reasonable

doubt that the ultimate sentencing verdict was not influenced by the prosecutor's improper suggestion that Jesus approved the execution of a man condemned for theft and that appellant's execution could enhance appellant's chances for salvation. Similarly, even if the impact of error were appraised solely as a matter of state-law penalty phase error, there is "a reasonable (i.e., realistic) possibility" that but for the improper comments by the prosecutor, appellant would not have been sentenced to death. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Accordingly, appellant's death sentence should be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXVII.

THE USE OF UNADJUDICATED OFFENSES AS EVIDENCE IN AGGRAVATION VIOLATED APPELLANT'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS.

Introduction

Because neither defendant was a hardened criminal with a string of prior convictions, the prosecution was reduced to arguing that a series of old, and often minor altercations, several of which were among teenage boys, equated to a history of menacing violence. The use of these unadjudicated alleged offenses deprived appellant of a fair penalty phase hearing and undermined the reliability of the death penalty determination.

Improper Use of Unadjudicated Offenses

As discussed previously, before his arrest in this case, appellant did not have any felony convictions. In an effort to bolster her argument for a death judgment against appellant, the prosecutor resorted to presenting evidence of alleged uncharged misconduct. Much of this evidence involved minor encounters among adolescent boys.

For example, there were several incidents involving appellant and Christopher Tobin supposedly threatening and assaulting David Bendowski in 1979 because of disputes between them about a former girlfriend of Mr. Tobin and about marijuana. (56 R.T. 7944, 7947-7950, 7952, 7960-7965, 7969-7971.) At the time of these alleged incidents, appellant was younger than 18. He was never arrested for these "crimes."

There was an additional incident in 1978 where appellant and Stephen Frame got into a fight in the parking lot of their high school. Initially, Mr. Frame tried to present himself as a blameless victim of an unprovoked assault. (56 R.T. 7921- 7929.) On cross-examination, however, Mr. Frame admitted that there was a prior incident where some of Mr. Frame's associates accosted appellant's younger brother in a classroom. (56 R.T. 7935.)

Again, there were no charges brought concerning this incident and appellant was still in high school.

Another incident in 1983 involved a purported assault on a police officer. Officer Emberton testified that he was trying to get onto the free way when appellant kicked his car and then struck him when he got out to check for damage. (57 R.T. 8090- 8101.) However, Mr. Clenney testified that the incident did not happen quite the way Officer Emberton testified. Clenney, who was never charged with anything, testified that Officer Emberton's car nearly hit him as he and appellant were hitchhiking. Suddenly, the car stopped and the driver got out and approached appellant in an aggressive manner. (61 R.T. 8631-8632.) Letner assumed a karate stance in his own defense but Mr. Clenney did not see appellant push the officer. (61 R.T. 8638-8639.) Officer Emberton struck appellant and appellant struck back. (61 R.T. 8642-8643.) At no time during the confrontation did Officer Emberton identify himself as a police officer. (61 R.T. 8633, 8636.)

Significantly, despite this arrest for assaulting an officer, no charges were ever filed.

Sheila White was appellant's ex-girlfriend. (58 R.T. 8372-8374.) She testified that despite having regular consensual sexual relations (58 R.T. 8374) during their relationship, appellant once raped her in 1987. (58 R.T. 8385-8389.) Her thirteen year old son was in the very next room. (58 R.T. 8385.) On another occasion that same year, appellant beat her. (58 R.T. 8375-8380.) With respect to these incidents, it is important to note that Ms. White never cried out to wake her son during the alleged rape nor did she report either incident to the police. (58 R.T. 8382.)

Alexander McAdams testified about an incident that took place in 1985. He stated that as a background matter, he thought appellant was bothering his girlfriend, Susan Forsythe. (58 R.T. 8165- 8166.) After some disagreement, Mr. McAdams claimed that appellant tried to initiate a head on collision as both men were driving up First Street in Visalia in opposite directions in the same lane of traffic. Eventually they struck when both vehicles were going 5-10 miles per hour. (58 R.T. 8167-8178.)

Mr. McAdams testified that he tried to back away and flee. (58 R.T. 8177.) As he fled, he saw appellant carrying what appeared to be a rifle and he heard shots. (58 R.T. 8182-8183.) Mr. McAdams conceded however, that there was no damage to his truck, and the police did not find any bullet holes in it. (58 R.T. 8194.)

Appellant's version of the incident is quite different. On the day of the confrontation with Mr. McAdams, appellant was driving Mr. McAdams' girlfriend to work in his Corvette. (60 R.T. 8577-8578.) As they stopped at a stop light, they saw Mr. McAdams in his

vehicle and McAdams was not stopping. Appellant had to run a red light to avoid a collision. (60 R.T. 8579.)

Appellant admitted that later he tried to scare Mr. McAdams with his vehicle in a manner similar to Mr. McAdams' description. However, the vehicles never struck and appellant was not carrying a rifle. (60 R.T. 8581-8581.) In fact, the rifle he owned was at Mr. Hockney's house. (60 R.T. 8583-8584.)

Officer Del Torchio testified that shortly after Mr. McAdams reported the incident, the police went to Mr. Hockney's house. There they found a Ruger carbine rifle (58 R.T. 8218) which Mr. Hockney told the officers belonged to appellant. (58 R.T. 8220-8221.)

Unquestionably, appellant's response to Mr. McAdams' provocation was reckless. Nonetheless, this activity is hardly representative of a violent criminal history. It is nothing more than a testosterone fueled altercation between two young men, barely out of their teens, involving cars and girls.

Finally, there was a 1986 incident involving "Healer the Dealer," a drug informant for the Napa police at the time of his testimony at appellant's trial. (58 R.T. 8255-8256.) Healer took money from Mr. Tobin's mother to fix her car and then disappeared before finishing the work. When appellant and Mr. Tobin unexpectedly encountered Healer, they forced Healer to drive them to where Mr. Tobin's mother was working to talk to her about Healer's theft of her insurance money. (58 R.T. 8291-8298.) Neither defendant was ever prosecuted as a result of this incident.

The admission of these unadjudicated offenses violated

appellant's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as appellant's Eighth and Fourteenth Amendment rights to a reliable penalty phase determination. In *Gardner v. Florida, supra*, 430 U.S. at pp. 357-358, the United States Supreme Court stated in relevant part:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. [Citations.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. 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. [I]t is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause.

Thus, for a death decision to be based on reason, due process requires that it be based on accurate and reliable information. (*Id.* at p. 359.) Moreover, the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." (*Godfrey v. Georgia* (1980) 446 U.S. 420 at p. 427.)

In the instant case, one must assume that appellant's death verdict was based in large part on inadmissible evidence of unadjudicated "crimes" which occurred years before appellant's penalty phase trial and most of which never even resulted in an arrest. Although California required individual jurors to find beyond a reasonable doubt that appellant committed these unadjudicated crimes

before the jurors could consider them as aggravating evidence,[127] the beyond a reasonable doubt requirement does not go far enough to eliminate undue prejudice, particularly concerning incidents that occurred years earlier. Appellant was still required to defend himself on these very old matters before a jury which had just convicted 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 unadjudicated testosterone-driven encounters among teenage boys and young adults 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.

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[127] The jury instructions did not require juror unanimity as to alleged unadjudicated crimes before individual jurors could consider such alleged crimes as aggravating factors. The failure to require juror unanimity further undermined the reliability of the sentencing determination, and, as argued below, violated appellant's Sixth Amendment right to trial by jury.

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 crimes because the State had previously failed to adjudicate and prove his guilt as to those crimes. 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, rule 404(b) 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 Eighth and Fourteenth Amendments 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.)[128]

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 closing argument (67 R.T. 9642-9644, 9656-9664), 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.) Therefore, appellant's death sentence should be vacated.

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[128] This court apparently did not consider the principles announced in these cases when it decided *People v. Balderas* (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 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"].)

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXVI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXVIII.

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

Introduction

There were 62 unreported conferences during trial, including the critically important conference concerning jury instructions. Moreover, because of memory loss over time, even years of very expensive efforts at record reconstruction yielded negligible results. Indeed, trial counsel for codefendant Tobin failed to participate in at least some of the hearings because he claimed that he did not remember anything that would be helpful. The trial court's failure to comply with the requirement to place all conferences and proceedings on the record deprived appellant of his constitutional right to an adequate record on appeal.

Failure to Ensure an Adequate Record

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.[129]

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[129] Christopher Tobin's Request for Correction and Completion of Record, filed by codefendant on July 21, 1992 (Vol IV Augmented Clerk's Transcript at pp. 639-926) ,

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 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

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and appellant's request for Correction and Completion of the record filed in August of 1994 (Vol. V Augmented Clerk's Transcript at pp. 927-1242) list the incidents where there were proceedings which were not recorded by a court reporter.

does it effectively eviscerate the statute, it also defies logic. Collectively, the rulings of this court have allowed trial judges to violate the provisions of section 190.9 with impunity. This is so because this court has imposed the burden on the appellant to show prejudice but allowed the trial courts to deprive the defense of any really effective means of carrying that burden. That is, in order to show prejudice, the appellant must be able to reconstruct what happened during each off-the-record proceeding. More often than not, such reconstruction -- at least *an 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, Mr. Tobin'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. Appellant's motion to correct and augment the record, including his request for settled statements was filed over three 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."[130] (Volume VI, Augmented Clerk's Transcript at p. 1285.)

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[130]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

The hearing on the request for settled statements did not occur until five years after the end of the trial. Codefendant'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.[131]

Further, 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,[132] about what occurred during the off-the-record proceedings. (4/18/95 R.T. 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. (50 R.T. 7430; 51 R.T. 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

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190.9. (45 RT 6578.)

[131]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 [codefendant Tobin'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." (1 RT 2, 4/17-18/95 Hearing.)

[132]In April 1995, at the time of the hearing on the 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.)

this important discussion on the record. (51 R.T. 7456-7461)(RT 148-149, 4/18/95.). This summary, however, completely fails to convey the back and forth which would typically occur during a discussion of proposed jury instructions. Moreover, it is this back and forth that provides both content and context for the jury instructions that were given and those that were refused. Additionally, it may be that the defense raised objections concerning particular instructions that were overruled by the trial judge, thus leaving counsel to make the best of a bad situation by changing strategy or emphasis in a way that is not adequately reflected in the summary of the conference that was placed on the record.

As long as this court does not sanction trial courts for not following the requirements of section 190.9, this kind of cavalier attitude by trial judges is likely to prevail. In point of fact, in virtually all capital cases there is expensive, time consuming, extensive record correction to remedy **exactly** the kind of problem that Penal Code section 190.9 was intended to forestall. Indeed, if such an important proceeding as the conference on jury instructions need not be recorded and may simply be "summarized," then section 190.9 creates a statutory right but leaves the defendant with no effective remedy. In order to bring a halt to this virtually ubiquitous and costly problem, this court should take a more active role in sanctioning trial courts for noncompliance with clear statutory mandates.[133]

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[133] The creation of a verbatim record is not an impossibility. The military requires that a verbatim record be prepared in every felony case (Article 54 of the Uniform Code of Military Justice [10 U.S.C. section 854] and there are sanctions for the

Moreover, 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 appellate proceeding 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 so 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 (codefendant's trial counsel) had no recollection of what transpired during unrecorded portions of the trial.

In this regard should this court rule that an issue or objection was waived by the failure of the defense to properly object, appellant will have been severely prejudiced because the appropriate argument or objection may well have been made in one of these numerous

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failure to comply with this mandate. See generally *United States v. Gray* (C.M.A. 1979) 7 M.J. 296. While the military has adopted an "off the record" sidebar procedure, See Rules for Courts Martial [RCM] 802, it is limited in scope and does not relieve the statutory burden on the prosecution to ensure that there is an adequate verbatim record for appellate review.

unrecorded conferences. Thus, the trial court's failure to comply with section 190.9, and provide the defense with an adequate record on appeal could be severely prejudicial. In view of this problem, appellant asks this court to take into account the 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.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXVII on this issue.

XXIX.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Introduction

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was

old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law 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." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same

constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained eighteen special circumstances[134] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were

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[134]This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now twenty-two.

created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this court's construction of the lying-in-wait special circumstance, which the court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72

N.Y.U. L.Rev. 1283, 1324-26 (1997).)[135] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. Indeed, in *People v. Stanley* (1995) 10 Cal.4th 764, 842, this court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the

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[135]The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See section E. of this Argument, *post*).

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in

aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[136] Indeed, the court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[137] or had a "hatred of religion,"[138] or threatened witnesses after his arrest,[139] or disposed of the victim's body in a manner that precluded its recovery.[140]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v.*

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[136]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[137]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[138]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

[139]*People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[140]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

California (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds[141] or because the defendant killed with a single execution-style wound.[142]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[143] or because the defendant killed the victim without any motive at all.[144]

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[141]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[142]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[143]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[144]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No.

c. Because the defendant killed the victim in cold blood[145] or because the defendant killed the victim during a savage frenzy.[146]

d. Because the defendant engaged in a cover-up to conceal his crime[147] or because the defendant did not engage in a cover-up and so must have been proud of it.[148]

e. Because the defendant made the victim endure the terror of anticipating a violent death[149] or because the defendant killed instantly without any warning.[150]

f. Because the victim had children[151] or because the

S014199, RT 6801 (same).

[145]See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[146]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[147]See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[148]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[149]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[150]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[151]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

victim had not yet had a chance to have children.[152]

g. Because the victim struggled prior to death[153] or because the victim did not struggle.[154]

h. Because the defendant had a prior relationship with the victim[155] or because the victim was a complete stranger to the defendant.[156]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating

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[152]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[153]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[154]See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[155]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[156]See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[157]

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[158]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[159]

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[157]See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[158]See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[159]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[160]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[161]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[162]

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[160]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[161]See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

[162]The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary

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aggravating factors outweigh the mitigating. (See section C of this argument, below.)

imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* , *supra*, 536 U.S. 584, 122 S. Ct. 2428 [hereinafter *Ring*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's

death penalty scheme as interpreted by this court violates the federal Constitution.

a. *In the Wake of Ring, Any Aggravating Factor Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[163] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this court does not require that a reasonable doubt standard be used during any part of the penalty

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[163]See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[164] According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must

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[164]This court has acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

find that aggravating factors outweigh mitigating factors.[165] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[166]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section

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[165]In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: '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.'" (*Id.*, 59 P.3d at p. 460)

[166]This court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

190, subd. (a),[167] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 122 S.Ct. at p. 2440.) Section 190, subd. (a) provides that the

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[167]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Even then, death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].) In essence, therefore, a true finding on a special circumstance is a necessary, but NOT a sufficient prerequisite to the imposition of a death judgment.

Additionally, Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to

call for leniency,[168] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[169]

There is no meaningful difference between the processes followed under each scheme. "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*, 124 S.Ct. at 2439-2440.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions,

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[168]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[169]California Penal Code Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

In *Prieto*, the court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of

parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) **This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.**

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring*, *supra*, 122 S.Ct. at 2439-2440.)

Finally, this court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional

> protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

(*Ring*, *supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[170] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure is

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[170]In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. *The Requirements of Jury Agreement and Unanimity*

This court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[171] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring, supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p.

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[171]See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

732;[172] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 122 S.Ct. at p. 2443).[173] See section D, *post.*

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the

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[172]The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra,* 524 U.S. at pp. 731-732.)

[173]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

requirement did not even have to be directly stated.[174] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

This court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed particularly in a case like appellant's, where the chief reasons

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[174]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

presented to the jury for imposing a death sentence were numerous instances of purported misconduct that were not part of the commitment offense.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson*, *supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree

unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* makes clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual

determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship*, *supra*, 397 U.S. at 364. Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Stantosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be

extinguished. See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas*(1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Stantosky, supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'"

(455 U.S. at 756.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Stantosky.* They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Stantosky, supra*, 455 U.S. at 763. Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship, supra*, 397 U.S. at 363.

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. *Beck v. Alabama, supra,* 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California, supra* 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) In

Monge, the U.S. Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not.

They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this court did not consider the applicability of

section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and

with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious: Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the

Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

6. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This court has held that the absence of written findings does

not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[175] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants.

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[175]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

(*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id*. at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one

aggravating factor relied on to impose death.[176]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but

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[176]See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative

proportionality review." California's 1978 death penalty statute, as drafted and as construed by this court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their

outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2242, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[177]

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[177]See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. §

Section 190.3 does not require that either the trial court or this court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently

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2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192, citing *Furman v. Georgia, supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, as explained in detail in issue XXVII, supra, the prosecution presented extensive of unadjudicated misconduct. Indeed, a significant portion of the prosecution's case in aggravation consisted of unadjudicated

misconduct involving teenage boys and their relationships with girls and cars.

The United States Supreme Court's recent decisions in *Ring v. Arizona*, *supra,* and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438

U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial

court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against

"'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It

encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785, *judg. vacated on other grounds, (1971) 403 U.S. 915*.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[178] as in *Snow*,[179] this court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating

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[178]"As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275.)

[179]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at 126, fn. 32.)

circumstances apply. (See sections C.1-C.5, *ante.*) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante.*) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the court was seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The court offered three justifications for its holding.

(1) The court initially distinguished death judgments by

pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia* (1977) 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on

certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."

(*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[51] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

(3) Finally, this court relied on the additional

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[51]The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

"nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are

routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia, supra.*)

Nor can this fact justify the refusal to require written findings by the jury (considered by this court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*)[52] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing

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[52]Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443.)

proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this court when a fundamental interest is affected.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular

punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)[53]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at p. 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed

[53]These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra* 356 U.S. at pg., 100; *Atkins v. Virginia, supra*, 122 S.Ct. at 2249-2250.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as

the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[54] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[54]Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

Appellant Joins Codefendant's Argument

Appellant joins codefendant Tobin's argument XXXVIII on a somewhat similar issue.

XXX.

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* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of his right to be informed of the nature and cause of the accusation against him, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, of his right not to be subjected to unreasonable searches and seizures or convicted upon the basis of illegally seized evidence, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

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 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, Christopher Tobin, were stopped by a police officer in the car owned by Ms. Pontbriant. Appellant was at the wheel and Mr. Tobin was in the passenger's seat. 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. 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 requires heightened 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* [55]"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* (1956) 46 Cal.2d 818, 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 (Brown I), supra,* 40 Cal.3d 512, 541.) In a death penalty case, "individual jurors bring to their deliberations 'qualities 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.

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[55]*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."

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXIX on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

CONCLUSION

For all of the foregoing reasons, appellant asks this court to reverse his convictions and set aside his sentence of death.

Dated: February 9, 2004

Respectfully submitted,

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Certificate of Word Count

I am the attorney for appellant Richard Lacy Letner. Based upon the word-count of the Word Perfect program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 145,397 words. (California Rules of Court, rule 28.1(e)(1).

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: February 9, 2004

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PROOF OF SERVICE

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 12008 Prescott, AZ 86304. On February 9, 2004 I served the within

OPENING BRIEF FOR APPELLANT
RICHARD LACY LETNER

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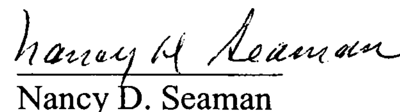

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