IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RICHARD LACY LETNER, CHRISTOPHER ALLAN TOBIN,

Defendants and Appellants.

CAPITAL CASE
S015384

Tulare County Superior Court No. 26592
The Honorable William Silveira, Jr., Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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Other Authorities

CALJIC 1.00	138
CALJIC 1.01	144
CALJIC 2.00	144
CALJIC 2.01	138

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD LACY LETNER, CHRISTOPHER ALLAN TOBIN,** Defendants and Appellants.	**CAPITAL CASE** S015384

STATEMENT OF THE CASE

On October 14, 1988, the Tulare County District Attorney filed an information in case number 26592, charging appellants Richard Lacy Letner and Christopher Allan Tobin with the following crimes against victim Ivon Pontbriant on March 1, 1988: Count I, murder (Pen. Code[1/], § 187); Count II, attempted rape (§§ 664, 261, subd. (2)); Count III, residential robbery (§§ 211, 212.5); Count IV, residential burglary (§ 459); and Count V, auto theft (Veh. Code, § 10851, subd. (a)). The information also alleged the following three special circumstances to count I: that Letner and Tobin both committed the charged murder while engaged in the commission or attempted commission of (1) rape (§ 190.2, subd. (a)(17)(C)), (2) robbery (§ 190.2, subd. (a)(17)(A)), and (3) burglary (§ 190.2, subd. (a)(17)(G)).

The information also charged Letner in counts VI, VII, VIII, and X with four separate counts of burglary. (§ 459.) Tobin was charged in counts IX and

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1. Unless otherwise noted, all further statutory references are to the Penal Code.

XI with two separate counts of receiving stolen property. (§ 496.) (CT 7-10.) On November 28, 1988, Letner and Tobin were each arraigned. Each of them pled not guilty to all counts and denied all allegations. (CT 13-14.)

Appellants each moved to dismiss the information pursuant to section 995. (CT 15-24.) The trial court denied the motion on March 22, 1989. (CT 117-118.)

On April 10, 1989, Tobin filed a petition for writ of prohibition and mandamus in the Fifth District Court of Appeal. The petition alleged insufficient evidence to charge Tobin with murder, burglary, or any of the special circumstances. (CT 119-142.) On April 13, 1989, the court of appeal denied the petition. (CT 227.)

Appellants also moved to have the trial of the various crimes relating to the murder of Ivon Pontbriant severed from the trial pertaining to counts VI through XI. (CT 26-41.) Appellants also moved to suppress evidence pursuant to section 1538.5 and under the federal due process clause. (CT 74-89.) On June 7 and 8, 1989, the trial court heard and denied appellants' motion to suppress. The trial court granted appellants' motion for a separate trial as to counts VI through XI. (CT 416-419.)

Appellants both filed motions to be tried separately from one another. (CT 257-267, 467-476.) The trial court denied these motions on August 25, 1989. (CT 503-504.)

On November 21, 1989, a jury was impaneled to try the case. (CT 688.) On January 11,1990, the jury found appellants guilty on all counts and found all special circumstance allegations to be true. (CT 971-994.)

The penalty-phase trial commenced on January 22, 1990. (CT 1031.) On February 20, 1990, the jury returned death verdicts against both appellants. (CT 1274-1275.)

Appellants both filed motions for a new trial. (CT 1310-1311, 1467-

1476.) The trial court denied these motions on April 17, 1990. That same day, the trial court denied appellants' motions to modify their death sentences pursuant to section 190.4, subdivision (e). (CT 1575-1576.)

On April 24, 1990, the trial court entered judgments of death as to both appellants. Additionally, appellants were both ordered to serve consecutive terms of 6 years 8 months on their convictions of robbery, burglary, auto theft, and attempted rape. (CT 1589, 1598-1605, 1613-1618.)

STATEMENT OF FACTS

Guilt-Phase Evidence

Christopher Allan Letner and Richard Lacy Tobin became close friends while attending high school together in Napa. (RT 5381, 6890.) Tobin moved to Visalia sometime in 1984 and developed a romantic relationship with Jeanette Mayberry a few months later.[2/] (RT 5380-5381.) Letner also moved to Visalia shortly thereafter, and for the next several years Letner and Tobin lived off-and-on together and with various girlfriends and roommates in a number of apartments in the Visalia area. (RT 5380-5392, 6187-6190, 6200-6201.)

By September 1987, Letner and Tobin were living together in an apartment at 301 East Murray in Visalia. (RT 5077-5079, 5391.) On December 21, 1987, the apartment manager served them with a notice to pay the rent or quit the premises. (RT 5080-5081.) By January 1988, Tobin moved into Mayberry's apartment three blocks from the East Murray apartment.[3/] (RT

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2. This was after Tobin had parted with his then-wife Cheryl Williams. (RT 5378.)

3. The couple moved back together in hopes of repairing their stormy relationship, which by this time had produced a daughter, Jennifer, born in May 1987. (RT 5391, 5406.)

5392, 5406-5407.) Letner remained at the East Murray address. (RT 5407.) The rent at the East Murray apartment remained unpaid into January 1988, and on January 7 the management served Letner and Tobin with an eviction notice.[4] (RT 5084-5086.)

During this same period, Letner and Tobin worked for Module Air in Goshen. They were both laid off in January 1988.[5] Neither of them obtained regular employment thereafter. (RT 5399.)

On January 12, 1988, 59-year-old Ivon Pontbriant and Warren Gilliland rented the house at 804 North Jacob in Visailia.[6] (RT 5100, 5333-5334.) Shortly thereafter, Gilliland met Letner at the nearby Breakroom Bar. Letner agreed to help Gilliland repair washers and driers at the North Jacob house. In return, Gilliland would pay Letner a commission on the washers and driers he sold.[7] Gilliland also hoped to teach Letner the trade of appliance repair. (RT 5107-5111.) Ms. Pontbriant and Gilliland befriended Letner. Indeed, Gilliland came to view Letner as something like a son, and Ms. Pontbriant also said Letner reminded her of her son. (RT 5110, 5113-5114, 5407.) Letner

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4. Letner and Tobin were both on the rental agreement. (RT 5078-5079.) The apartment manager appeared in court on February 17, 1988, to obtain an eviction notice, which was issued on March 3, 1988, (RT 5087-5088.)

5. Module Air constructed "prefab" school classrooms. Letner worked as an electrician, and Tobin performed "odd jobs." (RT 6269-6271.) Letner worked from June 10, 1987, to January 29, 1988. Tobin worked from May 28, 1987, to January 15, 1988. (RT 6283.)

6. The two had been together for approximately seven years, and Gilliland considered Ms. Pontbriant to be his wife. (RT 5097-5099.) Mr. Gilliland died on Christmas Eve 1989, shortly before the close of the People's case-in-chief. (RT 6573.)

7. Mr. Gilliland, who suffered from severe alcoholism and a number of serious medical conditions, repaired appliances to supplement his social security payments. (RT 5094-5097, 5102-5103.)

eventually brought Tobin to the house a couple of times and introduced Tobin as his cousin. (RT 5115.)

Early in the morning of Sunday February 28, 1988, Letner and Tobin borrowed Mayberry's car to go to a swap meet.[8] (RT 5409-5410.) Later that morning, they arrived at the home of Gilliland and Ms. Pontbriant.[9] They came bearing gifts -- a bottle of Kahlua and a couple cartons of Marlboro cigarettes. (RT 5121.)

The two came into the kitchen and had coffee with Gilliland and Ms. Pontbriant. While they were sitting at the table, Gilliland said he was preparing to go to Modesto to visit his sons and grandsons. (RT 5123-5124.) Ms. Pontbriant mentioned that the rent was due in two days.[10] In the presence of Letner and Tobin, Gilliland handed Ms. Pontbriant about $340 in cash and told her to pay the rent. Ms. Pontbriant placed the cash in her checkbook and put the checkbook in her purse. (RT 5124-5125, 5127-5128.) Letner and Tobin left after about an hour. (RT 5137.)

Letner returned the car to Mayberry at about 1:00 p.m. After doing so, he took some glee in informing Mayberry that Tobin was with his exwife, Cheryl Williams, at a nearby park. Mayberry went to the park and confronted Tobin, which led to a heated and protracted argument. After a good deal of rancor, Mayberry finally threw away her engagement ring and went home.[11]

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8. Neither Letner nor Tobin had a working car at that time. (RT 5399.) Both of them rode bicycles during this period. (RT 5116, 5465.)

9. They said they had come in Tobin's girlfriend's car. (RT 5121-5122.)

10. The $395 monthly rent on the house was due the first of each month. (RT 5333-5334.)

11. Mayberry had previously been arrested for disturbing the peace stemming from a prior altercation with Cheryl Williams. (RT 5453.)

(RT 5409-5415.)

At some point that day, Gilliland and Ms. Pontbriant had an argument. Gilliland packed up a few items and made arrangements for his son, Jerry Gilliland, to pick him up at the Capri Motel in Visalia and take him to Modesto.[12/] (RT 5137-5139, 5219, 5369.) Sometime later, Gilliland arrived at the Breakroom Bar on a moped. He had a suitcase under his arm, and he was very drunk. Letner was also at the bar at the time. Gilliland met with Letner for a while and then left on the moped. Letner left sometime later on his bicycle. (RT 5490-5492, 5500-5501.)

Gil1liland arrived at the Capri Motel on his moped sometime later and checked into a room. His son picked him up very early the next morning. (RT 5341-5344.) Before going to Modesto, they went back to the house on North Jacob. Ms. Pontbriant was asleep in bed. Gilliland picked up a small toolbox and a puppy. His son then drove Gilliland to his exwife's home in Modesto and dropped him off with the moped and the puppy.[13/] (RT 5143-5144, 5355-5356, 5367.)

On the evening of February 29, Mayberry returned to her apartment and found the bedroom window broken. A moment later, Letner and Tobin arrived. Tobin was drunk. Mayberry and Tobin started arguing. Mayberry tried to leave. Tobin began hitting her and attempted to grab her arm.[14/] Meanwhile,

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12. Gilliland telephoned his exwife, Etta Gilliland, that afternoon, said he had been "into it" with Ms. Pontbriant, and said he wanted Jerry to pick him up. He telephoned again from the motel at about 10:00 p.m. and arranged to have Jerry pick him up there. (RT 5354-5355.) Gilliland would periodically come to Modesto for a short visit after an argument with Ms. Pontbriant. (RT 5372.)

13. Gilliland stayed at his exwife's home until the following Friday, March 4. (RT 5179-5182, 5356.)

14. During the course of the attack, Tobin pulled out a good deal of Mayberry's hair and bruised her temples. (RT 5459.)

Letner was on the upstairs balcony yelling vulgar names at Mayberry. (RT 5415-5416, 5457.)

Mayberry eventually was able to get away and took refuge in an upstairs neighbor's apartment. Tobin followed her and banged on the neighbor's door. The neighbors called the police. Tobin went back downstairs and broke Mayberry's livingroom windows. He also retrieved his shotgun from the apartment and attempted to load it. When the neighbors yelled that the police were on their way, Tobin used the shotgun butt to break the windows of Mayberry's car. He then went back into the apartment and retrieved an ornamental samurai sword. All this time, Letner continued to encourage Tobin to hit Mayberry and continued to call her names. Letner and Tobin then left. (RT 5417-5419.)

The next day, March 1, Tobin returned to Mayberry's apartment in search of his driver's license.[15] He tried to apologize to Mayberry. Mayberry told him to get away, and she left the apartment. (RT 5427-5429.)

That same day, Ms. Pontbriant drove to the home of her friend, 70-year-old Flourene Gentry. As Ms. Pontbriant always did on the first of the month, she drove Ms. Gentry to the store to buy groceries. (RT 5512-5513, 5516-5517.) During the drive, Ms. Pontbriant said she was angry with Gilliland because he had taken her little dog when he left.[16] (RT 5550-5551.)

When they arrived at the grocery store, Ms. Pontbriant stayed in the car because she was ill. Ms. Gentry went inside, purchased her groceries, and

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15. Tobin had apparently come to the apartment the previous night to get his license to cash a severance check. (RT 5428.)

16. Ms. Pontbriant also said at some point that she was angry with Gilliland because he had promised to stop drinking vodka, but she had found a bottle of vodka on a shelf where he repaired appliances. (RT 5548.)

bought Ms. Pontbriant a 12-pack of Schaefer's beer.[17] (RT 5516-5519, 5549.) Ms. Pontbriant then dropped off Ms. Gentry at home at about 3:00 p.m. (RT 5520.)

Ms. Pontbriant telephoned Ms. Gentry sometime later. She said she thought Gilliland might come back home. Ms. Pontbriant said she was worried about Gilliland, and she said she would call back later. (RT 5522.)

Ms. Pontbriant called back sometime around 8:30 p.m. She said a man who had purchased a stove from Gilliland had brought it back and wanted a refund. The man refused to believe Gilliland was not at home. Ms. Pontbriant did not like this man, and she said she told him to leave. (RT 5522-5525.)

Ms. Pontbriant telephoned Ms. Gentry a third time that evening.[18] She was concerned that Gilliland had still not returned. She said she was afraid. During the conversation, Ms. Pontbriant exclaimed "Oh," and started laughing. She announced, "Someone's at the door, and they're coming in." She also told Ms. Gentry, "There's two of them," and that one of them reminded her of her son.[19] (RT 5532.) Ms. Pontbriant then said something to the effect of, "Everything's going to be alright now," and she said she would speak with Ms. Gentry later. (RT 5533.) During this conversation, Ms. Pontbriant also said something about "feeling no pain." (RT 5539.)

Sometime that same evening, Letner and Tobin were together at the Breakroom Bar drinking beer. The two left together sometime between 7:30 and 9:30 p.m. (RT 5492-5496.) Directly across the street from the Breakroom

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17. Ms. Pontbriant normally drank Schaefer's beer. (RT 5105.)

18. At trial, Ms. Gentry recalled the third call coming at about 9:30 p.m. (RT 5528-5529.)

19. Ms. Pontbriant had previously told Ms. Gentry that the man who helped Gilliland repair appliances – Letner – reminded her of her son. (RT 5532-5533.)

Bar was Frank's Liquors. Sometime in March 1988, one of the clerks at Frank's recalled either Letner or Tobin coming in to buy a six-pack of Heineken beer.[20/] This same customer came back later that night and purchased a six-pack of Lowenbrau beer. During one of these purchases, the same customer bought an inexpensive bottle of wine and a bottle opener of a particular type sold at Frank's. (RT 6099-6109.)

Later that evening, Ms. Pontbriant and Letner made several telephone calls to the home of Edward Burdette.[21/] During the various conversations, Ms. Pontbriant and Letner spoke with both Burdette and his "common-law" wife, Kathy Coronado. Ms. Pontbriant accused Burdette of helping Gilliland move. She also complained about Gilliland having taken her dog, and she repeatedly insisted that Burdette had helped Gilliland take Letner's tools. (RT 5567, 5572.)

Letner got on the telephone with Burdette. He accused Burdette of helping Gilliland move, and he said Gilliland was probably with Burdette. Letner said he would "kick [Gilliland's] ass," and he also threatened Burdette. (RT 5567-5568.)

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20. The clerk knew Letner and Tobin as customers who frequented the store to buy beer and wine. (RT 6102-6104.)

21. Burdette had worked for Gilliland transporting washers and driers. He had met Letner several times at Gilliland's home. (RT 5558-5560.) On the preceding Thursday or Friday, Burdette told Gilliland, Letner, and Ms. Pontbriant that he would be unable to work that weekend because he would be out of town. (RT 5558-5562.) When Burdette returned home Sunday, February 28, he learned that Gilliland had been trying to contact him all weekend. He phoned Gilliland's home the next day, February 29, and spoke with Ms. Pontbriant, who insisted he had helped Gilliland move. Burdette informed Ms. Pontbriant that he knew nothing about the matter. (RT 5563-5564, 5594.)

Burdette initially stated that the March 1 telephone calls could have started as early as 8:00 p.m., but he later testified that the calls could have come as late as 10:00 p.m. (RT 5566-5567, 5574.)

Ms. Pontbriant seemed upset and intoxicated during the telephone calls. (RT 5571.) She sounded as though she was trying to get Letner "off her back." (RT 5572.) During one of the calls, Ms. Pontbriant told Coronado that someone would harm her if she did not get the tools back. Specifically, she said, "He will hurt me." Ms. Pontbriant was crying at the time. (RT 5597.)

At one point, Letner told Coronado that he wanted to meet Burdette in the street to beat him up. When Coronado told Letner to stop calling and leave them alone, Letner said, "Shut up, you loud-mouthed bitch before I stick my dick in your mouth." (RT 5598.) Burdette and Coronado finally refused to take anymore calls and unplugged the telephone. (RT 5569, 5599.)

At about midnight, Visalia Police Officer Alan Wightman noticed Ms. Pontbriant's red Ford Fairmont at a stop sign. He followed the car onto State Route 198 (RT 5117, 6138-6140) and eventually stopped the car somewhere east of County Center. After approaching the car, he determined that Letner was the driver and that Tobin was the passenger. (RT 6138-6149.) Letner said he was taking his friend home. Letner's breath smelled of alcohol. (RT 6151.) On the floor of the car's back seat was a Lowenbrau six-pack carton containing four beer bottles.[22/] (RT 5710, 5712, 6150, 6166-6167.) Letner was unable to provide a driver's license or registration. (RT 6151-6153.) He said the car belonged to Ms. Pontbriant. He said Ms. Pontbriant lived on North Jacob, but he could not provide an exact address or a telephone number. (RT 6152-6154.) Officer Wightman ran a licence check and obtained only a post office box and a former address for Ms. Pontbriant. (RT 6154-6155.)

The officer performed a pat-down search on Letner and found a buck

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22. The Lowenbrau carton was of the same type sold at Frank's Liquors. (RT 6109.)

knife in his front pocket.[23] (RT 6157.) The officer had Tobin get out of the car. Tobin also smelled of alcohol. An open Heineken beer bottle was under Tobin's seat. The officer poured out the beer and threw the bottle over a fence.[24] (RT 6160, 6164.) Tobin told the officer he was going to his home on South Crenshaw, where he lived with "Jeanette."[25] (RT 6167.)

Officer Wightman briefly searched the car's trunk for open containers. He found a number of items in the trunk, including several bags and a sword. (RT 6168-6170.) The officer had Letner perform some field sobriety tests; he determined that Letner was capable of driving. He cited Letner for driving without a license, and he ordered Letner and Tobin to lock the car, leave, and not return. Letner and Tobin walked away in the direction of County Center. (RT 6170-6173.)

Sometime that night, Letner and Tobin broke into the vacant house at 248 South Crenshaw.[26] The house's caretaker later discovered a half-empty bottle of beer and some dirt in the house. (RT 6205-6212, 6531-6532, 6537.)

Very early the next morning, March 2, Pamela Loop noticed two men outside her home on West Hurley in Visalia. The men asked if Jake Novotny lived in the area, and they said Novotny was supposed to take them to work in

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23. The police later recovered the buck knife from Letner following his arrest on March 29, 1988. (RT 4869, 6477-6478.) Jeanette Mayberry knew Letner to carry the knife regularly. (RT 5402-5405.)

24. The police recovered the beer bottle on March 3. (RT 6286-6287.)

25. In 1986 and 1987, Tobin and Jeanette Mayberry shared a house at 248 South Crenshaw with Darlene Jolly and Mike Kinnett. (RT 6187-6188, 6200-6201.)

26. Unbeknownst to Tobin, Darlene Jolly and Mike Kinnett had moved from the house by that time. (RT 6189-6191, 6201-6202.)

Fresno. Loop told the men that Novotny lived in the house behind hers.[27] (RT 6216-6221.)

Knowing that Novotny was out of town at the time, Loop telephoned his wife, Denise Novotny, and warned her about the two men coming to her home. (RT 6222-6224, 6236, 6242.) A moment later, Letner and Tobin appeared at Denise's door. Letner asked for Novotny and said that Novotny was going to give them a ride to work. Denise told them her husband was out of town. Tobin asked Denise for a ride and offered to pay her for gas. Denise declined, saying her son was asleep inside the house. (RT 6236-6245.) Tobin appeared anxious and excited. He said something to the effect of, "This is an emergency, we have to get to work." (RT 6245-6247.) When Denise still refused, Letner and Tobin walked away.[28] (RT 6226-6227, 6247-6249.)

Ted and Ida Blevins were Ms. Pontbriant's parents. By March 2, they were concerned because their daughter was supposed to call, and they had not heard from her. They went to her home that evening with Ms. Pontbriant's cousin, Jack Cantrell. When there was no response at the door, Cantrell looked through the front window and saw Ms. Pontbriant sprawled on the floor. (RT 4831-4834.)

Cantrell had a neighbor call the police, who arrived at about 8:20 p.m. (RT 4835-4838.) The police entered the house and found Ms. Pontbriant's dead body face-down in a pool of blood on the livingroom floor near the coffee table. She was naked but for a pair of socks and a brassiere wrapped around her waist. Her hands were bound and her neck was garroted with a telephone

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27. John "Jake" Novotny had previously worked with Letner and Tobin at Module Air and had previously picked them up and driven them to work. Neither of them had ever been to Novotny's home. (RT 6274-6279.)

28. Loop overheard Denise's conversation with Letner and Tobin over the telephone. (RT 6225.)

cord. (RT 4841, 4850, 4873, 5620, 5637.) She had a gaping cut in the back of her neck. (RT 4897.) An empty Heineken beer bottle was lodged into her buttocks near her genital area. (RT 5622-5623.) There was a great deal of fecal matter on the bottle. (RT 5623, 5756.) Another Heineken bottle lay between the body and the couch.[29] (RT 5647, 6285-6286.) The rest of Ms. Pontbriant's clothes had been cast aside. Fecal matter was found in her jeans and her panties. (RT 5661.) Her sweater had been torn at the neck and down the side. (RT 5662.)

There was another pool of blood near Ms. Pontbriant's right elbow. Blood was spattered on the wall near the television, and two trails of blood led from the body. (RT 5637-5639.) Clumps of Ms. Pontbriant's hair were tangled in the telephone cord around her wrists. (RT 5622.) More clumps of Ms. Pontbriant's hair, found on and near the couch, had been removed by force during a struggle. (RT 5640-5641, 5964-5967, 5973, 6076-6077.)

Several hairs recovered from Ms. Pontbriant's chest were indistinguishable from Letner's hair. Two of these hairs had been removed by force and appeared to have blood on them. (RT5967-5969, 5994-5997.) In Ms. Pontbriant's bedroom,[30] the police found fresh blood spatters on a pillow and on a doily on the dresser. (RT 5173-5174, 5685-5686.) These blood stains were consistent with Tobin's blood.[31] A blue baseball cap belonging to Letner

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29. The police also found five Heineken bottle caps in the kitchen. (RT 5665-5672.) Mr. Gilliland and Ms. Gentry both testified that they had never known Ms. Pontbriant to drink Heineken or Lowenbrau beer. (RT 5105-5106, 5521.)

30. The bedroom was found in disarray, with the bed rumpled, a dresser drawer pulled out, and an open trunk with clothes pulled out. Ms. Pontbriant did not keep the bedroom in such a state. (RT 5172-5179.)

31. At trial, Criminalist Rodney Andres testified that these blood stains could not have come from Ms. Pontbriant or Letner but could have come from Tobin or Gilliland. (RT 5814, 5824-5829.)

was also found in the bedroom. (RT 5173-5176, 5688, 5442-5443.) The blue baseball cap contained hairs indistinguishable from Letner's hair. (RT 5970.) The police also recovered a semen sample from the bedroom carpet.[32] (RT 5722-5723.) Inside the bathroom, they found blood on a damp washrag. (RT 5692.) It appeared as though the rag had been used to wipe something and had then been rinsed. (RT 5692-5693.)

On the coffee table in the livingroom were a Schaefer beer can, a Lowenbrau beer bottle cap, a Marlboro cigarette, and an ashtray containing several Marlboro and Camel cigarette butts.[33] (RT 5649-5652.) The police also found a knife puncture in the top of the coffee table. A photograph of Ms. Pontbriant with a knife slash through it was found nearby. The photograph appeared as though it had been placed on the table and had a knife thrust through it. (RT 5653-5657.) The gash in the table and the cut through the photograph were both consistent with having been made by Letner's buck knife. (RT 6044-6053.)

Ms. Pontbriant's white purse, containing her checkbook, was also found in the livingroom.[34] The purse's contents were partially spilled. (RT 5658-5660, 5782-5785.) Ms. Pontbriant's brown purse was found in the dining area. The purse's contents had been dumped on the floor. (RT 5675-5678.) On a bush outside the house, the police found the afghan Ms. Pontbriant had always spread across the front seat of her car. (RT 5159-5161, 5513-5515, 5616.) A

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32. Although the semen sample could not be typed conclusively, it had more likely come from Tobin than from Letner or Gilliland. This was because there was some indication the semen had come from a "secretor," and Tobin was the only one of the three who was a "secretor." (RT 5865-5870, 5874-5875, 5921.)

33. Camels were Letner's cigarette of choice. (RT 5406.)

34. Another Camel cigarette butt was recovered near the white purse. (RT 5659.)

bottle opener recovered from the kitchen was of the same particular type as sold at Frank's Liquors.[35] (RT 5667, 6107.)

That same night, the police retrieved Ms. Pontbriant's car, which was still parked on Highway 198 near County Center. (RT 5790.) In addition to the Lowenbrau beer carton still in the back seat, the police found a white cloth with blood stains and a black baseball cap belonging to Tobin inside the passenger compartment. (RT 5442, 5707-5712, 6526-6527.) The blood on the towel was consistent with Tobin's blood.[36] Hairs found inside Tobin's black baseball cap matched Letner's hair. (RT 5971.) Inside the trunk, the police found a basket and several bags containing Letner's belongings, including a number of articles of clothing, cartons of Camel cigarettes, a box of tools, a toolbelt with some other miscellaneous tools, and numerous bottles of nail polish and hair-care products. The trunk also contained Tobin's shotgun, his ornamental sword, and his bag from Module Air.[37] (RT 5432-5441, 5715-5718, 6271-6274.)

The next day, March 3, the police executed a warrant at Letner's and Tobin's apartment at 301 East Murray. Inside, they found a guest book containing a notation of Letner's and Tobin's names along with the apartment address. (RT 6293.) They also found, among other things, more packages of Camel and Marlboro cigarettes and more bottles of hair-care products of the same type recovered from Ms. Pontbriant's car. (RT 6291-6293, 6296.)

That same day, Dr. Gary Walter performed an autopsy on Ms. Pontbriant. (RT 4871.) He concluded that Ms. Pontbriant died from the gaping

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35. Gilliland testified that the bottle opener had never been in the house before. (RT 5171-5172.)

36. Again, the blood was consistent with having come from Tobin or Gilliland, but it could not have come from Ms. Pontbriant or Letner. (RT 5831-5832.)

37. Tobin had left the rest of his belongings at Mayberry's apartment after his fight with her. (RT 5429-5430.)

four-and-a-half-inch-wide cut in the back of her neck. The wound was between her first and second cervical vertebrae. It severed her spinal cord, cut her right carotid artery and, indeed, was deep enough to reach the back of her throat. Inflicting this wound required extreme force and more than one application of the cutting instrument. (RT 4897-4905, 4895-4907.) Letner's buck knife could have caused the fatal wound. (RT 4905.)

Additionally, Ms. Pontbriant suffered frontal stab wounds to the neck – two to the left neck and one to the right neck. These stab wounds came within an inch of Ms. Pontbriant's carotid arteries. (RT 4893.) These stab wounds were consistent with being inflicted with Letner's buck knife. (RT 4889-4891.) Dr. Walter also discovered three smaller lacerations beneath the larger wound to the right neck. (RT 4883, 4888.)

Ms. Pontbriant's killers also inflicted knife wounds and several blunt trauma injuries to her face. These injuries were sustained while Ms. Pontbriant was still alive. The blunt force injuries were consistent with having been kicked extremely hard with a shoe or beaten with a fist.[38] (RT 4880-4882, 4877.) The telephone cord around Ms. Pontbriant's wrists and neck was bound tight enough to leave wrist imprints and ligature marks. (RT 4920-4921.) The binding occurred before Ms. Pontbriant's death. (RT 4924-4926.) The killers also inflicted two lacerations to Ms. Pontbriant's left arm near the wrist, which both appeared to be defensive wounds. (RT 4926-4928.)

Ms. Pontbriant's blood alcohol level at the time of her death was about .29. Based on lividity indications on the front of Ms. Pontbriant's body, Dr. Walter opined she died in a face-down position in the late evening of March 1, 1988. (RT 4938-4039, 5019, 5038.)

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38. Tobin was a second-degree or third-degree black belt in karate. Letner was also proficient in karate, having been taught by Tobin. (RT 5420, 5425-5426, 5478.)

That same day, March 3, Letner made a collect telephone call from Reno, Nevada, to his grandmother, Dorothy Letner, in Council Bluffs, Iowa. He said he was coming to Council Bluffs to look for work. Mrs. Letner discouraged him and never said it was okay for him to come. (RT 6299-6304.)

Nonetheless, Letner and Tobin arrived at the home of Dorothy and Dick Letner on March 6. (RT 6258, 6303-6304.) Letner and Tobin said they had hitchhiked to Iowa under severe weather conditions. They claimed they had been robbed of all their clothing, money, and possessions. (RT 6303-6307.) Letner's grandfather gave them a suitcase of clothing, took them to the local Iowana Motel, and paid a week's rent on a room for them. (RT 6308-6309, 6315-6316, 6318-6319.)

Earl Bothwell and his friend Fred Hare were also living in the Iowana Motel at that time.[39/] They were working as contractors for various home improvements. Hare introduced Bothwell to Letner and Tobin one day, and Bothwell provided Tobin with a job. (RT 6418-6420.)

Bothwell had a conversation with Letner one day in Letner's motel room. Letner spoke about an incident involving a woman in California. He said he had stolen $12 or $14 from the woman. He also said he stole the woman's "real nice" red and white Ford. (RT 6422.) Letner said the car would have made it to Iowa if the police had not stopped him for driving erratically or really slow. He laughed about how dumb the police had been to let him go.[40/]

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39. At the time of appellants' trial, Bothwell was in Illinois state prison on a conviction of insurance fraud. He had suffered two prior felony convictions. (RT 6416-6417.) At appellants' trial, Bothwell also admitted having used several aliases to avoid spousal support. (RT 6438.) Bothwell was offered no consideration, and received no consideration whatsoever, for his testimony at appellants' trial. (RT 6428-6429, 6542-6545.)

40. Letner had mentioned at some point earlier that he was wanted in California for murder. (RT 6441.)

(RT 6422.)

At some point during this conversation, Tobin returned to the motel room. Bothwell asked Tobin if he was wanted for murder in California. Tobin responded, "Yeah, I killed the old bitch." Tobin said "She was hollering and screaming" and so he feared someone would call the police. Tobin then asked Bothwell, "What would you do?" Tobin also said he had taken $12 or $13 from "the old bitch."[41] (RT 6423-6424.) Bothwell informed Tobin he had no work for him that day, and he left the room. (RT 6424.)

At about one or two a.m. the next day, March 29, Bothwell and Hare were in their motel room with Marilyn Foster and Beth Underwood, two women they had met that evening at the local Hard Times Tavern. Letner and Tobin came to their room at some point, and Tobin ended up assaulting Bothwell.[42] As a result of the assault, Bothwell suffered four broken ribs. The police were dispatched to the motel room on a reported disturbance, and Letner and Tobin were both arrested.[43] (RT 6426, 6435, 6458, 6471-6476.)

A police computer check by the Iowa authorities revealed that Letner and Tobin both had outstanding California warrants for murder. (RT 6480-6481.) California investigators arrived in Council Bluffs the next day and brought Tobin back to Tulare County. They arranged to have Letner transported back separately via a private extradition service. (RT 6489, 6523,

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41. Prior to that day, Letner and Tobin had both asked Bothwell if he could get them false identification because they both had outstanding warrants against them in California. (RT 6482-6483 6425.)

42. The trial court withheld from the jury the facts surrounding the assault and the resulting arrest during the guilt-phase trial.

43. Letner had been arrested about a week earlier, had spent a night in jail, and had then been released, on a seven-year-old traffic warrant. (RT 6482-6483.) The arrest warrants for Letner and Tobin for the murder were not issued until March 25. (RT 6523.)

6527-6528.)

Letner was placed in a van with several other prisoners for his trip back to California. At about midnight on April 10, the van stopped at a convenience store in San Antonio, Texas. The two guards went into the store and errantly left the keys in the ignition.[44/] A moment later, they saw the van driving away. The guards immediately contacted the San Antonio Police. Shortly thereafter, the police located the van at a nearby apartment complex. One of the van's back windows had been kicked out, and the keys were missing. Except for Letner, all of the prisoners were still in the van. (RT 6491-6498, 6502.) The San Antonio Police conducted a thorough search for Letner, including helicopters and K-9 units, but to no avail. (RT 6499.)

On the night of April 21, Letner drove a stolen pickup truck to the United States border checkpoint at Las Cruces, New Mexico.[45/] He gave the alias "Steven Michael Kennedy," but he provided no identification. He said he had borrowed the truck. The border agent ran a computer check and determined that the truck was stolen and that Letner was using an alias.[46/] Letner was then arrested and was finally brought back to Tulare County. (RT 6514-6516, 6531.)

After being returned to the Tulare County Jail, Tobin had occasion to

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44. The key chain included the keys to the prisoners' handcuffs and shackles. (RT 6494-6495.)

45. The truck had been stolen from its owner in El Paso, Texas, on April 17. (RT 6521.) The facts surrounding the truck theft were withheld from the jury during the guilt-phase trial. Letner had a hitchhiker with him in the truck when he approached the border checkpoint. (RT 6513.)

46. By this time, Tulare County investigators had learned from Napa County police that Letner had used the alias "Steven Michael Kennedy." They provided this information to the FBI. (RT 6528-6529.)

speak with another inmate, Gregory Garrard.[47] Garrard asked Tobin about the evidence against him in the murder case. Tobin said he only knew about a bloody t-shirt or rag found in the car. (RT 6338) Tobin also said something about having spent the night at Darlene Jolly's old house on Crenshaw. (RT 6340.) At trial, Garrard claimed he told a defense investigator that Tobin had said "he had nothing to do with it." (RT 6344.)

In September 1989, Investigator John Johnson went to Tehachapi State Prison to interview Garrard about his conversations with Tobin.[48] Garrard said Tobin told him that he was primarily concerned about a bloody rag found in the victim's car when they were stopped by the police. Garrard said Tobin never mentioned anything about being innocent. (RT 6536-6537.)

Tobin's Guilt-Phase Defense

On February 29, 1988, Visalia Police Officer Jeff McIntosh arrived at Mayberry's apartment at about 7:00 p.m. on a reported domestic disturbance. He noticed two broken windows in the apartment and two broken windows in Mayberry's car. Mayberry did not appear to have any injuries, and she did not want to file a complaint. (RT 6584-6586.) Mayberry said that Tobin had slapped her in the face and that Letner had left with a shotgun. (RT 6590.)

Visalia Sheriff's Lieutenant Gary Blyleven was at Ms. Pontbriant's home before her body was removed. Sheets used when removing the body were later checked for possible forensic evidence. (RT 6600-6603, 6606.)

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47. Garrard had also lived with Darlene Jolly at some point and had visited her frequently at the 248 South Crenshaw house. (RT 6337.) At the time of appellants' trial, Garrard was in Tehachapi State Prison for marijuana sales and for being an exfelon with a firearm. (RT 6336, 6341.)

48. Garrard asked for nothing, and received nothing, in exchange for giving his information to the authorities. (RT 6538-6539.)

Lieutenant Blyleven attended Ms. Pontbriant's autopsy when a "rape kit" was performed.[49] On April 1, he was informed that some slides from the rape kit were missing. He went back to the morgue on April 4 and recovered the missing slides from the exact location he had placed them during the autopsy. (RT 6595-6597, 6608.)

Visalia Police Detective Jay Frame interviewed Ms. Gentry a few days after the murder. Ms. Gentry was still very distraught. Her speech was slurred, and she smelled of alcohol. (RT 6613-6616.) She related her various contacts with Ms. Pontbriant on the day of the murder: Ms. Pontbriant picked her up, spent the day with her, brought her home at about 5:00 p.m., and called her three times that night. (RT 6616-6617.)

She received the first call at about 9:00 p.m. Ms. Pontbriant said she was depressed because Gilliland had telephoned her, saying he was in Eugene, Oregon, and was not coming back. (RT 66-17-6618.) The second call came at about 11:00 p.m. Ms. Gentry invited Ms. Pontbriant to come over. Ms. Pontbriant declined because she had been drinking and did not want to drive. (RT 6618.) The third call came, in Ms. Gentry's estimation, at about 1:00 a.m. Ms. Pontbriant's attitude was now "altogether different." (RT 6618-6619.) She mentioned something about two men "walking in." (RT 6624-6625.)

When discussing this third telephone call with Detective Frame, Ms. Gentry broke down and was unable to answer anymore questions. During the interview, Ms. Gentry was not positive about her time estimations regarding the telephone calls. (RT 6624-6625.)

Burt Arnold had previously shared an apartment with Letner, Tobin, and Mayberry. Two or three weeks before Ms. Pontbriant's murder, Letner and Tobin told him about an idea they had of moving to Oklahoma or Iowa. (RT

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49. No injuries to Ms. Pontbriant's vagina or rectum were noted during the autopsy, and the rape kit produced negative results. (RT 4935-4936.)

6630-6632, 6635.) When the police questioned Arnold regarding Letner's and Tobin's possible whereabouts shortly after the murder, Arnold said nothing about them possibly going to the Midwest or anywhere else. (RT 6637-6638.)

Tobin recalled to the stand Officer Rick Logan to impeach Gilliland's testimony. The first interview with Gilliland occurred shortly after Gilliland returned to Tulare after visiting his exwife. Officer Logan determined during the interview that Gilliland had been drinking and was close to being intoxicated.[50] At some point during the interview, Gilliland said he did not want to speak on tape. At times during this interview, Gilliland threatened to kill Letner and Tobin. He said he was reluctant to talk with the police because he wanted to find Letner and Tobin first himself. Gilliland theorized that Letner and Tobin had gone to the house to steal money. He said he had met Tobin only once in his garage and that Ms. Pontbriant had never met Tobin. Gilliland said he had last seen Letner and Tobin on the morning of March 1.[51] Gilliland mentioned nothing about any large sums of money at the house. He said he had left town on March 1 when his son picked him up at Frank's Appliance. (RT 6641-6648.)

Officer Logan interviewed Gilliland again on March 11. Gilliland was intoxicated and did not want the interview tape recorded. He said a tool box had been taken from his garage. He also said Ms. Pontbriant normally kept her car keys on the kitchen table in case Gilliland wanted to use the car.[52] (RT

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50. Mr. Gilliland had already admitted on the stand that he had been drunk every day from the time of learning about Ms. Pontbriant's murder until being admitted into an alcohol recovery program and that he was intoxicated when talking to Detectives Logan and Johnson. (RT 5323-5324.)

51. In the same interview, Gilliland said he had last seen Letner and Tobin on the morning he left for Modesto. (RT 6698.)

52. Gilliland testified that Ms. Pontbriant normally kept the keys in her purse, that she was very protective of her car, and that she would not allow

6649-6650.) Gilliland told the officer that either Letner or Tobin, or both of them, were present at the house the day he left, when he gave Ms. Pontbriant $185. He said Letner was at the house three or four days earlier when he (Gilliland) gave Ms. Pontbriant $150. (RT 6651-6652.)

During this second interview with Officer Logan, Gilliland said Ms. Pontbriant had earlier treated Letner for a cut wrist and had advised Letner to go to the hospital. (RT 6652-6653.) According to Gilliland, this treatment and advice about the wrist occurred on the same day Letner showed up at the house in a car with the cartons of cigarettes and the liquor.[53] (RT 6672-6673.) Gilliland also said in this second interview that he had met Tobin twice but that Tobin had been in the house only once before. (RT 6669.) He confirmed that Ms. Pontbriant kept her money in her checkbook inside her purse. (RT 6703.)

Officer Logan also interviewed Ms. Gentry about the several telephone calls from Ms. Pontbriant on the night of the murder. Ms. Gentry said the first call came between 4:00 and 5:00 p.m., the second call came at about 7:00 p.m., and the third call came between 9:00 and 10:00 p.m.[54] At some point during

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others to drive it. She let Gilliland drive the car only once – to have the tires checked. (RT 5119-5120.) Ms. Gentry also testified that Ms. Pontbriant normally kept her keys in her purse (RT 5515) and never allowed anyone to drive her prized car. (RT 5547.) In subsequent interviews with the police, Gilliland also confirmed that Ms. Pontbriant did not allow him to use her car. (RT 6650-6651.)

53. Ms. Pontbriant worked as a nurse. (RT 5100-5101, 5552-5553.) Jeanette Mayberry testified that Letner had gone to Ms. Pontbriant for treatment of the wrist wound sometime in February. (RT 5464-5465.) Letner later testified during the penalty-phase trial that he cut his wrist while burglarizing a liquor store and that the liquor he brought to the house was obtained in this burglary. (RT 8974.)

54. Officer Logan interviewed Ms. Gentry again on March 14, when her emotional state was far more stable. Without any prompting, she said that, in light of her earlier emotional condition, she might have been mistaken about the times of Ms. Pontbriant's various telephone calls. Ms. Gentry nonetheless was

the third call, Ms. Pontbriant said she was "feeling no pain." (RT 6674-6675.)

Officer Logan testified that Ms. Pontbriant's body was found wearing a gold-colored watch and a ring. Inside Ms. Pontbriant's home were a television, a VCR, two boxes of costume jewelry, and $18 in cash and change in the bottom of her purse. (RT 675-6676, 6707.)

On March 29, Officer Logan accompanied Investigator Johnson to Council Bluffs to pick up Letner and Tobin. Upon his arrival, he discovered that the local television and newspapers were reporting that people in Council Bluffs had been arrested for a California homicide. He also discovered that Earl Bothwell had checked out of the Iowana Motel the day they arrived. (RT 6676-6679, 6689.)

Tobin also called to the stand Jerry Gilliland, who testified about picking up his father at the motel and driving him to Modesto on February 29. (RT 6708-6709, 6724-6725.) Before leaving for Modesto, they drove to the North Jacob house to pick up a few things. Gilliland went into the house for a few moments. Jerry then heard a woman inside the house yelling, and he heard what sounded like things being thrown. Jerry looked into the house and saw Gilliland removing a suitcase and some other items.[55/] When Gilliland left a moment later, the woman was still yelling and was obviously upset. (RT 6711-6715.)

Jerry helped his father load some belongings, including a toolbox, into the car. While driving to Modesto, Jerry chastised his father about some vodka bottles he had noticed hidden in the garage. When they arrived in Modesto, Jerry helped his father unload his belongings and left him at his mother's house. (RT 6717-6718.)

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positive that the third call came between 9:00 and 10:00 p.m. (RT 6690-6693.)

55. Jerry Gilliland did not recall his father bringing a dog with him. (RT 6714, 6728.)

When Gilliland was in custody previously for drunk driving, Jerry brought him checks and money orders from his mother. Jerry did not personally provide Gilliland with any money.[56] (RT 6722-6723.)

Tobin next called to the stand Martin Mendoza, a furniture shop owner who had prior business dealings with Gilliland. One day shortly after Ms. Pontbriant's murder, Gilliland asked Mendoza if he wished to buy the various appliances he still had at the house. During this conversation, Gilliland complained about a bump on his head he allegedly had sustained in a fight with Letner and Tobin in an alley.[57] Gilliland also claimed Letner and Tobin had kicked him in the ribs during this fight. Knowing that Gilliland had a very bad drinking problem, Mendoza did not believe this story. (RT 6732-6738.)

At some point, Gilliland had introduced Letner to Mendoza. Gilliland said he had picked up Letner "off the street" and was teaching him to repair appliances. Letner had a bandage on his hand at the time. Letner said he was a karate expert, and he said he cut his hand in a fight with someone. (RT 6738-6739.)

Tobin also called to the stand Cheryl Williams, his exwife and the mother of his six-year-old daughter. (RT 6741-6742.) Williams testified about Tobin's argument with Jeanette Mayberry on February 28. Williams went to

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56. Gilliland's jail incarceration in 1987 for drunk driving had already been established. (RT 5195, 5353.) A good deal of conflicting testimony had been presented about the particulars of Gilliland's income and finances while in jail and after his release in December 1987. Etta Gilliland and her new husband Richard Cuzak received Gilliland's social security benefits and deposited them on Gilliland's behalf. (RT 5196-5197, 5351-5353, 5361-5364.) Etta Gilliland had previously testified that Jerry had given his father money while he was in jail and had given him $800 upon his release. (RT 5354.)

57. Gilliland earlier testified that he went to the hospital sometime in March 1988 with a cut on his head he had sustained while being robbed. (RT 5228-5230.)

Visailia that Sunday with her daughter and her girlfriend. They ended up meeting Tobin at a local park. Mayberry arrived about 15 minutes later and tried to "attack" her. Tobin held back Mayberry, but Mayberry continued to yell "foul language." At some point at the park, after Letner had arrived, Mayberry attempted to take Tobin's jacket, apparently to get some money in one of the pockets. They all drove away in a car at some point, leaving Mayberry behind. Mayberry followed them in her own car. Eventually, the cars stopped, and Tobin approached Mayberry in an effort to have her go away. (RT 6741-6748.)

About a half hour later, Williams returned to the park with the daughter and some friends. Tobin rejoined her. Mayberry came back again and tried to "attack" Williams again. Williams ended up spending the rest of the day with Tobin at the park. At some point, she saw Tobin with an envelope of money from his "last job." Williams was unaware at that time of Tobin having any intent to leave California. (RT 6748-6750.)

Tobin called to the stand Toxicologist Bill Posey. Based on Ms. Pontbriant's .29 blood alcohol content at the time of death, Posey opined that Ms. Pontbriant could have drank about 16 beers over 6 hours, or about 18 beers over 8 hours, or about 14 or 15 beers over 14 hours. (RT 6763-6768.)

Tobin's mother, Jackie Tobin, testified that her son told her sometime around February 15 that he and Mayberry were not getting along. Tobin also told his mother that he was thinking about going to Iowa with Letner. (RT 6778-6779.)

Tobin recalled to the stand Investigator John Johnson, who testified further about his May 24 interview with Gilliland at the alcohol recovery center. (RT 6781.) When discussing his brief stop at the North Jacob house with his son on the way to Modesto, Gilliland said Ms. Pontbriant was sleeping; Gilliland said nothing about Ms. Pontbriant waking up, yelling, or throwing

anything. (RT 6786.)

During this same interview, Gilliland said the following about the events of February 28: Letner and Tobin came to the house in a car and gave him some bottles of Kahlua and two cartons of cigarettes. Tobin waited in the car while Letner came inside and drank coffee with Ms. Pontbriant. During this time, Gilliland and Ms. Pontbriant discussed the rent. Ms. Pontbriant already had $180. In Letner's presence, Gilliland handed Ms. Pontbriant an additional $340.[58] Gilliland said he had made the money from the sale of a washer and drier the day before. At some point while Letner and Tobin were at the house, he informed them that he was going to Modesto for a couple of days. (RT6788-6792.)

Tulare County Sheriff's Sergeant Nelson Chadwell testified about Gilliland's finances during his incarceration at the county "road camp" from April 2, 1987, to December 15, 1987. The facility did not allow inmates to carry cash, and any funds mailed to inmates were kept in an account for them. (RT 6803-6905.) Gilliland received various contributions to his account, mostly from money orders, while incarcerated. He spent about $16 a week on commissary goods during this period. Sergeant Nelson opined that there was no market inside the facility for cash sales of commissary goods. (RT 6805-6813.)

Tobin also recalled to the stand Jeanette Mayberry. About a week before Tobin attacked Mayberry at her apartment, Letner came to the apartment with a badly cut wrist. He asked Mayberry for help. She refused. Letner said he would let "mama" tend to the wound. Mayberry understood "mama" to be Ms. Pontbriant. (RT 6818-6820.)

Sometime shortly after the murder, Mayberry went back to the East

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58. Later in the same interview with Investigator Johnson, Gilliland said that Tobin was also in the kitchen at some point that day. (RT 6793.)

Murray apartment and found an unmailed letter from Letner. The letter was to Letner's grandparents, asking them how they would feel about him moving to Iowa to get a fresh start. (RT 6820.)

Tobin testified on his own behalf and gave the following version of the facts surrounding Ms. Pontbriant's murder: Letner had been planning to leave the state for some time, and he wanted Tobin to go with him. (RT 6828.) When Tobin met with his exwife Cheryl Williams and their daughter at a park on February 28, Mayberry caught wind of this. She came to the park, screamed at Williams, and chased her. Tobin tried to restrain Mayberry. He eventually left with Williams, her friend, and the daughter. Mayberry followed them. Tobin arranged to meet Williams and their friends at another park later. When Tobin met them at the park later, Mayberry again appeared and tried to "attack" Williams. Hoping to avoid any further discord, Tobin decided not to return to Mayberry's apartment that night. Instead, he spent the night with Letner at the East Murray apartment. At that time, Tobin had $245 in cash. (RT 6829-6837.)

Tobin and Letner went back to Mayberry's apartment the following evening, only to find that Mayberry was not home. Tobin went inside. Mayberry arrived a few minutes later, started screaming, and kicked Tobin in the groin. Tobin slapped her twice and threw a hammer through a window. Mayberry ran to the neighbor's home, with Tobin at her heels. When she refused Tobin's demands to return to the apartment, Tobin broke one of the windows of her car. Tobin then retrieved his sword and shotgun and went back to the East Murray apartment.[59/] (RT 6838-6843.)

Tobin then decided finally to go to Iowa with Letner. (RT 6844-6845.) The next morning, Tobin returned to Mayberry's apartment to get his clothes.

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59. Tobin claimed that Letner returned to the East Murray apartment sometime later with the sword and shotgun. (RT 6844-6845.)

Mayberry slammed the door in his face, and he left with nothing. (RT 6845-6846.)

Tobin and Letner went to the Breakroom Bar that evening. At some point, Mayberry arrived at the bar with someone named "Pete," who was wearing Tobin's clothes. (RT 6848, 7105-7109.) At about 6:30, Letner received a call at the bar. He said Ms. Pontbriant had called and wanted him to come over. They went to her house, Tobin on a bicycle and Letner on foot. (RT 6846-6848, 6849-6850.) Letner had his buck knife with him. (RT 6958-6960.)

Ms. Pontbriant had been drinking; she was upset with Gilliland for taking her dog and her money and leaving her with all the bills. Ms. Pontbriant, Tobin, and Letner drank Ms. Pontbriant's Schaefer's beer until it was gone. Tobin then went to the local Oval Liquor Store[60] and bought a six-pack of Heineken beer and a six-pack of Lowenbrau beer, which the three of them also shared. (RT 6851-6855.) During the course of the evening, Ms. Pontbriant made several telephone calls to someone named "Ed." She was angry with "Ed" because she thought Gilliland was with him. Eventually, Letner got on the telephone with "Ed" to "chew him out" because he was "cussing" at Ms. Pontbriant. (RT 6856-6857.) Tobin recalled Letner making some threats on the telephone about getting his tools back. Tobin did not recall hearing Ms. Pontbriant say she would be hurt. (RT 6969-6971.) He claimed Ms. Pontbriant did not cry on the telephone or say anything about being afraid. (RT 7093-7094.)

As the evening wore on, Ms. Pontbriant and Tobin became drunk.

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60. Tobin denied ever going to Frank's Liquors that night. (RT 6854.) He claimed he did not normally purchase Heineken or Lowenbrau beer but bought those brands of beer that evening at Ms. Pontbriant's request. He also claimed to have never before seen the bottle opener found in Ms. Pontbriant's house. (RT 6964-6967.)

When they again ran out of beer, Tobin went back to the Oval Market and bought two more six-packs of Heineken and Lowenbrau. When Tobin returned, Ms. Pontbriant and Letner were on the couch with their arms around each other. They soon started kissing. Tobin decided to leave. He road his bicycle back to the Oval Market and bought a quart of beer. He road back to the East Murray apartment, drank some of the beer, and fell asleep. (RT 6857-6860.)

Letner awakened Tobin sometime later and said, "Help me load this stuff up in the car so I can take it to Ivon's house."[61] (RT 6861-6862.) Tobin helped load Letner's various belongings into Ms. Pontbriant's Ford Fairmont. Tobin also put his shotgun and sword in the trunk in hopes of selling it later to Darlene Jolly and Mike Kinnett.[62] (RT 6863-6865.) Letner reopened the cut on his wrist while loading the car. He wiped the blood on a rag in the car.[63] (RT 6979.)

Tobin and Letner then left in Ms. Pontbriant's car. Officer Wightman pulled them over moments later; he let them go again with a warning not to return to the car. (RT 6865-6870.) Letner and Tobin then walked to the Marco Polo Bar and drank some beer. Tobin suggested calling Ms. Pontbriant to tell her about the car. Letner got up and appeared to go make a telephone call.

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61. Letner had allegedly asked Ms. Pontbriant earlier in the evening if he could put some things in her storage room while he was away in Iowa. (RT 6862.) Tobin noticed no blood on Letner, and Letner did not appear to be nervous or urgent, when he returned to the apartment. (RT 7098-7099.)

62. Jeanette Mayberry had testified in Tobin's defense that she knew Jolly and Kinnett to deal in guns. (RT 6821.) Kinnett earlier testified he had not been interested in buying any property and had never expressed any such interest to Tobin. He flatly denied dealing in guns. (RT 6202.)

63. Tobin said Letner threw the rag into a dumpster. (RT 7097.) He testified that the bloody rag found later in the car was not the same one Letner had used. (RT 6979.)

When he returned, he said there was no answer. (RT 6871-6872.)

After Letner and Tobin finished their beer, they went to the house on South Crenshaw and discovered it was vacant. They gained entry to the house through the back door and slept on the floor inside.[64] The next morning, Letner and Tobin walked to Ms. Notovny's house and asked her for a ride to the Goshen Bus Depot. When she refused, they hitchhiked to Goshen. (RT 6872-6875.)

Tobin purchased bus tickets to Sacramento for himself and Letner. From Sacramento, Letner and Tobin took another bus to Reno, and from Reno they hitchhiked to Iowa through a snowstorm with nothing but the clothes on their backs.[65] (RT 6876-6879, 7033-7034, 7068-7070.)

After Tobin and Letner checked into the motel in Council Bluffs, Tobin began working for Earl Bothwell. (RT 6880-6881.) Tobin gave the following account of his altercation with Bothwell leading to his arrest: Bothwell and Hare called Letner and Tobin to their motel room very late that night. Two women were in the room. Tobin touched one of the women's hair.[66] Bothwell became angry and challenged Tobin to a fight. The two men went outside and "slap boxed" for a moment. Bothwell became furious and threatened to shoot Tobin. He went back into the room, retrieved a shotgun from under the bed, and pointed it at Tobin. Tobin took the shotgun from Bothwell and handed it to Letner. The police arrived shortly thereafter and arrested Letner and Tobin. The whole incident allegedly angered and humiliated Bothwell. (RT 6884-

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64. Tobin could provide no good reason for not returning to their East Murray apartment that night or the next day. (RT 7017-7018.)

65. Tobin said he paid for all their various expenses along the way. (RT 6877-6878.)

66. Tobin denied making any sexual advances toward either of the women. (RT 7039.)

6885, 7037-7043.)

At trial, Tobin said he had been in Ms. Pontbriant's garage once or twice before the night of the murder, but he denied ever being inside the house before that night. He denied ever going to the house with Letner and giving anyone any alcohol or cigarettes. He denied having gone to Ms. Pontbriant's house on February 28, and he denied any knowledge of Gilliland planning to leave town. (RT 6921-6922.) He claimed to have never seen Gilliland give Ms. Pontbriant any money, and he denied ever seeing Ms. Pontbriant's purse or checkbook. (RT 6850, 7072-7073.)

Tobin could not recall when Letner raised the subject of going to Iowa after he returned to the apartment from Ms. Pontbriant's house on the night of the murder. (RT 6975-6976, 7013-7014.) Although Tobin claimed he had put his sword and shotgun in the car to sell them to Jolly and Kinnett that night, he denied telling Officer Wightman he was on his way to the South Crenshaw house where he believed them to live. Tobin could not explain why he still ended up going to the South Crenshaw house after leaving the sword and the shotgun behind in the car. (RT 7009-7018.)

Tobin said that Pam Loop's testimony was all lies and that Denise Novotny was mistaken about Tobin and Letner asking her for a ride to work. (RT 7023-7026.) Tobin claimed Jeanette Mayberry and his own mother were both mistaken when testifying about his earlier plans to go to Iowa. (RT 6885.) He claimed to recall nothing about telling Letner's grandparents that they had been robbed on their way to Iowa. (RT 7305-7036.) Tobin denied ever asking Bothwell for false identification or ever making any incriminating statements to Bothwell. (RT 6881, 6982-6983.) He also denied ever telling Gregory Garrard he was worried about the rag found in Ms. Pontbriant's car. (RT 6979-6980.)

Tobin repeatedly insisted that Letner never told him anything about

killing Ms. Pontbriant. (RT 7018, 7036, 7101-7103.) Tobin denied ever harming Ms. Pontbriant or taking anything from her home. He claimed to have absolutely nothing to do with Ms. Pontbriant's murder, and he denied any knowledge of any of the circumstances of the murder. (RT 6881-6882, 6983-6997, 7006.)

Finally, Tobin called to the stand Private Investigator James Dunham, who had interviewed Garrard at Tehachapi State Prison. Garrard allegedly said that Tobin had denied committing the charged murder. (RT 7120-7121.)

Dunham also interviewed Bothwell at an Illinois state prison. Bothwell said he had intentionally evaded the authorities and wanted nothing to do with the murder investigation. He said he did not go to the police after Letner's and Tobin's arrest because he was scared. He also said he thought he might be in trouble with the police for not having come forward with his information earlier. (RT 7121-7126.)

Letner's Guilt-Phase Defense

Letner again recalled to the stand Officer Rick Logan. While inspecting Ms. Pontbriant's house, he found a small bank containing numerous coins. He again testified that Ms. Pontbriant's body was found wearing a yellow metal watch, a ring, and stud earrings. The only notation in Ms. Pontbriant's checkbook for March 1 was a $50 payment for the gas bill. (RT 7148-7153.)

During a March 4 interview with Officer Logan, Gilliland said he wanted Ms. Pontbriant's killers punished. Prior to March 11, Gilliland told Officer Logan nothing about any money having been in the house. (RT 7154-7156.)

On April 7, Gilliland had Officer Logan come to the house to retrieve a knife he had obtained, believing that the knife might be the murder weapon. Gilliland said he did not really think the knife had been used in the murder, but

he wanted the police to have it "just in case."[67] (RT 7156-7159.)

Laurie Willis worked at the Breakroom Bar and knew Letner and Tobin. One afternoon sometime abound February 29 or March 1, an older woman called the bar asking for Letner. Willis took a message but never gave it to Letner or anyone else. (RT 7160-7168.)

Ray Philpot owned the Goshen bus station and testified about the prices of bus tickets in March 1988. A ticket to Sacramento would have cost $23.20. A ticket to Council Bluffs would have cost about $109. At that time, there were special "gambler" bus fares from Sacramento to Reno for $16 with some rebate from the casinos upon arrival. At that time, there was also a Greyhound bus depot in downtown Visalia that offered passage to Sacramento on a similar schedule as the Goshen station. (RT 7171-7178.)

Letner also recalled Investigator Johnson, who testified about finding hairs on the sheets used to transport Ms. Pontbriant's body. He collected the hairs on September 8, 1989, and sent them to the FBI for analysis. (RT 7181-7183, 7187.)

Criminalist Gary Cortner testified that he had examined Ms. Pontbriant's sweater and determined it had been torn off. However, he could not determine if one portion of the sweater had been torn or cut. (RT 7192-7194, 7209-7210.) Cortner also analyzed various human hairs recovered from Letner's blue baseball cap, from Tobin's black baseball cap, and from Ms. Pontbriant's buttocks and chest. In conducting this analysis, he could not distinguish Letner's hair from Tobin's hair. (RT 7192-7199, 7215-7216.)

Gary Sims, a criminalist from a private laboratory, was present when Letner's buck knife was disassembled and subjected to multiple, detailed

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67. The evidence had previously established (1) that about a month after the murder, James Wright tried to sell Gilliland a knife he had found at the local Oak Tree Inn and (2) that Gilliland took the knife and gave it to Officer Logan on April 7. (RT 5225-5226, 6293-6294, 6352-6353.)

forensic tests. No blood was detected on the knife. Sims acknowledged that any detectible traces of blood could have been washed from the knife. He opined, however, that a thorough washing would have also removed some of the other debris found on the knife. (RT 7222-7239.)

Sara McCuiston owned a second-hand store in downtown Sacramento. She testified that Tobin's down jacket was similar to jackets she would sell at the store for about $15. She said she would occasionally reduce the price for clothes in return for other clothes. She said Letner and Tobin looked familiar.[68] (RT 7258-7261.)

Alice Quair lived about a block from Ms. Pontbriant's North Jacob house. About a week after the murder, she bought a refrigerator from Gilliland for $200, paying $150 up front. Investigator Johnson dropped off Gilliland at her house at some point later, and Gilliland collected another $20 payment. (RT 7282-7286.)

Sandra Saulque worked at Coast Savings and Loan in Visalia. In February 1988, Saulque's daughter bought a washer and drier from Gilliland. She gave Gilliland a check, which cleared on February 16. On that date, Gilliland had a balance of $13.11 in his personal Coast account. The only activity in the account in the weeks that followed was a $40 deposit on February 25 and a $40 withdrawal on March 1. His balance at that point was $4.98. The withdrawal was made from one of Coast's Modesto branches. (RT 7288-7299, 7332.)

Private Investigator Cliff Webb interviewed Bothwell in prison on October 6, 1989. Per prison policy, Webb was unable to tape record the interview. Bothwell allegedly said that Investigator Johnson had told him the

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68. Tobin had previously testified that, while on the way to Council Bluffs, he went to a used clothing store in Sacramento and traded the jacket he was wearing plus $5 for the down jacket. (RT 7110-7112.)

details of Ms. Pontbriant's murder before he gave his statement to Investigator Johnson. (RT 7323-7324.)

Finally, Letner recalled to the stand FBI Agent Michael Malone, who had performed some of the hair analyses in this case. Malone reiterated that the various "broken hairs" he analyzed had been removed forcibly.[69] (RT 7383-7385.) He did not identify any of the larger clumps of hair recovered from the crime scene as coming from Letner or Tobin. (RT 7389-7390.)

Malone had no trouble distinguishing between or among Tobin's hairs, Letner's hairs, or Ms. Pontbriant's hairs. There was nothing to suggest that the hairs found on Ms. Pontbriant's chest, which were consistent with Letner's hair, had been removed by force. (RT 7395.)

The People's Guilt-Phase Rebuttal

The prosecution recalled Cliff Webb. Webb interviewed Laurie Willis in August 1988. She said she was unsure about the date she had taken the telephone call for Letner at the Breakroom Bar, but she had a feeling the call came sometime around the date of the murder. Although she remembered receiving the phone call, she did not remember the phone number, and she never provided any phone number. (RT 7333-7334.)

Terry Wood lived in the East Murray apartments next door to Letner and Tobin. (RT 7335-7337.) Sometime in 1988, Wood and Tobin were in custody together in a crowded holding cell in the Tulare County Jail. Tobin said he and Letner were at Ms. Pontbriant's house drinking beer on the night of the murder. Tobin mentioned nothing about leaving the house before borrowing Ms.

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69. Malone acknowledged that one of these hairs had been broken during handling in the laboratory, but he also concluded that this same hair had in fact been removed from Ms. Pontbriant's head by force. He opined that it was very unusual for hairs to be broken during this handling process. (RT 7386-7389, 7391, 7394.)

Pontbriant's car. At trial, Wood claimed his memory of the conversation was vague.[70] (RT 7337-7340, 7355-7358.)

The prosecution again recalled Investigator Johnson. Before beginning the interview with Bothwell at the Illinois prison, Investigator Johnson told Bothwell nothing more than his name and why he was there. The investigator did not know beforehand what Bothwell's statements might be. The only thing Investigator Johnson knew was that Bothwell was interested in talking to him. (RT 7363-7365)

Investigator Johnson interviewed Terry Wood on October 15, 1989. Wood said Tobin had told him he had borrowed Ms. Pontbriant's car from her home. Specifically, Tobin said that he came back to the house at some point and that he and Letner borrowed Ms. Pontbriant's car to go sell some things because they were leaving the state.[71] (RT 7366, 7371.)

At trial, Investigator Johnson produced a job application for an undercover security position Tobin had submitted in Iowa. Under the "skills" portion of the application, Tobin stated he was a second-degree black belt in tae kwon do. (RT 7366-7367.)

Letner attempted to impeach Investigator Johnson with some statements the investigator allegedly made immediately before the preliminary hearing in this case. Investigator Johnson emphatically denied ever having said he would lie, cheat, or steal to convict Letner and Tobin. Instead, the investigator merely told Letner's counsel he would work very hard to seek out the truth. Investigator Johnson added that sometimes defense attorneys do not like the truth. (RT 7377-7378.)

Finally, the prosecution recalled Jeanette Mayberry. Mayberry spoke

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71. Tobin denied having told Terry Woods that he went back to the house and left in Ms. Pontbriant's car. (RT 6887.)

with Tobin several times in jail following his arrest. Tobin told her the following story about the night of the murder: He left Ms. Pontbriant's house twice that night to buy beer. The first time, he bought a six-pack of Heineken. The second time, he bought a six-pack of Lowenbrau. At some point, he returned to the East Murray apartment. Letner came back to the apartment two or three hours later. Letner awakened Tobin and said, "Come on. Let's go. I've got the car." Letner said Ivon loaned him the car to go to Iowa. Tobin said he wanted to stop and sell someone his shotgun before taking off for Iowa in Ms. Pontbriant's car.[72] (RT 7418-7422.)

Tobin's Guilt-Phase Surrebuttal

Tobin called to the stand Mercedes Brasel of Carter Lake, Iowa. Tobin did some painting work at Brasel's home while he was employed by Bothwell. On March 28, 1988, Bothwell came to Brasel's home and collected the final $50 on the $200 painting job. Tobin worked at Brasel's all day that day. Bothwell picked up Tobin at the house that day when Tobin finished the painting. (RT 7437-7448.)

The People's Penalty-Phase Case In Aggravation

The Assault Of Stephan Frame

In 1978, Letner and Stephan Frame attended Vintage High School in Napa. Sometime during June that year, Letner telephoned Frame's parents' home and asked Frame if he was associated with certain people. Letner said these people were a bunch of "pricks." Letner warned Frame that he was "after

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72. Tobin had denied being at the apartment two or three hours before Letner returned. He also denied that Letner said "let's go to Iowa" upon returning to the apartment. (RT 6974.)

his ass." Frame responded that he would have a shotgun waiting if Letner came to his home. (RT 7921-7924, 7934.)

The following Monday, Letner approached Frame in the high school parking lot. He asked Frame if he was in fact Steve Frame.[73] Letner also asked if Frame knew who he was. Letner then struck Frame with his fist, knocking him unconscious for a moment. Frame regained consciousness on the ground, only to discover Letner kicking him in the face repeatedly with a work boot. (RT 7924-7927.)

Letner finally relented after Frame begged him to stop. As a result of the assault, Frame was hospitalized for a concussion, a broken nose, and a broken cheekbone.[74][75] (RT 7927-7930.)

The Terrorization Of David Bendowski

David Bendowski also went to high school in Napa and knew Letner and Tobin. In June 1978, 16-year-old Bendowski dated Tobin's exgirlfriend a few times. One day shortly thereafter, Letner and Tobin appeared at Bendowski's home uninvited and forced their way inside. Tobin confronted Bendowski in the hallway. He delivered a roundhouse karate kick to Bendowski's face, causing a bloody nose. Tobin said something about being

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73. This was the first time Frame met Letner in person. (RT 7925.)

74. When reporting the matter to the police, Frame said something about other people being involved in a confrontation with Letner's brother a week earlier. (RT 7935.)

75. Medical records produced at trial indicated that Frame suffered a brain contusion caused by blunt force, a broken nose, and a broken upper jaw. (RT 8406.)

angry over Bendowski dating his exgirlfriend[76] (RT 7959-7963.)

Tobin, Letner, and Letner's brother, John, returned to the Bendowski home a couple months later. John spoke with Bendowski at the front door and told him to come outside to speak with them. He assured Bendowski there would be no trouble. (RT 7964.)

When Bendowski came outside, Letner and Tobin forced him into Letner's car and drove him somewhere out in the country. During the drive, Letner and Tobin told Bendowski to pay them $50 or $100 for each of his three dates with Tobin's exgirlfriend. Tobin reasoned that, "If she was gonna act like a whore, he (Tobin) was going to treat her like a whore." (RT 7964-7966.) Letner and Tobin also threatened they were taking Bendowski out to the hills to hang him from a tree and beat him. Fearful of being beaten, Bendowski tried to appear willing to meet Letner's and Tobin's demands.[77] (RT 7967-7968.)

At one point during the drive, Bendowski tried to escape while the car was stopped at a light. One of the appellants slammed the door shut before Bendowski could get out. (RT 7967.) The car eventually pulled over, and Letner and Tobin threatened to beat Bendowski then and there. John intervened, saying that Bendowski should be given a chance to pay. Letner and Tobin made Bendowski get out of the car. Letner suggested taking Bendowski's shoes. Instead, they drove away, leaving Bendowski stranded. (RT 7969-7970, 7980.)

On January 20, 1979, Letner and Tobin again came to Bendowski's home and confronted his 14-year-old sister Julie. When Julie said Bendowski

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76. Bendowski's sister Julie Bryant, who was 14 years old at the time of Letner's and Tobin's home invasion, was also present at her parent's house. She witnessed Tobin's assault and confirmed Bendowski's account of the facts at appellants' trial. (RT 7946-7955.)

77. Bendowski had good reason to fear Letner and Tobin, having previously seen them beat others severely. (RT 7968.)

was not home, Tobin ordered her to "go look for him" inside the house. Julie told Tobin to go inside and look for himself. Tobin then threatened, "You do it or I'll work you over." (RT 7941-7944.)

Julie did as she was told. She came back and told them her brother was not home. Tobin ordered Julie to tell Bendowski they were looking for him. (RT 7944-7945.)

Sometime that same day, Bendowski was walking home through a residential neighborhood when he spotted Letner and Tobin in a car.[78] Bendowski tried to run, but Letner and Tobin followed him in the car. When running appeared futile, Bendowski finally stopped and talked with them. Once again, Letner and Tobin forced Bendowski into the car. They were upset because Bendowski had not paid them. This time, they offered Bendowski a "discount."[79] (RT 7971-7974.)

They drove Bendowski to a nearby gas station and parked. Letner threatened that, if Bendowski did not pay the money, they would break one of Bendowski's fingers for every day he was late. Bendowski agreed to pay them later that evening. (RT 7974-7976.) Letner and Tobin then drove Bendowski a couple blocks from his home and released him. (RT 7976-7977.) Bendowski finally told his parents that night about Letner and Tobin terrorizing him, and the police were contacted. (RT 7978.)

The Assault And Robbery Of Kenny Warren

Kenny Warren also knew Letner and Tobin from high school.[80] (RT

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78. John Dean was also in the car with Letner and Tobin. (RT 7973.)

79. At trial, Bendowski testified he never owed Letner or Tobin any money. (RT 7976.)

80. Warren had suffered a previous felony conviction in January 1987 for carrying a concealed weapon. (RT 8075-8076.)

8044-8045.) Sometime in mid-May 1981, Warren and about nine other young men went to Letner's house. They were looking for a fight in response to a fight Letner and Tobin had with them sometime earlier.[81] Warren and two of his friends approached the door. When his friends knocked and kicked at the door, someone inside fired a shotgun through the door. Warren and the others fled. Two more shotgun blasts erupted from inside the house, injuring three of the young men outside. Two of these young men were seriously injured.[82] (RT 8071-8074, 8078-8079.)

About two weeks later -- on the afternoon of May 29 -- Tobin and Robert Nance approached Kenny Warren inside the Grand Auto store in Napa. Tobin told Warren to go outside, and he hurled a punch in Warren's direction. Fearing he would be "jumped" if he left the store, Warren told Tobin they could talk inside. When Tobin assured Warren he would not be "jumped," Warren agreed to go outside with them. (RT 8045-8049.) As it turned out, this was a bad idea.

Once outside the store, Nance kicked Warren in the face. Tobin said to Warren, "Go ahead. One on one." Nance threw a punch, which Warren blocked. Tobin kicked Warren in the back, knocking him to his knees. Tobin then said, "It's two on one now, fucker." (RT 8050-8052.)

Warren jumped to his feet and ran. Nance tackled him. Tobin and Nance repeatedly kicked Warren in the head and ribs. Tobin pulled handfuls of hair from the back of Warren's head. (RT 8053.) After a few moments of the beating, Nance took Warren's wallet, which contained $85. (RT 8054.)

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81. At trial, Warren acknowledged that these people he had associated with had an ongoing dispute with Letner and Tobin which involved previous fights. (RT 8077-8078.)

82. The trial court gave the jury a limiting instruction that the evidence of this incident was to be considered only as to Tobin. (RT 8070-8071.)

Tobin and Nance let Warren up from the ground. Nance extended the wallet in his hand and dared Warren to take it. Warren snatched the wallet and ran. (RT 8054-8055.) Nance tackled him again, and the two assailants resumed the kicking. One of them stole Warren's wallet again. Tobin tried to drag Warren into a car. (RT 8055-8060.)

By this point, someone informed one of the Grand Auto employees, Richard Baker, about the assault going on in the parking lot. Baker told another employee to call the police, and he went outside to investigate. (RT 7992-7993.) He saw Warren on the ground with Tobin repeatedly kicking him in the head and chest. Tobin said he would kill Warren if he ever shot at his house again. (RT 7995-7998, 8061-8062.)

Nance was in a nearby car. As Baker jotted down the car's licence plate number, Tobin said that Warren got what he deserved because he shot at his house. Tobin then got into the car and fled. (RT 7997-7999, 8061-8062.)

Tobin left his victim in the parking lot bleeding from the ear. (RT 8000.) As a result of the assault, Warren sustained a broken nose and various contusions and strains.[83] (RT 8075.) Warren did not get his wallet back. (RT 8061.)

The Assault Of Officer Andrew Emberton

At about 11:45 p.m. on July 21, 1983, off-duty Officer Andrew Emberton of the Berkeley Police Department was driving on University Avenue when he noticed Letner in the roadway. Letner was holding a cardboard hitchhiking sign bearing the word "Vallejo." The officer stopped and motioned for Letner to get out of the road. Letner approached and became confrontational. Wanting no part of such a confrontation, the officer tried to

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83. Warren's medical records indicated that he sustained a strained neck and blunt force trauma to the ribs. (RT 8408-8409.)

drive away. Letner then struck the side of the car. Officer Emberton stopped again. Letner approached him, assumed a karate stance, and said something to the effect of, "Come on. Let's fight. I'll kick your ass." (RT 8091-8098.)

Letner said repeatedly that he wanted to fight and that he would kick Officer Emberton's ass. (RT 8095.) Letner pushed the officer in the chest. Officer Emberton said he was not interested in fighting and just wanted Letner to go on the sidewalk. Letner continued to challenge the officer and pushed him in the chest a second time. (RT 8099.)

At that point, a marked police car arrived. Letner turned and walked away. The uniformed officer and Officer Emberton arrested Letner. Effecting the arrest required the two officers to grab Letner's arms and struggle with him until finally putting him in handcuffs.[84/] (RT 8100-8102.)

The Assault Of Alexander McAdams

On the afternoon of January 14, 1985, Alexander McAdams briefly visited his girlfriend Susan Forsythe at the restaurant where she worked in Benicia.[85/] He left the restaurant in his truck. A moment later, Letner approached him in a truck and repeatedly pulled into McAdams' lane. Letner looked angry, and McAdams was scared. McAdams continually tried to evade Letner. Eventually, McAdams put his truck in reverse. Letner again followed and somehow struck McAdams' bumper head-on.[86/] (RT 8167-8180.)

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84. A juvenile standing near Letner at the time was also taken into custody. (RT 8103-8104.)

85. Forsythe told McAdams sometime earlier that she was having a problem with Letner and was afraid of him. (RT 8164-8166, 8191.) McAdams' brother was married to Tobin's sister. (RT 8190.)

86. McAdams testified that Letner had assaulted him "probably quite a few times" previously. (RT 8204-8205.) One of these occasions involved Letner walking up to McAdams' truck, reaching through the window, and

Letner got out of his truck with a rifle in his hands. (RT 8178, 8182.) McAdams drove quickly across an open field. As McAdams was fleeing, Letner fired several shots at him. (RT 8178, 8183-8184, 8194.)

McAdams drove immediately to the Benicia Police Department and reported the incident. Officers were sent to Anthony Hockney's apartment in Benicia. (RT 8187-8188, 8211-8213.) They discovered Letner's truck parked in front. The officers went to the front door and asked a young lady if Letner was there; she said she was alone. The officers then heard noise coming from inside. They entered the apartment and found Hockney in the back bedroom. Beside him on the bed was a Ruger carbine rifle.[87/] (RT 8118-8119, 8214-8218.)

Hockney said the rifle belonged to Letner.[88/] Hockney also said Letner had been in the apartment when the police arrived but had left after the police came inside. The officers searched the area but were unable to find Letner. (RT 8120, 8221-8222.)

About 15 or 20 minutes later, the officers stopped Letner in his truck. When ordered out of the truck, Letner challenged the officers, saying things to the effect of, "You're a tough motherfucker with a shotgun." (RT 8226.) After Letner's arrest, while he was being taken to the police station, he said, "You

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grabbing McAdams by the throat. This incident also somehow involved Susan Forsythe. (RT 8203-8204.)

87. At the time of appellants' trial, Hockney was incarcerated at Vacaville State Prison for a parole violation stemming from a 1987 burglary conviction. (RT 8106-8107.) He claimed that Letner and another man came to his apartment on January 14, 1985, with the rifle. The other man said he had just purchased the rifle, and he asked Hockney if he could keep it at the apartment. Hockney agreed. (RT 8107-8108, 8115-8117, 8137.) Hockney claimed to have never met Letner before that day. (RT 8109.)

88. The rifle was the same type Letner had used earlier when firing at McAdams. (RT 8114, 8182, 8216-8218.)

think you got me because you've got my gun. But my gun's clean." (RT 8228.) Letner also said, "I'll be out of this soon, and then I'll get Alexander McAdams." (RT 8229.)

At the police station, Letner said the following about assaulting McAdams: He had a dispute with McAdams over a girl. He admitted driving head-on into McAdams' truck in order to scare him. Letner denied ever using the gun. In fact, he denied even owning or possessing the gun. (RT 8231-8232.) When searching Letner at the police station, the officers found a receipt in Letner's name for the same Ruger .44 caliber rifle seized from Hockney's apartment. (RT 8229-8230.)

The Terrorization Of William Healer

William Healer also met Letner and Tobin in high school.[89] (RT 8285.) In 1986, Healer was running an auto body and paint shop in Napa. At some point that year, Tobin's mother brought her car to Healer for repairs. Healer completed all the repairs except the painting. He told Mrs. Tobin to bring the car back later for the painting service. (RT 8285-8291.) Sometime later, Healer moved his business to another shop about two blocks away. (RT 8292.)

On November 29, 1986, Healer drove a pickup truck to a gas station in Napa. As Healer was pumping gas, Letner and Tobin approached him on bicycles. Tobin was angry about Healer's repairs to his mother's car. He accused Healer of trying to leave town. Tobin reached into the truck and removed the keys from the ignition. He ordered Healer to come with them. Letner and Tobin loaded their bicycles into the back of the truck. They escorted Healer back into the truck and told him they hoped to take care of the matter

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89. In August 1989, Healer pled guilty to various felony drug charges. In return for a suspended sentence, Healer temporarily became an informant for the Napa Narcotics Bureau. (RT 8344-8347.)

without any bloodshed. Letner and Tobin joined Healer in the truck. Tobin locked the driver's door and handed Healer back the keys. (RT 8293-8303.)

While pulling out of the gas station, they encountered Daniel Lobick[90], who said he needed a ride to get some drugs. Letner and Tobin had Lobick join them in the truck. They then ordered Healer to drive to a nearby Kmart store where Tobin's mother worked. When they arrived, Tobin again took the keys and had Healer follow him into the store. Tobin discovered that his mother was not there, and he ordered Healer back to the truck to drive to a nearby Sears, another place where Mrs. Tobin worked. (RT 8305-8307.)

Along the way to Sears, Letner threatened that Healer should not have "burned" Tobin's mother. (RT 8308.) They arrived at Sears, and Tobin went inside. Letner continued to threaten Healer in the truck. When Tobin returned a moment later, Letner opened the truck's driver door, struck Healer in the face, and again said, "No one burns my best friend's mother." Tobin told Letner to stop because his mother would be coming shortly. (RT 8308-8310.)

By this point, Healer was begging for his life. Letner and Tobin questioned Healer about whether he or his family members had any money. (RT 8310-8311.) Mrs. Tobin appeared a moment later. At Letner's and Tobin's direction. Healer went to speak with her. Healer was crying. He apologized to Mrs. Tobin for any misunderstanding about her car. Mrs. Tobin said there was no misunderstanding, and she asked Healer why he was so upset. When Healer explained what had happened, Mrs. Tobin twice offered to drive him home. (RT 8312-8315.)

Tobin approached them. He denied that Healer had been struck, and he started laughing. He assured his mother and Healer that Healer could leave in his truck with them with no further trouble. When Healer got back in the truck,

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90. As revealed later in Tobin's penalty-phase case, this individual was in fact Dan Hlobick. (RT 9216.)

Letner spoke with him about giving them money to avoid being hurt anymore. (RT 8317-8321.)

Tobin returned to the truck. Healer was ordered to drive to a nearby Burger King. While en route, Letner asked for Healer's wallet. Healer said he did not have his wallet with him. Letner called Healer a liar and ordered him to pull over. (RT 8322-8324.) Healer stopped the truck and got out. Letner kicked Healer hard in the chest and said he (Letner) was going to find Healer's wallet. (RT 8325-8327.) Letner and Tobin searched the truck. Healer pleaded with them, saying he would give them money at his house. They all got back in the truck. Letner said he needed to get a gun, and he ordered Healer to drive to some location on Franklin Street. (RT 8327-8328.)

While Healer was driving, Letner and Tobin warned him not to go to the police. Tobin then grabbed the back of Healer's head, and Letner started beating Healer in the face. Tobin grabbed Healer by the throat and choked him. (RT 8327-8332.) By this time, they had reached their destination on Franklin Street. They had Healer stop the truck, and Tobin again grabbed Healer by the head while Letner beat him in the face. Letner and Tobin then discussed who would go inside to get the gun. (RT 8332-8335.)

At that moment, Healer noticed that, for the first time, his assailants had neglected to lock his door. Healer bolted from the truck. He approached a woman driving on Franklin Street. He pounded his palms on her car and begged, "Help me. Help me. They're going to kill me." The woman let Healer in her car and headed toward the police station.[91/] Letner and Tobin had been chasing Healer on foot, and one of them continued to follow after Healer got into the car. A moment later, Healer pointed to a nearby house. He told the woman who had saved him that he knew the people who lived in this house.

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91. The woman was Marilyn Quinn, who also testified about these events at appellants' trial. (RT 8270-8277.)

The woman stopped the car. Healer ran to the house and had the people inside call the police. (RT 8270-8277, 8335-8341.)

Healer went to the hospital for injuries to his throat and chest. As a result of the attack, Healer suffered permanent disfigurement to his rib cage and ongoing emotional problems.[92/] (RT 8341-8342.)

The Assault And Rape Of Sheila White

Sheila White met Letner at the Breakroom Bar in Visalia in July 1987 and formed a romantic relationship with him thereafter. (RT 8372-8374.) On the night of December 27, 1987, White and Letner were at White's apartment preparing to go to bed after having been drinking all day. The two began arguing. Letner leaped on the bed and repeatedly beat his fists against the back of White's head, neck, and back. Letner then started choking her. Gasping for air, White pleaded for Letner to stop until she finally passed out. (RT 8374-8381.)

When White woke up the next morning, Letner was still at the apartment. He left for a few hours and came back. Letner was very apologetic when he returned. (RT 8381-8382.)

Letner came to White's apartment again on the evening of January 1, 1988. The two talked and began to argue. Letner left, only to return again about an hour later. White again let Letner in the apartment when he insisted on talking with her. (RT 8384-8386.) Letner then began repeatedly pushing himself onto White, trying to kiss her. When White rebuffed Letner's sexual advances, Letner forced her to the floor and raped her. (RT 8386-8389.) White did not report the rape because she was afraid of Letner. (RT 8389-8390.)

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92. Healer's medical records indicated that he sustained bruising to the neck and trauma to the ribs. (RT 8409-8411.)

The Assault And Robbery Of Mike Mohrhauser

On April 16, 1988 – shortly after Letner's escape in San Antonio – he was hitchhiking somewhere between El Paso, Texas, and Las Cruces, New Mexico. Mike Mohrhauser was driving his pickup truck home to Las Cruces when he picked up Letner. (RT 8416-8419.)

Letner said his name was "Steve Kennedy," and he said he was on his way to San Diego. Mohrhauser invited Letner to stay the night with him at his parent's house because Letner said he had nowhere to stay. Later that night, Letner and Mohrhauser went out "partying." Letner ended up vomiting on the side of Mohrhauser's truck during the drive back to Mohrhauser's house. (RT 8420-8422.)

The next day, Letner and Mohrhauser went to El Paso to "party" some more. Mohrhauser had Letner drive the pickup truck back to Las Cruces that night because Mohrhauser was too intoxicated. At some point during the drive home, Mohrhauser had Letner pull over so that Mohrhauser could go to the bathroom. As Mohrhauser was urinating, Letner approached him and hit him over the head with something, knocking Mohrhauser unconscious. (RT 8422-8427.)

Mohrhauser regained consciousness about an hour later and found himself face-down in a watery irrigation ditch. The ditch was some 30 feet from where Mohrhauser had been urinating. He had a gash on his head from where Letner had hit him. (RT 8427-8429.) Mohrhauser's watch and wallet were missing[93], and his truck was gone.[94] When the truck was later returned to Mohrhauser, $3,000 worth of tools were missing. (RT 8432-8433.)

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93. The wallet contained $65. (RT 8431.)

94. Letner was driving Mohrhauser's truck when he was later apprehended at the border checkpoint in Las Cruces. (RT 6511-6513, 6521, 8416-8417.)

Letner's Penalty-Phase Case In Mitigation

Letner first disclosed to the jury some of Earl Bothwell's prior in limine testimony. Bothwell had previously testified in limine as follows about Tobin's assault in the Council Bluff's motel room: Bothwell and Hare were in their room that night with the two women. Letner and Tobin came to the room. Tobin made sexual advances to one of the women, and Bothwell told Letner and Tobin to leave. Bothwell warned them he had a shotgun under his bed. (RT 8463-8465.)

Tobin grabbed the shotgun. Bothwell told him to put it back. Tobin threatened, "I'll blow your fucking head off." Hare and Letner grabbed Tobin, and Letner removed the clip from the shotgun. Tobin struck Bothwell in the ribs with the gun's stock, and he kicked Bothwell a few times. (RT 8465-8467.)

Bothwell feared that, if Letner had not removed the gun's clip, Tobin would have shot him. Bothwell also testified that Letner would buy things for Tobin and somehow seemed to idolize Tobin. (RT 8469.)

Letner next called to the stand his younger brother, John Letner, who testified about their family background and upbringing. The father was an alcoholic, who would go on sporadic drinking binges for months. This caused the family to move frequently. Indeed, the family lived in 15 or 16 different towns in various parts of the country during Letner's upbringing. (RT 8471-8473.)

The father became mean when he was drunk, and he tended to direct his anger toward Letner. Letner nonetheless tended to overlook his father's shortcomings. The parents argued frequently about the father's drinking. They separated a few times and eventually split up when Letner was 19 years old. (RT 8573-8475.)

Alcohol was generally available in the home, and Letner started drinking "a lot more" at about age 15. He also started using marijuana, but John did not know his brother to use other drugs. (RT 8476-8477, 8516.) After the father's death in September 1981, Letner became withdrawn, and his drinking increased. (RT 8477-8478.)

"Just about everyone" teased Letner about his looks while he was growing up. Indeed, the family looked into plastic surgery for Letner's face, but the father ultimately would not allow it. (RT 8478-8479.) On a few occasions when Letner was between 16 and 18 years old, John witnessed his brother crying with a shotgun on his lap. (RT 8479, 8503.)

John knew Stephen Frame in high school when John was 14 and Frame was 16 or 17. One day at school, Frame and two other boys confronted John about an altercation John had with a girl. The boys grabbed John out of his chair and threatened to beat him up. The larger of these boys said that he and John "were going to go a few rounds." When the boy threw a punch, a teacher broke up the scuffle. (RT 8480-8481.)

John did not tell his brother about this incident for fear of Letner becoming involved. This was because their "family's values" demanded defending family members and others confronted with physical mismatches. Indeed, John theorized that their father would have beat Letner if he had not defended his brother. John also claimed their father used physical force against his sons all their lives. (RT 8482.)

Letner nonetheless learned about Frame's altercation with his brother. Letner telephoned Frame that day and threatened to beat him up if Frame did not leave John alone. Frame allegedly said he would "blow [Letner's] fucking brains out" if Frame could get to his truck before Letner could get to him. (RT 8483-8485.)

John admitted being present in the car on the day Letner and Tobin

drove David Bendowski "out to the country." John claimed Bendowski got in the car willingly to go drink beer and smoke marijuana with them. (RT 8485-8488.) At some point, Tobin and Bendowski discussed some money Bendowski owed Tobin over a drug deal. Bendowski acknowledged owing the money. When Tobin continued to insist on being paid, Bendowski asked to be let out of the car. They complied with the request. John claimed Tobin's demand for money had nothing to do with his exgirlfriend. John also claimed that no one threatened to harm Bendowski. (RT 8488-8490, 8512.)

About William Healer, John simply claimed to have known him to sell drugs in 1986. (RT 8490.)

John also testified that Letner and Tobin met in the summer of 1977 and soon became inseparable. John acknowledged that Letner and Tobin frequently found their way into fights and into trouble. John advised his brother to stay away from Tobin to avoid trouble. John eventually said he would not hang around with Letner anymore unless Letner stopped associating with Tobin. (RT 8491-8493.)

Sometime around Christmas 1987, Letner telephoned his brother and said he wanted to move because Tobin was acting crazy and was scaring him. John invited Letner to move into his apartment with him. (RT 8493-8494.)

About a month after Ms. Pontbriant's murder, Letner telephoned John and their mother. He claimed he had done nothing wrong. John and the mother both said Letner should turn himself in to the authorities if he had in fact done nothing wrong. Letner doubted he would be acquitted, even though he had allegedly done nothing. John told him not to call their mother if he was unwilling to face justice. (RT 8495-8496.) Letner telephoned them again sometime later. John and the mother both allegedly said they wanted nothing to do with him unless Letner turned himself in to face the charges. Letner allegedly told them he would do so. (RT 8496-8498.)

Letner recalled Burt Arnold to the stand. Arnold said he had occasionally seen Letner and Tobin fight each other. He said that Letner would usually back down. He acknowledged that these fights had not involved serious physical confrontation. (RT 8531-8533.)

Letner also recalled Sheila White to the stand. While White was involved with Letner, she saw Tobin almost daily. White believed Letner idolized Tobin or thought Tobin was like a god. (RT 8552-8555.)

Letner next called to the stand his former brother-in-law, Derrin Clenny, who testified about the encounter with Officer Emberton in Berkeley.[95/] Officer Emberton pulled up to them, got out of his car, and aggressively approached Letner. He did not identify himself as a police officer. Letner assumed a karate stance and appeared to be ready to fight. The two then "fought a little bit," and Letner pushed the officer. Officer Emberton lunged at Letner, and Letner struck the officer. The police then arrived and arrested Letner. Clenny said Officer Emberton never touched him. He claimed that Letner never struck the officer's car. (RT 8629-8643.)

Letner took the stand on his own behalf and sought to deny, excuse, or minimize his culpability for his various prior acts of violence and terror. Letner admitted striking Stephan Frame in the face and kicking him when Frame was down on the ground. Letner claimed he committed the assault because his father had told him either to defend his brother or find somewhere else to live. (RT 8556-8559.)

When questioned on cross-examination about the Frame incident, Letner admitted that -- in connection with this incident -- he and Tobin had also gone to the home of Bill Lundblad, one of the other young men who had previously

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95. At the time of the Berkeley incident, Clenny was known as Derrin McElroy. (RT 8629-8630.). Clenny had suffered prior felony convictions for one count of auto theft and two counts of receiving stolen property. (RT 8634.)

confronted Letner's younger brother. When Lundblad would not come out of his home, Letner punched him in the face through the screen door. (RT 8706-8708.)

Regarding David Bendowski, Letner denied being present on the day Tobin forced his way into the Bendowski home and kicked Bendowski in the face. Letner did admit being with Tobin on the day they drove Bendowski "out to the country," to Soda Springs. He claimed that Bendowski joined them in the car voluntarily to go drink beer. During the car ride, Tobin told Bendowski to pay $60 he owed Tobin for drugs. Letner also told Bendowski he should pay the money he owed for the marijuana. Tobin also said he was going to charge Bendowski $50 for having sex with Tobin's former girlfriend, Joann Schultz. Letner claimed no one ever threatened Bendowski. (RT 8559-8565, 8720.)

When they arrived at Soda Springs, they all drank beer together. Bendowski decided not to leave with them, saying he preferred to walk. Letner denied threatening to take Bendowski's shoes. (RT 8565-8566.)

Regarding the third encounter with Bendowski, Letner gave the following story: He went to the Bendowski home that day and threatened Julie to go find her brother, who was not home. (RT 8731-8732.) He and Tobin found Bendowski walking that day. Tobin chased after Bendowski and brought him back to Letner's car. The three young men drove to a nearby gas station, parked in the back, and smoked some marijuana. At no time did anyone threaten Bendowski. (RT 8566-8570.)

Letner gave the following story regarding his assault of Officer Emberton: He and his brother-in-law Darren McElroy were hitchhiking when a carload of people threw beer bottles at them. Officer Emberton drove toward them a moment later, pulled his car onto the curb, and almost hit Darren. The officer got out of his car. Without identifying himself as a police officer, he grabbed Darren's arm. Letner slapped Officer Emberton's arm away. The

officer swung at Letner, and Letner punched back, knocking Officer Emberton to the ground. (RT 8570-8575.)

At that moment, two police cars arrived, and Letner was arrested. The police would not listen to Letner's explanation. (RT 8575-8576.)

Letner said the following about his assault of Alexander McAdams: Letner drove Sue Forsythe to work that day. At some point during the drive, McAdams was driving near him. McAdams drove through a red light, which somehow also forced Letner to run the light to avoid a collision. (RT 8577-8579.) Letner approached McAdams on the road later that day and repeatedly drove into McAdams' lane in order to scare him. When Letner got out of his truck a moment later, he had nothing in his hands. (RT 8580-8582.)

Letner denied chasing McAdams or ever having a gun that day. (RT 8583.) He claimed to have left a rifle at some point with someone named "Rodney," who was a neighbor of Hockney. At some point, Rodney told Letner the rifle was at Hockney's home. (RT 8584-8588.) Letner denied ever hitting McAdams. (RT 8588.) On cross-examination, Letner admitted having intended to "beat the hell" out of McAdams that day. (RT 8753.)

Letner said the following about his theft of Mohrhauser's truck: Mohrhauser took heroin on the night of the theft. At some point that evening, Mohrhauser's brother beat up Mohrhauser to prevent him from driving. At some point later, while Letner was driving the truck, Mohrhauser tried to punch Letner. Mohrhauser said that Letner should get out of the truck because Letner had not "backed him up" earlier. (RT 8588-8597.)

Letner stopped the truck. He pulled Mohrhauser out of the truck and then drove away, leaving Mohrhauser behind. Letner denied ever hitting Mohrhauser or taking Mohrhauser's watch or wallet. Letner claimed the watch and wallet were already in the truck. (RT 8597-8598.) On cross-examination, Letner admitted selling the tools in Mohrhauser's truck in Mexico. (RT 8938.)

Letner said the following about the events of December 27, 1987, with Sheila White: Letner passed out drunk that night and was taken to bed by White and Tobin. At some point, White poked Letner in the eye while he was sleeping. This caused Letner to wake up, swinging drunken punches. Letner could not recall if he in fact inflicted the injuries White had claimed. (RT 8598-8602.)

Letner admitted having sex with White on January 1. He said he had been drinking and taking drugs that night, and he claimed he had believed the sex was consensual. (RT 8603-8604.)

Letner claimed the following about the November 1986 assault on Willie Healer: Healer, Letner, and Tobin all drank beer and smoked marijuana together in the truck that day. Healer did nothing to indicate that he did not want Letner and Tobin to join him in the truck. (RT 8606-8611.)

When they were all together in the Sears' parking lot, Letner complained to Healer about Healer "ripping off" Tobin's mother. Letner then slapped Healer. (RT 8612-8613.) A moment later, Healer left the truck to speak with Tobin and Tobin's mother. When Healer returned to the truck, Letner "might have" threatened Healer and hit him again. Letner denied anyone threatening or striking Healer after that point. Letner also claimed his actions were prompted solely by a dislike for Healer, not for money. Letner nonetheless acknowledged he had Healer provide him with beer and buy him a hamburger that day. He denied ever stopping anywhere that day to pick up a gun. (RT 8613-8618.)

Letner claimed that, at some point while they were all driving in the truck, Healer slammed on the brakes, exited the truck, and ran. Letner chased Healer because Tobin told him to do so, but Healer managed to escape. (RT 8619-8620.) On cross-examination, Letner said he had no remorse for what he had done to William Healer. (RT 8781.)

Concerning the charged murder, Letner claimed he had not testified earlier in the guilt-phase trial for fear of having a "rat jacket" in prison. Letner chose to testify about the killing during the penalty-phase trial to "expose the truth." (RT 8644-8645.) He gave the following story about the night of Ivon Pontbriant's murder: Letner had been planning to borrow Ms. Pontbriant's car so that he and Tobin could move the various hair and beauty products recovered later. He acknowledged he had stolen these items[96], and he said he was hoping to sell them before he and Tobin left town. Letner claimed he and Tobin did not plan on leaving town together. (RT 8656-8657.)

When Letner and Tobin arrived at the house that night, Ms. Pontbriant was intoxicated. So was Letner, having smoked marijuana and taken cocaine. Ms. Pontbriant was upset because Gilliland had left her, taking her dog and Letner's tools but leaving her with all the bills. At some point, Ms. Pontbriant and Letner telephoned Ed Burdette several times. Ms. Pontbriant never said anything to Burdette about being hurt if Letner's tools were not returned. (RT 8645-8650.)

Letner, Tobin, and Ms. Pontbriant drank all of Ms. Pontbriant's beer. When they were finished, Ms. Pontbriant gave Tobin some money to get more beer and to buy some Camel cigarettes for Letner. (RT 8652.) While Tobin was away, Letner and Ms. Pontbriant started to hug and kiss on the couch.[97] When Tobin returned with the beer, Ms. Pontbriant brought out a photo album

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96. Indeed, Letner admitted on cross-examination that he had committed a total of four burglaries in the Visalia area, including a burglary of Mixter's Pharmacy, in the month before Ms. Pontbriant's murder. (RT 9040.)

97. Letner claimed that he and Ms. Pontbriant had sex three times previously, but he said he did not actually have intercourse with her on the night of the murder. (RT 8654, 8659-8661.) On cross-examination, he claimed that Mr. Gilliland had been aware of his sexual relationship with Ms. Pontbriant (RT 8970), and Letner said he gave her oral sex on the night of the murder. (RT 8965-8966.)

and showed Letner some pictures. The three of them drank all the beer again, and Tobin sent Letner back to the store with $10 to buy more beer. Letner rode his bicycle to the Oval Liquor Store and bought the Heineken and Lowenbrau. (RT 8653-8658.)

When Letner returned, Ms. Pontbriant had him tell Tobin to leave for about an hour. Tobin went out to the front yard, taking several beers with him. Letner and Ms. Pontbriant then disrobed and became "intimate" on the couch. After about 35 minutes, while Letner and Ms. Pontbriant were putting their clothes back on, Tobin reentered the house. (RT 8658-8661.)

Ms. Pontbriant asked Tobin, "What the fuck do you think you're doing just walking in here?" Tobin replied, "I know what you guys are doing." Tobin asked Letner if he had gotten Ms. Pontbriant's car yet. Ms. Pontbriant then slapped Letner and called Letner a son of a bitch. Letner slapped Ms. Pontbriant, and Ms. Pontbriant fell to the couch. (RT 8661-8663.)

Tobin and Ms. Pontbriant started to argue. Letner went to use the bathroom, where he overheard Ms. Pontbriant make several threats to call the police. When Letner came back out, Tobin was repeatedly kicking Ms. Pontbriant in the arm. To shield Ms. Pontbriant from any further attack, Letner pulled her away by the head, pulling Ms. Pontbriant's hair in the process. (RT 8662-8665.)

Tobin then tried to pull off Ms. Pontbriant's sweater. At that moment, Letner noticed that Tobin had somehow taken hold of Letner's buck knife, which had earlier been in Letner's pocket. Tobin used the knife to cut the collar of Ms. Pontbriant's sweater, and he tore off the sweater. Tobin then pulled down Ms. Pontbriant's pants and discovered that she had defecated. Ms. Pontbriant pointed at Tobin and laughed. Tobin pulled out a bunch of Ms. Pontbriant's hair and forced her to the floor. Tobin then produced the telephone cord from his pocket and bound Ms. Pontbriant's wrists and neck.

Tobin held Ms. Pontbriant's head down with his foot and strangled her with the phone cord. (RT 8665-8671.)

According to Letner's story at trial, he noticed by this point that Ms. Pontbriant was turning pale. Letner bravely intervened, throwing himself upon Tobin. Tobin bit Letner on the top of the head, and Letner bloodied Tobin's nose with a head butt. (RT 8671.) At that moment, Letner saw his buck knife stuck into the coffee table, and he pulled out the knife. Tobin went into the kitchen, retrieved a butcher knife, and threatened to kill Letner if he interfered anymore. (RT 8672-8673.)

Fearing retribution from Tobin, Letner stood back while Tobin repeatedly stabbed Ms. Pontbriant in the back of the neck. When Tobin started making a sawing motion with the knife in the back of Ms. Pontbriant's neck, Letner went to the bathroom and vomited. (RT 8673-8674.)

After the murder, Tobin forced Letner to help him clean the house. As they picked up the various empty beer bottles and wiped the house for fingerprints, Tobin placed a beer bottle in Ms. Pontbriant's buttocks and kicked it. Tobin then retrieved Ms. Pontbriant's purse, removed the keys, and said, "Well, we don't have to steal the car now."[98] (RT 8675-8676.) The two left in Ms. Pontbriant's car. Tobin brought with them some of the remaining beer and the butcher knife used in the murder. They returned to the East Murray apartment, where Tobin disposed of the murder weapon. (RT 8677-8679.) The police stopped them in the car shortly after they left East Murray. (RT 8680.)

Following Letner's arrest, he wrote a series of letters to Danny Payne, a fellow inmate in the Tulare County Jail. Letner claimed he wrote these letters because Payne was going to help him with his defense. The plan was, according to Letner, to provide Payne with "all the facts." Payne would then advise Letner about how to write another "incomplete" version of the facts to

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98. Letner admitted they had earlier planned to steal the car. (RT 8676.)

give to the district attorney. The idea was that, by omitting certain facts, Letner and Payne could somehow enter an agreement with the prosecution, with the undisclosed facts being used somehow as a "bargaining chip." (RT 8683-8684, 8787-8792.)

In the first letter, Letner claimed that Tobin killed Ms. Pontbriant while he (Letner) was away getting beer. Tobin was stabbing the back of Ms. Pontbriant's neck when Letner returned with the beer. Tobin said he killed Ms. Pontbriant because she refused Tobin's sexual advances. (RT 8792-8795.)

At trial, Letner claimed he had lied in this first letter because he did not want to be viewed as a coward who stood by and did nothing while Ms. Pontbriant was killed. (RT 8683.) Payne allegedly said the story was unbelievable and would not work. Letner then wrote several more letters explaining what "really" happened. (RT 8796-8797.)

These subsequent letters were by and large consistent with Letner's trial testimony. There were, however, key differences. In one of the letters, Letner said he had to "fuck" Ms. Pontbriant to get her car so that he and Tobin could leave town. (RT 8810-8811.) He claimed he "fucked" her on the couch while Tobin was waiting outside. He said Tobin walked in after he and Ms. Pontbriant finished having sex and were getting dressed. During the ensuing argument, Tobin asked Ms. Pontbriant, "How about you fuck me too." Letner then responded, "Fuck this bitch." Ms. Pontbriant slapped Letner, and Letner slapped her back. Ms. Pontbriant threatened to call the police, which "instantly triggered a frenzy" in Letner and Tobin. Tobin cut off Ms. Pontbriant's sweater with the buck knife; Letner grabbed her hair and said, "Nobody calls the police on us." (RT 8812-8818.) Tobin then said, "We got to kill her." (RT 8820.) Letner wrote nothing about Tobin threatening him or making him do anything. (RT 8827.)

In Letner's final letter, he wrote that he went to the house that night

intending to steal the car and get "sex money" from Ms. Pontbriant. (RT 8861-8864.) He again claimed that he "fucked" Ms. Pontbriant on the couch. (RT 8869-8870.) He again wrote that he grabbed Ms. Pontbriant's hair and warned her that nobody call the police on them. (RT 8877.) Again, Letner wrote nothing about any threats from Tobin. (RT 8891.)

Finally, Letner called to the stand Dr. Richard Blak, a psychologist. Blak interviewed Letner and several members of Letner's family. He also had Letner perform several psychological tests. (RT 9080-9085.) Based on these tests and interviews, Blak opined that Letner suffered from the following emotional or mental disorders: chronic depression, alcohol dependence, and polysubstance dependence. (RT 9092-9094.) He further opined that these conditions all stemmed from an underlying borderline personality disorder (BPD), which started in Letner at about age three or four. (RT 9098-9100.)

Blak explained that this BPD condition was characterized by a number of negative qualities, including (1) self-damaging impulsiveness (RT 9105-9107), (2) mood swings (RT 9107-9108), (3) aggressive behavior and lack of anger control (RT 9111-9116), (4) "identity disturbance" (RT 9124), (5) chronic emptiness and boredom (RT 9129-9130), and (6) frantic efforts to avoid real or imagined abandonment. (RT 9131.) Blak theorized that persons with BPD have a distorted sense of reality and may act out on perceived but nonexistent threats. (RT 9135-9136.)

Blak opined that a person with BPD, when confronted with periods of extreme stress, might lose touch with reality and have a distorted sense of right and wrong. (RT 9249-9251.) He further opined that Letner's disorder was treatable and that Letner's aggression could be controlled with proper medical and psychiatric care. (RT 9156-9157.)

When cross-examined by Tobin, Blak acknowledged that Letner's BPD was consistent with his having killed Ms. Pontbriant. He also acknowledged

that this condition was consistent with Letner fabricating a story to blame Tobin. (RT 9420.)

Tobin's Penalty-Phase Case In Mitigation

Tobin presented the following evidence regarding the Willie Healer incident: Dan Hlobick[99] testified he was in the truck with Letner, Tobin, and Healer during the entire incident. Before they drove to Sears that day, Letner "smacked" Healer a few times. (RT 9216-9218.) When they arrived at Sears, Healer apologized to Ms. Tobin for not completing the auto painting. A short time later, when they were all driving on Franklin Street, Healer abruptly stopped the truck, jumped out, and ran. Letner followed him for a moment and then returned. Tobin said, "Boy, I don't know what got into that guy." (RT 9217-9220.)

On cross-examination, Hlobick claimed that Tobin never struck Healer or grabbed his throat. He claimed that neither Letner nor Tobin asked Healer for his money or wallet. (RT 9224.) However, Hlobick did recall Letner saying at one point, "I want to go get the gun first." Hlobick did not know what Letner was talking about. It was at that moment, however, when Healer ran from the truck. (RT 9226-9226.)

Tobin's mother, Jackie Tobin, also testified about the Healer incident: Mrs. Tobin brought her car to Healer for body repairs and prepaid about $850. When she returned for the car, the repairs were not finished. She arranged with Healer to bring the car back. When she returned about a week later, Healer's business was no longer there. (RT 9228-9231.)

When Tobin later brought Healer to meet Mrs. Tobin at Sears, Healer did not cry or appear to be upset or injured. Instead, he was apologetic and

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99. Hlobick had suffered a prior felony conviction for second-degree burglary. (RT 9220.)

offered to complete the auto work. (RT 9231-9233.)

On cross-examination, Mrs. Tobin said she spoke with Healer on the telephone after Tobin's arrest for the Healer incident. Healer purportedly said he had reported Tobin to the police to teach him a lesson. Healer also purportedly said he was going to drop the charges. (RT 9239.)

Raymond Dudley was married to Tobin's sister Tammy. After Tobin's arrest for kidnapping Healer, Raymond and Tammy went to visit Tobin in custody. Sometime thereafter, Tammy telephoned Healer, and Raymond listened to their conversation. (RT 9185-9186.) When Tammy asked why Healer was pressing charges against Tobin, Healer said he wanted to teach Tobin a lesson and have him grow up. Healer also said that he would be dropping the charges and that Tobin had not touched him or done anything to him. (RT 9187-9188.) Healer allegedly told Tammy that Letner hit him and that Tobin told Letner to stop. (RT 9193.)

Tobin called John Dean[100] to the stand concerning the David Bendowski incident. Dean was driving his mother's car one afternoon with Letner and Tobin as passengers. They noticed Bendowski walking along the road and stopped to talk with him. Bendowski joined them in the car. Letner and Tobin spoke with Bendowski about Tobin's girlfriend Joann. They also talked about some money Bendowski owed for some marijuana. (RT 9195-9199.) At no time did anyone strike Bendowski or threaten him. Nor was there any discussion about Bendowski paying for having sex with Joann. Eventually, they dropped off Bendowski close to his home. (RT 9200-9201.)

On cross-examination, Dean admitted having earlier told the Napa Police that the car they had driven that day was not his mother's car but, rather, was in fact Tobin's car. When Dean was confronted with his earlier statement to the

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100. Dean had suffered a prior felony conviction for auto theft. (RT 9194.)

Napa police, he testified that Bendowski appeared nervous in the car. Dean claimed he could not recall if there had been any argument in the car or if Bendowski said he wanted out of the car. (RT 9206-9211.)

While working as a trustee in the county jail, Robert Hernandez[101] became acquainted with Letner. Over the course of several conversations, Letner told him about the murder case he was facing. Letner said that he and "Chistopher" went to the victim's house to get $300 and take some "stuff." Letner said his victim started yelling about identifying him for "taking her stuff." Letner demonstrated how he used the knife on his victim. He said he killed his victim to keep her quite. (RT 9484-9485, 9487-9488.)

Leo Pike was another jail inmate who had been housed in the cell between Letner and Danny Payne. Pike occasionally noticed Letner speaking with Hernandez. Pike approached them on one of these occasions. When he approached, Letner and Hernandez both said "Shh."[102] (RT 9511-9516.)

Tobin's mother and father both testified that they were divorced when Tobin was about age 14. But for a short period when Tobin lived with his father, he spent his teenage years living with his mother. (RT 9174-9175, 9234-9235.)

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101. At the time of trial, Hernandez was in state prison for second-degree burglary and a parole violation. (RT 9473, 9480.) Prior to meeting Letner, Hernandez had pled guilty to the burglary charge. In return for his testimony at the preliminary hearing in this case, Hernandez was initially sent to a drug program. After failing the drug program, he was returned for sentencing, where he was given a 16-month lower term, partially due to his prior testimony in this case. (RT 9486, 9493-9499.)

In 1986, Hernandez testified for the prosecution in another matter. In exchange, Hernandez received reduced sentencing, reduced charges, and dismissed charges in several pending cases against him. (RT 9488-9493.)

102. Letner had previously denied saying anything to Hernandez. (RT 8696.)

Tobin's mother, father, and younger sister Tammy all testified that they had maintained contact with Tobin following his arrest. They all testified that they loved Tobin. They all testified that they hoped Tobin would receive life without parole so that they could maintain contact with him. (RT 9176-9177, 9179-9180, 9236.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO SUPPRESS EVIDENCE OF THE TRAFFIC STOP ON THE NIGHT OF MS. PONTBRIANT'S MURDER; IN ANY EVENT, ANY ERROR REGARDING THE SUPPRESSION MOTION WAS HARMLESS

A. Procedural And Factual Background

On February 17, 1989, Tobin filed a written motion to suppress all evidence flowing from Officer Wightman's traffic stop of Ms. Pontbriant's car shortly after the murder. (CT 74-90.) (See § 1538.5.) Letner joined the motion on May 26, 1989. (CT 362-366.)

The trial court heard evidence and argument on the matter on June 7, 1989. During the hearing, Officer Wightman testified that at about midnight on March 1, 1988, he noticed Ms. Pontbriant's red Ford Fairmont driving on Garden Street in downtown Visalia. The car's driver and passenger were both white males. Although there had been no rain for a few hours, the car was wet. This led the officer to believe the car had just left from somewhere in the downtown area, where there had been a great number of auto thefts over the past few months. (RT 6/7/89[103] 7-9.)

Officer Wightman followed the car onto Highway 198. While traveling on the highway, the car continually drove well below the speed limit, doing about 40 miles per hour in a 55 zone. Drawing on his experience, the officer knew that intoxicated people often drive very slow for no apparent reason.[104]

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103. "RT 6/7/89" refers to the reporter's transcript of the various pretrial motions held on June 7, 1989.

104. The car had been doing the speed limit until getting onto the highway. (RT 6/7/89 14.)

Accordingly, Officer Wightman suspected that the car's driver might be under the influence. (RT 6/7/89 10-12.) He also suspected that the car might have been stolen from one of the downtown car lots. (RT 6/7/89 14.)

As the car approached the highway, Officer Wightman called in for a license check. Before stopping the car, he learned that it belonged to Ivon Pontbriant. (RT 6/7/89 38-39.) The officer stopped the car and determined that Letner was the driver and Tobin was the passenger. Letner smelled of alcohol. He said he had no license, and he said Ms. Pontbriant had loaned him the car to take home Tobin, who was drunk. Letner said he and Tobin had been in a fight. The officer had Letner get out of the car. He noticed the unopened beer bottles in the back. (RT 6/7/8915-20.)

After running a warrant check on Letner and Tobin, the officer was told to treat Tobin with caution because he was known to be violent. He also had Tobin get out of the car. The officer patted down both of them. After asking Letner and Tobin about their destination and where they lived, he issued Letner a citation for driving without a license. The officer then had them lock the car and sent them both away on foot. (RT 6/7/89 15-24.)

On June 8, 1989, the trial court denied the motion to suppress. The court found that, based on the totality of the circumstances, the traffic stop was justified because Officer Wightman had a reasonable suspicion that the car was stolen. (RT 6/8/89[105] 35-38.)

B. The Trial Court Properly Denied Appellants' Suppression Motion

Letner and Tobin both claim on appeal that neither the evidence presented at the suppression hearing, nor the trial court's reasons for denying the suppression motion, can withstand appellate scrutiny. In this regard, they

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105. "RT 6/8/89" refers to the reporter's transcript of the pretrial hearings held on June 8, 1989.

both argue that, absent some justifiable reason for the traffic stop, the Fourth Amendment allowed them to make their getaway unmolested in Ms. Pontbriant's car immediately after brutally murdering her and stealing her car.

Initially, respondent notes that Tobin is precluded from raising such a complaint. Because Tobin was merely a passenger in the stolen car, he has no standing to claim that Letner, the car's driver, was detained in violation of the Fourth Amendment. In making this assertion, respondent recognizes the split of authority on this subject in the state appellate courts, and respondent acknowledges that this very issue is currently pending before this Court in *People v. Brendlin* (S123133), review granted April 14, 2004. (See *People v. Brendlin* (2004) 8 Cal.Rptr.3d 882, 886.) Respondent submits that the People's proposed resolution of this split of authority in *Brendlin* is the correct one. Accordingly, respondent hereby incorporates the reasoning set forth by the People in the pending *Brendlin* matter, and respondent further submits that, based on this reasoning, Tobin is precluded from complaining about Officer Wightman's traffic stop in this case.[106/]

However, even assuming Letner and Tobin were both free to challenge the trial court's findings regarding their detention, their claims of error are both misplaced. In support of these claims, appellants both argue -- erroneously -- that the car's slow speed was the sole reason for the traffic stop. (Tobin AOB, Arg I, 40-56; Letner AOB, Arg III, 152-172.) Letner's and Tobin's Fourth Amendment claims are both misplaced.

When reviewing a trial court's ruling on a motion to suppress, an

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106. In an effort to minimize the swelling of the already very lengthy appellate briefs in these death penalty cases, respondent respectfully asks this Court to take judicial notice of the People's brief on the merits in *Brendlin*, filed in this Court on July 9, 2004. (Evid. Code, § 452, subd. (d).) Respondent shall provide counsel for both appellants a copy of the People's *Brendlin* brief upon the filing of respondent's brief in these consolidated matters.

appellate court must uphold the trial court's factual findings, whether express or implied, which are supported by substantial evidence. This is so because the trial court has "the power to judge the credibility of witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences...." (*People v. Lawler* (1973) 9 Cal.3d 156, 160; see also *People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

As to questions of law, the appellate court exercises its independent judgment "'to measure the facts . . . against the constitutional standard of reasonableness.'" (*People v. Loewen* (1983) 35 Cal.3d 117, 123; see also *People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Williams*, *supra*, 45 Cal.3d at p. 1301; *People v. Leyba*, *supra*, 29 Cal.3d at pp. 596- 597.) When doing so, however, the appellate court must review the evidence in the light most favorable to the lower court's ruling. (*People v. Renteria* (1992) 2 Cal.App.4th 440, 442.)

Moreover, a trial court's correct decision to deny a motion to suppress evidence must be affirmed on appeal even when it is based on an erroneous reason. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1580.)

> [If] the action of the trial court in denying the motion to suppress was right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. A correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasons.

(*People v. Hobbs* (1987) 192 Cal.App.3d 959, 963.)

It is also settled that a

> judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. (3 Witkin, Cal. Procedure (1954) Appeal, 79, pp. 2238-2239; [citations].)

(*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Applying these standards, the trial court's decision regarding the traffic stop in this case must be upheld. An ordinary traffic stop is treated as an investigatory detention, i.e., a "*Terry* stop." (*United States v. Sharpe* (1985) 470 U.S. 675, 682; see generally, *Terry v. Ohio* (1968) 392 U.S. 1.) "Under this approach, we examine 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" (*United States v. Sharpe*, *supra*, 470 U.S. at p. 682, *quoting Terry v. Ohio*, *supra*, 392 U.S. at p. 20.)

The standard for determining whether a detention is reasonable under the federal constitution requires a balancing of the public interest served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. (*Brown v. Texas* (1979) 443 U.S. 47, 50-51; *In re James D.* (1987) 43 Cal.3d 903, 914.) To justify an investigative detention, there must be articulable facts leading to a suspicion that some activity relating to a crime is about to occur and that the person the officer intends to detain is involved in that activity. In short, a reasonable suspicion of involvement in criminal activity justifies a temporary stop or detention. (*People v. Souza* (1994) 9 Cal.4th 224, 230; see also *In re Tony C.* (1978) 21 Cal.3d 888, 893; *In re James D.*, *supra*, 43 Cal.3d at pp. 913-914; *Terry v. Ohio*, *supra*, 392 U.S. at p. 22.)

Moreover, the possibility of an innocent explanation does not deprive an officer of the capacity to entertain a reasonable suspicion of criminal conduct. "Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal, or illegal -- to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges. [Citation.]'" (*People v. Leyba*, *supra*, 29 Cal.3d at p. 599.)

Because no "neat set of legal rules" determines whether a particular set of facts meets this "minimal level of objective justification" (*United States v. Sokolow* (1989) 490 U.S. 1, 7), a police officer ordinarily must rely on a combination of factors in deciding whether to detain an individual. To evaluate the detention, the reviewing court must consider the "totality of the circumstances -- the whole picture. . . . " (*Alabama v. White* (1990) 496 U.S. 325, 330; see *People v. Souza*, *supra*, 9 Cal.4th at pp. 230-231.)

In this case, there is substantial evidence to support the trial court's determination that, under the totality of the circumstances, Officer Wightman had a reasonable suspicion of criminal activity to justify a traffic stop. Appellants both apparently concede that the officer observed the car continually driving for some distance at an unusually slow speed on the highway. This fact was not, however, the sole reason for the traffic stop.

The evidence also established that there had been no rain in the area for about two and a half hours. Thus, when Officer Wightman observed the water on Ms. Pontbriant's car, he reasonably concluded that the car had just been moved from somewhere in the vicinity. That vicinity was downtown Visalia, where the officer knew there had been numerous car thefts in the preceding months. The officer followed the car onto the highway. As he followed in his marked patrol unit, Officer Wightman observed the car driving unusually slow. At that point, he effected the traffic stop, partly out of concern that the car had been stolen.

Numerous cases support the common-sense conclusion that the unusually slow speed of a vehicle can constitute an important factor in determining the reasonableness of a temporary detention for investigation. (See, e.g., *People v. Remiro* (1979) 89 Cal.App.3d 809, 828; *Williams v. Superior Court* (1969) 274 Cal.App.2d 709, 712; *People v. Gibson* (1963) 220 Cal.App.2d 15, 20; *People v. Anguiano* (1961)198 Cal.App.2d 426.) In this

case, the observation of the wet car, driving in the high-car-theft area, allowed Officer Wightman to form at least *some suspicion* that the car might be stolen. When the car then drove at an unusually slow speed, while being followed by a marked patrol unit, any reasonable police officer could and would suspect that the car's driver was hoping to avoid contact with the police. Based on these facts, taken in conjunction, Officer Wightman reasonably suspected that the car might have been stolen. As it turns out, that suspicion was on the mark.

The traffic stop here was a minimally intrusive means to dispel that suspicion. Accordingly, the trial court reasonably rejected appellants' motion to suppress. The trial court's finding on this matter should not be second-guessed.

C. Any Error In Denying Appellants' Suppression Motion Was Harmless

Assuming, arguendo, that Officer Wightman improperly detained Letner and Tobin, the scope of "tainted" evidence, excludable as "fruit of the poisonous tree" (see *Wong Sun v. United States* (1963) 371 U.S. 471), would encompass only the evidence derived from the *improper detention*, not the evidence obtained from the car search. In other words, the officer could have stopped or "seized" the car for the sole purpose of searching it. Because neither Letner nor Tobin had any expectation of privacy in the stolen car, they could not challenge *the seizure or search of the car*. (See, e.g., *People v Satz* (1998) 61 Cal.App.4th 322, 324-326, citing *Rakas v. Illinois* (1978) 439 U.S. 128, 141 [no expectation of privacy where there is no possessory interest in the place searched]; *People v. Shepherd* (1994) 23 Cal.App.4th 825, 828-829 [no expectation of privacy in search of a stolen vehicle]; *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1533 [same]; accord *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334-1335; *United States v. Allen* (6th Cir.1997) 106 F.3d

695, 699 [no expectation of privacy in unpaid hotel room]; *United States v. Rahme* (2d Cir.1987) 813 F.2d 31, 34 [no expectation of privacy after rental period terminated]; *United States v. Huffhines* (9th Cir.1992) 967 F.2d 314, 318 [same]; *United States v. Larson* (8th Cir.1985) 760 F.2d 852, 854-855 [same].)

For these same reasons, appellants cannot contest the search or seizure of the car itself based on a claim that *they personally* were improperly detained. This is because, analytically, Officer Wightman's traffic stop effected two "seizures" for Fourth Amendment purposes. The first "seizure" was of Letner's person, as the car's driver. The second "seizure" was of Ms. Pontbriant's car. Appellants have no cognizable objection to the seizure and search of the car because they had no privacy interest in the car they had stolen. Under these circumstances, the only person who could have challenged that seizure and search was the car's owner, Ms. Pontbriant. Appellants' complaint would be limited to the improper "seizure" of Letner's person (and, arguably, Tobin's person; see above, relating to the pending case of *People v. Brendlin*). Accordingly, any remedy excluding evidence would be limited solely to the evidence derived from Letner's improper detention or, at most, from both of appellants' improper detentions.

Analytically, the situation in this case is no different from where a defendant is present in someone else's house, and the police unjustifiably break into that house and conduct a search. If, in the process of the break-in, the police also unjustifiably detain the defendant, the defendant may challenge that detention and the fruits derived therefrom. The defendant may not, however, contest the police's observations inside the house – including the defendant's presence therein – because he has no expectation of privacy in another person's house. The only ones who could bring such a challenge, if they chose to do so, would be the house's owners or legal occupants.

In this case, the evidence derived from the detention of appellants'

persons was minimal. Assuming the detention was improper, the evidence derived therefrom consisted solely of appellants' various statements to Officer Wightman and the evidence obtained during the officer's pat-down searches of appellants' persons (i.e. Letner's buck knife).

The rest of the evidence flowed solely from the initial seizure and subsequent searches of Ms. Pontbriant's stolen car, where appellants had no reasonable expectation of privacy. That evidence consists of everything observed during the search of the car, which includes the presence of Letner and Tobin themselves. Under this analysis, appellants were – like the various beer bottles and other items – merely things found in the car during the search they are precluded from challenging.

Additionally, aside from appellant's persons, the discovery of the various items of physical evidence in Ms. Pontbriant's car was inevitable. (See *People v. Coffman* (2004) 34 Cal.4th 1, 62; *Nix v. Williams* (1984) 467 U.S. 431, 443-444.) After the Tulare County authorities discovered the horrific murder scene at Ms. Pontbriant's home the day after the murder, there is no question that, within a very short time, they would have found and searched her car, which was still parked where Letner and Tobin had left it on Highway 198.

Moreover, even if *all* of the evidence stemming from the traffic stop and subsequent search should have been excluded, appellants cannot show any appreciable harm from any of this evidence. As appellants properly note, the erroneous denial of a motion to suppress evidence is subject to harmless error analysis under the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Ratliff* (1986) 41 Cal.3d 675, 688; *People v. Minjares* (1979) 24 Cal.3d 410, 424.) The *Chapman* standard "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Neal*,

supra, quoting *Chapman*, *supra*, 386 U.S. at p. 24.) "To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *(People v. Neal*, *supra*, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) The test is whether the admission of such evidence was harmless beyond a reasonable doubt in light of all the other evidence presented at trial. (*People v. Danielson* (1992) 3 Cal.4th 691, 708, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

The evidence stemming from Officer Wightman's traffic stop was harmless beyond a reasonable doubt in light of the other overwhelming evidence of appellants' guilt. The evidence stemming from the traffic stop and search of the car was but a very small part of the overall evidence. Even if the jury had heard nothing about the traffic stop, or the evidence derived from Officer Wightman's search of the car, they would have still learned all of the following: In the days preceding the murder, Letner and Tobin had both lost their jobs (RT 5399, 6269-6271, 6283) and were both being evicted from the only residence either one of them still had available. (RT 5080-5081, 5087-5088, 5427-5429.) Apparently due to these circumstances, Letner and Tobin were both planning to leave for Iowa. (RT 6630-6632, 6635, 6778-6779, 6820.) Neither one of them had a working car (RT 5399), but Ms. Pontbriant did.

Letner and Tobin were present in Ms. Pontbriant's home two days before the murder, when Gilliland handed Ms. Pontbriant a large sum of cash and said he would be leaving town. (RT 5123-5125, 5127-5128.) Letner met with Gilliland that same evening at the nearby Breakroom Bar while Gilliland was, in fact, on his way out of town. (RT 5490-5492, 5500-5501.)

Letner and Tobin were together at the Breakroom Bar sometime between 7:30 and 9:30 p.m. on the night of the murder. (RT 5492-5496.) Shortly

thereafter, Letner and "another man" arrived at Ms. Pontbriant's home. (RT 5532-5533.) Ms. Pontbriant and Letner made several telephone calls to Edward Burdette and Kathy Coronado that night. Ms. Pontbriant cried and said she was in fear of being harmed during these telephone calls. (RT 5572, 5597.)

In the early morning hours after the murder, Letner and Tobin arrived together, uninvited, at the home of Denise Novotny, who they begged for a ride out of town. (RT 6236-6249.) Immediately thereafter, Letner and Tobin both decided, spontaneously, (1) to uproot from their homes and lives in Visalia, (2) to take a bus to Reno, and (3) to hitchhike across the country to Iowa under severe weather conditions with nothing but the clothes on their backs – all for no rational reason other than flight. (RT 6258, 6299-6307.)

After a short time in Iowa, Letner acknowledged to Earl Bothwell that he was wanted in California for murder and that he had stolen $12 or $14 and a "real nice" red and white Ford from a California woman. (RT 6422, 6441.) Tobin also acknowledged to Bothwell that he was wanted for murder for killing and stealing $12 or $13 from an "old bitch" in California. (RT 6423-6424.)

The jury would have also heard about the crime-scene evidence tying Letner and Tobin to the murder. Directly across the street from the Breakroom Bar, where Letner and Tobin were on the night of the murder, was Frank's Liquors. Sometime around the time of the murder, one of the clerks at Frank's recalled either Letner or Tobin coming in to buy a six-pack of Heineken beer and a bottle opener of a particular type sold at Frank's. (RT 6099-6109.) Heineken beer bottles were recovered from the crime scene, and the bottle opener recovered from Ms. Pontbriant's kitchen was of the same particular type as sold at Frank's Liquors. (RT 5667, 6107.) Additionally, several hairs recovered from Ms. Pontbriant's chest were indistinguishable from Letner's hair. (RT5967-5969, 5994-5997.) Fresh blood spatters found on a pillow and on a doily in the bedroom were consistent with Tobin's blood. (RT 5173-5174,

5685-5686, 5831-5832.)

Finally, even if all the evidence of the traffic stop had been excluded, the jury still would have heard about all the evidence discovered in the search of the car following the discovery of Ms. Pontbriant's body. That evidence included the various beer bottles and appellants' various possessions found in the trunk. The subsequent search of the car also uncovered the bloody rag. The blood on the rag was, again, consistent with Tobin's blood. (RT 5831-5832.) Officer Wightman would have also been allowed to testify that, independently of the traffic stop, he observed two white males driving Ms. Pontbriant's car at about midnight on the night of the murder.

In short, even without any of the evidence derived from the traffic stop, or from Officer Wightman's search of the car, it would have been abundantly clear to anyone that Letner and Tobin were both responsible for this heinous murder. Any error in admitting evidence flowing from the traffic stop was harmless beyond a reasonable doubt.

II.

REQUIRING LETNER TO WEAR LEG BRACES FOR ONE DAY WAS PERMISSIBLE OR WAS, AT WORST, HARMLESS

Letner claims the trial court somehow violated his rights under the federal and state constitutions by requiring him to wear leg braces in court for one day during jury selection. (Letner AOB, Arg. I, 99-117.) Letner is wrong.

A. Factual Background

On November 20, 1989, during jury selection, the court held a hearing in chambers to address appellants' concerns about being forced to were leg braces in court that day. Appellants both argued that the leg braces were demeaning and were unwarranted. (RT 4461-4463.) The sheriff's sergeant who accompanied Letner and Tobin to court spoke to the necessity of the leg braces. He pointed out that Letner, while wearing normal restraints, had tried to attack another jail inmate the week earlier. The sergeant also pointed to other "recent developments" of which the court was aware. (RT 4463.) These "recent developments" were that Letner and Tobin had been observed practicing martial arts kicks and moves in jail. Based on these observations, the sergeant was concerned they might attempt to escape. (ACT[107] 1538.)

The trial court found that the leg braces would not be "readily apparent," that they were not "unduly restrictive," and that they were unlikely to "create any possibility of prejudice." (RT 4464-4465.)

The next day, November 21, the court ordered that appellants did not need to wear the leg braces anymore. (RT 4693.)

During record correction proceedings following appellants' convictions, the trial court settled the record to clarify that the leg braces, which were worn

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107. "ACT" refers to the augmented clerk's transcript.

under appellants' pants to prevent them from executing upward martial-arts kicks, were worn for only one day and were not visible under appellant's clothing. (ACT 1594-1595.)

B. The Short-Term Order For Leg Braces Was Permissible

Even assuming the leg braces in question are akin to "shackles," the court's order was justified under the circumstances. A criminal defendant cannot be physically restrained in the jury's presence unless there is a showing of manifest need for such restraints. (*People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Duran* (1976) 16 Cal.3d 282, 290-291.)

> Such a showing, which must appear as a matter of record, may be satisfied by evidence, for example, that the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom A shackling decision must be based on facts, not mere rumor or innuendo.

(*People v. Anderson*, *supra*, at 596, internal citations omitted..)

Where there is evidence that a defendant poses a threat of violence or other nonconforming conduct, a reviewing court will uphold the decision of the trial court to shackle a defendant absent an abuse of discretion. (*People v. Combs* (2004) 34 Cal.4th 821, 837; *People v. Hawkins* (1995) 10 Cal.4th 920, 944, 42 overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

In this case, the leg braces were, at most, a very minor physical restraint. The court had good reason to order them. As discussed above, Letner and Tobin had both been observed practicing upward-kicking martial arts moves in jail, and Letner had previously assaulted another inmate. Given these facts, along with Letner's previous escape when being transported to California (which apparently involved Letner kicking out a van's window), the court had good reason to order this minimally-intrusive measure. This is especially true

in light of the crowded, close quarters of the courtroom here. (ACT 1538-1539.) The trial court was within its discretion in ordering appellants to wear leg braces.

C. Any Error Regarding The Leg Braces Was Harmless

Improperly shackling a defendant during trial is harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense. (*People v. Anderson, supra,* 25 Cal.4th 543, 596; *People v. Coddington* (2000) 23 Cal.4th 529, 650-651; *People v. Majors* (1998) 18 Cal.4th 385, 406; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584.) Despite Letner's speculations to the contrary, there is absolutely no evidence that any juror ever saw the leg braces, which were worn under appellants' pants while they sat behind the defense table.

Moreover, even assuming one or more of the prospective jurors somehow glimpsed the leg braces, there could have been no appreciable prejudice. Again, these were not shackles; they were leg braces worn under appellants' pants. The sight of these very minor restraints would not have affected any juror in the same way the sight of chains or shackles might have. It is well settled that brief glimpses of a defendant in restraints is ordinarily harmless. (*People v. Cunningham* (2001) 25 Cal.4th 926, 988; *People v. Medina* (1995) 11 Cal.4th 694, 731-732; *People v. Tuilaepa, supra,* 4 Cal.4th 569, 584-585; *People v. Duran, supra*, 16 Cal.3d at pp. 287, fn. 2, 295-296.)

In this case, appellants were forced to wear the leg restraints for only one day during jury selection. Even assuming some of the *actual jurors* saw the braces that day, appellants could not possibly have suffered any prejudice.

Simply put, no juror ever saw either Letner or Tobin in any restraint during the trial itself. Moreover, any claim that wearing the leg braces for one day during jury selection somehow impaired Letner's "right to testify or participate in his defense" is absurd. Letner's claim of error must be rejected.

III.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR SEPARATE TRIALS

Letner and Tobin both challenge the trial court's decision to try them jointly at the guilt-phase and penalty-phase trials. They both claim that this decision amounted to an abuse of discretion and violated numerous federal constitutional guarantees. In particular, they claim that the joint trials were improper because appellants had conflicting defenses. They also claim that the joint trials (1) deprived each of them of the right to an individualized and reliable determination of guilt and proper sentence and (2) allowed the jury to hear evidence that otherwise would have been inadmissible. They both also add that, at least with respect to the guilt phase, the joint trials allowed the prosecution to link a "strong case" to an allegedly "weak case." (Letner AOB, Arg II, 118-151, Arg. XXIV, 448-461; Tobin AOB, Arg. II, 57-63, Arg. III, 64-77.)

Respondent acknowledges that Letner and Tobin both repeatedly requested the trial court to give them separate guilt-phase and penalty-phase trials. Respondent submits, however, that the trial court's refusal of these requests was within its discretion. Respondent also submits that the order denying separate trials or separate juries in this case did not violate any constitutional right and does not provide any grounds for appellate relief.

It is well established that the California Legislature has expressed its preference for joint criminal trials. (§ 1098; *People v. Taylor* (2001) 26 Cal.4th 1155, 1174 (*Taylor*); *People v. Ervin* (2000) 22 Cal.4th 48, 70 (*Ervin*); *People v. Pinholster* (1992) 1 Cal.4th 865, 932.) In light of this statutory preference, a decision regarding severance remains largely within the trial court's discretion. (*Taylor*, *supra*, at p. 1174; *Ervin*, *supra*, at p. 70.) "[W]hen the trial court's denial of severance and impanelment of dual juries is urged as error on appeal

... the error is not a basis for reversal of the judgment in the absence of identifiable prejudice or 'gross unfairness ... such as to deprive the defendant of a fair trial or due process of law.' " (*Taylor*, *supra*, at p. 1174, quoting *People v. Cummings* (1993) 4 Cal.4th 1233, 1287; see also *Lockhart v. McCree* (1986) 476 U.S. 162, 180 [upholding use of single jury to try both guilt and penalty phases of single defendant's trial]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1241.) Indeed, this Court has twice held that the decision to try potential death penalty codefendants jointly requires reversal on appeal only when "gross unfairness" has deprived the defendant of a fair trial. (*Taylor*, *supra*, at p. 1174; *Ervin*, *supra*, at p. 70.)

The joint trials in this case were far from "grossly unfair." When considering a request to try codefendants separately, the trial court should consider whether a joint trial would require the defendants to face "an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1286, quoting *People v. Turner* (1984) 37 Cal.3d 302, 312.)

Virtually none of these potential problems appeared in this case. There was no danger of confusion from multiple counts because all the charges here stemmed from the murder and robbery of Ms. Pontbriant. Nor is there anything to suggest that either appellant would have offered testimony exonerating the other had they been tried separately. To the contrary, they almost certainly would have both presented evidence tending to implicate the other had they been given separate trials.

There was also virtually no danger of appellants being "prejudicially associated" with one another or of a "weak" case being joined to a "strong" one. The evidence all very clearly showed Letner and Tobin acting jointly in

all the events surrounding the murder. Indeed, Letner and Tobin were together in Ms. Pontbriant's home a few days before the murder, when Gilliland handed Ms. Pontbriant a large sum of cash and announced he would be leaving town for a few days. Appellants were seen together at the Breakroom Bar on the night of the murder. Letner and another "unidentified" man arrived at Ms. Pontbriant's house shortly thereafter. Immediately after the murder, Letner and Tobin were seen together, with a great deal of their personal belongings, in their victim's car. They both appeared at Denise Novotny's home early the next morning, looking for a ride out of town. Even if appellants had been tried separately, all of this evidence would have been admissible against both of them. After appellants left town on a bus, they hitchhiked to Iowa together, and they both later admitted to Earl Bothwell that they had killed and stolen money from a woman in California. Appellants' individual admissions of guilt to Bothwell would have also been admissible against them had they been tried separately.

In short, appellants were clearly crime partners in the murder. Indeed, they were also partners in most of the prior crimes revealed at the penalty-phase trial. Prejudicial association with one another was not a serious consideration here.

Moreover, the mere fact that appellants presented different and possibly conflicting defenses does not itself necessarily render the joint trials unfair. As this Court summarized in *People v. Hardy* (1992) 2 Cal.4th 86:

> "Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none has found an abuse of discretion or reversed a conviction on this basis.*" (*People v. Boyde*, *supra*, 46 Cal.3d at p. 232, italics added.) If the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials "would appear to be mandatory in almost every case." (*Turner*, *supra*, 37 Cal.3d at pp. 312-313.)

(*People v. Hardy*, *supra*, at p. 168, original emphasis.)

The only possible "antagonistic" portion of either of appellants' guilt-phase defense was Tobin's claim that he left Ms. Pontbriant and Letner alone at the house on the night of the murder. Tobin claimed he returned to the East Murray apartment, drank some beer, and fell asleep. Letner returned to the apartment later and asked Tobin to help him load some items into Ms. Pontbriant's car so they could take them back to Ms. Pontbriant's house. (RT 6857-6865.) Thereafter, the police stopped them in the car. Tobin repeatedly insisted that Letner never said anything about killing Ms. Pontbriant. (RT 7018, 7036, 7101-7103.)

As this Court noted in *Hardy*:

> [A]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other. Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that the defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. Stated another way, mutual antagonism only exists where the acceptance of one party's defense will preclude the acquittal of the other.

(*People v. Hardy*, *supra*, 168, internal quotes and citations omitted.)

If the jury had accepted Tobin's far-fetched story, this would not have precluded an acquittal for Letner. The jury could have believed Tobin's alibi and could have also found insufficient evidence to tie Letner to the murder. Moreover, the fact that the jury found both appellants guilty on all counts and found true all allegations necessarily reveals that they rejected Tobin's story.

True, Letner's penalty-phase defense sought, in part, to blame Tobin exclusively for the murder. In this regard, Letner presented a good deal of testimony on this matter. Again, however, that testimony came after the jury had already found both appellants guilty of all charges and found the various special circumstances to be true. Moreover, the ultimate finding that appellants

both deserved the death penalty indicates that the jury also rejected Letner's self-serving penalty-phase testimony.

Tobin also argues that the joint trials improperly allowed Letner to present other aggravating evidence against him at the penalty phase that would have otherwise been inadmissible. In this regard, Tobin complains about testimony revealing that Letner and Tobin had both used and sold drugs in high school. Tobin also complains about a few instances of testimony concerning Letner's fear of, and domination by, Tobin. (Tobin AOB, Arg. III, 66-70.)

These evidentiary complaints fall well short of "gross unfairness" sufficient to establish a due process violation or any constitutional infringement. At the guilt phase, the jurors were instructed that evidence admitted against only one of the defendants could not be considered against the other defendant. (CT 786.) They were also told that post-arrest statements by one defendant were not to be considered as to the other defendant. (CT 787.)

Following the penalty-phase evidence, the jurors were instructed that the aggravating factors relating to a defendant's prior criminal activity were limited to crimes "which involved the use or attempted use of force or violence or implied threat to use force or violence." (CT 1184.) More precisely, the trial court directed the jury as to the particular instances of prior criminal activity they were allowed to consider as to either Letner or Tobin. The court instructed that, before the jury could consider any of these prior instances as factors in aggravation, they had to find that these enumerated prior instances had been proven beyond a reasonable doubt. The judge then expressly stated that the jury could not "consider any evidence of any other criminal activity" against Letner or Tobin except for the specific instances that had been enumerated in the instructions. (CT 1200-1202.) Even more precisely, the jury was also expressly told that they were not to consider evidence of any of appellants' unrelated burglaries or of any of their narcotics use or sales in determining the proper

sentence for either of them. (CT 1207.) The jurors were also expressly instructed that, in determining the proper sentence for Tobin, they were forbidden from considering any fear Letner may have had of Tobin or any of the underlying reasons for such fear. (CT 1246.)

Jurors are presumed to follow such limiting instructions, and there is no reason to believe the jury here failed to discharge that duty. (*People v. McLain* (1988) 46 Cal.3d 97, 119-120.) In any event, the testimony about which Tobin complains amounted to nothing. That testimony, mentioned in passing during Letner's defense, was insignificant in comparison to the evidence of Tobin's participation in this especially brutal murder and his prior history of violent criminal behavior.

Conversely, Letner complains about Tobin being allowed to present penalty-phase rebuttal evidence from Robert Hernandez and Leo Pike concerning Letner's jailhouse admissions of personal culpability for robbing and murdering Ms. Pontbriant. Tobin's defense presented this evidence to impeach Letner's penalty-phase testimony that Tobin was alone responsible for the murder and that Letner simply stood by out of fear of Tobin. (RT 9484-9485, 9487-9488, 9511-9516.) The claim is unavailing because the prosecution certainly could have presented this evidence from Hernandez and Pike to rebut Letner's penalty-phase testimony, even if Letner had been tried separately from Tobin. Moreover, as noted above, the jury had already found that Letner and Tobin were both guilty of the burglary, the robbery, the attempted rape, the resulting murder, and the various special circumstances stemming therefrom. Even without the rebuttal evidence from Hernandez and Pike, the jury would have discredited Letner's penalty-phase testimony portraying himself as having no personal involvement in the murder.

In sum, appellants cannot show that the trial court abused its discretion in ordering joint trials. Nor can they show how this order deprived them of

their constitutional rights to independent and reliable determinations of guilt or personal culpability. Following the guilt-phase trial, the court instructed the jury that it must decide separately whether each of the defendants was guilty as to each count, and also that it must decide each count separately, in a separate verdict. (CT 891.) Following the penalty phase, the jurors were told:

> You must decide separately the punishment to be imposed on each individual defendant. You should analyze what the evidence in the case shows with respect to each individual, leaving out of consideration entirely any evidence admitted solely against the other defendant.
>
> Each defendant is entitled to have his own case determined from evidence as to his own acts and statements and conduct, and any other evidence in this case which may be applicable to him, just as if he were being tried alone.

(CT 1177.) At the close of the penalty-phase instructions, the jurors were again admonished that they "must decide separately the question of penalty as to each of the defendants." (CT 1260.)

As was true in *Taylor* and *Ervin*, these instructions were adequate to ensure an individual penalty consideration as to each appellant. Because there is nothing in the record to suggest that the jurors in this joint trial were unable or unwilling to assess independently and reliably the respective culpability of Letner and Tobin, appellants are unable to establish any abuse of discretion, any due process violation, or any other reversible error stemming from the denial of their requests for separate trials. (*Taylor*, *supra*, at p. 1174; *Ervin*, *supra*, at p. 70.) Appellants' claims to the contrary must be rejected.

IV.

SUFFICIENT EVIDENCE SUPPORTS APPELLANTS' BURGLARY, ROBBERY, AND ATTEMPTED RAPE CONVICTIONS, AND THE FELONY-MURDER CONVICTIONS AND SPECIAL CIRCUMSTANCE FINDINGS RELATED THERETO

Letner and Tobin next argue that nearly all of their various convictions, and the special circumstances findings based on those convictions, must be reversed for insufficient evidence. In particular, they both claim (1) there was insufficient evidence to convict them of attempted rape or to support the attempted rape special circumstance (Letner AOB, Arg. IV, 173-223; Tobin AOB, Arg. IV, 78-131), (2) there was insufficient evidence to convict them of robbery or to support the robbery special circumstance (Letner AOB, Arg. V, 224-272; Tobin AOB, Arg. VI, 136-180), and (3) there was insufficient evidence to convict them of burglary or to support the burglary special circumstance (Letner AOB, Arg. VII, 283-304; Tobin AOB, Arg. VII, 181-188). In a separate argument, Tobin also claims that the special circumstance findings against him must be set aside because there was no evidence he was the actual killer, or intended to kill, or participated in a felony murder "with reckless indifference to human life and as a major participant." (Tobin AOB, Arg. VIII, 189-193.) For the reasons set forth below, none of these claims are persuasive.

A. Controlling Legal Standards

In considering claims of insufficient evidence, a reviewing court must determine "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." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Earp* (1999) 20 Cal.4th 826, 887; *People v.*

Marshall (1997) 15 Cal.4th 1, 34; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Where the jury's findings rest to some degree upon circumstantial evidence, the reviewing court must decide whether the circumstances reasonably justify those findings, "'but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial." (*People v. Earp*, *supra*, at pp. 887-888, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 528-529; see also *People v. Young* (1995) 34 Cal.4th 1149, 1175; *People v. Maury* (2003) 30 Cal.4th 342, 396 [the same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence].)

A murder is of the first degree when "committed in the perpetration of, or attempt to perpetrate" several enumerated felonies including attempted rape, burglary, and robbery. (§ 189.) A killing is committed in the perpetration of one of these enumerated felonies if the killing and the felony are parts of one continuous transaction. (*People v. Earp*, *supra*, at p. 888; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.)

"[T]he reach of the felony-murder special circumstance is equally broad." (*People v. Earp*, *supra*, quoting *People v. Hayes*, *supra*, at pp. 631-632.) The felony-murder special circumstance requires that 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" certain enumerated felonies, including attempted rape, burglary, and robbery. (§ 190.2, subd. (a)(17)(A)(C)(G).) The standard for the sufficiency of evidence for a felony-murder special circumstance is the same as for the underlying conviction -- "the question we ask is whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt." (*People v. Cain* (1995) 10 Cal.4th 1,

39, quoting *People v. Rowland* (1992) 4 Cal.4th 238, 271; see also *People v. Mickey* (1991) 54 Cal.3d 612, 678 [applying same standard for reviewing sufficiency of evidence of guilt and for special circumstances].)

Additionally, "[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, ... are principals in any crime so committed." (Pen. Code, § 31; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123; *People v. Prettyman* (1996) 14 Cal.4th 248, 259-260.) Under this doctrine, one may be liable as an aider and abettor when he aids the perpetrator of an offense, knowing of the perpetrator's unlawful purpose and intending, by his or her act of aid, to commit, encourage, or facilitate commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 554-555; *People v. Montoya* (1994) 7 Cal.4th 1027, 1039. "Aiding and abetting does not require participation in an agreement to commit an offense, but merely assistance in committing the offense." (*People v. Morante* (1999) 20 Cal.4th 403, 434; *People v. Luparello* (1986) 187 Cal.App.3d 410, 439.)

Furthermore, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117, quoting *People v. Prettyman*, *supra*, 14 Cal.4th at p. 260.) To convict a defendant under the natural and probable consequences doctrine:

> [T]he jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a "natural and probable consequence" of the target crime that the defendant assisted or encouraged.

(*People v. Prettyman*, *supra*, 14 Cal.4th at p. 254.)

B. Attempted Rape

In challenging the sufficiency of evidence for their attempted rape convictions, appellants both criticize and attack each individual piece of evidence discretely. They argue that each piece of evidence, when viewed discretely, *might* be subject to an innocent explanation. Appellants then argue, at length, that these possible innocent explanations are plausible in light of the overall evidence. Their arguments are based on (1) appellants' own interpretation of the particular evidence showing attempted rape, (2) their own interpretation of the overall evidence (and their own inferences from that evidence) and (3) their own selective interpretation of legal authority. In short, Letner and Tobin have undertaken lengthy and painstaking efforts to parse the facts with the goal of showing how each individual piece of evidence *might* be reconcilable with a conclusion other than that they both committed murder during an attempted rape. (Letner AOB, Arg. IV, 173-223; Tobin AOB, Arg. IV, 78-131.)

Appellants' attempts in this regard amount to a transparent effort to have this Court view the evidence in the light most favorable to *them*. They do not acknowledge that a reasonable juror, presented with this overall evidence, and drawing reasonable inferences therefrom, could find them both guilty of attempted rape. Indeed, when the evidence here is viewed in its totality, it was more than sufficient for any reasonable juror to find appellants guilty of attempted forcible rape.

Forcible rape is "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator ... [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) An

attempt to commit rape consists of two elements: (1) a specific intent to commit the rape and (2) a direct but ineffectual act done toward committing the rape. (§ 21a.) To constitute an attempt, the act "must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances." (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Memro* (1985) 38 Cal.3d 658, 698.) However, an actual element of the offense need not be proved. (*People v. Dillon* (1983) 34 Cal.3d 441, 454.)

Moreover, "the act need not be the last proximate or ultimate step toward commission of the substantive crime." (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) Where the evidence reveals the defendant's design to commit a crime, even "'slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime.'" (*People v. Memro*, *supra*, 38 Cal.3d 658, 698, quoting *People v. Fiegelman* (1939) 33 Cal.App.2d 100, 105.)

The only rational conclusion from the evidence here is that Letner and Tobin subjected Ms. Pontbriant to a night of sheer terror before finally robbing and murdering her. Ms. Pontbriant herself spoke of her fear on the telephone to Edward Burdette and Kathy Coronado. (RT 5572, 5597.) The evidence of the knife thrust through the photograph of Ms. Pontbriant on the coffee table and the evidence of fecal matter in Ms. Pontbriant's jeans and panties both graphically reveal the extent to which she was terrorized by the two killers she had earlier welcomed into her home. (RT 5653-5657 5661.) The fact that Ms. Pontbriant was bound and choked with the telephone cord, was battered severely in the face, was stabbed deeply into both sides of her neck, and was ultimately killed in a near decapitation, inflicted by repeated cutting to the back

of her neck, reveals just how serious and accurate Ms. Pontbriant's fears were. (RT 4877-4882, 4893, 4897-4905, 4895-4907)

Given these facts, coupled with the other evidence, the jury rationally found that appellants' overall scheme of terror included an attempt to rape. As discussed below, the evidence here showed that appellants went to Ms. Pontbriant's home on the night of the murder to (1) rob her of money or (2) steal her car or (3) both. Ms. Pontbriant's desperate and tearful telephone calls to Burdette and Coronado indicate that appellants were in fact hounding her to provide them with something.

In light of the overall evidence, it is also quite fair to conclude that appellants also used the threat of rape to achieve their goal. When the police found Ms. Pontbriant's dead body, bound by the wrists and throat, she was face-down and naked except for the socks on her feet and the brassiere wrapped around her waist. (RT 4841, 4850, 4873, 5620, 5637.) Clumps of hair had been ripped from her head and were cast about the room or tangled in the telephone cord binding. (RT 5640-5641, 5964-5967, 5973, 6076-6077.) The naked body, with the brassiere pulled down around the waist, was alone sufficient to create an inference that this brutal murder was preceded by a sexual intent. Additionally, Ms. Pontbriant's sweater had been torn at the neck and down the side, and the rest of her clothes had been cast aside. (RT 5661-5662.) The only reasonable conclusion from this evidence was that Ms. Pontbriant had been forcibly stripped of her clothing. If there remained any doubt, the Heineken beer bottle lodged into Ms. Pontbriant's buttocks near her genital area also indicated that her killers harbored a sexual intent. (RT 5622-5623.)

Additionally, at one point while Letner was speaking with Coronado on the telephone, he threatened, "Shut up, you loud-mouthed bitch before I stick my dick in your mouth." (RT 5598.) This fact further suggests that, within an

hour or so before the murder, appellants were willing to use the threat of violent sexual aggression to intimidate and achieve their goals.

These facts were further buttressed by the forensic evidence of the semen stain found on the bedroom carpet, which had apparently come from a "secretor," with Tobin being the only "secretor" who had been in the house. (RT 5722-5723, 5865-5870, 5874-5875, 5921.) The semen stain in the bedroom was accompanied by the fresh blood stains, which were also consistent with Tobin's blood, found on the pillow and doily in the same bedroom. (RT 5173-5174, 5685-5686, 5831-5832.)

Once again, the evidence in this case showed that Ms. Pontbriant's killers terrorized her before the murder. Ms. Pontbriant did not disrobe and tear off her own sweater voluntarily. She did not rip out her own hair. She did not pull her brassiere down. Nor did she insert the beer bottle into her buttocks. Appellants did all that. The jury reasonably found that Letner and Tobin attempted to rape Ms. Pontbriant as probably the penultimate cruel and demeaning act to the murder.

Appellants are both correct that there was no evidence of an actual rape. That, however, is why they were both charged and convicted of *attempted rape*. Assuming appellants did not, in fact, actually rape Ms. Pontbriant, there is certainly enough evidence for a reasonable jury to find that they (1) intended to do so and (2) engaged in at least one direct but ineffectual act toward that purpose. (§ 21a.) The "extraneous circumstances" that might have frustrated their attempt to rape could have been the dissuasion resulting from their victim's terror-induced defecation, or perhaps their victim's pleading not to be raped and killed, or anything. Whatever the reason, there was sufficient evidence of an attempted rape and a murder during that same course of conduct.

Letner also claims that, pursuant to section 1118.1, the trial court improperly denied his motion for acquittal on the attempted rape charge at the

close of the prosecution's case-in chief. His sole argument on this point is that since Tobin's guilt-phase testimony "was not part of the prosecution's evidence, it cannot be considered at all in evaluating the sufficiency of the evidence to sustain the attempted rape and the attempted rape special circumstance allegation against the section 1118.1 made by appellant at the close of the prosecution's case-in-chief." (Letner AOB, Arg IV, 193-194.)

True enough, Tobin's guilt-phase testimony provided additional evidence showing an attempted rape. Tobin testified that he witnessed Letner and Ms. Pontbriant hugging and kissing on the couch. (RT 6857-6860.) The jury certainly could have discredited Tobin's self-serving claim that he was uninvolved or that Ms. Pontbriant willingly participated in any sexual activity. At the same time, the jury could conclude from this testimony, and in light of the overall facts, that the murder was preceded by forcible sexual conduct.

As outlined at length above, however, the prosecution's evidence was more than sufficient by itself to show an attempted rape. Tobin's testimony only added to this evidence. The trial court properly denied appellants' motion for acquittal under section 1118.1.

Although the evidence supporting the attempted rape convictions was circumstantial, a reviewing court must accept all logical inferences that the jury might have drawn from this circumstantial evidence and must reject appellants' "attempts to reargue the persuasiveness of the evidence." (*People v. Maury, supra,* 30 Cal.4th at p. 396; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11).

C. Aiding And Abetting Attempted Rape

Appellants both also argue that there was no evidence that they jointly attempted to rape Ms. Pontbriant or that either of them aided and abetted the other in an attempted rape. Notwithstanding appellants' efforts to construe the facts in their own favor, the evidence shows otherwise.

As discussed in the preceding arguments, Letner and Tobin were clearly joint venturers in this sadistic enterprise. They had both lost their jobs (RT 5399, 6269-6271, 6283) and were both being evicted from their apartment. (RT 5080-5081, 5087-5088, 5427-5429.) They were both planning to leave for Iowa (RT 6630-6632, 6635, 6778-6779, 6820), but neither one of them had a working car. (RT 5399.) They were both present in Ms. Pontbriant's home two days before the murder, when Gilliland handed Ms. Pontbriant a large sum of cash and said he would be leaving town. (RT 5123-5125, 5127-5128.) They both went to Ms. Pontbriant's home together on the night of the murder. (RT 5532-5533, 6958-6960.) Hairs indistinguishable from Letner's hair were found on Ms. Pontbriant's body (RT 5967-5969, 5994-5997) and blood and semen consistent with Tobin were found in her bedroom. (RT 5173-5174, 5685-5686, 5831-5832, 5722-5723, 5865-5870, 5874-5875, 5921.)

The evidence of the murder itself suggested more than one killer. Ms. Pontbriant was stripped of her clothes. Her hair was ripped from her head. She was bound by the neck and wrists, brutally beaten, stabbed severely on both sides of her neck, and then held down while her spinal cord was deliberately and methodically severed from the back. (RT 4877-4882, 4893, 4897-4905, 4895-4907.) Although it is *possible* that either Letner or Tobin could have performed this brutal slaying alone, the evidence implies that they were both involved. This inference is bolstered by the lack of any significant defensive wounds – only two small lacerations to the left arm near the wrist, which might have been defensive wounds. (RT 4926-4928.)

Letner and Tobin were also together in Ms. Pontbriant's car, with several of their own personal belongings, shortly after the murder. (RT 6138-6149.) After the police stopped them in the stolen car that night, neither of them returned to their apartment. Nor did either one of them ever attempt to retrieve any of their belongings from the car, or from the East Murray apartment, or

from Mayberry's apartment. Instead, Letner and Tobin spent the next few hours together in an abandoned house and then walked to the home of Denise Novotny, who neither of them knew. They begged Novotny for a ride out of town. (RT 6236-6249). When she refused, Letner and Tobin made their way to Goshen, took a couple of buses to Reno, and hitchhiked across the country to Iowa with nothing but the clothes on their backs. (RT 6258, 6299-6307.) While in Iowa, they both independently admitted to Earl Bothwell that they had murdered and stolen money from a woman in California. (RT 6422-6424, 6441.)

Any reasonable jury would have concluded from this evidence that Letner and Tobin were together and acted in concert during the murder. It was, therefore, also reasonable to conclude that appellants jointly participated in the various acts of terror leading up to the murder, including the attempted rape.

Moreover, even assuming that one of them did not personally participate in the attempted rape, the jury would have reasonably found that he somehow aided, encouraged, facilitated, or assisted in the offense, given the clear evidence that Letner and Tobin were jointly involved in the overall criminal enterprise of, at the least, terror and robbery. (See *People v. Beeman*, *supra*, 35 Cal.3d at pp. 554-555.)

Furthermore, even if one of the appellants intended to commit only a burglary or robbery, his confederate's attempt to rape Ms. Pontbriant would have been a natural and probable consequence of this home invasion. Accordingly, appellants were both equally liable for the attempted rape. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 260.)

D. The Attempted Rape Special Circumstance

Appellants also both challenge the jury's finding of the attempted rape special circumstance. To establish this special circumstance, it must be shown

that a "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 ... Rape in violation of section 261." (§ 190.2, subd. (a)(17)(C).)

There was ample evidence that appellants murdered Ms. Pontbriant during or immediately after the attempted rape and that the attempted rape was not "merely incidental" to the murder. As discussed, it is fair to conclude that the attempted rape was among the featured acts in appellants' cruel theater of terror and violence, the climatic act being the methodical, cold-blooded murder. Any rational juror would have found that the attempted rape immediately preceded the murder and that the murder was motivated, at least in part, to silence Ms. Pontbriant about the attempted rape and the other violent acts. (See, e.g., *People v. Marshall, supra,* 15 Cal.4th at p. 37 [where victim's body was found gagged and strangled, with her underwear and pants pulled down, and where defendant was seen leaving crime scene, there was "ample basis upon which a rational trier of fact could find that defendant killed ... while engaged in the attempt to perpetrate a forcible rape]; *People v. Cain, supra,* 10 Cal.4th at p. 47 [sufficient evidence to support attempted rape special circumstance where there were dual intents to rape and steal, and where evidence suggested that murders were committed to advance these other felonies and to conceal the defendant's identity as the perpetrator]; *People v. Earp, supra*, 20 Cal.4th at p. 889 [defendant's flight from police indicative of consciousness of guilt, supporting rape special circumstance].)

Once the jury here found that Letner and Tobin were guilty of attempted rape, their conclusion regarding the attempted rape special circumstance was obvious. Under these facts, the murder was clearly committed during the attempt to rape or, at minimum, was committed at least in part to avoid detection for the attempted rape.

E. Robbery

Appellants both argue at length that the evidence was insufficient to sustain their robbery convictions. In support of these arguments, appellants not only interpret all of the facts in the light most favorable to them, but they also insist that this Court must discredit or ignore the very clear evidence showing their robbery of Ms. Pontbriant. (Letner AOB, Arg. V, 224-272; Tobin AOB, Arg. VI, 136-180.) These claims border on the frivolous.

Robbery requires the taking of another person's personal property, against the person's will and from her immediate presence, accomplished by means of force or fear and with the specific intent permanently to deprive that person of her property. (§ 211.) The evidence here showed that Letner and Tobin were both present in Ms. Pontbriant's home a couple days before the murder, when Gilliland handed Ms. Pontbriant about $340 in cash. Ms. Pontbriant placed the cash in her checkbook and put the checkbook in her purse. (RT 5124-5125, 5127-5128.) During this same period, Letner and Tobin were both planning to leave for Iowa (RT 6630-6632, 6635, 6778-6779, 6820), but neither one of them had a working car. (RT 5399.)

Letner and Tobin arrived at the house together on the night of Ms. Pontbriant's murder. Within, at most, an hour or so after the murder, the police saw Letner and Tobin together in Ms. Pontbriant's car in the vicinity of the murder. (RT 5117, 6138-6140) At trial, Warren Gilliland and Flourene Gentry both confirmed that Ms. Pontbriant normally kept her car keys in her purse, and that she did not allow others to drive her car. (RT 5119-5120, 5515, 5547.) When the police later discovered the murder scene, they found Ms. Pontbriant's white purse in the same livingroom where the body was. The purse had been rifled, and its contents were found partially spilling out onto the floor. (RT 5658, 5678.) Shortly after Letner and Tobin arrived in Iowa, they both admitted to Earl Bothwell that they had murdered and stolen money from a

woman in California. Letner also told Bothwell that he had taken the woman's "real nice" red and white Ford. (RT 6422-6424, 6441.)

When a defendant kills another and takes substantial property from his victim, it is reasonable to conclude that the killing was for purposes of robbery. (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1128; *People v. Kelly* (1992) 1 Cal.4th 495, 529; *People v. Turner* (1990) 50 Cal.3d 668, 688.) The facts here, viewed in conjunction with the gruesome evidence of the murder, lead to only one reasonable conclusion: while appellants were in Ms. Pontbriant's immediate presence, they jointly used force to take her money and car keys from her purse with the intent to permanently deprive her of this property. Moreover, even if appellants murdered Ms. Pontbriant before taking her property, the theft was clearly not an afterthought. To the contrary, the most rational conclusion from the overall evidence is that appellants went to Ms. Pontbriant's home intending to steal her money and her car. "While it may be true that one cannot rob a person who is already dead ..., one can certainly rob a living person by killing that person and then taking his or her property." (*People v. Navarette* (2003) 30 Cal.4th 458, 499, citing *People v. Frye* (1998) 18 Cal.4th 894.)

As part of appellants' lengthy protestations, they point to the fact that some $18 in cash and change remained buried in the bottom of Ms. Pontbriant's purse and that other small quantities of change and other items of some value remained in the house. However, the jurors -- who heard all this evidence -- could reasonably find that appellants robbed their victim of her money and car keys but, in their haste to leave, did not inventory the entire contents of the purse or bother with the various other items in the house, such as the television, VCR, etc.

The main thrust of appellants' challenge to their robbery convictions is that the testimony of Warren Gilliland and Earl Bothwell was, in their estimation, simply too incredible to warrant any consideration at all. Indeed,

appellants go so far as to claim that *even presenting* this testimony somehow constituted a due process violation or somehow amounted to the prosecution knowingly using "false" evidence. In this regard, appellants both painstakingly chronicle each piece of evidence which might somehow be viewed as discrediting Gilliland and Bothwell.

Appellants efforts in this regard implicitly amount to a request for this Court to disregard the most basic tenets of appellate review. It is, of course, well settled that in reviewing the sufficiency of the evidence, an appellate court may not reevaluate the credibility of witnesses, reweigh the evidence, or resolve conflicts in the evidence. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 319-320; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Jones* (1990) 51 Cal.3d 294, 314; *People v. Johnson, supra,* 26 Cal.3d at p. 578; e.g., *People v. Griffin* (2004) 33 Cal.4th 1015, 1028.) All conflicts in the evidence must be resolved in favor of the prevailing party. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Reversal on appeal "is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction." (*People v. Bolin* (1998) 18 Cal.4th 297, 331, internal quotes and citations omitted.)

The jurors here evaluated all the evidence, including all the evidence presented to impeach or discredit Gilliland and Bothwell. It was the jurors' function, and solely their function, to weigh that evidence and assess credibility. Moreover, they had good reason to accept Gilliland's and Bothwell's testimony. Although Gilliland's pretrial statements to the police were somewhat confused and inconsistent, he repeatedly said he had handed Ms. Pontbriant a large sum of cash in appellants' presence. (RT 6651-6652, 6788-6793.) Despite appellants' protestations to the contrary, there was no evidence that this cash transfer simply *could not have happened.* Appellants are also unable to explain how any federal constitutional right could have been violated by the jury

accepting Gilliland's testimony in favor of appellants' own self-serving claims.

Moreover, the jurors could reasonably accept Bothwell's testimony. Bothwell was not offered or given any consideration for his information to the authorities or his testimony at appellants' trial. (RT 6428-6429, 6542-6545.) Bothwell had no rational reason to fabricate evidence implicating Letner and Tobin both in the murder and robbery.[108/] Investigator Johnson, who had no reason to fabricate evidence, testified that he told Bothwell nothing whatsoever about the facts of the murder when taking Bothwell's statement in the Illinois prison. (RT 7363-7365.)

Furthermore, the other evidence corroborated Gilliland's and Bothwell's testimony. Gilliland testified that Ms. Pontbriant put the money he handed her into her checkbook and placed the checkbook in her purse. After the murder, the police found that the purse containing the checkbook had been rifled. (RT 5658, 5678.) Bothwell testified that Letner told him he had taken his victim's "real nice" red and white Ford. (RT 6422-6424, 6441.) Shortly after the murder, the police observed Letner and Tobin riding in Ms. Pontbriant's red Ford Fairmont. (RT 5117, 6138-6140)

In short, there was ample evidence for any juror to find that Letner and Tobin robbed Ms. Pontbriant. Indeed, any other conclusion would have been illogical in light of the facts.

F. Aiding And Abetting Robbery

Appellants also both claim that there was no evidence of either of them personally robbing Ms. Pontbriant or of either of them aiding and abetting the

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108. Indeed, as revealed in the penalty-phase trial, Bothwell believed that Letner might have spared his life when he (Letner) removed the clip from the shotgun while Tobin was assaulting him with the gun in the Iowa motel room. (RT 8469.)

other in the robbery. As explained above, however, there was ample evidence that Letner and Tobin acted in concert in all events on the night in question, including the robbery and murder. To summarize again, they were both planning to leave for Iowa but needed a car; they were both present when Gilliland handed Ms. Pontbriant a large sum of cash and said he would be leaving town; they went to Ms. Pontbriant's home together on the night of the murder; forensic evidence found in the house confirmed that they both had been there; the evidence of the murder suggested that they were both involved; they were both observed in their victim's car shortly after the murder; they both hid together in an abandoned house in the late-night hours after the murder; they both begged Denise Novotny for a ride out of town early the next morning; they both fled town together and hitchhiked to Iowa together; they each admitted to Bothwell in Iowa that they had murdered and stolen money from a woman in California.

This evidence established that appellants both had motive and opportunity to rob their victim. It also established that they were both in their victim's home during the same period the murder was committed. The evidence also suggested that they both were actually involved in the murder. The evidence further showed mutual consciousness of guilt based on the facts that (1) they made their getaway together in their victim's stolen car and (2) then both fled the state together to Iowa, where they each admitted murdering and stealing from their victim.

Moreover, as discussed above ("subsection E"), the evidence also clearly showed that at least one of them personally robbed Ms. Pontbriant of her property. Even assuming only one of them *actually took* this property, it was reasonable to conclude that they both shared a common intent to rob and murder. Accordingly, it was also reasonable to conclude that appellants aided and abetted each other in all facets of this mutual scheme of robbery, terror, and

murder. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 260.) Again, appellants' claims to the contrary must be rejected.

G. The Robbery Special Circumstance

Appellants also argue that the evidence was insufficient to support the jury's finding of the robbery special circumstance because (1) there was allegedly nothing to show that they formed an intent to steal from Ms. Pontbriant until after they murdered her and, therefore, (2) there was nothing to prove that the robbery was not "merely incidental" to the murder.

The robbery felony-murder special circumstance requires a finding that a "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 ... Robbery in violation of Section 211 or 212.5." (§ 190.2, subd. (a)(17)(A).) The robbery special circumstance requires a finding that the defendant had an "independent felonious purpose" for the robbery and committed the murder to advance that independent purpose. (*People v. Mendoza* (2000) 24 Cal.4th 130, 182, 99; see also *People v. Bolden* (2002) 29 Cal.4th 515, 554, 127 [evidence was sufficient for robbery-murder special circumstance where no evidence suggested defendant took victim's property as reminder or token of incident, to give false impression of his motive, or to facilitate or conceal the murder in some other way].)

"[W]hen one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Hughes* (2002) 27 Cal.4th 287, 357.) Even "'[i]f a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money.' " (*Ibid.*) That

appellants may have harbored a concurrent intent to kill does not invalidate the robbery-murder special circumstance. (*People v. Maury, supra,* 30 Cal.4th at p. 402 403; *People v. Barnett* (1998) 17 Cal.4th 1044, 1160.) Accordingly, substantial evidence supported the robbery conviction and the robbery-murder special-circumstance finding.

As discussed above, there was ample evidence to show that appellants robbed Ms. Pontbriant of her car keys and money. There was nothing to suggest that the robbery was "merely incidental" or an afterthought to the murder. To the contrary, it appeared that the intent to rob provided at least part of the motive for appellants' other acts of brutality, including the battery, the stabbing, the attempted rape, and the murder. Under these facts, any reasonable juror could find that the murder facilitated the robbery. The robbery was committed during the same period as the murder, and the murder was clearly motivated, at least in part, to silence Ms. Pontbriant about the robbery and the other acts of violence. The evidence is more than sufficient to support the jury's findings of the felony-murder robbery special circumstance as to both Letner and Tobin.

H. Burglary

Appellants both claim that the evidence was insufficient to sustain their residential burglary convictions because they allegedly had no intent to commit any crime when entering their victim's home. In this regard, they both argue -- correctly -- that Ms. Pontbriant welcomed them into her home the night they killed her. They also claim that they could not have harbored the necessary intent for burglary when entering the house because they spent a good deal of time drinking beer, talking with Ms. Pontbriant, and arguing with Burdette and Coronado on the telephone before finally executing the robbery and murder. (Letner AOB, Arg. VII, 283-304; Tobin AOB, Arg. VII, 181-188) Appellants

are wrong again.

The crime of burglary is committed when a person "enters any ... building," including a "house," "with intent to commit ... larceny or any felony." (§ 459; *People v. Valencia* (2002) 28 Cal.4th 1, 6.) The fact that Ms. Pontbriant invited Letner and Tobin into her home is irrelevant because "[o]ne who enters a room or building with the intent to commit a felony is guilty of burglary even though permission to enter has been extended to him personally or as a member of the public." (*People v. Horning* (2004) 34 Cal.4th 871, 904-905; *People v. Sears* (1965) 62 Cal.2d 737, 746.)

As discussed above, there was ample evidence to show that appellants both intended to rob Ms. Pontbriant of her car keys and money. There was also ample evidence for a reasonable juror to find that they formed that intent before entering their victim's home. Again, they were both planning on leaving for Iowa, but they needed a car. (RT 5399, 6630-6632, 6635, 6778-6779, 6820.) Indeed, Letner's remarks to Bothwell in Iowa, about how Ms. Pontbriant's car would have made it to Iowa if the police had not stopped him (RT 6422), indicate that appellants intended to steal the car for their trip to Iowa. The presence of Letner's and Tobin's belongings in the car immediately after the murder reinforces this conclusion.

Because Letner and Tobin were both unemployed, they also presumably needed money for the trip. (RT 5399, 6269-6271, 6283.) They were in Ms. Pontbriant's home a couple days before the murder, when Gilliland handed Ms. Pontbriant a large sum of cash and said he would be leaving town. (RT 5124-5125, 5127-5128.)

Given these facts, it was rational to conclude that appellants intended to rob Ms. Pontbriant before entering her house. Indeed, because appellants set out for their trip to Iowa in their victim's stolen car immediately after the murder, it would be unreasonable to believe that they spontaneously hatched

their plan to steal the car and leave the state while they were sitting in Ms. Pontbriant's home drinking beer or while they were terrorizing her.

The mere fact that they spent some time in the house drinking beer does not alter this conclusion. The jurors could reasonably find that, during this period, appellants were attempting to fortify their victim, or perhaps fortify themselves, with alcohol before executing the robbery and murder. The jury could have also reasonably concluded that Letner and Tobin simply wanted to imbibe on their victim's beer, and then use her money to buy more beer, before acting on their intents to rob, rape, terrorize and murder. The evidence was sufficient to support appellants' burglary convictions.

I. The Burglary Special Circumstance

The burglary felony-murder special circumstance requires a finding that a "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 ... Burglary in the first or second degree in violation of Section 460." (§ 190.2, subd. (a)(17)(G).) If the defendant has an independent felonious purpose, such as burglary, and commits the murder to advance that independent purpose, the special circumstance is present. (*People v. Mendoza, supra,* 24 Cal.4th at p. 182.)

As discussed above, there was ample evidence that appellants both intended to rob Ms. Pontbriant and that they formed that intent before entering her home. Accordingly, the burglary could not have been "merely incidental" to the murder. Admittedly, appellants probably also both intended to murder their victim when they entered her home. This, however, would have only formed an *additional* basis for the burglary special circumstance. Moreover, this concurrent intent does not negate a finding that appellants were also liable for the felony-burglary special circumstance under a robbery theory.

Because the murder apparently took place sometime well after appellants entered the house, the burglary and the ensuing robbery could not have been "merely incidental" to the murder. Although this brutal murder appeared to be motivated in part by Letner's and Tobin's own sadistic designs, the killing was also committed to facilitate appellants' other violent criminal acts. Indeed, it is obvious that the murder was motivated, at least in part, to silence Ms. Pontbriant as a witness to the various other crimes, including the burglary, the robbery, the brutal battery and neck stabbing, and the attempted rape. Because the evidence was more than sufficient to find Letner and Tobin both guilty of residential burglary, there can be no question under these facts that the evidence also supported the burglary felony-murder special circumstance.

J. "Heightened Scrutiny"

Appellants both argue that each of their felony-murder convictions and the related felony-murder special circumstances must be overturned because the federal Due Process Clause and the Eighth Amendment both demand "heightened scrutiny" of the evidence in death penalty cases. In this regard, appellants implicitly claim that the well-established standard for reviewing the sufficiency of evidence must somehow be elevated in capital cases for reasons they do not explain. Appellants are wrong because:

> [A] verdict is constitutionally reliable when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present.

(*People v. Bradford* (1997) 15 Cal.4th 1229, 1372; *People v. Diaz* (1992) 3 Cal.4th 495, 566.) Moreover, the requirement that each juror be convinced of guilt beyond a reasonable doubt provides a sufficient reliability for purposes of

assessing guilt and sentence. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 1198; *People v. Michaels* (2002) 28 Cal.4th 486, 539.)

As explained at length above, the evidence presented against appellants, and the reasonable inferences to be drawn from that evidence, was more than constitutionally sufficient to support all of the charges and special circumstance allegations found by the jury in these cases. Because appellants do not explain how any of the evidence amounted to "error of a constitutional stature," their claims must be rejected. (*People v. Gurule* (2002) 28 Cal.4th 557, 626.)

K. Actual Killer, Intent To Kill, Or Reckless Indifference

Finally, in a separate argument, Tobin claims that the special circumstance findings against him must be set aside because there is allegedly insufficient evidence that he (1) was the actual killer, or (2) intended to kill, or (3) participated in a felony murder "with reckless indifference to human life and as a major participant." (Tobin AOB, Arg. VIII, 189-193.) (See § 190.2, subd. (d); *People v. Estrada* (1995) 11 Cal.4th 568; *People v. Anderson* (1987) 43 Cal.3d 1104.)[109/]

For the many reasons outlined above, this claim too must be rejected. As discussed, there was abundant evidence that appellants both personally participated in Ms. Pontbriant's murder. Appellants both arrived at the house together with the clear intent to, at minimum, rob their victim. Immediately after the murder, they were together in their victim's stolen car, and they both

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109. Because the murder here was committed before the June 6, 1990, effective date of Proposition 115, (see *Tapia v. Superior Court* (1991) 53 Cal.3d. 282), the trial court properly refrained from instructing the jury as to the provisions of Proposition 115 as relating to felony-murder accomplices. Instead, the jury here was instructed that each of the felony-murder special circumstances allegations required a finding that each appellant was either the actual killer or intended to kill. (CT 872; see *People v. Sanders* (1990) 51 Cal.3d 471, 515-516; *People v. Anderson*, *supra*, 43 Cal.3d at pp. 1115, 1147.)

made their getaway together. The physical evidence suggested that both of them were present and both participated in the brutal acts leading up to the murder. They both individually admitted to Earl Bothwell that they had killed their victim. Even if only one of them actually wielded the knife while severing Ms. Pontbriant's neck, the evidence was more than sufficient to establish that they both acted together with the mutual intent to kill.

V.

THE ATTEMPTED RAPE SPECIAL CIRCUMSTANCE IS LEGALLY VIABLE

Tobin argues that, as a matter of law, an attempted rape cannot support a statutory special circumstance. This is so, according to Tobin, because a murder cannot advance an attempted rape. Because in such a situation a rape did not occur, Tobin claims an attempted rape can be only "merely incidental to the murder." (Tobin AOB, Arg V, 132-135.)

As Tobin recognizes, this Court addressed this issue in *People v. Kelly, supra,* 1 Cal.4th 495. This Court found that, where a defendant attempts to rape his victim, and kills the victim during the attempt, he has committed attempted rape and is "guilty of felony murder and is subject to the rape special circumstance." (*Id.* at p. 525.)

Tobin nonetheless insists this conclusion is wrong because, for the special circumstance to apply, the murder must have actually advanced the rape. He reasons that, since a defendant cannot rape a corpse, a murder cannot advance an attempt to rape. Tobin is wrong.

The statute expressly defines the special circumstance as where the "murder was committed while the defendant was engaged in, or was an accomplice in, the ... attempted commission of" rape. (§ 190.2, subd. (a)(17)(C).) An attempt to rape requires only "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a; *People v. Toledo* (2001) 26 Cal.4th 221, 229.)

A defendant can, with the intent to rape, make a direct but ineffectual act done toward the crime's commission but for whatever reason fail to achieve his goal. If the defendant then murders his victim, he is guilty of both felony murder and the attempted rape special circumstance. As this Court found in *People v. Berryman* (1993) 6 Cal.4th 1048, an intent to kill formed after the

termination of an attempted rape can in fact support a special circumstance finding. "[T]he felony-murder special circumstance does not require a strict 'causal' or 'temporal' relationship between the 'felony' and the 'murder.'" (*Id.* at p. 1091; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 624.) Where a defendant, during the same course of conduct, commits an attempted rape and then murders his victim, the murder is not merely incidental to the attempted rape. Indeed, such a murder might have numerous "independent purposes" including, among other things, punishing the victim for thwarting an attempted rape or silencing the victim about the attempted rape. Under such circumstances, the defendant is subject to the attempted rape special circumstance.

Tobin also claims in passing that applying this special circumstance to him would somehow amount to an unforeseeable expansion of the attempted rape special circumstance. (See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353.) The claim is equally baseless. Prior to Tobin's crimes, the statute expressly provided a special circumstance where a defendant commits murder while committing an attempted rape. (§ 190.2, subd. (a)(17)(C).) No defendant who killed after attempting to rape would have believed he was immune from this special circumstance based on the sophism Tobin now propounds.

VI.

THE SUPERIOR COURT PROPERLY REJECTED THE MAGISTRATE'S CONCLUSION FROM THE PRELIMINARY HEARING THAT LETNER AND TOBIN COULD NOT BE LIABLE FOR BURGLARY

Letner and Tobin both argue that their convictions of first-degree burglary must be reversed because the magistrate presiding over their preliminary hearings found insufficient evidence of a residential burglary. Letner and Tobin both claim, further, that their first-degree, felony-murder convictions stemming from the burglary of Ms. Pontbriant's home must also be overturned. They both also claim that the jury's special circumstance findings regarding murder during a burglary must likewise be reversed. (Letner AOB, Arg VI, 273-282; Tobin AOB, Arg., XXXII, 318-324.)

Appellants are both mistaken because, under the provisions of section 739, the Superior Court correctly overturned the magistrate's conclusion regarding the burglary allegation. Because this finding turned on a legal determination by the magistrate, the prosecution was entitled to refile the burglary charge, and to refile the burglary special-circumstance allegations, in the charging information.

A. Procedural And Factual Background

At the close of the preliminary hearing in this case, the magistrate stated:

> As to the trouble with count three which is the burglary, there is no real intent showing -- or no evidence showing the intent prior to going in, and that would have some bearing on the 211. Not necessarily the attempted rape, but I'm not making any factual findings in that regard. It doesn't appear to me to be sufficient evidence to show that the 459 has been committed and thus the special circumstance would not necessarily prevail. Although if we start thinking about theories, it would appear that they'd have to have the intent to rob before going in. But I do not -- I just can't find sufficient evidence to show that.

(RT Prelim. [Vol. V.] 10/21/88 6.)

A moment later, the magistrate stated:

> I may have misspoken. Count three is the burglary charge relating to the victim's residence which I have some trouble finding any evidence to show that there was an intent to commit a felony upon the entry. I may have found a factual find (sic.) that both the Defendants were there that night at the scene, but I just can't find any evidence that they entered that residence with the intent to commit a felony at the moment of entry. In other words, there's no forced entry. It appears that there was a party going on and thus it would be a situation where they were invited in. I do find sufficient evidence to find the burglary and attempted rape and that supports the special circumstances.

(RT Prelim. [Vol. V.] 10/21/88 7-8.)

On October 13, 1988, the prosecution filed an information charging Letner and Tobin with residential burglary and alleging, as a special circumstance, that both of them committed a murder during that burglary. (CT 7-10.) Despite the magistrate's equivocal statements on the matter, Letner and Tobin both challenged the information pursuant to section 995 because, inter alia, the magistrate had allegedly made a "factual finding" of insufficient evidence of the charged burglary. (CT 15-24.) The prosecution filed a written response, arguing, inter alia, that the People were entitled under section 739 to include these counts and allegations in the charging information because the evidence presented at the preliminary hearing supported them, and that the magistrate's comments suggesting insufficient evidence amounted to an error of law. (CT 60-65.)

The Superior Court heard argument on the matter on March 1, 1989. During this argument, the prosecutor correctly pointed out that the magistrate's finding at the preliminary hearing did in fact rest on a legal determination. (CT 203-205.) On March 22, 1989, the trial court denied appellants' section 995 motion, finding that "there was sufficient evidence to hold the defendants to

answer on all charges, and on all special allegations." (CT 209.)

Thereafter, Tobin sought a pretrial petition for writ of prohibition on the matter in the Fifth District Court of Appeal. (CT 119-142.) Letner did not seek such a remedy. The Fifth District denied Tobin's petition on April 13, 1989. (CT 227.)

B. The Trial Court Properly Refused To Dismiss The Burglary Charges And The Related Special Circumstance Allegations

Respondent first points out that, unlike Tobin, Letner did not seek a pretrial writ to challenge the Superior Court's findings regarding his section 995 motion. (See § 999a.) Having failed to seek such a remedy, Letner is precluded from raising this issue on appeal. (*People v. Carter* (1983) 144 Cal.App.3d 534, 538, disapproved on other grounds in *People v. Coronado* (1995) 12 Cal.4th 145; *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

Even if Letner and Tobin were both entitled to raise this claim, it is meritless. The prosecution is permitted to file an information which includes an offense not named in the magistrate's commitment order, if: (1) the evidence before the magistrate shows the offense was committed and (2) the offense was transactionally related to offenses forming the basis of the commitment. (§ 739; *Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665. (*Jones*.) However, the prosecution may not recharge an offense if the magistrate has made a factual finding when denying the matter. If, however, the magistrate's finding rests only on a *legal conclusion*, the prosecution may challenge that conclusion in the superior court by refiling the charges in the information. (*Ibid*; *People v. Ondarza* (1980) 106 Cal.App.3d 195, 201.)

Appellants both claim that the magistrate, at the close of the preliminary hearing, made a *factual finding* concerning their intent when entering their victim's home before murdering her. Letner and Tobin are wrong again.

The distinction between legal and factual conclusions, originally enunciated in *Jones*, was clarified by this Court in *Pizano v. Superior Court* (1978) 21 Cal.3d 128:

> [A]n offense not named in the commitment order may not be added to the information if the magistrate has made factual findings which are fatal to the asserted conclusion that the offense was committed. A clear example of this would be when the magistrate expresses disbelief of a witness whose testimony is essential to the establishment of some element of the corpus delicti. When, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate legal conclusion that it does not provide probable cause to believe the offense was committed, such conclusion is opened to challenge by adding the offense to the information.

(*Id.* at p. 133; *People v. Ondarza*, *supra*, 106 Cal.App.3d at p. 201.)

This Court revisited this issue in *People v. Slaughter* (1984) 35 Cal.3d 629. Quoting *Pizano*, this Court again found that "[w]hen . . . the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause . . ., such conclusion is open to challenge by adding the offense to the information." (*People v. Slaughter*, *supra*, at p. 639, original emphasis, quoting *Pizano*, *supra*, at p. 133.) In such a case, the magistrate's determination is "a legal conclusion, not a finding of fact as that term is used in *Jones*. Therefore, the People were entitled to challenge [the magistrate's] action. . ." (*Slaughter*, *supra*, at p. 639, quoting *Pizano* at pp. 133-134.)

In the present cases, the magistrate at the preliminary hearing clearly accepted all of the prosecution's evidence. The magistrate nonetheless found, as a legal conclusion, that the evidence did not suffice to show the requisite intent for burglary. As the prosecutor properly argued at the section 995 hearing before the Superior Court, the magistrate's finding on this matter appears to have been guided by the belief that the consensual entry into Ms. Pontbriant's home negated burglary as a matter of law. (CT 64-65.) That belief

was, of course, wrong. (*See People v. Frye, supra,* 18 Cal.4th at p. 954 [under section 459, an entry into a home need not be a trespass to support a burglary conviction, and a person who enters for a felonious purpose may be found guilty of burglary even if he enters with the owner's or occupant's consent]; see also *People v. Talbot* (1966) 64 Cal.2d 691, 700; overruled on other grounds in *People v. Ireland* (1969) 70 Cal.2d 522, 540; *People v. Sears, supra,* 62 Cal.2d at p. 746; *People v. Deptula* (1962) 58 Cal.2d 225, 228.)

In any event, the magistrate's conclusions regarding the burglary charges and the related special circumstance allegations were, at most, a finding of insufficient evidence. There is nothing to suggest that the magistrate's conclusions on this matter rested on any credibility determinations unfavorable to the prosecution or on any weighing of conflicting evidence. Under this Court's established precedent in *Jones*, *Pizano*, and *Slaughter*, the magistrate's finding constituted an "ultimate legal conclusion" The prosecution was, therefore, entitled to raise these charges and allegations in the information so long as the evidence presented at the preliminary hearing supported them. (§ 739.) In order to contest these charges and allegations, appellants needed to show, before the superior court, that they had been "committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B); *Ghent v. Superior Court* (1979) 90 Cal.App.3d 944, 955; *People v. Firestine* (1968) 268 Cal.App.2d 533, 535.) To make such a showing, appellants would need to prove that the preliminary hearing did not disclose "such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*Slaughter*, *supra*, 35 Cal.3d at p. 636; *People v. Williams* (1988) 44 Cal.3d 883, 924.)

Understandably, neither Letner nor Tobin now question the sufficiency of evidence at the preliminary hearing showing, at minimum, probable cause to believe that they both burglarized Ms. Pontbriant's home and murdered her

during that burglary. Instead, appellants' claim in this regard appears to rely solely on the magistrate's errant (and somewhat equivocal) legal pronouncements at the close of the preliminary hearing. This attempt to seize upon the magistrate's comments is unavailing because, as discussed, the magistrate's conclusion was one of law, not fact. The prosecution was entitled to challenge that finding under section 739, by virtue of filing an information reflecting the charges and allegations established at the preliminary hearing. In these cases, the Superior Court properly found that the evidence presented at the preliminary hearing supported these charges and allegations.

As is true of virtually all of appellants' various complaints, they both also argue, perfunctorily, that this alleged "error" violated a host of rights under the federal Constitution. In this instance, they both claim that the failure to dismiss all the burglary charges and related allegations after the preliminary hearing infringed on a state-created "liberty interest" and violated fundamental due process. As explained above, the Superior Court's rejection of appellants' claims was entirely consistent with California statutory law, as interpreted by this Court well before appellants' trial. Appellants' claim about being denied of a state liberty interest must, therefore, be rejected. Additionally, appellants provide no federal constitutional authority to question this state's procedures for challenging a magistrate's pretrial findings. Their unsupported allegations of some unspecified violation of the federal Constitution must likewise be rejected.

VII.

ANY IMPROPRIETY CONCERNING THE VARIOUS SPECIAL CIRCUMSTANCE FINDINGS DOES NOT INVALIDATE THE JURY'S ULTIMATE JUDGEMENT OF DEATH

Appellants both claim that their death judgments must be reversed if any one of the jury's three special circumstance findings rested on insufficient evidence. (Letner AOB, Args. VIII & IX, 292-304; Tobin AOB, Args. IX & X, 194-204.) Their arguments are unavailing because, for the reasons set forth at length above (Arg. IV), the evidence supported all three of the special circumstances against both appellants.

However, even assuming, arguendo, that any one of the special circumstances were to be stricken, appellants' claims are meritless. They both claim that, under *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, the absence of any one of these special circumstances requires a new penalty-phase trial because the special circumstances were among the various "factors" considered by the jury in "weighing" the evidence as to whether they deserved death. Appellants argue that, under *Ring* and *Apprendi*, this Court may not "reweigh" the evidence supporting their death judgments. They claim that remand for a new penalty-phase trial is constitutionally-mandated because *any* "factor in aggravation," which might later be found improper or otherwise inadmissible, necessarily requires reversal.

This claim fails because, as this Court has previously found, *Ring* and *Apprendi* are inapplicable to the determination of penalty in capital cases under California law:

> Under the law of this state, all of the facts that increase the punishment for murder of the first degree--beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death-- already have been

> submitted to a jury and proved beyond a reasonable doubt to the jury's unanimous satisfaction in connection with at least one special circumstance, prior to the commencement of the penalty phase. (See § 190.2.) Therefore, at the penalty phase itself no further facts need to be proved in order to increase the punishment to either death or life imprisonment without possibility of parole, because both now are prescribed as potential penalties. It is true that at the penalty phase, the choice between death and life imprisonment without possibility of parole depends on a determination as to which of the two penalties is appropriate, which in turn depends on a determination whether the evidence in aggravation substantially outweighs that in mitigation. But as explained, the ultimate determination of the appropriateness of the penalty and the subordinate determination of the balance of evidence of aggravation and mitigation do not entail the finding of facts that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed. Moreover, those determinations do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment that is outside the scope of *Ring* and *Apprendi*.

(*People v. Griffin* (2004) 33 Cal.4th 536, 595, internal citations omitted; see also *People v. Cox* (2003) 30 Cal.4th 916, 971-972; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 321.) For these reasons, the striking of any special circumstance would not require reversal because neither *Ring* nor *Apprendi* have any bearing on a California jury's penalty-phase determination.

Notwithstanding *Ring* or *Apprendi*, appellants both also claim that the federal Constitution forbids this Court from "reweighing" the aggravating evidence in any harmless error analysis once a special circumstance finding, or presumably any other evidence offered in aggravation, has been set aside. They are wrong. As this Court has held time and again, an invalid finding of one of several special circumstances does not warrant reversal of a death judgment where "there is no reasonable possibility that the error affected the penalty verdicts." (*People v. Rich* (1988) 45 Cal.3d 1036, 1114; see also *People v. Silva* (1988) 45 Cal.3d 604, 632-636; *People v. Allen* (1986) 42 Cal.3d 1222,

1281-1283.)

The jury properly considered all of the evidence in this case -- particularly appellants' personal involvement in Ms. Pontbriant's horrific murder and appellants' numerous prior acts of terror, violence, and brutality. The prosecution did not rely on any of the special circumstance findings as "factors in aggravation." The prosecutor *never* suggested in any way that the jurors should consider the various special circumstances as aggravating factors supporting a death verdict. Instead, the prosecution's penalty-phase argument focused on the horrible facts of the murder and on appellants' prior acts of violence. Accordingly, the jury "would not have given significant independent weight" to the burglary, robbery or attempted rape convictions themselves as opposed to the underlying facts supporting those convictions, which the jury could properly consider. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 512, citing *People v. Kelly, supra,* 1 Cal.4th at p. 551.) Moreover, even assuming some possible insufficiency as to the burglary special circumstance, the jury was instructed that they were to consider the burglary special circumstance merged into the robbery and attempted rape special circumstances. (CT 1187.)

There is simply no reasonable possibility that any invalidity as to any of the special circumstance findings affected the penalty verdict. Assuming any one of the special circumstances were to be set aside, this Court has "consistently found that an error of this nature is harmless" (*People v. Jones* (1991) 53 Cal.3d. 1115, 1148-1149; see, e.g., *People v. Hayes, supra,* 52 Cal.3d at p. 644; *People v. Hamilton* (1988) 46 Cal.3d 123, 151.) Appellants' claims should be rejected.

VIII.

THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION IN THIS CASE AND, IN ANY EVENT, ANY INSUFFICIENCY OF SUCH EVIDENCE WAS HARMLESS

Appellants each advance two related claims that (1) there was insufficient evidence to support a first-degree murder conviction based on premeditation and deliberation and that, therefore, (2) their first degree-murder convictions must be reversed because there is no way to determine whether they are based on an allegedly insufficient premeditation-and-deliberation theory or on an allegedly insufficient felony-murder theory. (Letner AOB, Args. X & XI, 305-315; Tobin AOB, Args. XI & XII, 205-214.) These claims fail for several reasons.

Letner and Tobin both rely on *People v. Anderson* (1968) 70 Cal.2d 15, where this Court described three types of evidence indicating premeditation and deliberation:

> (1) facts about how and 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--what 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 facts of type (1) or (3), would in turn support an inference that 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 his 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, original emphasis, internal quotes and citations omitted.)

This Court has subsequently clarified that the *Anderson* factors are not the exclusive means for establishing premeditation and deliberation. (*People*

v. Lenart (2004) 32 Cal.4th 1107, 1127; *People v. Perez* (1992) 2 Cal.4th 1117, 1125) For example, this Court has concluded that an execution-style killing, such as occurred in this case, may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive. (*People v. Hawkins, supra,* 10 Cal.4th at p. 957; *People v. Davis* (1995) 10 Cal.4th 463, 510-511.)

There is ample evidence here supporting an inference that Ms. Pontbriant's murder occurred as the result of preexisting reflection rather than an unconsidered or rash impulse. As discussed above, the evidence supports the finding that appellants brought Letner's buck knife to Ms. Pontbriant's home and that they entered the home intending to commit sexual assault or, at the least, robbery. Based on these facts, the jury could conclude that "when [appellants] entered [the] dwelling" and used the knife "to facilitate the commission of those crimes" they were in fact "motivated to kill [their] victim to eliminate her as a witness to those crimes." (*People v. Hughs* (2002) 27 Cal.4th 287, 371.)

As this Court also found in *Hughs*, "[t]he manner of killing also supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*Ibid.*) The facts here reveal that Ms. Pontbriant was (1) severely beaten, (2) stabbed repeatedly in the neck, and (3) bound and choked with the telephone cord. The facts further reveal that appellants then held Ms. Pontbriant down while they deliberately and methodically severed her spinal cord by carving deeply and repeatedly into the back of her neck. (RT 4897-4905, 4895-4907.) The manner of killing here leads to only one reasonable conclusion: after appellants finished their preliminary brutality -- the terrorization, the stripping, the beating, the frontal neck stabbing, and the binding – they deliberately, and with premeditation, held their victim down and nearly decapitated her. There can be no question that this

evidence sufficed to show premeditation and deliberation.

Finally, even assuming the premeditated and deliberate murder theory was somehow insufficient, it is certain that appellants' first-degree murder convictions did not rest solely on that theory. The jury found true as to both appellants the special circumstance allegations of felony-murder burglary, felony-murder robbery, and felony-murder attempted rape. (CT 981-983, 991-993.) These findings indicate that the jury did in fact find that appellants both were liable for first degree murder for committing murder while engaged in the commission of burglary, robbery, and attempted rape. As discussed at length above (Arg. IV), the evidence supports all of these special circumstance findings. However, even assuming one of the felony-murder findings was somehow insufficient, it is clear that the first-degree murder conviction rested, at least in part, on at least one valid felony-murder theory. Accordingly, any possible deficiency regarding premeditation and deliberation was necessarily harmless. (*People v. Hernandez* (1988) 47 Cal.3d 315, 351.)

IX.

THE JURY WAS PROPERLY INSTRUCTED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE AND, IN ANY EVENT, ANY ERROR IN THESE INSTRUCTIONS WAS HARMLESS

Appellants both argue that their murder convictions must be reversed because the standard CALJIC instructions given on the natural and probable consequences doctrine were "hopelessly confusing." They further claim that liability for murder under the natural and probable consequences doctrine is constitutionally infirm. (Letner AOB, Arg. XII, 316-325; Tobin AOB, Args. XIII & XIV, 215-224.) Neither claim has merit.

The trial court instructed the jurors, pursuant to CALJIC 3.02, that:

> One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, 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 1, 2, 3, 4, 5 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 a defendant was an aider and abetter or the actual killer but you are unable to decide which, then you must also find beyond a reasonable doubt that a defendant intended either to kill a human being or to aid another in the killing of a human being in order to find the special circumstance to be true.

(CT 817.)

Appellants' constitutional challenge rests on the bare assertion that jurors might somehow conclude that murder liability could be based on mere negligence. This Court has expressly rejected this same argument in *People v. Coffman, supra,* 34 Cal.4th 1:

> [W]e reject the premise of Coffman's argument that the application of the natural and probable consequences doctrine in capital cases unconstitutionally predicates murder liability on mere negligence.

> Liability as an aider and abettor requires knowledge that the perpetrator intends to commit a criminal act together with the intent to encourage or facilitate such act; in a case in which an offense the perpetrator actually commits is different from the originally intended crime, the natural and probable consequences doctrine limits liability to those offenses that are reasonably foreseeable consequences of the act originally aided and abetted.

(*Id.*, at p. 96.) Appellants provide no reason to question this Court's previous resolution of this issue. Any such attempt would be futile. After all, the instruction plainly stated that liability under this theory requires a defendant (1) to know of the underlying crime his confederates are contemplating and (2) to have "knowingly and intentionally aided and abetted" that crime. (CT 817.) There is no chance anyone would mistakenly believe that murder liability could be predicated on mere negligence.

Appellants' claim that the instruction was impermissibly confusing is equally baseless. In addressing claims of allegedly ambiguous or "confusing" jury instructions, the reviewing court inquires "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; quoting *Boyde v. California* (1990) 494 U.S. 370, 380.) This Court has expressly stated that this standard is applicable when reviewing possible confusion resulting from instructions on the natural and probable consequences doctrine. (*People v. Prettyman, supra,* 14 Cal.4th at p. 272.)

There is no such chance here. The jurors were told that they had to determine whether "the crimes charged in Counts 1, 2, 3, 4, 5 and the lesser included offenses were natural and probable consequences of [appellants'] originally contemplated crimes." The trial court then went on to define for the jury the elements of each and every "target" offense appellants might have contemplated short of murder. (CT 827-842, 885-890.) These instructions, taken as a whole, would have informed any rational juror that appellants had to

have knowingly and intentionally aided and abetted one or more of these lesser "target" offenses to be liable for murder under the natural and probable consequences doctrine.

In any event, any error in this instruction was harmless because appellants' murder verdicts were not based on the natural and probable consequences doctrine. The instruction itself informed the jury that this doctrine was "not applicable to the special circumstances charged." The instruction clearly stated that, to find true any of the special circumstance allegations, the jurors had to find beyond a reasonable doubt that appellants actually intended either "to kill a human being or to aid another in the killing of a human being. . . ." (CT 817.) The jurors were again instructed, pursuant to CALJIC 17.10, that the special circumstances required a finding that each appellant "intended to kill a human being or to aid another in the killing of a human being . . . ." (CT 872.)

Because the jury found all of the special circumstances to be true, the natural and probable consequences doctrine had no bearing on any of the verdicts here. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 96 [by finding the special circumstances true, the jury necessarily found defendant possessed the intent to kill].) Again, appellants' claims must be rejected.

X.

THE TRIAL COURT'S INSTRUCTION ON VOLUNTARY INTOXICATION WAS, AT WORST, HARMLESS

At the close of the guilt-phase trial, the jury was given the following instruction on voluntary intoxication:

> Evidence has been presented concerning the voluntary intoxication of the defendant. This evidence may affect your verdict as to count one in several ways:
>
> 1. 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.
>
> 2. If, due to evidence of the defendant's intoxication, you have reasonable doubt that he formed the specific intent to commit robbery, burglary, or rape, you may not convict him of (those offenses) first degree murder based on the felony murder rule.
>
> 3. If, due to evidence of the defendant's intoxication, you have reasonable doubt that the killing was the result of premeditation and 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.
>
> 4. If, due to evidence of the defendant's intoxication, you have a reasonable doubt that the defendant harbored malice, you may not convict him of murder in any degree.
>
> 5. If, due to evidence of the defendant's intoxication, you have a reasonable doubt that the defendant harbored malice, but find beyond a reasonable doubt that the killing was intentional and unlawful, he is guilty of voluntary manslaughter.

(CT 820.)

Appellants both argue that their murder convictions must be reversed because of alleged defects in this instruction. They claim that: (1) the

instruction's use of the term "defendant," stated in the singular, somehow "encouraged the jury to treat them as fungible entities," and ; (2) the instruction failed to inform the jurors of the possible effect of voluntary intoxication on aiding and abetting liability. (Letner AOB, Arg. XIII, 326-334; Tobin AOB, Arg. XV, 225-231.) Again, appellants' claims fail for several reasons.

First, the use of the term "defendant," rather than "defendants," could not have had the dire results appellants imagine. The jurors were instructed that "the word 'defendant' applied equally to each defendant." (CT 778) They were further told that they were to "decide separately whether each of the defendants is guilty or not guilty." (CT 891.) There is nothing to suggest the jurors failed to follow these instructions. (*People v. McLain*, *supra*, 46 Cal.3d at pp. 119-120.) Even without these warnings, there is no chance any reasonable juror would have viewed appellants as "fungible entities" for purposes of their guilt and penalty determinations. (See *Estelle v. McGuire, supra*, 502 U.S. at p. 72; *Boyde v. California*, *supra*, 494 U.S. at p. 380.)

Moreover, although appellants are correct that voluntary intoxication can be relevant to the specific intent required for aiding and abetting (see *People v. Mendoza, supra,* 18 Cal.4th 1114), there is nothing to suggest that either of them requested an instruction on this point. Trial courts have no sua sponte duty to give instructions relating evidence of voluntary intoxication to the question of a defendant's mental state or to clarify or elaborate the voluntary intoxication instructions it has given. (*People v. Lewis* (2001) 25 Cal.4th 610, 650; *People v. Ervin, supra,* 22 Cal.4th at pp. 90-91; *People v. Clark* (1993) 5 Cal.4th 950, 1021-1022; *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) Because appellants did not request any such instruction, their present claims are waived.

In any event, the failure to instruct on the effect of voluntary intoxication on aiding and abetting was necessarily harmless. The jurors were given the

following instruction on voluntary intoxication regarding the special circumstance allegations:

> Evidence of the defendants' voluntary intoxication may also be relevant to your determination of the special circumstance allegation. If, due to evidence of defendant's intoxication, you have a 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 allegation not true.

(CT 821.)

Because the jury found all the special circumstances true, they necessarily found that voluntary intoxication did not preclude appellants from each personally forming the intent to kill and the intent to commit the underling felonies. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 96.)

XI.

FELONY MURDER IS NOT A "SEPARATE OFFENSE" FROM MURDER WITH MALICE AFORETHOUGHT, REQUIRING A SEPARATE ACCUSATION IN THE CHARGING INFORMATION OR A UNANIMOUS JURY DETERMINATION ON A FELONY-MURDER THEORY

Appellants next argue that (1) the trial court lacked jurisdiction to try them for the "uncharged crime" of first-degree felony murder; (2) the information failed to put them on notice that the prosecution planned to proceed under a first-degree felony-murder theory; (3) the felony-murder instructions violated their right to have all elements of the charged crime proved beyond a reasonable doubt; and (4) charging both malice murder and felony murder in one count of the information violated their right to a unanimous verdict and unconstitutionally subjected them to double jeopardy. (Letner AOB, Arg. XIV, 335-346; Tobin AOB, Arg. XVI, 232-241.)

In *People v. Hughes*, *supra*, 27 Cal.4th 287, this Court rejected these identical claims for the following reasons:

> All of defendant's various claims rest upon the premise that under *People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 697] (*Dillon*), felony murder and premeditated murder are separate crimes, and that *Dillon* implicitly overruled *People v. Witt* (1915) 170 Cal. 104 [148 P. 928], in which we held that a defendant may be convicted of felony murder even though the information charged only murder with malice.
>
> As the People observe, numerous appellate court decisions have rejected defendant's jurisdictional argument. (*People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1097 [31 Cal.Rptr.2d 764]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 453-457 [284 Cal.Rptr. 579]; *People v. Scott* (1991) 229 Cal.App.3d 707, 712-718 [280 Cal.Rptr. 274]; *People v. Watkins* (1987) 195 Cal.App.3d 258, 264-268 [240 Cal.Rptr. 626].) We have rejected defendant's argument that felony murder and murder with malice are separate offenses (*Carpenter*, *supra*, 15 Cal.4th 312, 394-395 [it is unnecessary for jurors to agree unanimously on a theory of first degree murder]; *People v. Guerra* (1985) 40 Cal.3d 377, 386 [220

> Cal.Rptr. 374, 708 P.2d 1252] [same]), and, subsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt, supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. Thus we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately. (E.g., *People v. Diaz* (1992) 3 Cal.4th 495, 557 [11 Cal.Rptr.2d 353, 834 P.2d 1171] (*Diaz*); *People v. Gallego* (1990) 52 Cal.3d 115, 188 [276 Cal.Rptr. 679, 802 P.2d 169] (*Gallego*).)
>
> As we observed in *Diaz*, *supra*, 3 Cal.4th 495, "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." (*Id.*, at p. 557.) In the present case, defendant received adequate notice: (i) the preliminary hearing testimony made clear the prosecution's intent to establish that defendant killed during the commission of a burglary and a robbery; (ii) the information charged defendant with robbery, burglary, and sodomy, and (iii) the evidence at trial alerted defendant to the felony-murder theory. Even now, defendant does not explain in what manner he might have been prejudiced by the absence of a separate felony-murder charge. We conclude that defendant received constitutionally adequate notice of the prosecution's felony-murder theory. (*Diaz*, *supra*, 3 Cal.4th 495, 557; *Gallego*, *supra*, 52 Cal.3d 115, 188-189.)
>
> In summary, we reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*People v. Hughes*, *supra*, 27 Cal.4th at pp. 369-370; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 712 [felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded, and jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation].)

Appellants provide no basis to distinguish their cases from *Hughes* or

Nakahara. Nor do they provide any reason to question this Court's resolution of these claims in *Hughes* or *Nakahara*. Accordingly, respondent submits that appellants' various claims about first-degree felony murder somehow being a "separate offense" should be rejected for the same reasons enunciated in *Hughes* and *Nakahara*.

XII.

APPELLANTS' VARIOUS CLAIMS OF GUILT-PHASE INSTRUCTIONAL ERROR SHOULD BE DENIED FOR THE SAME REASONS THIS COURT HAS DISPOSITIVELY REJECTED THEM MANY TIMES BEFORE

A. CALJIC 2.03 And 2.06

Appellants claim that the trial court erred in giving the standard instructions on consciousness of guilt set forth in CALJIC 2.03[110] and 2.06[111], which told the jury that false statements or attempts to destroy evidence may indicate consciousness of guilt, but that such conduct is insufficient by itself to prove guilt. Appellants argue that these instructions created improper inferences and were impermissibly argumentative. (Letner AOB, Arg. XV,

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110. Pursuant to CALJIC 2.03, the jury was told:

> If you find that before this trial a defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a 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.

(CT 783.)

111. Pursuant to CALJIC 2.06, the jury was told:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying 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 the killing was deliberate and premeditated, and its weight and significance, if any, are matters for your consideration.

(CT 1641.)

347-356; Tobin AOB, Arg. XVII, 242-249.)

This Court has repeatedly and consistently rejected both of these claims. (See, e.g., *People v. Hughes, supra,* 27 Cal.4th at p. 348; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224; *People v. Johnson* (1992) 3 Cal.4th 1183, 1235; *People v. Kelly, supra,* 1 Cal.4th at pp. 531-532; *People v. Breaux* (1991) 1 Cal.4th 281, 303-304; *People v. Nicolaus* (1991) 54 Cal.3d 551, 578-579; *People v. Crandell* (1988) 46 Cal.3d 833, 871.)

B. CALJIC 2.51

Appellants also claim that the standard CALJIC 2.51[112] instruction, relating to motive, requires reversal because the instruction allegedly shifted the prosecution's burden and somehow allowed appellants to be convicted based on motive alone. (Letner AOB, Arg. XVIII, 374-378; Tobin AOB, Arg. XXI, 262-264.) Again, this Court has repeatedly and consistently rejected these precise claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Snow, supra,* 30 Cal.4th at pp. 97-98; *People v. Prieto, supra,* 30 Cal.4th at p. 254; see also *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1497.)

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112. Pursuant to CALJIC 2.51, the jury was told:

> 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.

(CT 802.)

C. Various Standard Instructions As Somehow "Diluting" The Requirement Of Proof Beyond A Reasonable Doubt

Applying the "shotgun" approach, appellants also both challenge a number of standard CALJIC instructions. (See CALJIC 1.00 [CT 773-774], CALJIC 2.01 [CT 780-781], CALJIC 2.02 [CT 782], CALJIC 2.21.2 [CT 795], CALJIC 2.22 [CT 796], CALJIC 2.90 [CT 814], CALJIC 8.83 [CT 877-878], CALJIC 8.83.1 [CT 879-880].) Appellants perfunctorily claim that these standard instructions, when taken in conjunction, somehow "diluted" the requirement of proof beyond a reasonable doubt and, therefore, amounted to error of constitutional proportions. (Letner AOB, Arg. XX, 386-393; Tobin AOB, Arg, XXII, 265-270.)

Again, this Court has repeatedly and consistently rejected all of these claims as to each of these instructions. (See, e.g., *People v. Stewart* (2004) 33 Cal.4th 425, 521; *People v. Nakahara, supra,* 30 Cal.4th at pp. 713-715; *People v. Crew* (2003) 31 Cal.4th 822, 847-848; *People v. Maury, supra,* 30 Cal.4th at pp. 428-429; *People v. Snow, supra,* 30 Cal.4th at pp. 95-96; *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054; see also *People v. Wade, supra,* 39 Cal.App.4th at pp. 1491-1496.)

Appellants provide no reason why this Court's repeated and consistent prior resolutions of *any* of these claims of instructional error were wrong. Nor do appellants offer any persuasive reason why any of these earlier findings should be reconsidered.

Accordingly, respondent submits that all of these well-worn claims of instructional error should be rejected summarily. However, in the event this Court may wish further briefing as to any of these matters, respondent is prepared to submit expeditious supplemental briefing including detailed legal analysis as to any of these claims. Because each of these claims appear to have been resolved dispositively, respondent has not included such detailed analyses

here in an effort to conserve increasingly scarce and costly resources.

XIII.

THE CALJIC 2.15 INSTRUCTION GIVEN HERE WAS PERMISSIBLE AND WAS, AT WORST, HARMLESS

The jury here was given the following instruction, pursuant to CALJIC 2.15, about the permissible inference of guilt when one is found in possession of recently stolen property.

> 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, 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 stolen property, any other evidence which tends to connect the defendant with the crime charged.

(CT 791.)

Appellants both claim that the trial court violated several constitutional guarantees by giving this instruction. In this regard, appellants argue that this instruction created an impermissible inference of guilt. They claim that this impermissible inference shifted or somehow lightened the prosecution's burden of proof for robbery because possessing stolen property cannot, by itself, create a rational inference that the stolen property was acquired by means of robbery rather than by mere theft. Appellants also both claim, apparently, that the evidence was legally insufficient to warrant this instruction. (Letner AOB, Arg. XVI, 357-367; Tobin AOB, Arg. XVIII, 250-256.)

A. The Trial Court Properly Instructed Pursuant To CALJIC 2.15

A jury instruction is constitutionally sound if it creates a permissive inference that allows, but does not require, the jury to infer an essential fact from proof of another fact so long as the inferred fact is more likely than not to flow from the proved fact on which it is made to depend. (*Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 (internal quotes and citations omitted), cert. denied, 506 U.S. 1052 (1993).) Accordingly, California courts, as well as the United States Supreme Court, have long held that it is constitutionally permissible to instruct a jury that an inference of guilty knowledge may be drawn from a defendant's unexplained possession of recently stolen property. (*Barnes v. United States* (1973) 412 U.S. 837, 845-846; *People v. Roder* (1983) 33 Cal.3d 491, 506; *People v. Vann* (1974) 12 Cal.3d 220, 224-225; *People v. McFarland* (1962) 58 Cal.2d 748, 755.)

CALJIC 2.15 does not shift the burden of proof or impair the presumption of innocence because the prosecution must still prove to the jury the defendant's guilt beyond a reasonable doubt. (*Barnes v. United States*, *supra*, 412 U.S. at 846 n.11; *People v. McFarland*, *supra*, at p. 756.) The CALJIC 2.15 instruction given here creates only a permissive inference, one the jury may either credit or reject based on its evaluation of the evidence. This instruction, therefore, did not relieve the prosecution of any burden of establishing guilt beyond a reasonable doubt. (*People v. Roder*, *supra*, 33 Cal. 3d at pp. 497-498.)

Indeed, this Court has repeatedly found that CALJIC 2.15 is properly given with respect to charges of theft-related offenses such as robbery. (See *People v. Prieto, supra,* 30 Cal.4th at p. 249 [proper with respect to burglary or robbery]; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977 [same]; *People v. Holt* (1997) 15 Cal.4th 619, 677 [same]; *People v. Johnson* (1993) 6 Cal.4th 1,

35-38 [burglary].) Indeed, this instruction has been uniformly upheld against this same constitutional attack where, as here, the theft-related offense set out in the instruction was itself the predicate felony for a felony-murder charge and constituted the basis for a murder conviction on that theory. (*People v. Mendoza, supra,* 24 Cal.4th at pp.176-177; *People v. Smithey*, *supra*, at pp. 975-978; *People v. Holt*, *supra*, at p. 677; *People v. Johnson*, *supra*, at pp. 37-38.) Accordingly, the CALJIC 2.15 instruction given here did not deprive Letner or Tobin of any constitutional right.

B. The Evidence Supported The CALJIC 2.15 Instruction

Citing *People v. Morris* (1988) 46 Cal.3d 1, Letner and Tobin both claim, perfunctorily, that the evidence did not warrant this CALJIC 2.15 instruction because the evidence did not necessarily show they committed robbery. Again, appellants' claims fall well off the mark.

As this Court found in *Morris*, where evidence relating to "possession [of recently stolen property] is conflicting or unclear, an unqualified instruction pursuant to CALJIC No. 2.15 should not be given, for it could easily mislead the jury into assuming that the defendant's possession has been established when, in actuality, the issue is in doubt." (*Id.*, at p. 40.) However, this rule does not apply where, as here, there is ample evidence to show that the defendants knowingly possessed recently-stolen property. (*People v. Holt*, *supra*, at pp. 676-677; *People v. Johnson*, *supra*, at pp. 35-38.)

The evidence here was more than sufficient in this regard. After all, the facts established, among many other things, (1) that Letner and Tobin both needed a car to make their way to Iowa, (2) that they both went to their victim's home on the night of the murder, (3) that they were both in their victim's stolen car together shortly after the murder, and (4) that they both had their personal belongings stowed in the car. There could be no serious question that

appellants both knowingly possessed stolen property.

Under these circumstances, the CALJIC 2.15 instruction is properly given as relating to robbery where, as here, the jury:

> was also instructed on all of the required elements of . . . robbery and was expressly told that in order to prove [that] crime[], each of the elements must be proved. We see no possibility that giving the jury the additional admonition that it could not rely solely on evidence that defendant possessed recently stolen property would be understood by the jury as suggesting that it need not find all of the statutory elements of . . . robbery had been proven beyond a reasonable doubt.

(*People v. Smithey*, *supra*, at p. 977, quoting *People v. Holt*, *supra*, 15 Cal.4th at p. 677.)

Indeed, as this Court further held in *Smithey*:

> In other words, the jury rationally could connect this evidence to guilt of robbery and burglary. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 157, 99 S.Ct. 2213.) Therefore, the trial court did not err in giving this instruction. Moreover, as in *Holt*, the jury was instructed on all the required elements of burglary and robbery, and was told expressly that in order to prove those crimes, each of the elements must be proved. As in *Morris*, other instructions cautioned the jurors that they should disregard any instruction that applied to or suggested facts they determined did not exist. Considering the instructions in their entirety, as we must (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1248, 74 Cal.Rptr.2d 212, 954 P.2d 475), we find no possibility that instructing the jurors pursuant to CALJIC No. 2.15 suggested that they need not find that all the statutory elements of burglary and robbery had been proven beyond a reasonable doubt . . . .

(*People v. Smithey*, *supra*, at p.978.)

The same conclusion follows here. The evidence of appellants' presence in their victim's stolen car -- shortly after the murder -- combined with the other graphic evidence of appellants' robbery and murder, was more than sufficient to support the CALJIC 2.15 instruction.

C. Any Possible Error Regarding CALJIC 2.15 Was Harmless

As this Court recently found in *People v. Coffman, supra,* 34 Cal.4th 1, even an improper CALJIC 2.15 instruction is harmless where there is "no reasonable likelihood of a more favorable outcome . . . had the instruction not been given." (*Id.*, at p. 102, citing *People v. Prieto*, *supra*, 30 Cal.4th at p. 249.)

As was true in *Coffman*, the evidence of appellants' guilt was truly overwhelming. Moreover, as in *Coffman*, the trial court here gave the same "panoply of other instructions that guided the jury's consideration of the evidence." (*People v. Coffman*, *supra*, at p. 102; see also CALJIC 2.90 [presumption of innocence and reasonable doubt standard of proof], 2.00 [defining direct and circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent], 3.31 [requirement of union of act and specific intent], 1.01 [duty to consider instructions as a whole].)

Unlike in *Coffman*, however, the CALJIC 2.15 instruction at issue here could not have misled the jury because it did not vaguely relate only to "charged offenses." The instruction here was specifically, and correctly, tailored to the sole theft-related crime of robbery. However, even assuming this instruction was somehow improper, it was perforce harmless. The instruction related only to robbery. Once the jurors found appellants responsible for this horrible killing, they could not help but also conclude that, based on the evidence, they also robbed their victim. Any error in giving CALJIC 2.15 was, at worst, harmless beyond a reasonable doubt.

XIV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY UNDER CALJIC 2.50, AND ANY POSSIBLE ERROR IN THIS INSTRUCTION WAS HARMLESS

The jurors were instructed pursuant to CALJIC 2.50 that they could, but were not required to, use evidence of uncharged offenses for the sole purpose of finding motive for flight or facilitation of flight. Specifically, the jurors here were told:

> Evidence has been introduced showing that a 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 the defendant is a person of bad character or that he has 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 (1) motive for flight or (2) to facilitate flight from crime.

(CT 800)

Appellants claim that this instruction violated due process because it somehow led to impermissible inferences of motive. Appellants' claim of "constitutional error" is unclear. Letner and Tobin appear to speculate that the jury might have viewed this instruction as applying to uncharged offenses unrelated to flight -- such as their prior burglaries or Tobin's fight with Mayberry in the days before the murder. They apparently argue that, *if* the jury might have viewed these instances of uncharged misconduct under this instruction, their convictions must be reversed as possibly being based on an improper inference of motive, intent, or identity. (Letner AOB, Arg. XVII, 368-373; Tobin AOB, Arg. XIX, 257-261.)

As this Court found in *People v. Catlin* (2001) 26 Cal.4th 81, jurors would not understand CALJIC 2.50 as permitting a conviction based on

evidence of a defendant's criminal propensity. Nor does the instruction otherwise relieve the prosecution of its full burden of proof. (*Id.*, at p. 147.)

Moreover, to the extent that the instruction failed to specify "exactly what type of other-crimes evidence could be considered," appellants cannot show "a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Boyde v. California*, *supra*, 494 U.S. at p. 380.) The instruction expressly told the jurors that evidence of uncharged crimes could be considered *only* "to show (1) motive for flight or (2) to facilitate flight from crime." The jurors are presumed to have followed this limiting instruction. (*People v. McLain*, *supra*, 46 Cal.3d at pp. 119-120.)

The only evidence of uncharged crimes tending to show a motive to flee or an effort to facilitate flight from the murder was (1) the presence of stolen merchandise in the car's trunk and (2) appellants breaking and entry into the vacant house on South Crenshaw in the hours after the murder and, (3) arguably, Letner's citation for driving his victim's car without a license shortly after the murder. (RT 6170-6173, 6205-6212, 6531-6532, 6537.) These instances fairly reflected an underlying motive to flee, or to facilitate flight from, the murder. A rational juror would not have confused this instruction to impute a general motive to commit crime based on unrelated instances of uncharged misconduct.

Furthermore, even if the jury was somehow confused by the instruction's failure to enumerate the specific instances that might be considered, any error was, at worst, harmless beyond a reasonable doubt. Again, the instruction expressly said that evidence of uncharged crime could be considered for the sole purpose of tending to show motive for flight. The jury was further instructed that:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime which has been committed is not sufficient

> in and of itself to establish guilt, but is a fact which, if proved, may be considered by you in light of all the other facts in deciding the question of guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination.

(CT 803.)

Evidence of appellants' uncharged instances of misconduct had little if any bearing on the determination of flight. Even without any such evidence, any reasonable juror would have found that Letner and Tobin both fled the state to avoid apprehension for the murder. In the hours immediately after the murder, appellants both abandoned their apartment and their belongings, held up overnight in a vacant house, and then desperately hitchhiked across the country with nothing but the clothes on their backs. Based on these facts alone, anyone would realize (1) that appellants both fled and (2) that their flight overwhelmingly established a consciousness of guilt. Under the circumstances, "there is no reasonable possibility that the jury considered" any uncharged misconduct "in making its determinations, in accordance with CALJIC No. 2.50, on the issues of" motive for flight. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 147, citing *Chapman*, *supra*, 386 U.S. at 24; see also *People v. Padilla* (1995) 11 Cal.4th 891, 951 [claim of error with respect to CALJIC 2.50 harmless where the likelihood of the jury using other-crimes evidence for an improper purpose was minimal].) Appellants' challenge to the CALJIC 2.50 instruction here must be rejected.

XV.

THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY ON ADOPTIVE ADMISSIONS AND, IN ANY EVENT, ANY ERROR REGARDING EVIDENCE OF AN "ADOPTIVE ADMISSION," OR INSTRUCTIONS RELATING THERETO, WAS HARMLESS

Tobin complains that the trial court somehow violated a host of his constitutional rights by failing to give a sua sponte instruction on adoptive admissions. In particular, he claims that the jury should have been instructed, pursuant to CALJIC 2.71.5, that Letner's statement to Officer Wightman -- that Letner was driving Tobin home -- could be used against Tobin only for the limited purpose of an adoptive admission. (Tobin AOB, Arg. XXIII, 271-272.) In a separate argument, Tobin also complains that the trial court erred prejudicially by allowing evidence of Letner's statement about driving Tobin home. (Tobin AOB, Arg, XXXIII, 325-330.) Neither claim is persuasive.

As Tobin acknowledges, although the trial court offered to give such an instruction (RT 6128), he did not take advantage of this offer. Having failed to request such an instruction, Tobin cannot complain now. As this Court expressly found in *People v. Carter* (2003) 30 Cal.4th 1166, "a trial court must give CALJIC No. 2.71.5 [on adoptive admissions] only when the defendant requests it." (*Id.*, at p. 1198.)

Tobin also complains that the trial court erred in allowing evidence of Letner's statement to Officer Wightman about taking Tobin home. (See RT 6151.) Tobin claims that this statement should have been excluded because it did not meet the foundational requirements of an adoptive admission. (See Evid. Code, § 1221.)

Tobin cannot have it both ways. If Tobin believed that the jury might view his failure to respond to Letner's equivocal statement as somehow being an "admission" of something, Tobin should have taken advantage of the court's

offer to give a limiting instruction on the matter.[113] If Tobin is correct that his failure to respond to Letner's statement *could not* be viewed as an adoptive admission, he has no basis to complain about this evidence.

In any event, Letner's statement about driving Tobin home was harmless. During the traffic stop, Tobin also personally told Officer Wightman that he was going to his home on South Crenshaw, where he lived with "Jeanette." (RT 6167.) This obvious lie from Tobin's own lips was far more damaging than Letner's statement. Moreover, neither of these statements had any bearing upon Tobin's verdict. The evidence linking Tobin to the murder, as one of the actual perpetrators, was overwhelming. There is no chance the outcome here would have been different if the jury never heard that Letner told the officer he was driving Tobin home. Even assuming this statement might somehow be construed as an "accusation" against Tobin for purposes of adoptive admissions, this minuscule bit of evidence was "harmless under any standard." *(People v. Carter, supra,* 30 Cal.4th at p. 1198.)

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113. Defense counsel's choice not to request this offered instruction was a reasonable strategic decision under the circumstances. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) No juror was likely to conclude independently that Tobin's failure to "respond" to Letner's statement amounted to an "admission" of any kind. An instruction to view this statement as an "adoptive admission" would have, therefore, served only to focus attention on a possible inference the jurors would have been extremely unlikely to have ever considered without an instruction pointing them in that direction.

XVI.

RECKLESS INDIFFERENCE TO HUMAN LIFE IS NOT AN "ADDITIONAL" ELEMENT OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE

Appellants next advance the novel claim that California's felony-murder special circumstance requires, in all cases, an express jury determination that the defendant acted "with reckless indifference to human life." (See § 190.2, subd. (a)(17), (c), (d).) Citing *Tison v. Arizona* (1987) 481 U.S. 137, and *Enmund v. Florida* (1982) 458 U.S. 782, appellants argue that the federal Constitution requires a finding of reckless indifference, *in addition* to a finding that the defendant was the actual killer or intended to kill, before liability can attach under California's felony-murder special circumstance provisions. Because the jury here was not instructed on the need for a finding of reckless indifference, appellants claim their death judgments must be reversed. (Letner AOB, Arg. XXI, 394-412; Tobin AOB, Arg. XXIV, 273-280.)

Appellants' interpretation of *Enmund* and *Tison* is faulty. As the *Tison* Court expressly found:

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence--the taking of human life--the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Tison v. Arizona*, *supra*, at pp. 157-158.)

This reasoning makes clear that the requisite level of culpability for capital punishment is present where the defendant *either* (1) intended to kill *or* (2) acted with reckless disregard to human life while engaged in a felony. Reckless indifference is not, therefore, an *additional element* but rather is an

alternative means of finding a defendant to be death eligible.

Appellants also claim that reckless disregard is required even where a defendant personally kills while committing a felony. *Enmund* itself forecloses this claim. As the *Enmund* Court found, a defendant may be subject to the death penalty where he actually kills during a robbery. (*Enmund v. Florida*, *supra*, at p. 798.) Simply put, a defendant cannot personally kill while committing an inherently dangerous felony without exhibiting, at minimum, a reckless indifference to human life sufficient to warrant death eligibility.

Moreover, even assuming a finding of reckless indifference were required, any error in this case was harmless. (*Chapman*, *supra*, 386 U.S. at 24.) Ms. Pontbriant's murder was no accident. Once the jurors found appellants both responsible for this particularly brutal killing, they could not help but also find that they both acted with, at minimum, a reckless indifference to human life.

XVII.

ANY ERROR IN FAILING TO GIVE ACCOMPLICE INSTRUCTIONS WAS HARMLESS

Letner argues that the trial court erred prejudicially in failing to give sua sponte guilt-phase instructions, pursuant to CALJIC 3.18, that Tobin was an accomplice whose testimony should be viewed with distrust. (Letner AOB, Arg. XIX, 379-385.) Tobin, in turn, claims that the trial court erred in failing to give sua sponte accomplice instructions with respect to Letner's penalty-phase testimony. (Tobin AOB, Arg. XXV, 281-286.)

Letner appears to be correct that such sua sponte instruction was necessary because Tobin was an accomplice, whose testimony might have been "subject to the taint of an improper motive, i.e., that of promoting his . . . own self interest by inculpating the defendant." (*People v. Box* (2000) 23 Cal.4th 1153, 1209, quoting *People v. Guiuan* (1998) 18 Cal.4th 558, 568.) Accordingly, "the trial court should have instructed the jury to view [Tobin's] testimony with care and caution to the extent it tended to incriminate [Letner]." (*People v. Box*, *supra*, at p. 1209.)

Such error is harmless, however, where "it is not reasonably probable that the jury would have reached a result more favorable to defendant had it been instructed to view with care and caution that portion of [the codefendant's] testimony that inculpated defendant." (*Ibid*, citing *People v. Arias* (1996) 13 Cal.4th 92, 143; *People v. Mincey* (1992) 2 Cal.4th 408, 461.) There is no such chance here. As was true in *Box*, the evidence clearly established that Letner and Tobin were together at the murder scene, and the jury was certainly aware that appellants had every motive to shift blame to each other. (*People v. Box*, *supra*, at p. 1209.) Moreover, the evidence overwhelmingly established Letner's guilt without Tobin's testimony. Indeed, although Tobin sought to exculpate himself, he did not seek directly to

inculpate Letner.

More importantly, the jury did not need an instruction to realize that Tobin's testimony should be distrusted. That fact was obvious. Indeed, the jury's across-the-board findings of guilt and special circumstances as to Tobin reveals that the jurors necessarily rejected Tobin's testimony. Letner was not harmed by the failure to give accomplice instructions.

Despite Tobin's claim to the contrary, the judge had no sua sponte duty to advise the jurors to view Letner's *penalty-phase* testimony with distrust. Ordinarily, a trial court must instruct the jury sua sponte with CALJIC No. 3.18 when an accomplice's testimony is admitted into evidence in the penalty-phase trial. (*People v. Carter, supra,* 30 Cal.4th at p. 1223; *People v. Mincey*, *supra*, 2 Cal.4th at p. 461; *People v. Andrews* (1989) 49 Cal.3d 200, 214, 260.) This rule is inapplicable, however, when:

> the penalty phase accomplice testimony relates to an offense of which the defendant has already been convicted. (*People v. Easley* (1988) 46 Cal.3d 712, 734, 250 Cal.Rptr. 855, 759 P.2d 490; *People v. Williams*, *supra*, 16 Cal.4th at p. 276, 66 Cal.Rptr.2d 123, 940 P.2d 710.) In such circumstances, we reasoned, a jury has already found the defendant guilty beyond a reasonable doubt of the offense and thus no further cautionary instruction is required as to that offense. (*Easley*, at p. 734, 250 Cal.Rptr. 855, 759 P.3d 490; *Williams*, at p. 276, 66 Cal.Rptr.2d 123, 940 P.2d 710.)

(*People v. Carter*, *supra*, 30 Cal.4th at p.1223.)

Such was the case here. Tobin complains that accomplice instructions were necessary because Letner's penalty-phase testimony sought to blame Tobin exclusively for the murder. However, by that time the jury had already found Letner and Tobin both guilty of the murder and found all the special circumstances applicable to both Letner and Tobin. Accordingly, the jury did not need to be cautioned as to Letner's testimony.

In any event, Tobin was not harmed. The jury's penalty finding of death as to Letner reveals that they rejected Letner's far-fetched and transparently

self-serving attempt to foist all responsibility for the murder onto Tobin. There is no reasonable likelihood that Tobin would have fared better had the jury been told to view Letner's testimony with caution.

XVIII.

APPELLANTS FAIL TO ESTABLISH PROSECUTORIAL MISCONDUCT

Appellants next purport to find "pervasive" prosecutorial misconduct throughout this case where, in fact, virtually none exists. (Letner AOB, Arg. XXII, 413-417; Tobin AOB, Arg. XXVII, 289-292.) Appellants' several allegations of misconduct are for the most part waived and are all unfounded. Moreover, to the extent that the prosecutor here did anything improper, her actions fell considerably short of prejudicial misconduct. In the following, respondent shall address each of appellants' several misconduct claims.

A. Controlling Legal Standards

The applicable federal and state standards regarding prosecutorial misconduct are well established: A prosecutor commits misconduct under the federal Constitution only when her behavior 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. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Samayoa* (1997) 15 Cal.4th 795; *People v. Hill* (1998) 17 Cal.4th 800, 819.) Additionally, under state law, such misconduct does not warrant reversal unless there is a reasonable likelihood that it affected the jury's evaluation of the evidence or the rendering of its verdict. (*People v. Hines* (1997) 15 Cal.4th 997, 1037-1038; *People v. Espinoza* (1992) 3 Cal.4th 806, 821; *People v. Strickland* (1974) 11 Cal.3d 946, 955; *People v. Watson* (1956) 46 Cal.2d 818, 835.)

Additionally, a defendant generally may raise a claim of prosecutorial

misconduct on appeal only by timely objecting to the challenged conduct at trial and requesting an admonition to cure any harm. (*People v. Frye, supra,* 18 Cal.4th at p. 969.) This rule does not apply, however, if a challenge at trial would have been futile, if the trial court deprived the defense of an opportunity to request an admonition by immediately overruling the objection, or if an admonition would not have cured the harm. (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821; accord, *People v. Frye*, *supra*, 18 Cal.4th at p. 970.)

B. Allegedly Improper Cross-Examination And Argument Regarding "Instant Death"

During an in limine hearing, the prosecutor requested to introduce two witnesses to testify about how Letner and Tobin had previously discussed and practiced an "instant death" martial arts technique. Appellants had explained that this technique involved cutting someone on the sides of the neck and stabbing the base of the skull. (RT 5049-5052.) The trial court excluded testimony from these witnesses under Evidence Code section 352. (RT 5068-5069.)

During the prosecutor's guilt-phase cross-examination of Tobin, the following occurred:

> The Prosecutor: There is a term in karate that is known as instant death, isn't there?
>
> Tobin's Counsel: Your Honor, I'm going to object to the question.
>
> The Court: Overruled.
>
> Tobin: I don't know if there is or not.
>
> The Prosecutor: You have never heard of instant death being caused by striking someone in the side of their neck at or near major arteries or veins?

(RT 6936.) At that point, appellants both objected, and the judge held a hearing

outside the jury's presence. Defense counsel both argued that the questioning violated the court's previous ruling regarding evidence of "instant death." The prosecutor explained that such questioning was now permissible on cross-examination because Tobin had taken the stand and denied any involvement in the murder. The trial court sustained appellants' objection, finding that such questioning was still more prejudicial than probative. (RT 6936-6941.) A moment later, the court admonished the jury that counsel's questions were not evidence and that the jurors were not to insinuate anything from a question alone. (RT 6944-6945.)

During closing argument, the prosecutor stated:

> 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 away blood from the head. That is something known to cause what's called "instant death," if the arteries are actually stricken.

(RT 7553.) Neither Letner nor Tobin posed any objection to these remarks.

Appellants now claim that these questions on cross-examination, coupled with these remarks during closing argument, amounted to the deceptive introduction of inadmissible evidence resulting in a due process violation. (Letner AOB, Arg. XXII, 418-424; Tobin AOB, Arg. XXVII, 293-298.) Again, this claim fails for several reasons.

The prosecutor's questions to Tobin were, at worst, a reasonable mistake. Although the court had previously forbidden the prosecution from calling witnesses to testify *during the case-in-chief* about appellants' proficiency with this "instant death" technique, the prosecutor could reasonably believe that such questioning was permissible on cross-examination during Tobin's defense case.

This is especially true in light of Tobin's claim that he had no participation in, or knowledge of, the murder. When a defendant voluntarily

takes the stand and generally denies the crime with which he is charged, the permissible scope of cross-examination is very wide. The prosecutor may fully amplify the defendant's testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. (*People v. Cooper* (1991) 53 Cal.3d 771, 822; *People v. Lanphear* (1980) 26 Cal.3d 814, 833-834; *People v. Humiston* (1993) 20 Cal.App.4th 460, 479.)

> Once a defendant takes the stand and testifies to the circumstances of the charged offenses, the prosecutor on cross-examination is permitted "to explore the identical subject matter in much greater detail."

(*People v. Mayfield* (1997) 14 Cal.4th 668, 674, quoting *People v. Green* (1979) 95 Cal.App.3d 991, 1007; see also *Fredric v. Paige* (1994) 29 Cal.App.4th 1642, 1650 [any fact may be called out in cross-examination which a jury might deem inconsistent with the direct testimony of a witness].)

In the present case, the prosecutor was entitled to ask Tobin detailed and delving questions in an effort to illuminate or impeach his testimony on direct examination. The fact that the court sustained defense counsels' objections does not mean that the prosecutor committed misconduct in pursuing this line of questioning. (See *People v. Freeman* (1994) 8 Cal.4th 450, 495 [merely asking a question to which an objection is sustained does not itself show misconduct].)

In any event, these questions were harmless. Neither of the questions led to a damaging response. Moreover, the jury presumably followed the court's immediate admonition that mere questions or statements by the attorneys could not be considered. (*People v. Bonin* (1988) 46 Cal.3d 659, 699; *People v. Klvana* (1992) 11 Cal.App.4th 1679, 1721.)

Concerning the prosecutor's reference to "instant death" during closing argument, appellants have waived any challenge to this remark. Neither of them objected or asked for a jury admonition, and this is certainly not "the

exceptional case" where "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692, quoting *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935; see also *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.)

In any event, the prosecutor's brief reference to instant death was not misconduct but, rather, was well within the prosecutor's broad latitude to argue inferences from facts. (*People v. Fierro* (1991) 1 Cal.4th 173, 242; *People v. Edwards* (1991) 54 Cal.3d 787, 839.) Given the evidence of the brutal murder here, it was fair for the prosecutor to point out that the slashes to Ms. Pontbriant's neck would have caused "instant death" if they had stricken her carotid arteries.

C. Alleged "Embellishing" Of Evidence And "Slandering" In Closing Argument

Appellants next cite the prosecutor with several instances of misconduct during her guilt-phase closing argument. (Letner AOB, Arg. XXII, 436-441; Tobin AOB, Arg. XXVII, 308-313.) They claim that the prosecutor engaged in reversible misconduct during closing statement by somehow "embellishing" the evidence. In this regard, appellants point to the prosecutor describing the blood stains on the pillow and doily in Ms. Pontbriant's bedroom as being "fresh" blood stains. (RT 7558-7559.) They also claim it was improper for the prosecutor to argue that the ransacked condition of Ms. Pontbriant's purse, together with the absence of any money in the checkbook, tended to corroborate Warren Gilliland's testimony that he handed Ms. Pontbriant money in appellant's presence, and Ms. Pontbriant then placed the cash in the checkbook in her purse. (RT 7541-7542.)

Letner further claims that the prosecutor improperly "slandered" them

both with the following comments in rebuttal argument.

> Now, counsel got up here and said [Earl Bothwell is] shifty. And he's got felony convictions. And you shouldn't believe him, and this and that. ¶ Obviously, no one's going to dispute his felony convictions. ¶ And, I would – I would submit to you that if you have any expectation that 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 mistaking [*sic*]. ¶ I mean, we have a situation here where this is the type of man Christopher Tobin is. ¶ Who do you think he's going to be hanging around with? ¶ He's going to be hanging around with other criminals. ¶ And that's what Earl Bothwell is. I have no hesitation in saying that to you, obviously.

(RT 7801-7802.)

Tobin adds that, when making the following comments, the prosecutor impermissibly "dwelled" on his fight with Jeanette Mayberry:

> This fight took place in the evening hours. Tobin hit Mayberry, pulled her hair and broke the windows, both to her apartment, and her car. And despite the fact that Mr. Tobin is having these problems, still, there is no departure from (sic) Iowa

(RT 7544-7545.)

> On Monday, Mr. Tobin admitted engaging in the slap contest with Jeanette Mayberry. Jeanette Mayberry testified that he hit her several times, Mr. Tobin says twice. But essentially Mr. Tobin admits there was slapping, and that there was property damage to her car and house.

(RT 7546.)

Because appellants did not object or seek jury admonitions as to any of these remarks, they have waived their present claims of misconduct. (*People v. Riel* (2000) 22 Cal.4th 1153, 1212; *People v. Cummings, supra,* 4 Cal.4th at p. 1302.)

In any event, these comments were all within the People's right to "vigorously argue [the] case, marshalling the facts and arguing inferences to be drawn therefrom." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 665; *People*

v. Thompson (1988) 45 Cal.3d 86, 112.) Fresh blood stains were in fact found on a pillow and on a doily in Ms. Pontbriant's bedroom. (RT 5173-5174, 5685-5686.) The fact that the purse containing the checkbook was found rifled near the body *did* tend to corroborate Gilliland's testimony about handing Ms. Pontbriant the cash in appellants' presence.

Moreover, given appellants' attempts to discredit Earl Bothwell as being a criminal, it was fair to point out that appellants were likely to meet and associate with other criminals in the low-rent Iowana Motel while they were both on the lam for the murder. These comments were not "improper slander." They were permissible inferences from the evidence and were proper in light of appellants' attempts to besmirch Bothwell.

The prosecutor's statements regarding Tobin's fight with Mayberry were also permissible. It was fair for the prosecutor to point out that, if appellants did not require a car or money for their planned trip for Iowa, Tobin logically would have left after his violent break-up with Mayberry. The fact that appellants did not leave until after the murder further suggests, therefore, that the murder was motivated in part to acquire Ms. Pontbriant's money and car for the trip. Once again, appellants fail to show any misconduct because all of these remarks were permissible argument.

D. Allegedly Improper Reference To A Biblical "Proverb"

In a separate argument, appellants both complain about the following remarks at the close of the prosecution's penalty-phase argument:

> Lastly, Ladies and Gentleman, 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.

(RT 9694; see Luke 23: 39-43.)

Appellants claim these remarks necessarily amount to reversible

misconduct. (Letner AOB, Arg. XXVI, 469-475; Tobin AOB, Arg. XXXI, 314-317.)

Because appellants did not object to these remarks, they have again failed to preserve their claim of prosecutorial misconduct for appellate review. (*People v. Roybal* (1998) 19 Cal.4th 481, 520; *People v. Wash* (1993) 6 Cal.4th 215, 259-260.)

Even if their claims were not waived, these remarks were permissible. Unlike in *People v. Wash*, *supra*, and *People v. Sandoval* (1992) 4 Cal.4th 155, the prosecutor here was not implying that the death penalty was somehow *mandated* under any religious authority. The prosecutor's "reference to religion or religious figures" did not "purport to be a religious law or commandment." (*People v. Danks* (2004) 32 Cal.4th 269, 311, quoting *People v. Sandoval*, *supra*, 4 Cal.4th at p. 194.) To the contrary, the prosecutor was fairly using this example to illustrate that spiritual contrition and forgiveness does not itself relieve anyone of the consequences for their crimes under the *secular* law enacted by the democratic will of the People. (See *People v. Rowland, supra,* 4 Cal.4th at pp. 277-278 [not misconduct to quote from the prologue of a book about not giving mercy or compassion.)

Respondent acknowledges the line of cases following *Sandoval* where this Court has found it improper for a prosecutor to rely on Biblical teachings to argue in favor of the death penalty. This case is different. The prosecutor's comments, viewed in their most rational light (see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Boyde v. California*, *supra*, 494 U.S. at p. 380), could not have been understood as invoking any Higher Power as a reason why appellants *deserved* death. Instead, the fairest view of these brief comments is that the prosecutor was asking the jurors not to allow their own personal religious views – which had nothing to do with the facts or the law in this case – *to deter* them from arriving at a death judgment they might otherwise reach after their

consideration of the overall facts and the applicable law. The mere fact that the prosecutor used the readily-understood theme of the crucifixion to illustrate this point did not transform this otherwise legitimate argument into misconduct. This distinction is one that this Court should address to guide future cases, even though appellants have both waived this claim for purposes of their own cases.

E. Appellants Fail To Show Reversible Misconduct

As noted, appellants' failure to object and seek jury admonitions bars them from raising nearly all of their prosecutorial misconduct claims. However, even if these bars were lifted, appellants are unable to show any prejudice. The various comments in the guilt-phase argument about (1) "instant death," (2) "fresh blood," (3) the ransacked purse, (4) appellants' relationship with Bothwell, and (5) Tobin's fight with Mayberry were all, at worst, innocuous. So was the prosecutor's brief questioning of Tobin about "instant death." There is no chance Letner or Tobin would have fared better in the guilt-phase but for these alleged instances of misconduct.

The sole allegation of misconduct in the penalty-phase is the prosecutor's brief biblical reference. Even if appellants had preserved their challenges to this remark, and even if the remark was somehow improper, it was harmless. As this Court has found repeatedly, even improper Biblical references are harmless where, as here, the comments were "only a small part of a prosecutorial argument that primarily focused on explaining to the jury why it should conclude that the statutory aggravating factors outweighed the mitigating factors." *(People v. Vieira* (2005) 35 Cal.4th 264, 296-297; see also *People v. Slaughter, supra,* 27 Cal.4th at pp. 1208-1211; *People v. Wash*, *supra*, 6 Cal.4th 215, 261.)

In short, none of these alleged instances of misconduct, even when all viewed together, came anywhere close to infecting the entire trial with

unfairness to the degree of violating due process. (*People v. Ochoa, supra,* 19 Cal.4th at p. 427.) There is certainly no reasonable likelihood that any of this alleged misconduct affected the jury's evaluation of guilt or determination of penalty. (*People v. Hines, supra,* 15 Cal.4th at pp. 1037-1038.) Appellants' allegations of prosecutorial misconduct should be rejected.

XIX.

APPELLANTS FAIL TO SHOW REVERSIBLE ERROR UNDER *BRADY* [114]

As part of appellants' overall allegations of prosecutorial misconduct, they also seek to impugn the prosecutor for failing to seek out and deliver information of some outstanding misdemeanor charges which were pending against Jeanette Mayberry at the time of appellants' guilt-phase trial. (Letner AOB, Arg. XXII, 424-436; Tobin AOB, Arg. XXIX, 299-307.) This allegation of "misconduct" is properly resolved as a claim of error under *Brady* and its progeny.

A. Procedural And Factual Background

In an in limine hearing during the penalty-phase trial, Letner's trial counsel brought to the court's attention that, during the pendency of the proceedings, Jeanette Mayberry (1) had an outstanding warrant in Fresno County, (2) had incurred two theft-related charges in Visalia, (3) had been cited for a few instances of failing to appear before and after her guilty pleas on these charges, and (4) had one of these charges reduced to a misdemeanor, and had her sentence postponed for some period. The prosecutor represented to the court that she had absolutely no knowledge of any of these matters. The court said it would hold a hearing on the matter later. (RT 8151-8160.)

This issue was raised in appellants' motions for new trials. The trial court denied this claim, finding that (1) Mayberry was not a material witness and (2) the information about these various pending matters would have

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114. See *Brady v. Maryland* (1973) 373 U.S. 83. Hereinafter "*Brady*."

provided little if any basis to impeach Mayberry. (RTNT[115] 52-56.)

B. Controlling Legal Standards

Under *Brady*, the prosecution must disclose material exculpatory evidence whether or not the defendant requests it. (*Brady*, at p. 87.) Materials that must be disclosed under *Brady* encompass evidence probative of a testifying witness's credibility, including the witness's potential for bias. (*People v. Morrison* (2004) 34 Cal.4th 698, 714; see also *United States v. Bagley* (1985) 473 U.S. 667, 676.)

The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf. . . ." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) As a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. (*In re Brown* (1998) 17 Cal.4th 873, 879.)

However, under *Brady* and its progeny the prosecution is required to disclose evidence to the defense only if it is both favorable to the accused and material either to guilt or to punishment. In this regard, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*People v. Roberts* (1992) 2 Cal.4th 271, 331; *Brady*, at p. 87; *United States v. Bagley*, *supra*, 473.U.S. at p. 682 (lead. opn. of Blackmun, J.).)

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115. "RTNT" refers to the reporter's transcript of the of the new trial and sentence modification hearing, held on April 17, 1990.

C. The Potential Impeachment Evidence Here Was Not Material Under *Brady*

It does appear that the information in question would be imputed to the prosecution here, at least with respect to the Visalia cases. Equally clear, however, is (1) that the trial prosecutor here was unaware of any of these events and (2) that Mayberry did not receive any consideration in any of these matters in return for her trial testimony. (CT 1495-1498, 1514-1515.)

Moreover, these incidents provided virtually nothing of value for impeachment. Mayberry testified at the preliminary hearing in September 1988, well before any of these various theft charges. Her preliminary hearing testimony was entirely consistent with her trial testimony. (RTPH[116] 124-188.) These various charges against Mayberry had nothing to do with her testimony, and there nothing to suggest Mayberry was ever given or promised any consideration in exchange for her testimony.

More importantly, Mayberry's testimony could have had virtually no impact on the ultimate outcome of appellants' cases. Mayberry offered nothing concerning the facts of the murder itself. Moreover, as the prosecutor noted in her opposition to the new trial motion, virtually all of Mayberry's testimony was merely duplicative of the other testimony and evidence produced at trial. (CT 1535-1536.) There is virtually no chance the result here would have been different if Mayberry had not testified at all. *A fortiori*, the evidence concerning Mayberry's various theft convictions was immaterial. Any possible collateral impeachment from this evidence was certainly insufficient to undermine confidence in the outcome here. (*People v. Roberts*, *supra*, 2 Cal.4th at p. 331; *Brady*, at p. 87; *United States v. Bagley*, *supra*, 473.U.S. at p. 682.)

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116. "RTPH" refers to the reporter's transcript of the preliminary hearing.

XX.

ANY ERROR IN ALLOWING THE PROSECUTOR TO QUESTION TOBIN ABOUT STOLEN PROPERTY WAS, AT WORST, HARMLESS

A. Procedural And Factual Background

Prior to trial, the prosecutor sought to present evidence that the various items of nail polish and hair-care products found in the trunk of Ms. Pontbriant's car had in fact been stolen. Pointing out that appellants were hoping to sell these various items, the prosecutor argued that this evidence was relevant to show that appellants were seeking funds to facilitate their escape. Appellants' sole objection to this evidence was that it was irrelevant. The trial court permitted the evidence, finding that it was relevant. (RT 4697-4702.)

The prosecution opted not to present any such evidence in its case-in-chief.

On direct examination, Tobin testified that he was aware of the various hair-care products being put into the trunk. (RT 6863.) He also testified that, on the morning after the murder, he did not want to go back near the car. (RT 6873-6874.)

On cross-examination, Tobin was questioned briefly about the various nail and hair products. Tobin said the items belonged to Letner. He also said he (Tobin) was aware that these items were stolen or "hot." (RT 6914-6916.)

B. The Prosecution's Questioning About These Stolen Goods Was, At Worst, Harmless

Appellants both argue that the trial court committed reversible error by allowing this brief cross-examination about the stolen nail polish and hair products. They claim that this questioning amounted to the introduction of improper "other crimes" evidence. (Letner AOB, Arg. XXIII, 442-447; Tobin

AOB, Arg. XXXIV, 331-334.)

Respondent first notes that these claims are waived. Appellants did not object to this evidence on the ground that it was impermissible "other crimes" evidence. (See Evid. Code, § 1101, subd. (B).) Instead, as noted above, appellants' sole objection was that the evidence was irrelevant. Because appellants did not raise their present objection before the trial court, they are precluded from doing so now. (Evid. Code, § 353; *People v. Barnett, supra,* 17 Cal.4th at p. 1130; *People v. Farnam* (2002) 28 Cal.4th 107, 153; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015; *People v. Clark* (1992) 3 Cal.4th 41, 125-126.)

Moreover, any such objection would have been futile because the questioning at issue was permissible for at least two reasons. First, as the prosecutor argued prior to trial, the stolen nature of these items was relevant to show that appellants were seeking funds to facilitate their trip to Iowa. The fact that they acquired this stolen merchandise, for the obvious purpose of selling it, tended to show the lengths appellants would go to facilitate the funding of their trip.

Second, it was fair to question Tobin about these items on cross-examination. As noted above, Tobin volunteered on direct examination that (1) he was aware that these items were in the trunk and (2) he had no desire to go back to the car to retrieve any of his property after the traffic stop. Given this testimony, the prosecutor was allowed to examine Tobin's various assertions, and the facts and circumstances surrounding those assertions. The prosecutor's ability to conduct such cross-examination included the ability to introduce evidence tending to explain or refute Tobin's statements. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 822; *People v. Lanphear*, *supra*, 26 Cal.3d at pp. 833-834.) This brief questioning on cross-examination was permissible.

In any event, even assuming these questions somehow constituted

evidence of "other crimes," any error was harmless. The improper introduction of "other crimes" evidence under section 1101, subdivision (b), constitutes reversible error only where it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error. (Cal. Const., art. VI, § 13; *People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 263.)

There is no such chance here. The questioning at issue revealed no more than that appellants possessed some stolen nail products and hair products. This fact could not have harmed Letner or Tobin because the jury was already aware that they were both thieves. After all, they were both caught red-handed in Ms. Pontbriant's stolen car. More importantly, as chronicled in detail in the preceding arguments, the evidence overwhelmingly established that appellants were mutually responsible for this particularly callous and sadistic murder.

There is no chance the result here would have been different but for this brief cross-examination. Any error with respect to this questioning is harmless under any standard.

XXI.

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF THE VARIOUS LETTERS EXCHANGED BETWEEN LETNER AND DANNY PAYNE TO IMPEACH LETNER'S PENALTY-PHASE TESTIMONY

On direct examination during Letner's penalty-phase testimony, he claimed Tobin was solely responsible for the murder and that he (Letner) merely stood by and watched. On cross-examination, the prosecutor effectively impeached this claim by introducing various letters that Letner and Danny Payne had exchanged in jail for the alleged purpose of somehow forming a story which they could provide to the district attorney in hopes of striking a deal for themselves. (RT 8683-8684, 8787-8792.)

Tobin now claims that these letters require reversal of his death judgment. He claims, perfunctorily, that to the extent these letters came from Danny Payne's hand, they were hearsay and violated the Confrontation Clause of the Sixth Amendment because Payne was not called as a witness at trial. Tobin also claims that these letters were unduly prejudicial under Evidence Code section 352 and amounted to improper aggravating evidence against him in violation of section 190.3. (Tobin AOB, Arg. XXXV, 335-343.) None of Tobin's claims withstand even superficial scrutiny.

Hearsay is evidence from a nontestifying witness offered for the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) None of the various statements in Payne's letters were offered for the truth of the matter. The jury was, of course, well aware that Payne was not a percipient witness to the murder. The jury was also aware that these letters -- from both Payne and Letner -- were being offered solely to *impeach* Letner's claim that Tobin was alone responsible for the murder. In short, the jury clearly understood these letters for what they were -- a pack of lies concocted by Letner and Payne in

hopes of foisting all blame onto Tobin. To the extent that anything in these letters reflected the "truth" of anything, they were plainly offered to show only that *Letner* was, in fact, also personally involved in the murder.

Accordingly, these letters written by Payne, based solely on the input from Letner, were not offered as hearsay against Tobin. For these same reasons, the letters written by Payne did not violate Tobin's right to confrontation. As this Court and the Supreme Court both recognize, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. (*People v. Combs* (2004) 34 Cal.4th 821, 842; *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9; see also *Tennessee v. Street* (1985) 471 U.S. 409, 414.)

For these same reasons, the letters written by Payne, based solely on Letner's representations, were not unduly prejudicial against Tobin under Evidence Code section 352 and did not provide any additional evidence in aggravation against Tobin under section 190.3. Because these letters were introduced to refute Letner's claim that Tobin was solely responsible, Tobin was not harmed by this evidence. In fact, Tobin would have been in a worse position if this evidence had not been introduced.

Even assuming that Payne's letters -- reflecting Letner's ever-changing story -- somehow violated Tobin's Sixth Amendment right to confrontation, any error was harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [Confrontation Clause errors subject to *Chapman* harmless-error analysis].) By the time of Letner's penalty-phase testimony, the jury had already found Tobin personally responsible for Ms. Pontbriant's burglary, robbery, attempted rape and brutal murder. The comments in the various letters between Letner and Payne, therefore, had virtually no bearing on the jury's penalty-phase determination as to Tobin. Moreover, the fact that the jury also sentenced Letner to death reveals that they rejected Letner's various

self-serving claims, as embodied in his trial testimony and his various letters to Payne.

Once again, Tobin fails to identify any prejudicial error under state law or any violation under the federal Constitution. His claim must be rejected.

XXII.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellants both claim that their death judgments must be reversed because the trial court refused to instruct the jury that life without possibility of parole actually means that they would serve life in prison without possibility of parole. (Letner AOB, Arg. XXV, 462-475; Tobin AOB, Arg. XXVI, 287-288.)

This Court has repeatedly and uniformly rejected this precise claim. (See, e.g. *People v. Maury, supra,* 30 Cal.4th at p. 440; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271; *People v. Jones* (1997) 15 Cal.4th 119, 189; *People v. Arias, supra,* 13 Cal.4th at p. 172; *People v. Sanders* (1995) 11 Cal.4th 475, 561-562.) Appellants provide no persuasive reason to reconsider these decisions. Their claims should be denied summarily.

Letner also adds that the court erred in refusing to instruct the jurors "You are to presume that if a defendant is sentenced to death, he will be executed in the gas chamber." The trial court properly refused to give this instruction because it is inaccurate. (See *People v. Maury*, *supra*, at p. 440 [no error in refusing to give inaccurate instructions about the consequences of a penalty-phase determination].) There is no basis for presuming appellants will be executed in the gas chamber as opposed to lethal injection or perhaps some other means. (§ 3604.) Nor was there necessarily any basis to conclude that appellants would in fact be executed. For example, the trial court might have modified a death verdict pursuant to section 190.4, subdivision (e). A death judgment might later be overturned via state appellate review or state or federal habeas review. The governor could commute a death judgment in any case. Appellants might escape from prison. Or appellants could simply die from other causes in the many years while awaiting execution. Accordingly, the trial court properly refused this instruction because there was no basis to presume

that either appellant would be executed in the gas chamber.

XXIII.

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO PRESENT AGGRAVATING EVIDENCE OF APPELLANTS' PRIOR UNADJUDICATED OFFENSES

Appellants both claim that the trial court violated their federal rights to due process and a reliable sentencing determination by allowing the prosecution to present their prior unadjudicated offenses as evidence in aggravation. (Letner AOB, Arg. XXVII, 476-485; Tobin AOB, Arg. XXXVI, 344-349.)

This Court has repeatedly and uniformly rejected this same claim. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 25 Cal.Rptr.3d 672, 758; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Michaels, supra,* 28 Cal.4th at p. 541; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1060-1061; *People v. Bolin, supra,* 18 Cal.4th at p. 335; *People v. Samayoa, supra,* 15 Cal.4th at p. 863.) The various federal circuit courts are in accord. (See *McDowell v. Calderon*, (9th Cir. 1997) 107 F.3d 1351, 1366, vacated in part on other grounds, 130 F.3d 833 (9th Cir. 1997); *Hatch v. Oklahoma* (10th Cir. 1995) 58 F.3d 1447, 1465-1466; *Devier v. Zant* (11th Cir. 1993) 3 F.3d 1445, 1464-1465; *Williams v. Lynaugh* (5th Cir. 1987) 814 F.2d 205, 207-208.

Appellants offer nothing to question the wisdom of this authority. Again, their claims should be summarily denied.

XXIV.

APPELLANTS' VARIOUS GENERAL CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE SHOULD BE REJECTED SUMMARILY FOR THE SAME REASONS THESE SAME CLAIMS HAVE BEEN REPEATEDLY DENIED

Once again, appellants apply the "shotgun" approach, raising numerous well-worn challenges to the constitutionality of California's death penalty statute (see §§ 190.3, 190.4) and the standard jury instructions relating thereto. Specifically, they claim (1) that the federal Constitution requires a finding of proof beyond a reasonable doubt that death is the appropriate sentence, (2) that the Constitution requires a finding of proof beyond a reasonable doubt as to each alleged circumstance in aggravation, (3) that the Constitution requires a unanimous jury finding as to each circumstance in aggravation, (4) that the Constitution requires written findings as to each factor in aggravation, (5) that the statute, and the jury instructions relating thereto, are constitutionally insufficient to channel the jury's discretion to prevent an arbitrary and capricious sentencing determination, (6) that the statute is unconstitutionally overbroad, (7) that the statute unconstitutionally forbids intercase proportionality review, (8) that the statute unconstitutionally uses "restrictive" adjectives in describing factors in mitigation, (9) that the instructions failed to identify certain sentencing factors as exclusively "mitigating" factors, (10) that the statute violates equal protection by somehow affording non-capital defendants greater procedural safeguards than capital defendants, (11) that each of these claims must be reexamined in light of *Apprendi v. New Jersey, supra,* 530 U.S. 466, and *Ring v. Arizona, supra,* 536 U.S. 584, and (12) that the statute unconstitutionally violates "international norms of humanity and decency." (Letner AOB, Arg. XXIX, 493-557; Tobin AOB, Arg. XXXVIII, 355-367.)

Once again, this Court has repeatedly, uniformly, and dispositively rejected each of these contentions. Indeed, in *People v. Panah*, *supra*, 35 Cal.4th 395, this Court recently addressed each of these claims in conjunction with the same arguments appellants now advance in support of them. This Court found that none of these arguments provided persuasive reasons to reexamine the many prior rulings which had dispositively rejected each of these allegations of constitutional error:

> Defendant raises a number of challenges to the death penalty statute that we have considered and consistently rejected in previous decisions. He provides no persuasive reason for us to reexamine those conclusions. We again conclude therefore that: (1) the statute adequately narrows the class of death-eligible offenders; (2) section 190.3, factor (a) is not impermissibly overbroad facially or as applied; (3) the statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, and specifically that all aggravating factors must be proved beyond a reasonable doubt, or that such factors must outweigh factors in mitigation beyond a reasonable doubt, or that death must be found to be an appropriate penalty beyond a reasonable doubt; (4) neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors, nor have our conclusions in this respect been altered by recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; . . . (7) because the statute does not allocate the burden of proof and a burden of proof instruction need not, and should not, be given, neither the failure of the trial court to instruct the jury that the reasonable doubt standard does not apply to mitigating factors, nor its failure to instruct the jury it need not unanimously agree on such factors, violated defendant's constitutional rights, nor was it likely the jury would have imported the reasonable doubt standard from the guilt phase into its penalty phase deliberations; . . . (8) the trial court is not required to omit inapplicable sentencing factors when instructing the jury; (9) nor is the trial court constitutionally required to instruct the jury that certain sentencing factors are relevant only to mitigation . . . ; (10) the use of certain adjectives in the list of mitigating factors, here, "substantial," "reasonably believed," and "moral," are not so vague as to erect a barrier to the jury's consideration of mitigating facts and render

> the statute unconstitutional; (11) CALJIC No. 8.88, with which the jury was instructed, adequately defines "mitigation" notwithstanding defendant's resort to empirical evidence which was not part of the record below; (12) neither the federal nor state Constitution requires intercase proportionality review; (13) the statute does not deny equal protection because the statutory scheme does not contain disparate sentence review, nor does it deny equal protection on any other ground; and (14) the statute is not constitutionally deficient because prosecutors retain discretion whether to seek the death penalty.
>
> .....
>
> Defendant argues that California's use of the death penalty violates international norms of humanity and decency. We have, as he acknowledges, repeatedly rejected this claim. "International law does not prohibit a sentence of death rendered in accordance with state and federal and statutory requirements."

(*People v. Panah*, *supra*, 25 Cal.Rptr.3d at pp. 758-561; see also, e.g., *People v. Ramos, supra,* 34 Cal.4th at p. 533 [(1) no need to instruct that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt, (2) or that jury unanimity on the findings is required, (3) intercase proportionality review not required, (4) "adjectives" in instructions do not limit consideration of mitigating factors, (5) court need not designate what mitigating factors the jury may consider as "mitigating," (6) no need for written jury findings, (7) international law does not prohibit California death penalty]; *People v. Brown, supra,* 33 Cal.4th at pp. 401-404 [(1) statute adequately narrows class of death-eligible offenders, (2) section 190.3, subdivision (a), does not result in arbitrary or capricious imposition of the death penalty, (3) statute is not unconstitutional for failing to impose a burden of proof--whether beyond a reasonable doubt or by a preponderance of the evidence--as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence," (4) unanimity not required as to aggravating circumstances, (5)

neither *Apprendi* nor *Ring* alter any of these conclusions, (6) constitution does not require written jury findings, (7) no requirement of intercase proportionality review, (8) use of certain adjectives in statute or instructions not unconstitutional, (9) court not required to instruct that certain statutory factors can be considered only in mitigation, (10) no equal protection violation because the statute does not contain disparate sentence review, (11) international law does not prohibit California death penalty]; *People v. Sapp, supra,* 31 Cal.4th at pp. 316-317 [summary rejection of claims that statute fails to (1) require unanimous jury agreement of aggravating factors, (2) require reasonable doubt standard or written findings on aggravating factors, (3) require aggravating factors to outweigh mitigating factors, (4) require finding of death as appropriate punishment beyond a reasonable doubt, (5) require intercase proportionality review].

Because appellants' various constitutional challenges have all been squarely and repeatedly rejected, this Court is of course well aware of all the reasons why these same claims have been found to be without merit. Accordingly, in an effort to preserve state expense and judicial resources, respondent believes that effective representation on behalf of the People does not require a lengthy rehash of these same threadbare arguments.

However, in the event this Court may wish to reexamine any of these claims, respondent is prepared to provide expeditious supplemental briefing, including detailed legal analysis, as to any issue this Court deems worthy of further consideration. For now, respondent submits that these claims should all be rejected summarily as having been settled dispositively.

XXV.

APPELLANTS FAIL TO IDENTIFY ANY PREJUDICE RESULTING FROM THE TRIAL COURT'S FAILURE TO ADHERE STRICTLY TO THE REQUIREMENTS OF SECTION 190.9

As appellants note, the trial court here did not have a court reporter record numerous conferences with counsel outside the jury's presence. Appellants also properly observe that this was error under section 190.9, which requires that all such conferences must be recorded in capital cases. They claim that this failing requires reversal because it allegedly deprived them of an adequate record to ensure meaningful appellate review. (Letner AOB, Arg. XXVIII, 486-492; Tobin AOB, Arg. XXXVII, 350-354.)

As appellants both recognize, this Court has repeatedly required a showing of prejudice resulting from error under section 190.9:

> An incomplete record is a violation of section 190.9, which requires that all proceedings in a capital case be conducted on the record with a reporter present and transcriptions prepared. (See also Cal. Rules of Court, rule 39.51(a)(2).) Although section 190.9 is mandatory, a violation of its provisions does not require reversal of a conviction unless the defendant can show that "the appellate record is not adequate to permit meaningful appellate review."

(*People v. Frye, supra,* 18 Cal.4th at p. 941, quoting *People v. Cummings, supra*, 4 Cal.4th at p. 1334, fn. 70.) If the record permits the reviewing court to pass on the claims raised on appeal, a defendant has not been prejudiced by an incomplete record. (*People v. Frye*, *supra*, at p. 941; *People v. Holt, supra,* 15 Cal.4th at p. 708; *People v. Freeman*, *supra*, 8 Cal.4th at p. 509; *People v. Roberts, supra,* 2 Cal.4th 271.) "[A] defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review." (*People v. Holt*, *supra*, at p. 708; *People v. Cummings*, *supra*, at p. 1333, fn. 70.) "Where the trial record can be reconstructed by other methods, the defendant must proceed with those alternatives." (*People v. Frye*, *supra*, at

p. 941; *People v. Hawthorne* (1992) 4 Cal.4th 43, 66.)

Moreover, this Court has expressly rejected appellants' claims of constitutional error. Failure to comply strictly with section 190.9 does not constitute a "'structural defect' or a denial of due process. . . . Since procedures for settlement of the record are often adequate to resolve those disputes and avoid any prejudice . . . a defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review." (*People v. Holt*, *supra*, 15 Cal.4th at p. 708, citing *People v. Cummings*, *supra*, 4 Cal.4th at p. 1333, fn. 70.)

The voluminous record here, reflecting the many years of record correction proceedings[117], bears witness to the extent to which appellants have been indulged in delaying the appellate process to explore every possible avenue, no matter how trivial, in perfecting every aspect of the record. After these years of extensive efforts, appellants are unable to point to any area where the record is insufficient to allow them to address any claim they might wish to raise on appeal. Appellants are certainly unable to establish how or why this record deprives them of the right to meaningful appellate review.

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117. The record of the ten-plus years of record corrections includes, among *many other things*, eight very lengthy volumes of augmented clerk's transcript.

XXVI.

APPELLANTS WERE NOT PREJUDICED BY CUMULATIVE ERROR

Finally, appellants both claim that, even if none of their various allegations of error warrant dismissal by themselves, the combined effect of these alleged errors amount to a violation of federal due process guarantees or constitute reversible error under state law. (Letner AOB, Arg. XXX, 558-562; Tobin AOB, Arg. XXXIX, 368-371.)

The Constitution does not require -- and no defendant can reasonably demand -- an entirely perfect trial. Although these lengthy and complex death-penalty trials were not altogether free of *any error* (because virtually none are), appellants' trials came as close to this goal as could reasonably be expected. As explained in the preceding arguments, any possible evidentiary or instructional errors in these cases were either (1) necessarily harmless in light of the other evidence or instructions or (2) were at worst de minimus. Moreover, as explained, any error with respect to the trial court's denial of the suppression motion was harmless under any standard because, even if the motion had succeeded, virtually no important evidence would have been suppressed. Any improper comments by the prosecutor were certainly harmless by themselves and had no possible relation to any of appellants' other allegations of error.

Accordingly, whether considered separately or collectively, the few possible errors in this case were harmless. The combined effect of these possible errors did not deny appellants a fair trial, a reliable verdict, or any other constitutional right. (See, e.g, *People v. Young, supra,* 34 Cal.4th at p. 1234; *People v. Vieira, supra,* 35 Cal.4th at p. 304; *People v. Harrison* (2005) 35 Cal.4th 208, 255; *People v. Monterroso* (2004) 34 Cal.4th 743, 768; *People v. Morrison, supra,* 34 Cal.4th at p. 731.)

CONCLUSION

For the reasons stated in the foregoing, respondent respectfully asks that appellants' convictions and death judgments be affirmed.

Dated: April 28, 2005

Respectfully submitted,

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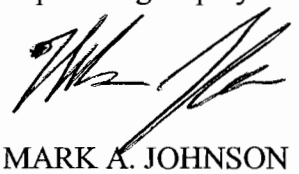

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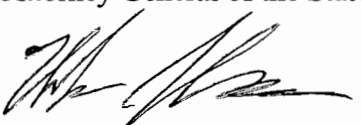
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 53,223 words.

Dated: April 28, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: People v. Letner and Tobin

No.: **S015384**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 2, 2005, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at Sacramento, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 2, 2005, at Sacramento, California.

_____ _____
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