IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

Richard Lacy Letner
Christopher Alan Tobin

Defendant and Appellant.

Case No. S015384

Tulare County
Superior Court No. 26592



# APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Judge William Silveria, Jr.

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br><br>**v.**<br><br>**RICHARD LACY LETNER**<br>**CHRISTOPHER ALLAN TOBIN,**<br><br>**Defendants and Appellants.** | **S015384**<br><br>**Tulare County Superior Court No. 26592** |

# APPELLANT'S REPLY BRIEF

## INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief ("AOB"). Appellant not only does not address each argument in respondent's brief, but he does not reply to every contention made by the State with regard to the claims he does discuss. Rather, appellant focuses only on the most salient points not already covered in the opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this reply are numbered to correspond to the argument numbers in the AOB.

## I.

## RESPONDENT HAS NOT DEMONSTRATED THAT THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL JUDGE'S DENIAL OF THE MOTION TO SUPPRESS THE FRUITS OF THE MARCH 2, 1988 VEHICLE STOP

Respondent makes a series of inaccurate factual assertions and faulty legal arguments in support of the trial judge's denial of appellants' motion to suppress all evidence derived from an illegal stop of the vehicle in which appellants were traveling in the early morning hours of March 2, 1988.

### A. Respondent Has Misrepresented the Basis of the Trial Judge's Decision Regarding the Motion to Suppress

Respondent asserts:

> The [trial] court found that, based on the totality of circumstances, the traffic stop was justified because Officer Wightman had a reasonable suspicion that the car was stolen.
> (RB at p. 68)

While the trial judge's decision, delivered orally in court, regarding the suppression motion, is not a model of clarity, his statements cannot reasonably be interpreted to mean that he believed that the vehicle stop was justified on the ground that the officer had a "reasonable suspicion" that the car was stolen. Indeed, the judge noted that although the police officer had a right to follow the car based on the suspicion that it was stolen, he could not justify stopping the car on that basis. The trial judge stated:

> First of all, the Court believes that the officer had a right to be suspicious about the movement of cars in that area [downtown Visalia], in which he first encountered the Ford Fairmont in which the defendants were riding. . . . There are no supermarkets, and the – so what you are left with is the downtown area in which there are probably a couple of bars in the vicinity, and some car lots. And –

> and the – that in itself wouldn't have given the officer any right to stop the car. But he certainly had every right to follow it . . .

(6/8/89 RT 56-57;[1] emphasis added.)

The trial judge then went on to explain that the slow speed of the car provided the basis for the stop: "The – and the Court believes that he [the police officer] did develop a reasonable suspicion based on slow speed." (6/8/89 RT 37.) He then amended that view to find that the officer's reasonable suspicion was based on both the slow speed at which the car was traveling and the fact that the officer knew about auto thefts in the area. (RT 37.)

Moreover, as pointed out in appellant's opening brief, at the motion to suppress hearing the prosecutor focused on slow speed as the basis for the stop, citing a series of California appellate court decisions dealing with slow speed to justify the legality of the stop. (Tobin's AOB at pp. 49-54.) These cases did not support the officer's assertion in this case that he believed the slow speed suggested that the driver was drunk. Respondent however, cannot now change the facts of this case: Officer Wightman testified that he believed that the slow speed of the car possibly meant that the driver was drunk and that is why he stopped the car.

### B. Having Failed to Argue at the Suppression Hearing that Appellant Did Not Have Standing to Challenge the Stop, the Prosecutor May Not Raise the Issue on Appeal

For the first time, the State argues in the RB that appellant Tobin could not challenge the vehicle stop:

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[1] The volume of the reporter's transcript containing the hearing concerning the motion to suppress does not have a number; therefore, it is identified here by date, 6/8/89.

> 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.

(RB at p. 69.)

Because respondent failed to argue this ground — lack of standing[2] — in the court below, respondent has waived the issue. As a general rule, an appellate court will not consider claims of error that could have been but were not raised below. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)[3]

In the context of a motion to suppress, the rule has been applied to prevent a party from asserting new theories for the first time on appeal to support or contest the admissibility of evidence. (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 ["To allow a reopening of the question on the basis of new legal theories to support or contest the admissibility of the evidence would defeat the purpose of Penal Code section 1538.5 and discourage parties from presenting all arguments relative to the question when the issue of admissibility of evidence is initially raised"].) In *People v. Miller* (1972) 7 Cal.3d 219, 227, this Court observed:

> [T]he People cannot introduce on appeal a new theory to justify the

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[2] As this Court noted in *People v. Ayala* (2000) 23 Cal.4th 225, 254, fn. 3, the United States Supreme Court no longer uses the word "standing" in its analysis of Fourth Amendment issues. Instead, the courts analyze the facts raised by such a claim in terms of the "expectation of privacy" of the person challenging the search or seizure. To show that a search caused a personal violation of rights, the defendant must establish that he or she had an actual, personal, and reasonable expectation of privacy in the place that was searched. (See *Minnesota v. Carter* (1998) 525 U.S. 83, 88.)

[3] See also *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316, where court of appeal noted that it is a "firmly entrenched principle of appellate practice that litigants must adhere to the theory on which the case was tried."

> search, in view of the defendant's lack of opportunity to present evidence in response to it, to cross-examine the prosecuting witnesses on testimony supporting the new theory, or to argue before the trier of fact the theory's invalidity or inapplicability.

*People v Aguilar* (1996) 48 Cal. App. 4th 632 involved a motion to suppress and an allegation that the police violated the knock notice requirement when they entered the bedroom of defendant's brother. On appeal, the State raised for the first time the objection that the defendant did not have standing to challenge whether his brother had consented to a search of his bedroom. The court of appeal found that because the prosecutor did nor raise the standing issue in the trial court, the court would not address it in the appeal. (*Id* at p. 637, fn.2 ) Similarly, in *People v. Hine* (1994) 15 Cal.4th 997, this Court refused to consider a new basis put forth on appeal by the prosecution to challenge a trial judge's ruling that a statement was inadmissible. The Court stated: "Because the prosecutor did not attempt to justify the admission of the statement on either of these grounds, the Attorney General may not now assert them as a basis for challenging the trial court's ruling excluding the statement." (*Id.* at p. 1034, fn. 4, citations omitted.)

The United States Supreme Court addressed this issue in *Giordenello v. United States* (1958) 357 U.S. 480, where the government argued in the lower courts that defendant's arrest was legal because it was based on a valid warrant. On appeal to the Supreme Court, the government changed the focus of the argument, urging that the arrest was lawful even without a valid warrant. The Court refused to consider the new theory, stating:

We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond.
(*Id.* at p. 488.)

The rule is not, however, automatically and invariably applied whenever a claim is made for the first time on appeal. "There is a limited exception to this rule: 'if a question of law only is presented on the facts appearing in the record, the change in theory may be permitted by the reviewing court.'" (*Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 942, quoting *People v. Carr* (1974) 43 Cal.App.3d 441, 445.) See also *People v. Robles* (2000) 23 Cal.4th 789, 800-801, fn. 7 [addressing People's theory of inevitable discovery raised for first time on appeal]; cf. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [addressing constitutionality of statute raised for first time on appeal].) This is not the case here, however.

The record in this case shows how the failure to argue an issue in the trial court makes it impossible to apply a new theory on appeal. Since the question of whether appellant had a reasonable expectation of privacy as a passenger to challenge the stop of the vehicle was never raised in the lower court, no one developed a factual record on this issue. The testimony and argument at the hearing on the motion to suppress focused exclusively on developing the record to answer the question of whether Officer Wightman had a reasonable suspicion justifying his stop of the vehicle. Accordingly, it would be extremely unfair to appellant, "who had no opportunity to attack [the new theory that he lacked a privacy expectation] factually or legally in the trial court" (*In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227), to now recognize respondent's new claim.

Because the prosecutor did not argue this theory — lack of an expectation of privacy for a passenger — in the trial court, this Court should decline to address it in this appeal.

### C. By Failing to Properly Brief this Issue, Respondent Has Waived the Issue

This Court should also find that respondent has waived the issue of appellant's alleged lack of a privacy expectation, due to his status as a passenger, to challenge Officer Wightman's vehicle stop because respondent failed to properly brief the issue. Rather, respondent simply incorporated "the reason set forth by the People in the *Brendlin* matter[4] [another case that was pending before this Court at the time of the filing of the RB in this case]" and asked the Court to take judicial notice of the prosecution's brief on the merits in the *Brendlin* case.

On August 15, 2005, appellant filed a Motion to Deny Respondent's Request that the Court Take Judicial Notice of the People's Brief on the Merits in *People v. Brendlin* (S123133), An Unrelated Case. As pointed out in the Memorandum of Points and Authorities in support of that motion, judicial notice is limited to matters which are indisputably true, and in this case, respondent's request for judicial notice of the *Brendlin* brief involved arguments made in an appellate brief in an unrelated case.

On February 1, 2006, this Court issued an order denying, without prejudice, respondent's request for judicial notice of the *Brendlin* brief.

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[4] This Court granted review on this case, *People v. Brendlin* (S123133), on April 4, 2004. It issued its opinion in this case on June 29, 2006. The *Brendlin* decision is discussed in the next subsection of this brief.

The order stated that the respondent could file a supplemental respondent's brief raising the arguments presented in the respondent's brief in *People v. Brendlin* (S125133). To date, respondent has failed to file any supplemental briefing on this issue. This leaves us with a respondent's brief citing an appellate brief rather than any case authority for their position. Because respondent has failed to brief this issue, this Court should decline to consider this issue — the reasonable expectation of privacy vel non of appellant as a passenger in the stopped vehicle — because it was not properly raised and briefed.

### D. Assuming Arguendo that this Issue was not Waived, Respondent Should not Prevail on the Basis That Appellant did not Have an Expectation of Privacy

In two recent decisions, this Court addressed the issue of whether a passenger has a reasonable expectation of privacy which would him to challenge the stop and search of the vehicle. In *People v. Brendlin* (2006) 38 Cal.4th 1107, this Court held that when a police officer stops a vehicle, the passenger is not "seized," within the meaning of the Fourth Amendment, unless he is subjected to a show of authority – such as being ordered out of the vehicle – or an investigation by the officer. Acknowledging that a majority of courts, including eight federal circuit courts and twenty-one state courts, have adopted a per se rule that the passenger is seized when the driver submits to a show of authority, this Court declined to adopt such a per se rule. Further, the Court held that under the facts of the *Brendlin* case, the passenger's freedom was not curtailed until the officer ordered him out of the car.

The *Brendlin* decision nonetheless found that passengers subject to an improper traffic stop do have constitutional rights. Once the vehicle has

been stopped, the officer cannot detain the passenger without a reasonable suspicion that he is involved in criminal activity. Moreover, according to the *Brendlin* decision, "neither the passenger nor the passenger's belongings in the vehicle may be searched without lawfully acquired cause to justify an arrest."(*Id.* at p. 1123, citations omitted.) The holding of *Brendlin, supra*, was limited to the issues developed in the trial court:

> Because defendant claims only that the traffic stop itself constituted a seizure, we need not consider whether defendant was seized when Deputy Brokenbrough asked him to identify himself or whether, assuming such conduct constituted a seizure, it was justified by the deputy's reasonable suspicion that he was a parolee at large.

(*Id.* at p. 1123.)

In the decision in *People v. Saunders* (2006) 38 Cal.4th 1129, the Court held that a passenger of a vehicle is seized, for purposes of the Fourth Amendment, when a law enforcement officer orders the passenger to step out of the vehicle. However, an officer's authority to order a passenger out of the vehicle is limited to those vehicles which have been lawfully stopped. (*Id.* at p. 1135.) In *Saunders*, unlike the situation in *People v. Brendlin, supra,* the passenger could challenge the vehicle stop because he was ordered out of the vehicle by the officer. However, the Court found that the stop was lawful because there was a legitimate basis for it, i.e., the front license plate was missing. (*Id.* at p. 1136.)

Given the limited holdings of both the *Brendlin* and *Saunders* decisions, neither compels a finding by this Court that appellant lacked standing to challenge the vehicle stop in this case. The primary obstacle to applying the holdings of those two decisions is that the hearing on the motion to suppress in this case simply did not address the question of

whether either defendant had the expectation of privacy necessary to challenge the stop. The focus of the hearing and the briefing on the motion, by both the prosecution and the defense, was whether Officer Wightman had a reasonable suspicion to justify stopping the car driven by Richard Letner. Similarly, in his ruling on the motion, the trial judge analyzed the facts surrounding the stop only for the purpose of determining the existence vel non of a reasonable suspicion on which to base the vehicle stop.

Because appellant was ordered out of the car (PH RT 604), the facts of the present case are closer to those in *People v. Saunders, supra,* than to those in the *Brendlin* decision. Accordingly, the underlying issue remains whether Officer Wightman's stop was based on reasonable suspicion.

### E. This Court Should Reconsider Its Decision in *People v. Brendlin* Because It Diverges From the Majority View on the Issue of a Passenger's Expectation of Privacy

As this Court recognized in the majority opinion in *People v. Brendlin, supra*, "[a] majority of courts,[5] including several federal circuit courts and some state courts, have embraced a per se rule that the passenger is seized at the moment the driver submits to the official show of authority." (*People v. Brendlin, supra*, 38 Cal.4th at p. 1114.) Therefore, the great weight of authority supports appellant's position that a passenger in a motor vehicle can challenge the lawfulness of the stop and detention of the vehicle. Although the United States Supreme Court has not expressly held

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[5] The dissent in *Brendlin* notes that eight of the federal circuit courts of appeal hold that passengers are detained during a traffic stop, while there are no cases on point from the other four federal circuits. In addition, twenty-one state courts have adopted the same view. (*People v. Brendlin, supra*, 38 Cal.4th at p. 1127.)

the passenger may challenge the validity of the stop, it has strongly suggested that a traffic stop of a vehicle constitutes a detention of all its occupants, including passengers. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 436 ["traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle"]; *Colorado v. Bannister* (1980) 449 U.S. 1, 4, fn. 3 ["There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"]; *Delaware v. Prouse* (1979) 440 U.S. 648, 653 ["stopping an automobile and detaining its occupants constitutes a 'seizure'"].)

A new decision of the United States Court of Appeals for the Third Circuit, *United States v. Mosley* (3d Cir. 2006) 454 F.3d 249, provides a very persuasive argument for the position that a passenger always has an expectation of privacy if the vehicle in which he or she is riding is unlawfully stopped by law enforcement. In the *Mosley* case, on the basis of an anonymous tip, the Philadelphia police stopped an automobile in which Mosley was a passenger. Mosley and the driver of the car filed a motion to suppress the stop and the subsequent seizure of guns found in the car. The government conceded that the stop was illegal and dismissed all charges against the driver. The federal district court agreed with the government that Mosley could not suppress the guns found in the car, despite the illegality of the stop, because as a passenger he did not have an expectation of privacy in the contents of the car.

The Third Circuit reversed the denial of Mosley's motion to suppress. The appellate court emphasized that the issue was not the search of the car but the seizure of Mosley. In reaching this conclusion, the Third Circuit took a view diametrically opposed to that of this Court in

*People v. Brendlin, supra.* The Court of Appeals wrote:

> The Fourth Amendment violation, however, was the traffic stop itself, and not just Mosley's removal from the car. We wish to reiterate this point for the benefit of future litigants: a Fourth Amendment seizure of every occupant of a vehicle occurs the moment that vehicle is pulled over by the police. The legality of the seizure depends upon the legality of the traffic stop.

(*United States v. Mosley, supra*, 454 F.3d 253, fn. 6.)

The *Mosley* court also noted that "...a traffic stop is a single act, which affects equally all occupants of a vehicle. To us, that description of traffic stops comports with the commonsense experience of everyone who has ever ridden in a car.." (*Id.* at p. 253.) This observation echoes statements in Justice Corrigan's dissent in *People v. Brendlin, supra:*

> Passengers in a vehicle pulled over for a traffic stop are not free to leave, in either a practical or a constitutional sense. Certainly no one can safely leave the vehicle before it stops. Once it has pulled over, the officer has the authority, as a matter of law, to order that the passengers remain inside [citation] or get out of the vehicle [citation]. This authority is soundly based on the need to protect the officer's safety. One of its necessary consequences, however, is that the passengers, having been forced to interrupt their journey, are deprived of further freedom of movement. Accordingly, the passengers have been detained and thus "seized" for Fourth Amendment purposes.

(38 Cal. 4th at pp. 1123-1124.)

The following decisions of a number of federal courts of appeals have found that passengers have an expectation of privacy which allows them to challenge, under the Fourth Amendment, their detentions in a vehicle stop. In *United States v. Colin* (9th Cir. 2002) 314 F.3d 439, 442-443, the Ninth Circuit observed: "[O]ccupants of a vehicle have standing to challenge on Fourth Amendment grounds an officer's stop of their vehicle even if they have no possessory or ownership interest in the vehicle."

In *United States v. Grant* (5th Cir. 2003) 349 F.3d 192, 196, the Fifth Circuit found that a passenger "does have standing to challenge the seizure of his person" occurring as part of the stopping of the vehicle. Similarly, the Eighth Circuit Court of Appeals held in *United States v. Ameling* (8th Cir.2003) 328 F.3d 443, 446 (quoting *United States v. Lyton* (8th Cir. 1998) 161 F.3d 1168, 1170) that a passenger may "challenge the stop and detention and argue that evidence derived from that stop should be suppressed as fruits of illegal activity."

In the *United States v. Gama-Bastidas* (10th Cir.1998) 142 F.3d 1233, 1239, the Tenth Circuit found that a passenger "can contest the constitutionality of his own search and seizure," including grounds for stopping a vehicle. Also, the First and Fourth Circuit Courts of Appeal have found that motor vehicle passengers have standing under the Fourth Amendment to challenge their detentions. (See *United States v. Sowers* (1st Cir.1998) 136 F.3d 24 [upon stopping of vehicle, "both the driver and the passenger are in a practical sense subject to the officer's authority," and thus "any one of them may challenge his own detention regardless of whether he was the immediate target of the investigation or whether he had a privacy interest in the vehicle itself"]); *United States v. Rusher* (4th Cir. 1992) 966 F.2d 868 [passengers' "privacy interest in their persons" allows them to challenge stopping of vehicle].)

In addition to these federal circuit courts of appeals, many state appellate courts have also found that passengers in motor vehicles have standing to challenge stops and detentions under the Fourth Amendment. (See, e.g., *State v. Bowers* (Ark.1998) 976 S.W.2d 379, 381 [the Arkansas Supreme Court wrote: "the occupants of a vehicle have standing to assert their own Fourth Amendment rights, independent of the owner's, such as in

a challenge to the initial stop, or the seizure of their person"]; *State v. Haworth* (Ida.1984) 679 P.2d 1123, 1124 [the Idaho Supreme Court found that both the passenger and driver have standing to challenge the reasonableness of a vehicle stop]; *People v. Bradi* (Ill. 1982) 437 N.E.2d 1285, 1288 [the Appellate Court of Illinois found that an occupant of a vehicle stopped by the police, can challenge the stop of the automobile since it entails an infringement of his personal freedom]; *State v. Eis* (Iowa 1984) 348 N.W.2d 224, 226 [the Iowa Supreme Court found that both the passenger and driver had standing because when "the vehicle is stopped they are equally seized; their freedom of movement is equally affected"]; *State v. Hodges* (Kan. 1993) 851 P.2d 352 [the Kansas Supreme Court wrote: "where the car and its occupants were improperly stopped, a passenger has standing"]; *State v. Stott* (Neb.1993) 503 N.W.2d 822, 828 [the Nebraska Supreme Court held that an occupant of a car had "standing to challenge the stop"of the vehicle under the Fourth Amendment]; *Scott v. State* (Nev. 1994) 877 P.2d 503, 508 [the Nevada Supreme Court found a passenger had standing to claim stop of the vehicle in which he was riding was a mere pretext to conduct an unreasonable search]; *People v. Millan* (N.Y. 1987) 508 N.E.2d 903 [the New York Court of Appeals wrote that "defendant, as a passenger in the cab, had a right to contest the legality of the stop of the cab"]; *State v. Carter* (Ohio 1994) 630 N.E.2d 355 ["both passengers and the driver have standing regarding the legality of a stopping because when the vehicle is stopped, they are equally seized"]; *State v. Scott* (Ore.1982) 650 P.2d 985, 990 [the Oregon Court of Appeals found that a passenger in stopped vehicle not only has standing to contest the stop under the Fourth Amendment he may claim evidence a fruit of illegal stop];

*State v. DeMasi* (R.I. 1908) 419 A.2d 285, 294, vacated on other grounds, 452 U.S. 934 [the Rhode Island Supreme Court found that all occupants of a stopped car had standing, as "all three shared a legitimate expectation that they would be free from the unreasonable governmental intrusion occasioned by the stop, the request for identification, and the warrant check"]; *State v. Harris* (Wis. 1996) 557 N.W.2d 245, 251[the Wisconsin Supreme Court wrote: "Once the police acted to seize someone in that vehicle, everyone in the vehicle acquired standing to challenge the lawfulness of the seizure. Therefore Harris, as a passenger in that vehicle, had standing to challenge the police officers' action"]; *Putnam v. State* (Wyo. 2000) 995 P.2d 632, 636 [the Wyoming Supreme Court observed: "Even if a person cannot directly challenge the search of a vehicle because of a lack of standing, they may indirectly challenge the search if they can demonstrate that the fruits of the search are a consequence of an illegal seizure of their person."].)

For all of the foregoing reasons, appellant asks the Court to reassess its decision in *People v. Brendlin, supra,* regarding a passenger's expectation of privacy and adopt the view taken by the vast majority of courts which have considered the issue as well as by the dissenting justices in *Brendlin*.

### F. Regardless of the *Brendlin* or *Saunders* Decisions, Appellant can Seek Suppression of Evidence Which is the "Fruit" of an Illegal Stop

Even assuming the validity of the *Brendlin* and *Saunders* decisions, appellant has established his right to challenge the unlawful stop. If an individual can establish that the initial stop of a car violated the Fourth Amendment, then the evidence that was seized as a result of that stop would

be subject to suppression as "fruit of the poisonous tree." (*United States v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095.) The Supreme Court's decision in *Wong Sun v. United States* (1963) 371 U.S. 471 makes clear that once a defendant has established the primary illegality in the case, here the illegal detention of the red Fairmont and its occupants, the next question is what evidence would not have been discovered "but for the illegal actions of the police." *(Id.* at pp. 487-488.) A court must then examine whether the evidence is so tainted by that illegality that it must be suppressed.

The taint analysis first set forth in *Wong Sun* remains the essential analysis for determining whether evidence obtained by unconstitutional police action is admissible. In vehicle stop cases, once the occupants of the vehicle have established that their detention, arrest or stop was illegal, "as a general rule any evidence obtained as a result of their detention must be excluded as fruit of the poisonous tree." (*United States v. Santana-Garcia* (10th Cir. 2001 ) 264 F.3d 1188, citing *United States v. Villa-Chaparro* (10th Cir. 1997 ) 115 F.3d 797, 800, fn. 1.)

The State bears the burden to show that evidence is not "the fruit of the poisonous tree." (*United States v. Twilley, supra,* 222 F.3d at p. 1097.) In *United States v. Arvizu* (9th Cir. 2001) 232 F.Ed 1241, 1252,[6] the Court of Appeals stated that "ordinarily, when a car is illegally stopped, the search that follows will be a product of that stop." The State must be able to prove that the primary taint of the illegal stop had been dissipated before the disputed evidence was obtained. It may do so by "demonstrating the evidence would have been inevitably discovered, was discovered through

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[6] Reversed on other grounds, *United States v. Arvizu* (2002) 534 U.S. 266.

independent means, or was so attenuated from the illegality as to dissipate the taint of the unlawful conduct." (*United States v. Nava-Ramirez* (10th Cir. 2000) 210 F.3d 1128, 1131.)

In *United States v. Mosley, supra,* the Third Circuit applied the following analysis to the determination of whether the trial judge had erred in denying Mr. Mosley's motion to suppress the guns, the fruit of the illegal stop:

> The car in which Mosley was riding was pulled over illegally. Mosley was illegally seized the moment the car was pulled over. The stopping of the vehicle was a but-for cause of the discovery of the guns. The bubble of causation which links a traffic stop to a subsequent search extends to all of the occupants of the stopped vehicle. To overcome Mosley's suppression motion, therefore, the government would have had to establish one of the traditional exceptions to the *Wong Sun* rule: attenuation, inevitable discovery, independent source, or some intervening act or event sufficient to purge the taint of the illegal stop. The government raised no exception at trial, and raises none on appeal. We therefore hold that the guns were fruit of the poisonous tree and must be suppressed.

(*Id.* 454 F.3d. at p. 268.)

In the instant case, the court below as well as the parties focused entirely on the lawfulness vel non of Officer Wightman's stop of the vehicle which Letner was driving and in which appellant was a passenger. Accordingly, the lower court did not address any of the factors identified in *United States v. Mosley, supra*, quoted above. Respondent now argues that the evidence derived from the detention of appellant and the search of the car should not be suppressed because it would have been discovered inevitably after the police found Ms. Pontbriant's body; that is, "they would have found and searched her car, which was still parked where Letner and Tobin had left it on Highway 198." (RB at p. 75.)

This argument is not persuasive since the car was still parked on Highway 198 only because Officer Wightman had stopped it there and ordered appellant and Letner to leave it there. Indeed, under the prosecution's theory of the case, had Wightman not stopped the vehicle, the defendants would have driven it to Iowa. Therefore, respondent's inevitable-discovery claim must fail as must the State's argument that the disputed evidence — to wit, all of the physical evidence found in Ms. Pontbriant's car as well as evidence that Richard Letner and appellant were in the car that particular night–was not the "fruit" of the initial illegal stop of the vehicle.

### G. Whether or not the Vehicle was Stolen is not Relevant to Determination of the Reasonableness of Officer Wightman's Decision to Stop it

While not directly arguing [7] that appellant did not have a right to challenge, on Fourth Amendment grounds, the stop of the vehicle because it was stolen, the respondent implies that this fact provides another basis for this Court to affirm the denial of appellant's motion to suppress. For example, the RB states:

> 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.

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[7] The respondent does make this argument in section C of Argument I of the RB, which is supposedly a discussion of the harmlessness of any error caused by the denial of the suppression motion. (RB at pp. 73-75.)

(RB at p. 73; italics in the original.) [8]

Further, respondent argues:

> 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.*

(RB at p. 73; emphasis in the original.)

There are several problems with these contentions. First, the State did not raise this issue (that the car was stolen and therefore defendants had no expectation of privacy in it) at the suppression hearing or in the trial court. Accordingly, as is true of the contention that appellant lacked "standing" because he was merely a passenger in the car, this issue is waived for failure to raise it in the court below. (See argument in subsection B, *supra*.)

Second, at the hearing on the motion to suppress, Officer Wightman never said that he believed the car was stolen based on the slow speed of the vehicle. He testified that he believed that the slow speed might be the result of an intoxicated driver. (RT 43-44, 6/7/89.)

Third, respondent cannot now assert that the officer was justified in stopping the car because it was in fact stolen. At the time when Officer Wightman was following the car, he ran a vehicle check to determine whether the car belonged to one of the downtown car lots, as this was his

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[8] In the brief, respondent also wrote: "In this regard, they [appellants] 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." (RB 68-69.) This argument doubtless has emotional appeal, but it does not provide a reasoned analysis of the factual and legal issues presented by the motion to suppress.

initial suspicion. He determined that it was registered to an individual and that it had not been reported stolen. (6/7/89 RT 43-44.) Therefore, by the time he actually stopped the car, Wightman knew that the available facts did not support his original suspicion that it was stolen from one of the downtown car lots.

In *People v. Glick* (1988) 203 Cal.App.3d 796, the court of appeal stated that "[a]ll drivers on public highways, even those who are subsequently determined to be driving stolen vehicles, have a protected privacy interest to be free from unreasonable seizures." (*Id.* at p. 800, citing *People v. Lionberger* (1986) 185 Cal.App.3d Supp. 1, 4-5; 4 LaFave, Search and Seizure (2d ed. 1987 ) § 11.3(e), p. 329.) In *Glick, supra,* the court also noted that this right is separate from any expectation of privacy the driver has in the car or its contents, and is personal to the defendant the same as if he were walking along a public street. (*Ibid.)*

The State cannot rely on an after-the-fact justification for a challenged search or seizure. In *People v. Sanders* (2003) 31 Cal.4th 318, this Court found that the prosecution could not justify a search based on the probation status of one of the occupants of the property when the officer did not know of that fact at the time of the search. The Court observed:

> But if an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts. This is not to say that the validity of the search depends upon the officer's purpose. The validity of a search does not turn on "the actual motivations of individual officers." (*Whren v. United States* (1996) 517 U.S. 806, 813.) But whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken

> an objective assessment of an officer's actions in light of the facts and circumstances then known to him." [Citations omitted.]

*(People v. Sanders, supra*, at p. 334.)

Just as the Court did not accept the after-the-fact justification of the police officer in the *Sanders* case, it should reject respondent's claim here that because the vehicle may have been stolen, Officer Wightman was justified in stopping it when the facts known at the time did not support a suspicion that it was stolen. Indeed, in this case the officer originally suspected that the car might have been stolen from one of the car lots in the downtown area which had experienced car thefts in recent months; however, before he stopped the car he had abandoned this suspicion, after having ascertained that the car was registered to a private individual and had not been reported stolen.(6/8/69 RT 38-39.)[9]

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[9] The following colloquy between defense counsel and Officer Wightman occurred at the hearing on the motion to suppress:

Q: Now, when you heard—well, let me ask you this. As you were going along behind the red Fairmont, had you already called in the license plate to get some information on it?
A: Yes.
Q: Where did you make that call in progress of this journey?
A: I believe the testimony at the prelim was on Mineral King, or approaching 198.
Q: And by the time you stopped the car, had you received any information on it?
A: Yes.
Q: What was that?
A: It belonged to Miss Pontbriant.
Q: Was there any other information about the car itself, that it was wanted in connection with any crime, or the occupants were suspected of anything, anything like that?
A: No.

(6/8/89 RT 38-39.)

### H. Respondent's Arguments that the Failure to Grant the Motion to Suppress Constituted Harmless Error are Unpersuasive

Many of the arguments made in the RB under the rubric, "Any Error In Denying Appellants' Suppression Motion Was Harmless" (RB at pp. 73-78), merely restate the respondent's earlier "standing" claims — that Richard Letner and appellant did not have any reasonable expectation of privacy in a stolen car and thus could not challenge the search and seizure. As discussed previously, these contentions are not persuasive. The underlying premise of this argument is that the search of the automobile was somehow separate from the stop of the vehicle and detention of the two occupants. As appellant argued previously, the suppression motion in this case rested on the fact that the initial vehicle stop was unconstitutional and that all evidence derived from that illegality should be suppressed as "fruit of the poisonous tree" under *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488.

Respondent also argues that the discovery of the various items found in Ms. Pontbriant's car was inevitable:

> 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.

(RB at p. 75.)

There are several problems with this argument.

First, the prosecutor did not argue this theory of inevitable discovery in the trial court. The prosecution must establish at the suppression hearing by a preponderance of the evidence that the evidence would have been discovered inevitably by lawful means independent of any illegal arrest,

detention or search. (*Nix v. Williams* (1984) 467 U.S. 431, 444, fn. 5; *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 682.) The prosecution failed to meet that burden in this case. It is clear that the State would not have discovered through lawful means evidence that appellant and Letner were in this vehicle during the time period in which the car was stopped by Officer Wightman.

A second problem with this inevitable discovery argument is that it is nonsensical. If Officer Wightman had not stopped the car when he did, the car would not have been parked on Highway 198 the next day. Indeed, it is impossible to know where the automobile would have been, absent the illegal stop. Similarly unavailing is respondent's assertion that

> 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.

(RB at p. 76.)

Moreover, respondent has confused the "inevitable discovery" rule with the "fruits of the poisonous tree" doctrine. The basis of the inevitable discovery theory is that the search would have occurred anyway despite any illegality. The theory does not apply to searches that would have occurred later by exploitation of the primary illegality. (See, e.g., *Colbert v. State* (2000 Ark.) 13 S.W. 3d 162 [evidence obtained by illegal stop and search of defendant's car when he was leaving town not admissible on inevitable discovery theory where police argued that absent this stop the police would have staked out defendant's home even though the police had not showed any intent to stake out his house prior to the stop]; see also *United States v. Cabassa* (2d Cir. 1995) 62 F.3d 470.) Thus, respondent's argument for inevitable discovery takes fruits analysis and simply renames it.

The various circumstances listed by respondent in support of this claim do not amount to strong evidence against appellant for the murder of Ms. Pontbriant. It is true that there were witnesses who could place Richard Letner at her house on the evening of the murder (i.e., Flourene Gentry, Edward Bourdette and Kathy Coronado), but none of them could say that appellant was also there.

By Officer Wightman's own account at the suppression hearing, he did not recognize the people in the Pontbriant car until he actually stopped it. Defense counsel cross-examined Wightman about this point, and Wightman maintained that he could not see their faces until he stopped the car. (6/8/89 RT 35.) Accordingly, respondent cannot now claim that Wightman could have placed appellant in the victim's car that night even if he had not stopped the car.

Similarly speculative is respondent's contention that "crime-scene evidence" relating to Letner and appellant rendered any error in denying the suppression motion harmless. The respondent cites evidence presented at trial by one of the employees at 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. 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.

(RB at p. 77.)

A review of the record confirms that this evidence was not substantial and does not support respondent's contention that any error in failing to grant appellant's suppression motion was harmless. Michael Long, the manager of Frank's Liquor and Superette, recalled that either

Richard Letner or appellant purchased beer and a bottle opener at his store one evening early in March 1988. (42 RT 6104.) However, he could not identify which defendant even though they do not look alike. Long stated that he could not "swear as to the actual identity of that person;" he had a "feeling" that one of the defendants had made that purchase. Long couldn't "remember exactly." (42 RT 6105.) On cross-examination, however, Long stated he was not sure whether either Letner or appellant was the person who had come into the store in early March 1988 to make the purchase of beer, a bottle opener and some wine. (42 RT 6114.)

As detailed in appellant's opening brief (AOB at pp. 145-151), Earl Bothwell was not a credible witness and had given inconsistent stories about what appellant supposedly said about his involvement in a murder in California. Indeed, during her closing argument at the guilt phase, the prosecutor acknowledged Bothwell's unreliable character:

> . . .Obviously no one is going to dispute [Bothwell's] 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.

(54 RT 7801.)

Given Bothwell's felony convictions, his admitted use of at least five aliases and the discrepancies in his story about what and when appellant allegedly admitted his participation in a murder, the respondent cannot rely on Bothwell's testimony as substantial evidence mitigating the prejudice which resulted from the denial of appellant's motion to suppress.

## I. Conclusion

The trial judge erred in denying the motion to suppress all evidence, the "fruit of the poisonous tree," obtained as a result of the illegal traffic stop by Officer Wightman[10] Respondent has failed to prove beyond a reasonable doubt that the erroneous denial of the suppression was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As argued fully in appellant's opening brief, this illegal stop provided the most crucial link between appellant and the murder of Ivon Pontbriant and thus was clearly prejudicial. Accordingly, the Court should reverse appellant's convictions and death sentence.

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[10] The motion filed in the lower court identified the following "fruits" which should be suppressed: all observations of the appellant in the vehicle and thereafter at the scene of the stop; all observations of the contents of the vehicle from the inception of the stop and thereafter; all statements made by appellant and Richard Letner at the scene of the stop; all evidence seized from the vehicle; and any and all other evidence obtained as a result of the stop of the vehicle, subsequent detention of appellant and search of the vehicle. (1 CT 76.)

## II.

## THE TRIAL COURT ERRED IN THE FAILURE TO SEVER THE GUILT PHASE TRIAL

Appellant argued in his AOB that the trial judge erred in failing to sever the guilt phase trials of appellant and his co-defendant, Richard Letner. (AOB at pp. 57-63.) Because there is little in respondent's brief on this claim that requires further discussion, appellant will rely upon the arguments made in the AOB. There is, however, one argument that requires further discussion.

As appellant argued in the AOB, the prejudice created by the joinder of the murder trials of the defendants was exacerbated by the prosecutor's decision to treat them as though they were inseparable persons, almost like conjoined twins. (AOB at pp. 61-62.) Respondent's brief does not dispute that claim; indeed, the brief takes the opposite tack. Respondent insists that because appellant and Letner were "clearly crime partners," they were not prejudiced by being tried together. (RB at pp.84-85.)

This tactic by the prosecution — to portray the defendants as inseparable — improperly encouraged the jurors to convict both defendants based on guilt-by-association evidence. This course violated the fundamental principle of a fair trial that a defendant should be found guilty only on the basis of evidence regarding him individually. (*People v. Mitchell* (1969) (1 Cal.App.3d 35, 39.) In this case, the prosecutor deliberately blurred the lines between the evidence which applied to one and not the other of the two defendants. For example, during her closing argument at the guilt phase, the prosecutor told the jurors that she did not need to delineate exactly what each defendant's role was in each crime in order for the jury to convict both defendants:

> Now, I would submit in our case, in this case, we have evidence of both defendants directly committing a crime, and helping each other aiding and abetting the crime. This is obviously, as you have seen, a somewhat lengthy crime that occurred there in her house. And for me to be able to identify to you which time which person did what thing is obviously not possible. What is possible, though, is to know that both of the defendants are principals. And we know that they are both principals through the evidence, such as the physical evidence, the hair, the blood, the matching of Letner's knife to the table, the – the consciousness of guilt that was exhibited by both defendants. By "consciousness of guilt" I'm talking about the lies to Pam Loop, Denise Novotny, about getting out of town. The lies to Officer Wightman. These things tell us that both defendants, whether they directly committed or aided and abetted, are principals in these crimes.

(53 RT 7582-7583.)

The prosecution's choice to treat the defendants as inseparable violated appellant's due process and Sixth Amendment rights which require the State to prove beyond a reasonable doubt every fact necessary to prove every element of a charged crime. (*In re Winship* (1970) 397 U.S. 358, 364.) The prosecution's decision to try appellant and his co-defendant as though they were inseparable partners in crime resulted in an unfair trial where guilt-by-association[11] was the basis for conviction. Accordingly, appellant's convictions must be reversed.

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[11] See also *People v. Lopez* (2006) 138 Cal.App.4th 674, 679 [court of appeal found that prosecutor committed misconduct and reversed because the prosecutor had argued that jury should convict the defendant because of guilt-by-association; to wit, he was a Roman Catholic priest charged with sexual molestation]; *Juan H. V. Allen* (9th Cir. 2005) 408 F.3d 1262, 1278 [evidence that a crime partner may have had the necessary motive is not sufficient to establish the defendant's motive.]

## III.

## THE TRIAL JUDGE'S DENIAL OF APPELLANT'S MOTIONS FOR A SEPARATE PENALTY PHASE TRIAL RESULTED IN REVERSIBLE ERROR

As established in appellant's opening brief, the prejudice created by a joint trial in this case was even more extreme in the penalty phase. Respondent argues that the trial judge did not err in denying repeated motions for severance of the penalty trials of appellant and co-defendant Richard Letner because the joint trial did not result in "gross unfairness" to appellant or his co-defendant. (RB at pp. 83-84, 86-88.) As already discussed in the AOB, the record in this case shows that such gross unfairness did occur during appellant's joint penalty trial with Richard Letner.

The respondent's reliance on *People v. Taylor* (2001) 26 Cal.4th 1155 and *People v. Ervin* (2000) 22 Cal.4th 48, to advance its position on the severance issue is misplaced. First, the evidence presented at the penalty phase trials in those two cases was far less dramatic and prejudicial than the evidence presented in this case. In *Taylor, supra,* defendant made the following claims about why his joint penalty phase trial denied his Eighth Amendment right to an individualized sentencing: (1) that he was biracial while his co-defendant was Caucasian; (2) his prior criminal record was more "significant" than that of his co-defendant; and (3) his mitigation evidence was less impressive than his co-defendant's. (*People v. Taylor, supra,* 26 Cal.4th at p. 1173.) Taylor's co-defendant did receive a life without parole sentence. (*Ibid.*)

Similarly, the evidence at the joint penalty trial in *People v. Ervin, supra,* was not as prejudicial to the defendant as the evidence at issue in this

case. *Ervin* involved three co-defendants and a murder for hire. Defendant Ervin claimed that the mitigating evidence elicited in support of his co-defendants tended to "eclipse" the evidence favorable to him. One of his co-defendants presented evidence of his community involvement in sports, music, religion and fund-raising for civic groups. Defendant Ervin also complained that he was harmed by the fact that the jury "compared" his role as the actual killer with the other defendants, one of whom hired the other two to do the killing. This Court rejected Ervin's arguments about the failure to sever his penalty phase trial from his two co-defendants:

> We see nothing in the record suggesting the jury assigned undue culpability to defendant after hearing his co-defendants' mitigating evidence. Defendant had ample opportunity to present, and did present, testimony and argument regarding his own good character and rehabilitation. The prosecutor made it clear to the jury that McDonald's role as "mastermind" of his ex-wife's murder fully justified imposing a death sentence on him. The fact that the jury returned a death verdict for McDonald shows it was not unduly impressed by the array of mitigating evidence introduced on his behalf. Robinson's lesser verdict can only reflect the jury's careful consideration of the respective culpability of the three co-defendants.

(*People v. Ervin, supra,* 22 Cal.4th at p. 96.)

As pointed out in the AOB, appellant faced far more harmful evidence as a result of being tried in a joint penalty trial with Richard Letner. Letner testified on his behalf and blamed appellant for the murder of Ivon Pontbriant. Letner painted a very ugly picture of appellant's actions during the crime. For example, he alleged that appellant had cut off Ms. Pontbriant's clothes and pulled down her pants, causing her to defecate. He further claimed that when the victim started laughing at appellant, he grabbed her hair and pulled out quantities of it. (60 RT 8666-8669.) Letner further described appellant as acting like a "wild animal" during the crime.

(61 RT 8794.)

Drawing upon his long relationship with appellant, Letner took every opportunity to paint appellant generally as a bully and a criminal. For example, he talked about appellant's alleged fighting and drug dealing while he was in high school. (61 RT 8718.) Letner also claimed that appellant had a "golden rule" that he would "never do a crime with a partner [he] [couldn't] kill." (63 RT 9019.) He also alleged that he was afraid of appellant because appellant had stabbed him in the leg (61 RT 8886) and had bitten him in the head. (60 RT 8671.)

Not only did Letner take the stand to testify that appellant alone was responsible for the murder of Ivon Pontbriant but he introduced witnesses, such as his brother John Letner, Sheila White and Burt Arnold, who testified that appellant dominated Letner. In addition, Letner's psychological expert, Dr. Blak, testified that because appellant essentially acted as a Svengali for Letner, appellant was in control at the time of the murder in this case. (63 RT 9155.) It is unlikely that these witnesses, including Letner himself, would have been allowed to or would be willing to testify against appellant if appellant had been given a separate penalty trial. Moreover, the prosecution would have had difficulty compelling their testimony at a separate trial of appellant since the decision in *People v. Boyd* (1985) 38 Cal.3d 762 limits the prosecution's evidence in its penalty case-in-chief to evidence that is relevant to one of the aggravating factors included in Penal Code section 190.3.

Unlike the facts of either the *Taylor* and *Ervin* cases, the joint penalty phase in this case did result in "gross unfairness" to appellant. In a death penalty case, the Eighth Amendment requires an individualized assessment of the defendant's character and background. (See, e.g.,

*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305.) Individualized consideration of penalty in the joint trial of appellant and co-defendant Letner was impossible because Letner made his case for life by putting all responsibility for the crime on appellant. Therefore, while appellant was trying to convince the jury not to sentence him to death, he faced, in essence, two prosecutors — the district attorney and his co-defendant.

In addition, in her closing argument at the penalty phase, the prosecutor continued to emphasize that the defendants were longstanding partners in crime. For example, she argued:

> . . .from the defendants' teenage years to the present they have shown themselves to be mean, aggressive, greedy and just generally not law-abiding citizens. They have acted with a complete and total disregard for the law.

(67 RT 9667.)

Further, she repeated her argument from the guilt phase that the jurors did not need to determine who actually killed Ms. Pontbriant because the defendants were acting in "complete tandem." (67 RT 9684.) The prosecutor also stated that "[t]he facts tell us that two men committed this murder, not one....[i]t is a case where two macho men rip off her clothes, and rip out her hair." (67 RT 9690.)

Not only did the joint penalty trial in this case deprive appellant of his Eighth Amendment right to an individualized and reliable determination of whether he should be sentenced to death, but it also lessened the prosecution's burden of proof to establish that the death penalty was the appropriate sentence for appellant. This lessening of the prosecution's burden occurred because appellant's co-defendant was trying just as hard as the district attorney to persuade the jury to sentence appellant to death.

The prosecution cannot show beyond a reasonable doubt that appellant was not prejudiced by this joint penalty trial. In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the U.S. Supreme Court stated that, in assessing error in a capital case, a reviewing court does not consider whether the jury would have sentenced the defendant to death in a hypothetical trial in which the error did not occur but rather whether the death sentence was "surely unattributable to the errors." (*Id.* at p. 279.) Given the extensive and highly prejudicial evidence offered by Richard Letner which would not have been admissible had appellant been tried separately, the error in trying the two co-defendants jointly in the penalty phase cannot be deemed harmless. Accordingly, the Court should reverse appellant's death sentence.

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## IV. - VII.

## APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT

Appellant's opening brief discusses in detail the evidence and the legal analysis establishing that appellant's convictions should be reversed for insufficiency of evidence. (AOB at pp. 78-194.)[12] The following discussion simply addresses the arguments and statements made in the respondent's brief that require additional refutation.

### A. Attempted Rape Conviction, Rape Felony Murder Conviction and Special Circumstance Finding[13]

In challenging appellant's arguments that the evidence was insufficient to establish that appellant attempted to rape (or aided and abetted an attempt to rape) Ivon Pontbriant and that she was killed in that attempt, the respondent relies on an emotional and exaggerated description of the evidence allegedly supporting these convictions. For example, the respondent argued that the defendants had subjected Ms. Pontbriant to a "night of sheer terror." Further, respondent claimed that 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. (RB at pp. 94-95) Respondent also concluded:

> Given these facts, coupled with the other evidence, the jury rationally found that appellants' overall scheme of terror included an attempt to rape.

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[12] Appellant was simply convicted of first degree murder. (4 CT 971.) However, the prosecution argued to the jury that he committed first degree felony murder based on attempted rape, burglary and robbery.

[13] This reply relates to Argument IV in the AOB.

(RB at pp. 94-95.)

Respondent apparently hopes that this hyperbolic rhetoric will overcome the absence of evidence of solid value in the record supporting the prosecution's theory of attempted rape. Respondent's invocation of the "terror" allegedly visited on Ms. Pontbriant by appellant and his co-defendant has nothing to do with evidence of an attempted rape. Further, respondent's description of her wounds, quoted above, does not logically point to an attempted rape. Finally, while respondent's claim that this evidence allowed the jury to find that "appellant's overall scheme of terror included an attempt to rape" is certainly dramatic, it does not support a conclusion that there is substantial evidence in the record of this case that appellant committed attempted rape or was an aider or abettor to an attempted rape of Ms. Pontbriant by Richard Letner.

Certainly, the fact the murder in this case involved violence does not mean that it also necessarily involved an attempted rape; such a conclusion amounts to "mere speculation [that should] not be allowed to do duty for probative facts." (*Galloway v. United States* (1943) 319 U.S. 372, 395.) A so-called "scheme of terror" does not equate with an attempted rape, which has two elements: the specific intent to commit rape and a direct but ineffectual act done toward its commission. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.)

Other evidence cited by respondent in support of the claim that the evidence was sufficient to prove an attempted rape is: (1) the condition of Ms. Pontbriant's body when police found her (that is, she was bound by the wrists and throat, she was face-down and naked except for the socks on her feet and her brassiere was wrapped around her waist); (2) clumps of her hair

were cast about the room or tangled in the telephone cord binding; (3) her sweater was torn and (4) there was a Heineken beer bottle lodged between her legs near her genital area.[14] (RB at p. 95.) In addition, the prosecution cited co-defendant Letner's crude remark to Kathy Coronado as evidence that the "appellants were willing to use the threat of violent sexual aggression to intimidate and achieve their goals." (RB at pp. 95-96.) In addition, the respondent cites the alleged semen stain on the bedroom carpet and the fresh blood stains, consistent with appellant's blood, found in the same bedroom. (RB at p. 96.)

Appellant has already discussed, in his opening brief, the significance of these items of evidence. First, as pointed out in the AOB, there are numerous decisions in which the California appellate courts have

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[14] The respondent brazenly misrepresents the evidence regarding this bottle, writing: "The Heineken beer bottle [was] lodged *into* Ms. Pontbriant's buttocks near her genital area." (RB at p. 95; emphasis added.) No one testified that the bottle was lodged "into" her buttocks. Officer John Rains testified that he found the bottle between her legs, and it was near her genital area. He stated: "The bottle was what I would term as securely placed between the victim's legs. I made an effort to remove the bottle with the victim lying in the position that she was in prior to moving the body and was unsuccessful. The only way that the bottle could be removed was after the coroner had arrived, and we had rolled the victim over onto a sheet I was able to take the bottle out at the point." (39 RT 5622-5623.) This evidence does not support the respondent's claim in its brief that the bottle was lodged in the victim's buttocks. Moreover, Dr. Walter, who did the autopsy, did not find any trauma either to Ms. Pontbriant's vagina or her anus. (34 RT 4935-4936.)

This misstatement of the facts in respondent's brief mirrors similar misuse of the bottle evidence by the prosecutor at trial: she took a piece of unpleasant and unduly prejudicial evidence to make a point which is not logically related to the charge of attempted rape. The presence of the feces-covered bottle does not logically support the charge of attempted rape.

reversed convictions for various kinds of sexual assaults for lack of substantial evidence, even though the victim was only partially clothed and there was evidence of violence. (See, e.g., *People v. Anderson* (1968) 70 Cal.2d 15 [young girl found naked next to her bed]; *People v. Johnson* (1994) 6 Cal.4th 1 [female victim found naked from the waist down]; *People v. Craig* (1957) 49 Cal.2d 313 [body found in ripped clothing, a raincoat over a slip and panties, with her legs spread apart and had numerous lacerations and contusions on her face and breasts]; *People v. Granados* (1957) 49 Cal.2d 490 [victim found partially clothed with her skirt up "above her private parts" and the defendant had expressed a sexual interest in her]; see also, *People v. Morris* (1988) 46 Cal.3d 1 [male victim found naked except for his shoes and socks in public bathhouse known as a meeting place for the gay community; neither rape nor attempted rape even alleged].)

Very recently, in *People v. Guerra* (2006) 37 Cal.4th 1067, this Court rejected challenges, on insufficiency grounds, to a first degree felony murder conviction and a felony-murder special circumstance based on an attempted rape. The *Guerra* decision acknowledged that in older decisions (such as *Granados, Craig and Anderson, supra*), the Court declined to infer an intent to commit a sexual assault if there was neither semen or vaginal trauma even though the body was unclothed. Citing *People v. Holloway* (2004) 33 Cal.4th 96, 138-139, the Court stated that the absence of such evidence did not "rebut an inference based on other physical evidence surrounding the attack..." (*People v. Guerra, supra,* 37 Cal.4th at p. 1131.)

The evidence suggesting an attempted rape in both the *Guerra* and *Holloway* cases was more substantial than in the instant case. For example, in *Guerra*, the record established that the defendant had an "escalating

sexual interest" in the victim. (*People v. Guerra, supra,* 37 Cal.4th at p. 1131.) In addition, the Court found that the wounds on the victim, specifically the infliction of "poke wounds" on her breasts while she was still alive, constituted an act in furtherance of an attempted rape. (*Id.* at p. 1132.) In the instant case, at the guilt phase, no evidence was presented that appellant had any sexual interest in Ms. Pontbriant, much less an "escalating interest." Appellant testified that co-defendant Letner had claimed that he was having an ongoing sexual relationship with Ms. Pontbriant. On the night of the incident, appellant saw Letner and Ms. Pontbriant kissing. (46 RT 6860.) However, it is neither rational nor fair to impute Letner's sexual interest in the victim to the appellant.[15] Moreover, it is improper to infer petitioner's intent from the actions of his friend. (See *Juan H. v. Allen, supra,* 408 F.3d at p.1278 [evidence that a crime partner may have had the necessary motive is not sufficient to establish the defendant's motive].)

In contrast to the victim in the *Guerra* case, the wounds on Ms. Pontbriant were not on her breasts or her genital area but on her neck and facial areas. The nature of the wounds makes it clear that the victim suffered a violent attack, but it was not directed to the sexual areas of her body. The primary wound on Ms. Pontbriant was inflicted from the rear.

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[15] Similarly, the respondent's citation of the evidence that co-defendant Letner told Kathy Coronado on the telephone, "Shut up, you loud-mouthed bitch before I stick my dick in your mouth," as evidence that "the appellants were willing to use the threat of violent sexual aggression to intimidate and achieve their goals," does not provide logical support for the allegations that appellant attempted to rape Ms. Pontbriant or aided and abetted an attempted rape of her by Richard Letner. Appellant's intent vel non cannot be inferred from the statements and conduct of his co-defendant. (See *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1278.)

(34 RT 4902-4903.) She was found lying face down on the floor, in a narrow area between the couch and the coffee table. Her legs were close together. She was nude except for a brassiere, which was around her waist, and a pair of socks. (39 RT 5620.)

The facts of *People v. Holloway, supra*, also differ dramatically from those of the instant case. There were two victims in the *Holloway* case; two half-sisters who lived together in a townhouse. One sister's body was found in the back seat of her car. Her body was partially unclothed; she had a vaginal tear, and foreign pubic hairs were found on her body and on the robe covering it. The other sister's naked body was found inside the townhouse; she was on a bed with her wrists and ankles tied; and she had been stabbed and strangled. Citing the evidence of the sexual assault of the victim found in the car as well as the other physical evidence in the case, this Court concluded that these facts were sufficient to uphold the convictions for burglary (with intent to commit a sexual assault) felony murder and burglary felony murder special circumstance. (*Id.* at p. 138.) In the instant case, no evidence tied appellant to another sexual assault nor was there any other evidence – such as a vaginal tear or numerous foreign pubic hairs[16] – which would make up for the lack for evidence of a sexual assault on the single victim. Accordingly, the *Holloway* decision is not dispositive here.

As noted previously, the prosecutor made much of the feces-covered

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[16] While there was some hair evidence in this case, none of it was tied to the appellant. The prosecution's hair expert, FBI Special Agent Michael Malonge, testified that three hairs consistent with co-defendant Letner were found on the victim's chest. (41 RT 5967-5969.) Malone also stated that it was "possible" that these hairs were "fringe hair," coming from the pubic area. (41 RT 5970.)

beer bottle found between Ms. Pontbriant's legs. This piece of evidence is, however, more lurid than it is probative of an attempted rape. The prosecution's pathologist testified that there was not any evidence of trauma to either Ms. Pontbriant's anus or her vagina. (34 RT 4935-4936.) The prosecution did not present any evidence that the bottle was actually pushed, kicked or otherwise placed up her anus or vagina.

In any event, if there was such evidence that would not prove an *attempted rape*. To the extent the position of the bottle supports any inference of an attempted sexual assault, it is an inference of a violation of Penal Code section 289, penetration by a foreign object. The elements of an attempted section 289 violation and those of an attempted rape under Penal Code section are, of course, different.[17] As Judge Kozinski stated in *Golden v. Hayes* (9th Cir. 2006) 444 F.3d 1062,

> . . . a state court is not free to define an element out of existence, or to ignore the element entirely when upholding a criminal conviction. Such a ruling is contrary to clearly established federal law, namely *Jackson v. Virginia*. Indeed, the quintessence of a *Jackson* claim--the very meaning of *In re Winship* — is that every element of a crime must be proven beyond a reasonable doubt.

(*Id.* at p. 1069.)[18]

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[17] Rape involves sexual intercourse and does not include the use of a bottle or any other inanimate object to penetrate the victim's vagina. Also, in 1988, when the crime in this case took place, the State could not have sought a special circumstance finding based on Penal Code section 289 as it was not one of the enumerated felonies included in Penal Code section 190.2, subdivision (a) (17). That does not justify, however, the prosecutor's use of this bottle evidence to try to prove an attempted rape when it was relevant, if at all, to a charge of penetration by a foreign object under section 289.

[18] In a society devoted to the rule of law, the difference between

(continued...)

The prosecution elected not to charge appellant with a violation of section 289 and did not prove an attempted rape occurred through showing that a beer bottle was found between the victim's legs.

Respondent's claim that the semen and blood evidence support the attempted rape convictions completely lacks merit. Respondent's assertion that the semen stain on the bedroom carpet "apparently" came from a secretor and that Tobin was the only secretor who had been in the house misstates the evidence in this case. (RB at p. 76.)[19] It ignores the fact that the carpet sample was not obtained until more than two months after Ms. Pontbriant's murder.[20] Further, the prosecution has no basis for asserting

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[18](...continued)
violating or not violating a criminal statute cannot be shrugged aside as a minor detail. *(Dretke v. Haley* (2004) 541 U.S. 386, 399-400 (dis. opn. of Kennedy, J.).)

[19] Later in the respondent's brief, in support of the proposition that "Letner and Tobin were clearly joint venturers in this sadistic enterprise," the respondent again cites blood and semen "consistent" with Tobin having been found in the victim's bedroom. (RB at p. 98.) The prosecution's expert, Andrus, testified that the blood stains found in the victim's bedroom were consistent with the blood types of both appellant and Warren Gilliland, who lived in the house. (40 RT 5825-5829.) Therefore, this blood evidence does not constitute substantial evidence that it even belonged to appellant as opposed to Mr. Gilliland. Certainly, it cannot be cited as substantial evidence supporting appellant's conviction of the attempted rape charge.

[20] This situation presents a chain of custody issue in relation to the carpet sample with the alleged semen stain. At the time the police discovered Ms. Pontbriant's body in the Jacob Street house, they took possession of the house (and the carpet in the bedroom) as a crime scene. At least, they should have taken possession of it; however, the record shows that it was not secured against intruders. For example, Warren Gilliland stayed in the house after the murder occurred. (37 RT 5224.) In addition,
(continued...)

that Tobin was the only secretor who had ever been in this rental house. (40 RT 5721-5722.) The prosecution's expert, Rodney Andrus, did not know when the semen was deposited in the carpet. Indeed, he acknowledged that it could have been deposited years before. (41 RT 5880 ) In addition, as the respondent implicitly admits in his statement that the semen "apparently" came from a secretor, Andrus was not able to testify with any certainty that the semen came from a "secretor." (41 RT 5877, 5935 ) Moreover, Andrus was not even certain the stain was semen because the antigenic activity which he did detect in the carpet could have been caused by chemicals involved in the manufacture of the carpet or added to it later. (41 RT 5877, 5935 )

Similarly, respondent's reliance on the evidence of the blood stains found in the bedroom is misplaced; they have absolutely no relevance to the issue of whether appellant or co-defendant Letner attempted to rape Ms.

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[20](...continued)
when the police returned to the house in May 1988, furniture had been removed and the living room carpet appeared to have been shampooed. (40 RT 5721-5722.) Given these facts, the prosecution failed to establish a chain of custody for the carpet containing the alleged semen stain. In *People v. Riser* (1956) 47 Cal.2d 566, this Court found that the State has certain responsibilities regarding the "continuous chain of custody" of demonstrative evidence; that is, the party relying on an expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime and that between receipt and analysis there has not been any substitution of or tampering with this evidence . (*Id.* at p. 580.) Given the fact that it is undisputed that the carpet sample with the alleged semen stain was not taken from the scene until two months after the murder and that various people had access to the house during that time, the prosecution could not establish "continuous chain of custody," as discussed in *People v. Riser, supra,* of this evidence. This failure supports appellant's position that the semen evidence does not constitute substantial evidence that an attempted rape occurred in this case.

Pontbriant. There is no logical nexus between the presence of blood on the doily and pillow in the bedroom and any attempt to rape Ms. Pontbriant. Speculation is not sufficient to sustain a conviction. As the Court of Appeal for the Ninth Circuit recently observed:

> Although we must draw all reasonable inferences in favor of the prosecution, a "reasonable" inference is one that is supported by a chain of logic, rather than, as in this case, mere speculation dressed up in the guise of evidence.

(*Juan H. v. Allen, supra*, 408 F.3d at p. 1277.)

Moreover, "[s]peculation and conjecture cannot take the place of reasonable inferences and evidence." (*Id.* at p. 1278.) According to this Court, an inference is not reasonably drawn from a fact if it is based only on speculation. (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

Recently, the Ninth Circuit Court of Appeals found such equivocal expert testimony to be insufficient to sustain a conviction for an assault on a child resulting in death. In *Smith v. Mitchell* (9th Cir. 2006) 437 F.3d 884, the defendant was convicted of killing her infant grandchild by shaking him to death. The prosecution presented three medical experts in support of the theory that the child had died of Shaken Baby Syndrome ("SBS"); the defense introduced the testimony of two other medical experts who testified that the physical evidence was insufficient to support the prosecution's theory. In the *Smith* case, it was undisputed that the child's brain did not show swelling nor the large amount of blood in his brain normally associated with SBS. (*Id.* at p. 887.) Other common indicia of SBS were also missing, such as retinal bleeding, fractures or large bruises. (*Ibid.*)

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Reversing the lower court's denial of Ms. Smith's habeas petition and applying the principles of *Jackson v. Virginia*, the Court of Appeals explained why this equivocal evidence given by the medical experts was not sufficient to convict Ms. Smith:

> There is no question that the prosecution experts testified that a shaking had caused the death, but they conceded the absence of the usual indicators of violent shaking such as bruises on the body, fractured arms or ribs, or retinal bleeding. There was bleeding on the brain, both old and new, but not enough to cause death. All of the prosecution witnesses based their opinion of Shaken Baby Syndrome on their hypothesis that violent shaking had torn or sheared the brain stem in an undetectable way. Their testimony was not that the brain demonstrated death in the usual manner of Shaken Baby Syndrome, caused by excessive bleeding or swelling that crushes the brain stem. Instead, their testimony was that death was caused by shearing or tearing of the brain stem and they reached this conclusion because *there was no evidence in the brain itself of the cause of death.* Thus, as the defendant expert Dr. Siegler stated, the tearing might have occurred or it might not have occurred; *there simply was no evidence to permit an expert conclusion one way or the other on the point. This is simply not the stuff from which guilt beyond a reasonable doubt can be established. . .*

(*Id.* at p. 890; emphasis added.)

The decision in *Smith v. Mitchell, supra,* shows that the prosecution cannot sustain a conviction in the face of a constitutional challenge if it cannot produce clear evidence in support of such a conviction.

For all of the foregoing reasons as well as those discussed in appellant's opening brief, the record in this case is devoid of evidence of solid value establishing that appellant attempted to rape or aided and abetted Richard Letner in an attempt to rape Ms. Pontbriant. Accordingly,

appellant's conviction for first degree felony murder[21] based on attempted rape as well as the attempted rape special circumstance finding must be reversed.

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[21] As noted previously, the prosecutor argued that appellant committed three different types of felony murder, based on attempted rape, robbery and burglary. Each subsection in this argument addresses one of the alleged type of felony murder.

### B. Robbery Conviction, Robbery Felony Murder Conviction and Special Circumstance Finding[22]

Respondent argues that the record in this case contains "very clear evidence" that appellant and his co-defendant robbed Ivon Pontbriant. (RB at p. 101.) As one of its argument in support of this claim, respondent states:

> 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.

(RB at p. 101.)

The record, however, establishes that Warren Gilliland could not have given Ms. Pontbriant $340 in cash.

First, the record discloses that Gilliland's statements regarding the money were wildly contradictory. Detective Logan testified that, in his initial interview, Warren Gilliland denied that there were any large sums of money in the house at the time of the murder. (45 RT 6647.) At a second interview, according to Detective Logan, Gilliland claimed that he had given Ms. Pontbriant $185 before he left Visalia on March 1, 1988. (45 RT 6670.) Gilliland also stated during this interview that he had given Ms. Pontbriant about $150 a few days earlier. (45 RT 6672.)

At trial, Gilliland testified that he gave Ms. Pontbriant between $340 and $350 in front of Letner and appellant when, two days before the murder, they visited the house shared by Pontbriant and Gilliland. (36 RT 5122-5524.) He also testified that he got most of that money from his

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[22] The reply relates to Argument VI in the AOB.

Social Security check and that only about $20 came from the sale of appliances. (36 RT 5135-5136.)

Second and more importantly, the record in this case shows conclusively that it was impossible for Gilliland to have given any large amount of money to Ms. Pontbriant at the end of February 1988. Etta Gilliland, Gilliland's former wife and the payee on his Social Security disability check, testified that he did not receive any Social Security payments until after the death of Ms. Pontbriant. During his incarceration in late 1987, Gilliland did not receive any Social Security disability checks. After he was released, the first check that Etta received as his payee was on March 11, 1988, ten days after the murder of Ivon Pontbriant. (38 RT 5360-5366.) The only money given to Warren Gilliland by Etta from his Social Security disability checks funds prior to March 11, 1988, was $100 that she received in December 1987 or January 1988, which she gave to him in January or early February 1988. (38 RT 5363-5364.)

In addition to the testimony of Etta Gilliland, defense counsel also introduced into evidence, as Defense Exhibit H, a letter from the Social Security Administration establishing that Warren Gilliland did not receive any Social Security checks between December 1987 and March 11, 1988. (45 RT 6583.)

The record in this case, therefore, establishes that there was not substantial evidence — that is, evidence which is reasonable, credible, and of solid value[23] — supporting Gilliland's claim that, in the presence of appellant and co-defendant Letner, he gave Ms. Pontbriant more than $350,

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[23] See *People v. Johnson* (1980) 26 Cal.3d 557, 578, for a definition of substantial evidence.

which she put in her checkbook.

Respondent claims that this Court cannot re-evaluate the credibility of witnesses, such as Warren Gilliland, in this appeal. (RB at p. 103.) While that is generally true, courts have reversed convictions based on inherently incredible evidence and testimony. For example, in *United States v. Chancey* (11th Cir. 1987) 715 F.2d 543, 546-457, the Eleventh Circuit reversed based on the insufficiency of evidence because a key prosecution witness was inherently incredible. Recently, in *United States v. Howard* (9th Cir. 2006) 447 F.3d 1257, the Ninth Circuit Court of Appeals reversed the ruling of the district court regarding a motion to suppress. In doing so, the Court of Appeals rejected as not credible the testimony of one of the witnesses relied upon by the district court judge in upholding the disputed search. As is true in the instant case, the testimony of the witness in the *Howard* case was refuted by other more reliable evidence:

> The best evidence the police had that Howard lived at West Bonanza was the statement by one of Barner's [Howard's girlfriend] neighbors that she had seen Howard there "at least eighty to ninety percent of the time." However, this statement was not credible, as it was utterly irreconcilable with the prior observations of the surveilling officers; it was also contradicted by the statements of the [apartment] complex's staff.

(*United States v. Howard, supra*, 447 F.3d at p.1267.)

Here the record established that Warren Gilliland could not have given Ivon Pontbriant either $180 or $340 just before her death because he simply did not have access to that much money during that time period. Accordingly, respondent cannot now rely on Gilliland's inherently incredible testimony to buttress the claim that there was sufficient evidence to support the robbery convictions in this case.

For this reason and for all of the reasons set forth in appellant's opening brief (AOB at pp. 136-180), the Court should reverse appellant's convictions for robbery, first degree robbery felony murder as well as the robbery felony murder special circumstance finding.

### C. Burglary Conviction, Burglary Felony Murder Conviction and Special Circumstance Finding[24]

A conviction of felony murder in the commission of burglary requires proof that the defendant entered the residence with the intent to commit a theft or another a felony. (*People v. Frye* (1998) 18 Cal.4th 894, 954.) In this case, the prosecution charged that appellant and his co-defendant entered Ms. Pontbriant's house with both the intent to rape and the intent to steal.

As appellant's opening brief explains, there is no evidence that at the time that appellant entered her house he had the intent to rape Ms. Pontbriant or that he knew that Letner had such intent. At trial, the prosecutor argued to the jury that the burglary in this case involved both an intent to commit robbery and/or an intent to commit rape. (53 RT 7593-7594.) Moreover, the jury was instructed that it could convict the defendants of the burglary charge if they found that the defendants had either an intent to rape or an intent to rob when they entered Ms. Pontbriant's house. (3 CT 834-835.)

Respondent's brief does not address the question of whether the record in this case supports the convictions for burglary and for burglary felony murder as well as the burglary felony murder special circumstance

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[24] This reply relates to Argument VII in the AOB.

finding based on the theory that appellant and Letner entered Ms. Pontbriant's house with the specific intent to rape her. Accordingly, appellant will not elaborate here on why the record does not contain substantial evidence of such intent but will rely on the arguments made in the AOB regarding this issue. (AOB at pp. 181-188.)

In arguing that the record in this case contains sufficient evidence to uphold the appellant's burglary convictions, the respondent merely states that there was "ample evidence" that appellant and Letner formed the intent to rob Ms. Pontbriant before they entered her house at her invitation. (RB at p. 109.) Respondent fails, however, to describe this socalled ample evidence other than to mention that the defendants wanted to go to Iowa and they stole her car in order to do that. (RB at p. 108.) Respondent asserts that they would have driven her car to Iowa had Officer Wightman not stopped them in Visalia. Further, respondent cites the presence of their belongings in the car as further evidence of this intent. The problem is, however, that even assuming that respondent's interpretation of this evidence is correct, none of it establishes that the intent to steal existed at the time appellant and Letner entered Ms. Pontbriant's house.

Respondent argues that a reasonable juror could have found that when appellant and Letner entered the house they had the intent to commit robbery because they were both unemployed and needed money. (RB at p. 108.) Evidence of a defendant's poverty generally is inadmissible to establish a motive to commit robbery or theft. This Court has found that the probative value of this evidence is outweighed by the risk of prejudice. (*People v. Wilson* (1992) 3 Cal.4th 926, 939; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024.) The probative value of such evidence lessens while the likelihood of unfair prejudice increases when this evidence is admitted

to establish guilt for crimes of violence, such as felony murder. As noted by Wigmore, "the practical result of [admission of evidence of indebtedness] would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence." (2 Wigmore, Evidence (3d ed. 1940) section 392, p. 34.) Accordingly, respondent cannot rely on this evidence — that appellant did not have job and must therefore have needed money — as a basis for upholding the jury's verdict on the burglary charges.

For all of the foregoing reasons as well as for the reasons set forth in appellant's opening brief, the prosecutor failed to present sufficient evidence that appellant had the specific intent to rape or to rob Ms. Pontbriant (or to aid or abet a rape or a robbery) when he entered her house at her invitation on March 1, 1988. Therefore, appellant's convictions for burglary, for first degree murder based on burglary felony as well as the burglary felony murder special circumstance finding must be reversed.

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## XI.

## BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION, APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER SHOULD BE REVERSED

Respondent has offered a very cursory opposition to appellant's claim that the evidence in this case was insufficient to support a conviction for premeditated and deliberated first degree murder. (RB at pp. 124-126.) Nevertheless, in this short argument, respondent misrepresents the facts of this case. First, citing the cases of *People v. Hawkins* (1995) 10 Cal.4th 920, 957, and *People v. Davis* (1995) 10 Cal.4th 463, 510-511, the State contends that the murder of Ivon Pontbriant was "an execution-style killing" and perforce committed with premeditation and deliberation. The murder in this case does not, however, qualify as an execution-style killing. Certainly, the facts are not similar to those in the two cases cited by respondent.

In *Hawkins, supra,* the unrefuted testimony of a forensic expert showed that the victim was shot twice, once in the back of the head near the base of the skull and once in the back of the neck. Further, the gunpowder residues found on the victim's body established that one of the shots was fired from a close range, between three and twelve inches away. The angle of entry and the downward trajectory of the bullets through the body suggested that the position of the gun was somewhere above his head. This Court concluded, based on evidence, the jury could have reasonably surmised that the victim in *Hawkins* may have been crouching or kneeling at the time the shots were fired. Most importantly, for purposes of comparison with the facts of the present case, there was little evidence that "would lend support to the hypothesis that the murder occurred on impulse

or in a rage." (*People v. Hawkins, supra,* 10 Cal.4th at p. 957.)

Certainly, in the instant case, the evidence does suggest that the killing occurred as a result of rage. In fact, in other portions of its brief, respondent describes the chaotic nature of the crime scene and the injuries suffered by Ms. Pontbriant. (RB at pp. 13-16.) There is nothing about the killing in this case that can be characterized as an organized, systematic and careful "execution-style" killing. The brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation: "If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations." (*People v. Caldwell* (1965) 43 Cal.2d 864, 869, citing *People v. Tubby* (1949) 34 Cal.2d 72, 78-79)

Similarly, the facts of *People v. Davis, supra,* are very different than those present in this case. In *Davis*, the victim was injured when she fled in a car that hit a pole. The defendant then strangled her. (*Id.* at p. 510.) By contrast in this case, the crime scene indicated frenzied activity. The victim was tied with a telephone cord, some of her hair was pulled out, and she had been stabbed multiple times. Even more revealing is the nature of the mortal wound. According to the prosecution's expert, this wound was the result of "sawing" action and required a great deal of force and some time to inflict. (34 RT 4904-4907.) Certainly, one could not reasonably infer from the evidence that this wound was an efficient way to kill the victim.

Respondent also argues that the fact that Richard Letner had a buck knife in his possession when he and appellant entered Ms. Pontbriant's house supports a finding that the murder was a result of premeditation and deliberation. (RB at p. 125.) Citing *People v. Hughes* (2002) 27 Cal.4th

287, respondent argues that the jury could reasonably conclude from his possession of the knife that appellant and Letner were "motivated to kill [their] victim to eliminate her as a witness to those crimes." (*Id.* at p. 371.) This argument is not persuasive. Carrying a concealed weapon may be consistent with a plan to kill, but it also is consistent with lesser criminal intents. In short, the fact of being armed does not establish a defendant's ultimate intention. (See Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference* (2000) 36 U.S.F. L.Rev. 261, 309 [making a similar point with regard to the planning activity in child abduction-murders].)[25] Letner's possession of a buck knife on the night of the murder is especially not persuasive in this case as the evidence did not establish that this knife was the murder weapon. The prosecution's expert testified that it was more probable that the gravest of the knife wounds suffered by Ms. Pontbriant, the injury to the back of her neck, was caused by a larger knife. (34 RT 4906; 35 RT 5011, 5041-5043.)

Respondent also asserts incorrectly that the defendants held Ms. Pontbriant down and "methodically" severed her spinal cord and that this fact establishes that the murder was premeditated. (RB at p. 125.) There is absolutely no evidence in the record in this case that supports the prosecutor's claim that the defendants held Ms. Pontbriant down. The testimony of Dr. Walter, who did the autopsy in this case, does not contain

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[25] See also *People v. Caldwell* (1955) 43 Cal.2d 864, 869, where this Court noted that first degree premeditated murder is one done "as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design." This definition of premeditated and deliberated murder remains the law in this state. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *Davis v. Woodford* (9th Cir. 2003) 333 F.3d 982, 992.)

any information that would support the inference that the defendants held her down while they used a knife to sever her spinal code. (34 RT 4870-5048.) Dr. Walter specifically said that he could not determine the order in which the wounds were inflicted or if they were inflicted by more than one person. (34 RT 4932.) Dr. Walters was never asked his opinion about the position of Ms. Pontbriant's body at the time the deep wound to the back of her neck was inflicted. As to the other, less serious stab wounds on her neck, Dr. Walters testified that he could not say whether she was standing or was laying or sitting down when she received these wounds. (34 RT 4897-4898.) Moreover, the evidence showed that Ms. Pontbriant had a blood alcohol level of .29 the time of her death. This high level of intoxication made it unlikely that she needed to be held down, in any event. (45 RT 6769.)

Given the state of the record in this case about the injuries suffered by Ms. Pontbriant, the prosecution cannot assert that the manner of the killing supports a finding of premeditation and deliberation. For all of the above reasons as well as the reasons set forth in appellant's opening brief, the prosecution did not produce substantial evidence that appellant committed a first degree premeditated and deliberated murder in this case. Accordingly, his conviction for murder should be reversed.

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## XIV.

## THE INSTRUCTIONS ON AIDING AND ABETTING WERE HOPELESSLY CONFUSING AND THIS ERROR WAS NOT HARMLESS

Appellant established that the jury instruction given in this case regarding aiding and abetting was hopelessly and unacceptably confusing. (AOB at pp. 217-224.) The problems with this instruction must be viewed in terms of the instructions given on the murder charge. The jurors received instructions on first degree felony murder (on three bases: attempted rape, robbery and burglary), first degree premeditated and deliberate murder, all lesser included homicides, and on aiding and abetting. (3 CT 815-818; 846-876.) It was in the context of this plethora of instructions and jumble of prosecutorial theories that appellant showed that it was error to give a confusing and ambiguous instruction on aiding and abetting on the natural and probable consequences theory. (AOB at p. 217.)

Respondent asserts that the instruction was not confusing; however, it does not address the points made by appellant about the unclear language in the instruction. The central point of confusion in the disputed instruction is the statement: "you must determine whether the defendant is guilty of the crimes originally contemplated, and, if so, whether the crimes charged in counts one, two, three, four, five and the lesser included offenses were natural and probable consequences of such original [sic] contemplated crimes." (3 CT 817.) As appellant pointed out in the AOB, the instruction does not identify the "crimes originally contemplated," and respondent has failed to identify them in its brief. Instead, citing the instructions found at 3 CT 827-842, 885-890, respondent merely asserts that the instructions defined "the elements of each and every 'target offense' appellants might

have contemplated short of murder." (RB at p. 128.) The instructions in the record cited by respondent merely define the crimes charged in counts two, three, four, five and the lesser included crimes. Therefore, under this reading, the language of the instruction is circular: the charged crimes are the same as the crimes originally contemplated. That means that the charged crimes are the natural and probable consequences of themselves.

As noted in the AOB, this Court has stated that if the prosecution relies on the natural and probable consequence theory of liability, it must "on its own initiative, identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (*People v. Prettyman* (1996) 14 Cal.4th 248, 268.) The failure to identify these target crimes as well as the fact that the instruction appears to state that the target crimes are the same as the charged crimes injected an unacceptable level of confusion into an already confusing set of instructions for a jury with the responsibility to determine the individual culpability of two defendants.

Respondent argues that the instruction was not confusing because there was not a reasonable likelihood that the jury had applied the challenged instruction in a way that violated the Constitution. (RB at p. 128.)[26] Respondent fails to provide any basis for this assertion, nor is there any support for respondent's claim that "appellants' murder verdicts were not based on the natural and probable consequences doctrine." (RB at p.

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[26] Respondent opined that this standard, set forth in *Boyde v. California* (1990) 494 U.S. 370, 380, governs when a jury instruction is challenged as confusing. However, that standard applies only if the instruction is ambiguous. When an instruction is erroneous or omits an element of an offense, a court should apply the traditional harmless error test under *Chapman v. California , supra* , 386 U.S. at p.24.) (*Neder v. United States* (1999) 527 U.S. 1, 19-20.)

29.) It is simply not possible to know on which theory the jurors based appellant's conviction for first degree murder since the prosecutor offered multiple theories, including the theory that either or both of the defendants were liable as aiders and abettors based on the natural and probable consequences doctrine,[27] and the jury received numerous instructions about those theories.

Respondent also argues that because the jurors found the three felony murder special circumstances true as to both defendants, "the natural and probable consequences had no bearing on any of the verdicts." (RB at p.129.) Given that appellant has challenged the three special circumstances based on insufficiency of the evidence, the prosecutor's reliance on those verdicts is misplaced. In addition, the verdicts on the first degree murder charges and the special circumstance allegations are not reliable because of the failure of the trial court to instruct the jurors that they must be unanimous in determining whether each of the defendants committed first degree felony murder or first degree premeditated and deliberate murder. (See Argument XVI, *supra*, and AOB at pp. 236-241.) Further, appellant challenged the instructions given regarding the special circumstances alleged in this case. (AOB at pp. 273-280.)

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[27] In *People v. Prettyman, supra,* this Court found the instruction on aiding and abetting and the theory of natural and probable consequences was erroneous, but the error was harmless. In *Prettyman*, unlike the instant case, the prosecutor never even mentioned this theory and that was a key factor in finding that the error was harmless. The Court stated: "Because the parties made no reference to the 'natural and probable consequences' doctrine in their arguments to the jury, it is highly unlikely that the jury relied on that rule when it convicted defendant Bray." (*People v. Prettyman, supra,* 14 Cal.4th at p. 268.)

The instruction on aiding and abetting and the theory of natural and probable consequences was incorrect and did not meet the rule set forth in *People v. Prettyman, supra.* This erroneous instruction was not harmless in this case because the prosecutor chose to argue so many different theories about the murder, and the jurors received a plethora of confusing instructions on those theories. The prosecution cannot show beyond a reasonable doubt that the jury did not convict appellant of first degree murder based on this faulty instruction, and, therefore, appellant's conviction for first degree murder must be reversed.

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## XVI.

## THE FAILURE TO INSTRUCT THE JURORS THAT THEY MUST DECIDE UNANIMOUSLY WHETHER APPELLANT COMMITTED FIRST DEGREE FELONY MURDER OR FIRST DEGREE PREMEDITATED MURDER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

Relying on two decisions of this Court, *People v. Hughes* (2002) 27 Cal.4th 287, 371, and *People v. Nakahara* (2003) 30 Cal.4th 705, 712, respondent asserts, without any analysis, that appellant's claim that the failure to charge and instruct regarding the various theories of first degree murder and to require that the jurors find guilt unanimously and beyond a reasonable doubt have already been rejected by this Court. (RB at pp. 133-135.)

Respondent's argument utterly fails to address the important constitutional issues raised by this claim in appellant's opening brief. (AOB at pp. 232-241.) The prosecutor argued to the jury that appellant and his co-defendant had committed either first degree felony murder or first degree malice (premeditated and deliberated) murder. The jurors were instructed on both of these offenses, but they were never told that they had to find unanimously all the elements of either premeditated murder or felony murder before they could find convict appellant of first degree murder. Moreover, the jury was given only a general verdict form for the first degree murder charge.

As stated in the AOB, because felony murder and malice murder have different elements, they are different crimes. The U.S. Supreme Court noted in *Richardson v. United States* (1999) 526 U.S. 813, 817, denoting a fact as an "element" means that a jury cannot convict unless the government has proved every element beyond a reasonable doubt.

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony-murder was erroneous, and the error deprived appellant of his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

As noted in the RB, this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony-murder. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712- 713.) However, appellant submits that this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court has consistently held that the elements of first degree premeditated murder and first degree felony-murder are not the same. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 475; *People v. Silva* (2001) 25 Cal.4th 345, 367.) Moreover, the U.S. Supreme Court has stated: "Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States, supra*, 526 U.S. at p. 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis.opn. of Schauer, J.) and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply. (See *Jones v. United States* (1999) 526 U.S. 227, 232.) Both of those

determinations, in turn, are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by re-characterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra.*) First, in contrast to the situation reviewed in *Schad*, *supra,* where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of

satisfying a single mens rea element" (*Schad v. Arizona, supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) Similarly, the specific intent to commit the underlying felony has been characterized as an element of first degree felony-murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

This Court also has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Steger* (1976) 16 Cal.3d 539, it declared:

> We have held, by conjoining the words "willful, deliberate, and premeditated" in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill. [Citation.] (Id. at p. 545, emphasis added, quoting *People v. Thomas, supra*, 25 Cal.2d at p. 900.)[28]

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[28] Specific intent to commit the underlying felony, the mens rea element of first degree felony-murder, is not specifically mentioned in Penal Code section 189. However, ever since the decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases cited therein; *People v. Dillon, supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had

(continued...)

As the U.S. Supreme Court has explained, the *Schad opinion* held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States, supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (§ 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189 & 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 302-306; *Ring v. Arizona, supra*, 536 U.S. at pp. 603-605; *Apprendi v. New Jersey, supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a

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[28](...continued)
been written by the Legislature." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; see also *Winters v. New York* (1948) 333 U.S. 507,514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice while felony murder does not. "The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See ... §§ 187, subd. (a), 189.)" (*People v. Hart, supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is a true "element" of murder in anyone's book.

Accordingly, the trial court erred when it failed to instruct the jurors that they must agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to so instruct was a structural error, and reversal of the entire judgment is therefore required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Recent decisions by this Court offer further support for appellant's argument that the two are separate crimes. In *People v. Seel* (2004) 34 Cal.4th 535, the defendant was convicted of attempted premeditated murder. (Pen. Code, § 664, subd. (a) and § 187, subd. (a).) The court of appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. In holding that double jeopardy barred retrial on the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, this Court endorsed

the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" (*Seel*, *supra*, 34 Cal.4th at p. 549, citing *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 493.) Intent, of course, is an element which makes malice murder a different crime from felony murder under California law.

In *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held that under Penal Code section 1387, the dismissal of a misdemeanor prosecution does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is, in fact, graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion, the Court compared the elements of the offenses at issue: "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Burris*, *supra*, 34 Cal.4th at p. 1016, fn.3, citing *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to determine whether new charge is same offense as previously dismissed one for purposes of section 1387].) The opposite of this proposition is also true: when two crimes have different elements, they are not the same offense.

*Seel* and *Burris* thus reaffirm the principle that because premeditated (malice) murder and felony murder have different elements in California, they are different crimes, not merely two theories of the same crime. The jury should not have been permitted to convict appellant of murder without being required to determine unanimously that the crime was either a premeditated (malice) murder under section 187 or a felony murder under section 189. The conviction therefore must be reversed.

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## XVII.

## THE CONSCIOUSNESS OF GUILT INSTRUCTIONS WERE IMPERMISSIBLY ARGUMENTATIVE AND ALLOWED THE JURY TO FIND APPELLANT GUILTY OF MATTERS BEYOND HIS INVOLVEMENT IN THE HOMICIDE

The trial court instructed the jury regarding consciousness of guilt using instructions (CALJIC Nos. 2.03, 2.06) that were argumentative and allowed impermissible inferences about the charged crimes. Respondent notes, as appellant has acknowledged, that the Court has rejected several challenges to these instructions. (RB at pp.136 - 137, citing several opinions of this court.) However, the Court should reconsider its other decisions in light of recent decisions by the high courts of other states.

The instructions at issue informed the jury that they could consider appellant's statements or actions as evidence of his "consciousness of guilt." It allowed the jury to draw inferences from circumstantial evidence, i.e. that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need for these instructions since the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455 [consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given].)

Respondent states that the instructions properly clarified that actions showing consciousness of guilt were not enough to prove guilt in and of themselves. (RB at p. 136.) However, the instructions unfairly highlighted the prosecution's use of the evidence and magnified its importance. Indeed, the Supreme Court of Wyoming held that giving similar instructions about

flight always will be reversible error because it unduly emphasizes evidence. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in such instructions.[29]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

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[29] Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333.)

> It is clearly erroneous for a judge to instruct the jury on a defendant's Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333.) consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749.)[30]

The consciousness of guilt instructions used in this case contained far-reaching implications. Appellant's actions would have been the same with regard to any potential crime; for example, the same actions that were used to show consciousness of guilt of a first degree felony murder could also have been probative of second-degree murder or even manslaughter. The instructions, however, made no such distinction and allowed the jury to find that appellant was guilty, not only of the general underlying crime (homicide), but also of all of the allegations of first degree murder and of special circumstances.

These instructions violated appellant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment; his rights under the Sixth and Fourteenth Amendments to have his guilt determined beyond a reasonable doubt by a properly instructed jury; and his right under the

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[30] See also *State v. Hall* (Mont.1999) 991 P.2d 929 [where the Montana Supreme Court held that an instruction on flight as evidence of consciousness of guilt was an unnecessary comment on the evidence and should not be given].)

Eighth and Fourteenth Amendments to a fair and reliable adjudication of the death penalty.[31] This Court cannot find that the erroneous instructions were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 "A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

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[31] As noted in the AOB, these rights are also secured under the California Constitution, article I, sections 7, 15 and 16. (AOB at p. 248.)

## XIX.

## THE TRIAL COURT ERRED IN INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 2.50

Defense counsel objected to the use of CALJIC No. 2.50 at the guilt phase on the ground that it alluded to unrelated "other crimes" evidence.[32] (52 RT 7459-7460) Appellant argued that this instruction was improper because it did not make clear to which "other crime[s]" the instruction applied. As appellant's opening brief pointed out, the prosecution introduced evidence that Richard Letner had been involved in some burglaries in the weeks before Ivon Pontbriant was murdered and that some of the stolen items from those burglaries were found in the trunk of her car after her death. (AOB at 257-258.) During her cross-examination of appellant at the guilt phase trial, the prosecutor implied that appellant had assaulted his girlfriend, Jeannette Mayberry, during an argument they had the day before the murder.

During her closing argument to the jury at the guilt phase, the prosecutor mentioned both these incidents as motives for the defendants to steal Ms. Pontbriant's car and money and to murder her. For example, the prosecutor described the dispute between appellant and Ms. Mayberry as a crime which gave him a motive to leave for Iowa and therefore a motive to steal a car from Ms. Pontbriant. (53 RT 7544, 7546.) The prosecutor also pointed out in her closing argument that Letner had committed burglaries

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[32] In the AOB, appellant mistakenly stated that the record did not show the defense objection to this instruction. (AOB at p. 257.) However, as stated in the AOB, because the instructional conference was not on the record, it is impossible to know what additional reasons may have been offered in opposition to CALJIC No. 2.50.

and needed to sell those stolen items to be able to leave for Iowa. (53 RT 7570.; 54 RT 7794-7796.)

Respondent claims that the only "other crimes" referred to in the disputed instruction were the (1) the presence of stolen merchandise in the car's truck; (2) the breaking and entering of the vacant house on Crenshaw after the murder; and Letner's citation for driving the victim's car without a license. (RB at p. 146.) According to respondent, it is clear that the jurors would not be confused by which "other crimes" to which the CALJIC No. 2.50 referred and even if they were, it would not matter because the jurors would find that the defendants fled and their flight established consciousness of guilt. (RB at p. 147.)

This argument is not persuasive. The prosecutor tried to paint appellant as a violent person with a criminal history, even though he had never been convicted of a crime before he was arrested in this case. Other crimes evidence is inherently prejudicial. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) It was especially prejudicial in this case as there were two co-defendants, whom the prosecutor tried to paint as inseparable partners-in-crime. In giving CALJIC No. 2.50, but failing to identify to which "other crimes" it referred, the trial court risked confusing the jurors about how to apply this instruction. A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt, meaning "there is no reasonable possibility that the error materially affected the verdict." (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F. 2d 294, 296, fn.3.) Given the facts of this case and the prosecutor's insistence on treating the defendants as partners-in-crime, there is a reasonable possibility that this imprecise and confusing instruction adversely affected the jury's verdicts.

## XXIV.

## THE INSTRUCTIONS REGARDING THE SPECIAL CIRCUMSTANCES ALLEGATIONS WERE INADEQUATE WHETHER OR NOT THE JURY FOUND APPELLANT TO BE AN AIDER AND ABETTOR OR AN ACTUAL KILLER

Respondent challenges appellant's claim that the instructions given on the felony murder special circumstances were erroneous because they did not require the jurors to find that appellant's actions demonstrated a reckless disregard for life and that he had been a major participant in the underlying felonies. Citing *Tison v. Arizona* (1987) 481 U.S. 137, 157-158, respondent argued:

> 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.

(RB at pp. 150-151, emphasis in the original.)

These assertions by respondent are wrong. The California death penalty statute, Penal Code section 190.2, subdivision (d), states in relevant part:

> [E]very person, not the actual killer, who, *with reckless indifference to human life and as a major participant*, aids, abets, counsels, commands, induces, solicits, requests or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4....

(*Id.*, emphasis added.)

In *People v. Estrada* (1995) 11 Cal.4th 568, this Court explained the origin of this "reckless indifference" and "major participant" language:

> The portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137 (hereafter *Tison*). In *Tison*, the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a defendant convicted of first degree felony murder who was a "major participant" in the underlying felony, and whose mental state is one of "reckless indifference to human life." (*Tison, supra*, 481 U.S. at p. 158 & fn. 12.) The incorporation of *Tison's* rule into section 190.2(d)--in express terms--brought state capital sentencing law into conformity with prevailing Eighth Amendment doctrine. [Citations.] ....*Tison* is the source of the language of section 190.2(d), and the constitutional standards set forth in that opinion are therefore applicable to all allegations of a felony-murder special circumstance, regardless of whether the People seek and exact the death penalty or a sentence of life without parole. We therefore begin our inquiry into whether the import of section 190.2(d) is adequately conveyed by its express statutory terms by looking to *Tison* for the meaning of the statutory phrase "reckless indifference to human life."

(*Id.* at pp. 575-576.)

As these statements from the *Estrada* opinion show, this Court has taken a position diametrically opposed to the one offered in respondent's brief about the requirements of *Tison v. Arizona, supra.* According to this Court's opinion in *People v. Estrada, supra,* the *Tison* standard requires that the defendant in a capital murder case must, at the least, have a subjective appreciation of the grave risk to life caused by his actions. (*Id.* at pp. 577-578.)

As appellant pointed out in his opening brief, the problem with the instructions in this case arose from the prosecutor's argument to the jurors that they should convict appellant and his co-defendant regardless of whether they considered one or both of them to have been the actual killer.

(53 RT 7582.) Because the prosecutor suggested to the jurors that it was unimportant to determine the actions of each of the defendants in this "somewhat lengthy crime," it was critical that the jurors receive clear instructions regarding which of the three felony murder special circumstances alleged were true as to each of the two defendants. The three instructions defining the three special circumstances did not include any of the *Tison* language, i.e., a reckless indifference to human life and major participation in the underlying felony. (4 CT 874-876.)

Respondent also argues that the "reckless disregard" requirement of *Tison, supra,* does not apply to the actual killer. (RB at p. 151.) While this Court has adopted that position (see, e.g., *People v. Anderson* (1987) 43 Cal.3d 1104, 1147), it is not consistent with the death penalty jurisprudence of the United States Supreme Court. First, by failing to apply the minimal standards of *Tison* regarding the mens rea necessary to execute a defendant, California has failed to provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 313.) In California, virtually all felony murders qualify as special circumstance cases. This Court acknowledged this fact in *People v. Hayes* (1990) 52 Cal.3d 577:

> A murder is of the first degree if "committed in the perpetration of, or attempt to perpetrate" any of certain enumerated felonies, one of which is burglary. (§ 189.) Under this provision, a killing is committed in the perpetration of an enumerated felony if the killing and the felony "are parts of one continuous transaction." [Cits.] We have indicated that the reach of the felony-murder special circumstance is equally broad.

(*Id.* at pp. 631-632.)

The breadth of the felony murder special circumstances is due not only to the fact that virtually all first degree felony murders are special circumstances[33] cases, but also to the fact that the California felony murder rule itself is exceedingly broad in at least three respects. First, the rule applies to the most common felonies resulting in death, particularly robbery and burglary, crimes which themselves are defined broadly by statute and court decision. Second, the felony murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape (see *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165) or as a "natural and probable consequence" of the felony (see *People v. Birden* (1986) 179 Cal.App.3d 1020, 1024-1025). Third, the felony murder rule is not limited in its application by normal rules of causation (see *People v. Johnson* (1992) 5 Cal.App.4th 552, 561), and applies to altogether accidental and unforeseeable deaths. In addition, the felony murder special circumstances are even broader than the felony murder rule because they cover a species of implied malice murders, so-called "provocative act" murders. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

Not only does California's law on felony murder special circumstances, at least as it applies to a defendant who is deemed the actual killer, fail to narrow the class of murderers eligible for the death penalty, it does not comport with the underlying principle of *Tison v. Arizona, supra,* and an earlier decision of the U.S. Supreme Court, *Enmund v. Florida*

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[33] Penal Code section 190.2, subdivision (a)(17) subjects a defendant to the death penalty if "[t]he murder was committed while the defendant was engaged in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" any of twelve listed felonies.

(1982) 458 U.S. 782, that no person should be executed unless s/he had acted with a sufficiently culpable state of mind. The *Tison* standard is meant to be the equivalent of the culpable mental state of implied-malice murder referred to in the Model Penal Code (MPC) as "extreme indifference to the value of human life." (*Tison v. Arizona, supra*, 481 U.S. at p. 157.) This concept incorporates the common law of implied-malice or "depraved heart" murder. (1 Model Penal Code and Commentaries, Part II, § 210.2, pp. 22-23 (ALI 1980).)

There is no reason to lessen the requirement that the prosecution prove the requisite mens rea before subjecting an individual to the death penalty just because that defendant is deemed to be the "actual killer." The *Tison* rule should apply to all defendants charged with one or more felony murder special circumstances.

In fact, in her majority opinion in *Tison v. Arizona, supra*, Justice O'Connor used actual killers as examples for the level of mens rea required:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of *all–the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery,* utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional. . . . *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.

(*Id.* at pp. 157-158, emphasis added.)

While the U.S. Supreme Court concluded that each of the Tison brothers was a major participant in the underlying felony, it expressly declined to hold that they had shown reckless indifference to human life. (*Id.* at p. 158.) Instead, the Court remanded the cases to the Arizona courts to make that determination. (*Id.*) The Arizona trial court subsequently sentenced both men to life imprisonment. (*State v. Ricky Tison*, No. Cr 9299, Sentence of Imprisonment (Jul. 13, 1992, Maricopa Co. Superior Ct.); (*State v. Raymond Tison,* No. CR 9299, Sentence of Imprisonment (Jul. 20, 1992, Maricopa Co. Superior Ct.).) The facts of the *Tison* case are often erroneously cited as an example of conduct constituting "reckless indifference to human life," but in truth, neither of the Tison brothers was ultimately found to meet the *Tison* standard even though they participated in an armed prison breakout that eventually resulted in the death of four people.

*Hopkins v. Reeves* (1998) 524 U.S. 88 involved an actual killer. In *Reeves*, the U.S. Supreme Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska

> could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, *so long as their requirement is satisfied at some point thereafter.*

(*Reeves*, *supra*, 524 U.S. at p. 99, citations and fns. omitted; emphasis added.)[34]

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9.[35] The *Loving* court explained its thinking as follows:

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[34] See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc.opn.of Stevens, J.) [stating that an accidental homicide, like the one in *Furman, supra,* may no longer support a death sentence].

[35] See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

> As highlighted by Justice Scalia in the *Loving* oral argument,[36] the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving v. Hart, supra,* 47 M.J. at p. 443.)

For all of the foregoing reasons, the Court should reject respondent's claim that the *Tison* rule does not apply to actual killers.

Moreover, even assuming the *Tison* rule applies only to accomplices, the instructions given in this case on the felony special circumstances were not sufficient because the prosecutor argued to the jurors that they did not need to decide the exact role of each defendant in the crime. That is, she

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[36] This case was before the U.S. Supreme Court, which affirmed Loving's conviction by general court-martial. (517 U.S. 748.) He then sought extraordinary relief in the nature of writ of mandamus, challenging the death sentence, before the United States Army Court of Criminal Appeals. That petition was the subject of the opinion discussed here.

argued that both could be actual killers or they could have aided and abetted one another, and the jurors need not decide their exact roles. The instructions given regarding the three felony murder special circumstances alleged in this case (4 CT 874-876) failed to notify the jurors that if they believed one of the defendants was merely an aider and abettor they could not find the special circumstance allegations true without finding both a reckless indifference to human life and major participation in the underlying felonies.

Respondent also argues that any instructional error would be harmless because

> 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.

(RB at p. 151.)

Respondent's claim that this instructional error was harmless is wrong for several reasons. First, the prosecutor offered a plethora of theories for the jurors to consider concerning the murder and special circumstances alleged in this case. The prosecutor further confused the issues by arguing that both defendants were aiders and abettors and the actual killers. Because of this confusion in both the evidence and the arguments of the prosecution, the inadequacy of the jury instructions on the three felony murder special circumstances allegations prejudiced appellant on the crucial issue of whether he should face the death penalty.

Second, there were problems with the evidence. There were no eyewitnesses to the crime. Earl Bothwell gave unreliable testimony about the "confessions" supposedly made to him by the defendants. He claimed that co-defendant Letner told him that both he and appellant were wanted

for murder in California and that appellant told him that he killed a woman in California. The prosecutor's closing argument to the jury shows that she was trying to finesse the problems with the State's evidence on the crucial question of which of the defendants actually killed Ms. Pontbriant and also on the issue of whether the non-killer had the necessary mens rea. Her claim that it didn't matter which of the defendants was the actual killer or that perhaps they were both actual killers was an attempt to evade this issue.

Third, the instructions on the murder itself were very confusing because the prosecution insisted that the jury be instructed not only on felony murder but on premeditated murder as well as its lesser included offenses. Thus, it was not possible to ascertain from the verdicts in the case whom the jury believed was the actual killer.

Finally, there is the question of what standard of prejudice applies to the instructional error at issue here. The opinions cited above establish that appellant is entitled to a reversal based on the failure to properly instruct the jury regarding the elements of the special circumstances charged against him. Even assuming that it is appropriate for this Court to determine prejudice under a harmless error analysis, the Court should apply the standard stated in *Chapman v. California* (1967) 386 U.S. 18, 24 because this error violated appellant's federal constitutional rights.[37] Under the *Chapman* standard, the burden is on the prosecution to prove that error "harmless beyond a reasonable doubt." In this case, the prosecutor cannot meet this burden because, as the prosecutor as much as conceded in her

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[37] As set forth in the argument made in the AOB, the erroneous instructions regarding the felony murder special circumstances given in this case violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution.

closing argument, the evidence did not establish which of the defendants was the actual killer in this case.[38]

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

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[38] Appellant maintains that there was insufficient evidence to convict him of any of the offenses charged in this case, either as an aider and abettor or as the actual killer.

## XXVII.

## THE MISCONDUCT OF PROSECUTOR AT APPELLANT'S TRIAL AMOUNTED TO REVERSIBLE ERROR

In his opening brief, appellant established that the prosecutor engaged in serious misconduct during her cross-examination of appellant and during her closing argument to the jury. (AOB at pp. 289-298.) Respondent offers a wan refutation to these claims of misconduct.

### A. Alleged waiver

First, respondent argues that any claims of prosecutorial misconduct are waived for failure to object at trial. (RB at pp. 156, 158, 160.) In the opening brief, appellant acknowledged that defense counsel failed to object to all of the instances of misconduct. (AOB at pp. 291-292.) However, as appellant has argued, there are exceptions to this rule; that is, if an objection and request for admonition would have been futile or would not have cured the harm created by the misconduct, an appellate court may decide the issue on its merits. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 822.) In its brief, respondent essentially agreed with the summary of the law set forth in the AOB; nonetheless, it fails to address appellant's claim that the facts of this case require the Court to decide the prosecutorial misconduct claims on their merits.

A recent decision of the California Court of Appeal illustrates the principles which allow appellate courts to consider claims of prosecutorial misconduct in the absence of a request for a curative instruction or objections at trial. The facts of *People v. Shazier* (2006) 139 Cal.App.4th 294 are similar to those presented here in that the prosecutor's misconduct involved statements made in direct contravention of the trial court's in limine orders. In *Shazier, supra,* the defendant's first trial concerning a

petition to commit him under the Sexually Violent Predator Act ("SVPA") ended in a hung jury. At the first trial, the judge granted the defendant's unopposed request to prohibit the witnesses from telling the jury the consequences of a true finding. Again at the second trial, the judge granted the defense motion that the witnesses be prohibited from telling the jurors that the defendant would not go to prison but to a mental hospital for treatment and would have a right to another trial after two years. In contravention of the court order, the prosecutor argued in his final rebuttal to the jurors that they should not make their decision based on what they thought it would be like for the defendant in Atascadero State Hospital. (*Id.* at p. 299.)

The defense counsel objected and asked for a mistrial, a request denied by the trial judge. On appeal, the prosecution urged that the issue of whether the trial prosecutor had committed misconduct had been waived because the defense counsel did not ask for a curative instruction when he objected to the prosecutor's argument. The court of appeal disagreed, finding that a request for a curative instruction would have been futile. (*Id.* at p. 301.) Further, the court determined that the prosecution had committed misconduct:

> Given the two in limine orders, and the fact that the court sustained defense objections to the prosecution questions related to consequences, it is apparent the prosecutor knew exactly what he was saying in his rebuttal, and had a definite purpose in his references to defendant staying at Atascadero State Hospital. We find the prosecutor committed misconduct in his rebuttal argument.

(*Id.* at p. 300.)

The above quotation applies to the facts in the present case where the prosecutor defied the trial court's order that she not refer to her theory that appellant had long harbored a desire to use an alleged martial arts technique which she called "instant death" and had used it to kill Ms. Pontbriant. (35 RT 5068-5069.) Despite this ruling, the prosecutor proceeded to ask about "instant death" during her cross-examination of appellant at the guilt phase. (46 RT 6936.) After defense counsel objected, there was a hearing without the jury present, and once again the judge reiterated his earlier ruling that such evidence was not admissible. (46 RT 6940-6941.) Despite this ruling by the trial court, the prosecutor proceeded to tell the jury inaccurately during closing argument that the pathologist had testified that the placement of the stab wounds was ". . known to cause what's called 'instant death,' if the arteries are actually stricken." (53 RT 7553.) Just as in *Shazier, supra,* the prosecutor in this case defied the order of the trial judge, and this misconduct prejudiced defendant.

**B. The Prosecutor's Misconduct was not a "Mistake"**

Respondent argues that the trial prosecutor's questions and argument about so-called "instant death," after she had been ordered by the trial judge to stay away from that subject, was "at worst, a reasonable mistake." (RB at p. 157.) Respondent claims that since the original ruling concerned the prohibition from calling witnesses to testify about "instant death" in the prosecution's case-in-chief, "the prosecutor could reasonably believe that such questioning was permissible on cross-examination during Tobin's defense case." (RB at p. 157.)

Respondent asks this Court to extend to the prosecutor a leniency that is totally inappropriate given the requirements our system of law places on the prosecution. As Judge Kozinski noted in *United States v. Kojayan*

(9th Cir. 1993) 8 F.3d 1315, 1323: "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." The prosecutor in this case knew that the trial judge had found that any testimony about this alleged technique of "instant death" would not be permitted because it was unduly prejudicial. (35 RT 5068-5069.) If, as respondent now argues, the prosecutor believed that somehow that very clear ruling on what evidence would be allowed did not apply to her cross-examination of appellant, the prosecutor was required, under her duty to see "that justice should be done" (*Berger v. United States* (1935) 295 U.S. 78, 88), to seek guidance from the trial judge before she asked appellant about "instant death." Just as the court of appeal found in *People v. Shazier, supra,* this Court should hold the prosecutor here fully accountable for improperly circumventing the orders of the trial judge regarding evidence of or reference to "instant death."

As discussed more fully in the AOB, the prosecutor's misconduct was serious and infected the fairness of appellant's trial. This misconduct thus violated appellant's due process right to a fair trial and his right to a fair and reliable capital trial. (U.S. Const., Amends. 6, 8, 14; Cal.Const., art. I, sections 7, 15, and 17.) Reversal is required because the prosecution cannot show beyond a reasonable doubt that this constitutional error was harmless. (*Chapman v. California*, supra 386 U.S. at p., 24.)

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## XXIX.

## THE PROSECUTION'S FAILURE TO DISCLOSE THE CRIMINAL HISTORY OF AN IMPORTANT WITNESS VIOLATED THE PRINCIPLES OF *BRADY V. MARYLAND*

The prosecutor failed to disclose the criminal history of one of its important witnesses, Jeannette Mayberry. Appellant has argued that this failure violated his due process rights, as described in *Brady v. Maryland* (1963) 373 U.S. 83, 87, because it deprived him of crucial impeachment evidence which he could have used to undercut the prosecution's case against him. (AOB at pp. 299-307.)

Respondent acknowledges that, despite the fact that the prosecutor allegedly did not know about Ms. Mayberry's criminal history at the time of trial, the information did qualify under *Brady, supra,* obligating the prosecution to disclose it to the defense. (RB at p.67.) The State disputes, however, that this information was material or that, had the defense known about it before the trial, it would have had any effect on the verdicts in this case. (RB at p. 167.) Further, respondent asserts:

> More importantly, Mayberry's testimony could have had virtually no impact on the 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.

(RB at p. 167.)

This last assertion of respondent obviously raises a question: if in fact the testimony of Mayberry was so unimportant, irrelevant and unpersuasive, why did the prosecution call her as a witness? A review of the record in this case establishes that Jeannette Mayberry's testimony was

very prejudicial to appellant.

Ms. Mayberry testified on three occasions at the trial in this case. (4/17/90 RT 26.) She testified that appellant, with whom she had a relationship and a young child, had been involved in a violent altercation with her -- which was reported to police -- in the days before the murder. (38 RT 5412-5418.) The prosecutor used this evidence to portray appellant as a violent person and also to support the claim that this fight with Mayberry provided a motive for the crimes in this case.[39] In addition, Mayberry testified about appellant's karate skills which, according to the prosecutor, proved that appellant had kicked Ms. Pontbriant in the face. (38 RT 5425-5426.)

Respondent's counter arguments to this *Brady* claim are not persuasive. The failure to give the defendants notice of Ms. Mayberry's pending criminal charges violated the principles set forth in *Brady v. Maryland, supra*, because this was evidence, material to the case and favorable to the defense, which was not disclosed by the prosecution. (*Id.* at p. 87.) This Court has found that evidence which can be used to impeach a prosecution witness qualifies under *Brady. (In re Sassounian* (1995) 9 Cal.4th 535, 544; see also *United States v. Bernal-Obeso* (9th Cir. 1993) 989

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[39] Indeed, at the hearing on the defendants' motions for a new trial, the trial judge described the importance of Mayberry's testimony as follows: ". . .the effect of her testimony – certainly that testimony regarding her situation when windows were broken out in her apartment, was let in to show the defendants had motive to flee, and this came in to show motivation to get Ivon Pontbriant's car, and leave. It also went to prove up this motivation to leave, this plan to go to Iowa because of the fact that basically they didn't have jobs, they didn't have property, they had this situation where Tobin's relationship with her had definitively ended." (4/17/90 RT 54.)

F.2d 331, 334 [where the government violated *Brady* when it failed to provide defense counsel with information regarding an informant's record].)

Evidence is material if "its suppression undermines confidence in the outcome of the trial." (*United States v. Bagley* (1985) 473 U.S. 667, 678; *In re Brown* (1998) 17 Cal.4th 873, 886.) Contrary to respondent's argument, the information about Jeannette Mayberry's pending criminal cases constituted material information. This Court detailed the standard for determining materiality in non-perjury *Brady* cases in the decision of *In re Brown, supra*. First, a showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. (*Ibid.*) The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. (*Ibid.)*

Second, according to *In re Brown, supra*,

> . . .it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

(*Ibid.*, citations omitted.)

Applying these principles to this case, it is clear that the information about Jeannette Mayberry's pending criminal charges was material to the

prosecution of this case. Mayberry's testimony was highly prejudicial to appellant because it painted him as a violent man. Her testimony also provided fodder to the prosecution's claim that the murder and alleged robbery of Ivon Pontbriant were motivated by appellant's lack of money and desire to leave Visalia and move to Iowa. Although the pending charges against Ms. Mayberry were misdemeanors rather than felonies, they involved crimes of crimen falsis (thefts and fraud) and were thus directly relevant to the issue of her truthfulness.

For all of the foregoing reasons as well as for those set forth in the opening brief (AOB at pp. 299-307), the prosecutor's failure to provide defendants with Ms. Mayberry's criminal record violated the principles of *Brady v. Maryland, supra,* and undermined appellant's ability to cross-examine Ms. Mayberry. This error also violated appellant's Sixth Amendment rights to confrontation and effective assistance of counsel as well as his Eighth Amendment rights to reliable guilt and penalty phase trials in a capital case.

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## XXXII.

## THE SUPERIOR COURT ERRED IN REINSTATING THE BURGLARY CHARGES WHICH HAD BEEN DISMISSED BY THE MAGISTRATE AT THE PRELIMINARY EXAMINATION

At the preliminary examination in this case, the magistrate, the Hon. Ronn M. Couillard, dismissed the counts[40] dealing with an alleged burglary. The magistrate made a factual finding that there was not "any evidence" showing an intent to commit a felony at the time that the defendants entered Ms. Pontbriant's house. (RT Prelim. [Vol. V.] 10/28/88 7-8.) Thereafter, the district attorney filed the information in this case, which contained both a burglary count and a burglary special circumstance. (1 CT 7-10.) Defense counsel then filed, under Penal Code section 995, a motion to dismiss these charges on the grounds that the magistrate had made a factual determination that there was not any evidence showing an intent to commit a felony at the time of the entry. (1 CT 15-22.) The Superior Court denied this motion. (2 CT 118.) Appellant filed a petition for writ of prohibition on this issue to the Court of Appeal (2 CT 119-142); the appellate court denied this petition. (3 CT 227.)

As explained in appellant's opening brief, the superior court and the court of appeal erred in failing to dismiss the burglary count and burglary special circumstance. Pursuant to Penal Code section 739, if the dismissal by a magistrate of a count or allegation was based upon a factual determination that the evidence did not support the charge, the superior

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[40] His dismissed involved the allegation of first degree burglary felony murder and the special circumstance based on burglary felony murder.

court judge is bound by that finding if such finding is supported by substantial evidence. (*People v. Slaughter* (1984) 35 Cal.3d 629, 639.) By contrast, if the magistrate's finding is based on a legal conclusion, the prosecution may challenge it by refiling the charges in the information. (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665.) However, as the Court of Appeal observed in *People v. Robinson* (1990) 221 Cal.App.3d 1586, 1591, the question of whether a defendant had the requisite intent is a factual issue. In addition, as the Court of Appeal stated in *People v. Henderson* (1986) 178 Cal.App.3d 516, "[a] magistrate's *factual finding that there is no evidentiary support* for the charge bars the prosecutor from refiling the charge in superior court." (*Id.* at p. 523; italics added.) Thus, in the instant case, the magistrate's finding that there was no evidence of intent to commit a felony at the time the defendants entered Ms. Pontbriant's house is a factual finding, and both the superior court and the appellate court erred in allowing the prosecutor to file the burglary charges against appellant.

Respondent argues that "the magistrate at the preliminary hearing clearly accepted all of the prosecution's evidence." (RB at p. 118.) Nothing in the record supports this assertion. The magistrate simply observed that he could not find "any evidence" that appellant and Letner had an intent to commit a felony when they first entered Ms. Pontbriant's house. (RT Prelim. [Vol.5] 10/21/88 7-8.) While the magistrate also noted that the evidence showed that Ms. Pontbriant invited them into house (*ibid)*, the record does not support respondent's argument that the magistrate dismissed the burglary charges solely because there was no forced entry. (RB at pp. 118-119.)

The purpose of the preliminary hearing is to weed out groundless or unsupported charges and to relieve the accused of the burden of defending against such allegations. (*People v. Brice* (1982) 130 Cal.App.3d 201, 209.) Thus, the preliminary hearing and the procedure under section 995 work together to assure the accused will not face unnecessary charges. (*Birt v. Superior Court* (1973) 34 Cal.App.3d 934.) Defeating the power of a magistrate to make findings that bar prosecution in the superior court "lacks support in law and logic." It would "reduce the preliminary hearing. . . to an ex parte proceeding at which only the prosecuting attorney could win." (*People v. Brice, supra*, 130 Cal.App.3d at p. 208.)

Respondent has failed to show that the magistrate's decision to dismiss the burglary count and the burglary special circumstance was based on a legal conclusion rather than a factual finding that there was no evidence of the necessary intent. For that reason and for all of the reasons set forth in appellant's opening brief on this issue (AOB at pp. 318-324), the Court should reverse appellant's conviction for burglary and the true finding of the burglary special circumstance as well as his death sentence.

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## XXXV.

## THE ADMISSION OF THE DANNY PAYNE LETTERS WAS IMPROPER AND HIGHLY PREJUDICIAL

### A. The Prosecutor did not Argue at Trial that she was Using the Letters to Impeach Richard Letner

Respondent argues that the prosecutor used the jail house correspondence between Letner and Danny Payne to impeach Letner's testimony at the penalty phase trial. (RB at p.171.) Respondent further asserts that

> [t]he 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.

(*Ibid.*; emphasis in the original.)

The record of this case, however, shows that the prosecutor did not make this claim of impeachment at trial. When defense counsel objected, on hearsay grounds, to the use of these letters, the prosecutor responded:

> Well, Your Honor, the witness has the evidence to the communication, and the fact that he wanted to write these letters for purposes of getting a deal. *If the Court wants to instruct the jury, that its content would only be used to provide meaning to what Mr. Letner did with respect to Payne, that's fine.*

(61 RT 8789; emphasis added.)

The trial judge stated: "That is the purpose for which this is going to be read." (61 RT 8789.)[41] There is no exception to the hearsay rule that out-of-court statements may be used to "provide meaning" to what the testifying

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[41] The judge failed, however, to instruct the jurors about the limited purpose of the prosecutor's use of the letters.

party did.

Further, in stating that the jury were "aware" that the letters were being introduced only for the impeachment of Letner, the prosecution ignores the fundamental necessity of jury instructions. One simply cannot assume that jurors know, without instruction from the court, why particular evidence has been introduced. A trial judge must instruct on all principles of laws closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*People v. Cavitt* (2004) 33 Cal.4th 187, 204.)

Certainly, there is nothing in the trial record in this case to support respondent's current claim that the jurors knew that the sole purpose of the trial prosecutor's cross-examination of Richard Letner about his correspondence with Danny Payne was to impeach Letner's penalty phase account of the murder. As noted in appellant's opening brief, the prosecutor in fact used the letters, including one that was indisputably written by Danny Payne, to put before the jury a highly imflammatory account of appellant's alleged involvement in the murder of Ivon Pontbriant. While it is true that the prosecutor also used the letters to undermine Letner's testimony on direct examination, that does not obviate the error and prejudice to appellant created by the prosecutor's improper use of these letters. In fact, the letters – copies of which the prosecutor enlarged and showed to the jury -- hurt both appellant and Letner because they painted a far more detailed and sordid picture of the crime than had been presented by previous testimony. Danny Payne, the actual author of one of them, and according to Letner, the de facto author of the others, was never cross-examined about their content.

This Court should not allow the prosecution to justify its erroneous use of the letters with an argument that was not made in the trial court and which is inconsistent with the way these communications were conveyed to the jury.

Because respondent failed to argue this ground in the court below, respondent has waived the issue. As a general rule, an appellate court will not consider claims of error that could have been but were not raised below. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Also, in *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316, the court of appeal noted that it is a "firmly entrenched principle of appellate practice that litigants must adhere to the theory on which the case was tried." Therefore, this Court should not address respondent's theory that the letters were offered only for purposes of impeaching Richard Letner.

### B. If this Court Decides to Address the Impeachment Argument, it Should Reject the Claim

The prosecutor's claim that it was proper for the district attorney to impeach Richard Letner with letters written by someone else, who was not produced at trial for cross-examination, has no support in the California Evidence Code. There is no provision of California's evidentiary law permitting the cross-examination of one person based on the out-of-court statements of another person, particularly when the declarant of the out-of-court statements has never been subject to cross-examination.

California does recognize, of course, the use of prior inconsistent statements to impeach a witness. California Evidence Code section 1235 states:

> Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony

at the hearing and is offered in compliance with section 770.[42]

The core requirement of section 1235 is that the witness must have testified at the trial. In *People v. Williams* (1976) 16 Cal. 3d 663, this Court held that the hearsay exception of section 1235, for prior inconsistent statements, applies only to prior statements of a witness who actually testifies at the trial. (*Id.* at p. 669.) In the *Williams* case, the prosecution introduced a transcript of testimony that a witness, unavailable at trial, had given at defendant's preliminary hearing. It then introduced a prior inconsistent statement, implicating defendant, that the witness had given to the police. Reversing the conviction, this Court held that to qualify for an exception from the hearsay rule, a prior statement must be inconsistent with testimony given by the witness at the trial, not at some other proceeding. In the instant case, Danny Payne did not testify at the trial in this case;[43] therefore, his letter could not be introduced to impeach Richard Letner as a prior, inconsistent statement.

Another requirement for admission of prior inconsistent statements for impeachment purposes is that the witness be subject to cross-examination concerning the prior statement. Usually this is done by

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[42] Evidence Code section 770 states: Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless;

(a) The witness was so examined while testifying as to give him an opportunity to explain to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action.

[43] In fact, Payne did not testify at the preliminary hearing or in any other proceeding in this case.

confronting the witness with the prior statement, interrogating the witness about the inconsistencies, and then offering the prior statement in evidence. (See e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 952.) Since the author of at least some of these letters was Danny Payne and he was not present at trial, this procedure could not be followed.

### C. The Prosecution's Use of These Letters Was Unlawful

A party may not, under the guise of cross-examination, introduce evidence that, though relevant, is not competent within the established rules. (*People v. Horowitz* (1945) 70 Cal. App. 2d 675; *People v. Oppenheimer* (1909) 156 Cal. 733; *Roche v. Llewellyn Ironworks Co.* (1903) 140 Cal. 563.)

In *People v. Watson* (1956) 46 Cal. 2d 818, this Court upheld the trial judge's restriction of defense questioning of a police officer which would have involved the use of unsworn statements made by third persons not called as witnesses. The Court observed:

> Simply because Officer Mullen testified on direct examination about certain phases of his own inspection of the Watson apartment, his observations of the deceased's body, and his conversation with defendant, does not mean that the door was thereby opened to an unrestricted line of cross-examination upon anything that he may have heard from third persons while he was in the apartment. These remarks and comments, being in the nature of unsworn statements made by various third persons who had not been called as witnesses, and who had merely inspected the premises and expressed their personal views or opinions, were inadmissible hearsay and not proper cross-examination.

(*Id.* at p. 827.)

Similarly, in *Buchanan v. Nye* (1954) 128 Cal.App 2d 582, the court of appeal found that counsel could not, under the guise of

cross-examination, read into evidence an absent witness's written hearsay statement. The Court stated:

> . . . respondent has not indicated and we fail to perceive into what exceptional category falls the written statement of an absent witness unavailable for cross-examination, whose statement is contained in a police report which is itself inadmissible under the law (Veh. Code, § 488), and whose statement is not offered for the purpose of contradicting or impeaching the person who made the statement to police officers or the testimony of the police officers who received the statement.

(*Id.* at pp. 585-586.)

The trial judge never instructed the jurors in this case that they were not to view the letters, copies of which were enlarged and shown to them as exhibits, as being offered for their truth.

### D. The Admission of the Payne Letters Violated the Confrontation Clause of the Sixth Amendment

Appellant's opening brief established that the prosecution's use of Danny Payne's letters (or those written by Letner under Payne's direction) violated the Sixth Amendment right to confrontation since the letters constituted testimony which was not subject to cross-examination as Payne did not appear as a witness at the trial in this case nor was he ever cross-examined about these letters. (AOB at pp. 337-338.) Citing inter alia *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9, respondent simply argues that because the letters were not offered as hearsay against appellant, the Confrontation Clause does not apply to appellant. (RB at p. 172.)

The United States Supreme Court's decision in *Crawford v. Washington, supra*, was decided after appellant filed the AOB in this case. The *Crawford* decision modified the Sixth Amendment analysis of the admissibility of out-of-court statements of witnesses who do not testify.

Prior to *Crawford*, the rule set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66, governed the admission of an unavailable witness's statement against a criminal defendant. The *Roberts* decision held that such statements could be admitted at trial only when (1) the evidence falls within a "firmly rooted hearsay exception," or (2) the statements contain "particularized guarantees of trustworthiness" such that adversarial testing would add little to the statements' reliability. (*Ibid.*)

In *Crawford, supra*, the Court rejected continued application of the *Roberts* rule with respect to "testimonial" hearsay. (*Crawford v. Washington, supra,* 541 U.S. at p. 51.) The Court also found that the framers of the Constitution "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.) *Crawford* emphasized that it "[did] not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability." (*Id.* at pp. 55-56.)

The *Crawford* decision created a new distinction, for purposes of the Confrontation Clause of the Sixth Amendment, between testimonial and non-testimonial statements. The Court decided in *Crawford* that the Confrontation Clause focuses on testimonial statements and

> applies to 'witnesses' against the accused--in other words, those who 'bear testimony.' [Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who

makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

(*Id.* at p. 51.) [44]

The *Crawford* decision left "for another day any effort to spell out a comprehensive definition of 'testimonial'" (*id.* at p. 68), but offered "[v]arious formulations" of the class of testimonial hearsay statements, including "'ex parte in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; [and] 'statements ... made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Id.* at pp. 51-52.) "... Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Id.* at p. 68.)

The Court noted in *Crawford* that it used the term "'interrogation' in its colloquial, rather than any technical legal, sense" (*id.* at p. 53, fn. 4), but found statements taken by police officers in the course of interrogations

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[44] The *Crawford* opinion explained that when non-testimonial hearsay is at issue, however, the Sixth Amendment allows the states flexibility in their development of hearsay law and exempts such statements from Confrontation Clause scrutiny. (*Id.* at p. 68.)

"are also testimonial under even a narrow standard." (*Id.* at p. 52.) The decision analogized modern police interrogations to the official pre-trial examination of suspects and witnesses by English justices of the peace before England had a professional police force. (*Id.* at pp. 43, 50-53 & fn. 4.) The Court noted that the Sixth Amendment Confrontation Clause also governs interrogations by law enforcement officers. (*Id.* at p. 53.)

1. The Letters Were "Testimonial"

In *Commonwealth v. Gonsalves* (Mass. 2005) 833 N.E.2d 549, 558, the Massachusetts Supreme Court described what constitutes "testimonial" hearsay under the *Crawford* decision as being all statements the declarant knew or should have known might be used to investigate or prosecute an accused. Similarly, the United States Court of Appeals for the Sixth Circuit stated the following test for determining what is "testimonial" under the *Crawford* decision:

> The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

(*United States v. Cromer* (6th Cir. 2004) 389 F.3d 662, 675.) [45]

In the *Cromer* case, the court of appeals found that the statements of a confidential informant were testimonial because tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. (*Ibid.*)

In *United States v. Summers* (10th Cir. 2005) 414 F.3d 1287, 1302,

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[45] See *United States v. Pugh* (6th Cir. 2005) 405 F.3d 390, 399 [applying the *Cromer* test].

the Tenth Circuit Court of Appeals defined "testimonial" as follows:

> a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime.

In *United States v. Saget* (2d Cir. 2004) 377 F.3d 223, 228, the Second Circuit observed that "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial." The Nebraska Supreme Court held in *State v. Hembertt* (Neb. 2005) 696 N.W.2d 473, 482 that "[t]he inquiry is whether ... the declarant intended to bear testimony against the accused," and thus, "[t]he determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."

Under any of the tests described above, the letters exchanged between Richard Letner and Danny Payne constitute testimonial hearsay since they were created for the express purpose of crafting a story to be told in court that would place all blame for the murder of Ivon Pontbriant on appellant and thus allow Letner to make a "deal" with the prosecution to dispose of the criminal charges against him in a favorable way. Richard Letner testified at the penalty phase of his joint trial with appellant that he wrote the letters under the direction of Danny Payne because Payne told him that appellant had been telling people in the county jail that Letner did the crime. Letner testified that he got scared because he thought, "How the hell am I gonna prove I didn't do it." (61 RT 8692.)

According to Letner, he wrote five statements because Payne promised to be a witness for Letner if Letner wrote the statements. Letner

said that the first statement was inaccurate because he did not want to admit he had been a coward and stood by while appellant was killing Ms. Pontbriant. (61 RT 8683.) He further testified that Payne did not believe this initial statement so he wrote another statement which was "the exact story I just told you here." (61 RT 8683.) Letner testified that he wrote this statement a second time in order to persuade Payne that it actually occurred. Under the direction of Payne, Letner said that he modified the second and third statements he wrote because Payne said if he included all the details of the crime in his statements or letters, the prosecutor would not need him as a witness against appellant:

> Well, Danny Payne said that if I — see the whole plan in the first place with Danny Payne was that he would call his lawyer, and get a hold of the D.A. and say he had some statements. But he said if I told him the exact truth, everything that happened, that they wouldn't need me at all, and that I needed a bargaining chip. So he took the second and third statements, and wrote a statement that left out a lot of parts. He said the reason to leave 'em [sic] out was so that when the D.A. read 'em [sic] they would know it was incomplete, and then they would come to me to offer me a deal.

(61 RT 8684.)

Letner further testified that he wrote two other statements and ". . .they were directly what Danny Payne had sent to me. He had sent me his written version and then I copied it, and then he said 'you got it now?' And I read it for about two hours and then I tried to copy it again, exactly what he did, what he said." (61 RT 8684-8685.)

At trial, the prosecutor never refuted these claims by Richard Letner that he wrote letters (or statements) about the crime that contained statements made by Danny Payne and that the purpose of these letters was to put together a story of the murder which would make the prosecutors want to make a "deal" with Letner at the expense of appellant.

The record in this case makes clear that Richard Letner and Danny Payne created these letters for testimonial purposes. Because Payne did not testify and was not subject to cross-examination, the admission of these letters violated appellant's Sixth Amendment rights, as set forth in *Crawford v. Washington, supra.*

### E. Admission of These Letters Constituted Reversible Error

As explained in appellant's opening brief, the prosecution's use of these letters during the penalty phase prejudiced appellant. The account of the murder found in the letters, which were enlarged and shown to the jury, was much more graphic and shocking than was presented in any of the other evidence introduced in the trial. Since Letner and Payne had fabricated the gory details in this account to put all the blame on appellant, it was him rather than Letner who was most prejudiced by the prosecutor's use of the letters.

In this case, there was a violation of an appellant's constitutional right to confrontation, and reversal is required unless the Court can determine that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As the Supreme Court stated in *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Or more recently, the

Court has formulated the inquiry as "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Under either of these standards, the error resulting from placing these letters in evidence and cross-examining co-defendant Letner about them was not harmless beyond a reasonable doubt.

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## XXXIX.

## CUMULATIVE ERROR UNDERMINED FUNDAMENTAL FAIRNESS AND VIOLATED EIGHTH AMENDMENT STANDARDS OF RELIABILITY

Appellant's opening brief demonstrated how the errors in this case combined to produce both the guilt and penalty verdicts in this case. (AOB at pp. 368-371.) Respondent argues that any errors in this case were either (1) harmless in light of the other evidence or instructions or (2) "were at worst de minimus, " and therefore their combined effect did not deny appellant a fair trial, a reliable verdict, or any other constitutional right. (RB at p. 183.)

Appellant's opening brief, taken together with the instant reply brief, demonstrates multiple errors in this case. These errors stand in close relation to one another and led to the guilt and penalty verdicts. The errors were myriad, beginning with an improper search and seizure of the automobile in which appellant was traveling on the night of the crime, an improper joint trial and reliance on the incredible testimony of two witnesses with a history of lying, and culminating in a record that was insufficient to support the various prosecution theories concerning the murder of Ivon Pontbriant. Appellant's penalty phase trial was also marred by the fact that he was compelled to try to make his case for life in a proceeding where his co-defendant testified against him. The failure to sever appellant's trial from that of his co-defendant constituted a denial of his right to a fair trial, and the resulting prejudice was particularly egregious at the penalty phase.

In the end, the cumulative effect of the numerous errors in this case ensured that the jury would find appellant guilty of crimes for which the

prosecution had failed to present sufficient evidence. The errors also ensured that the jury would return a verdict of death.

Even if some of the errors were harmless individually, the cumulative effect of these errors affected the trial as a whole. Thus, other courts have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss. 1978) 361 So.2d 1360, 1363.) And because the death penalty was imposed, the cumulative effect of these errors must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].) Accordingly, given the cumulative effect of the numerous errors in the trial in this case was to deny appellant due process, a fair trial by jury, and a fair and reliable penalty determination in violation of the Sixth, Eighth and Fourteenth Amendments, the Court should reverse appellant's convictions and death sentence.

***

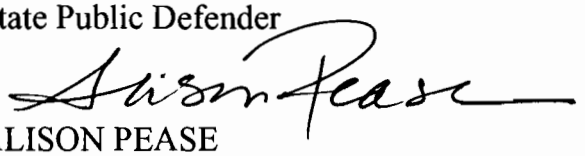
## CONCLUSION

For all the reasons stated above and in appellant's opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: September 25, 2006

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender



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**(CAL. RULES OF COURT, RULE 36(B)(2))**

I, Alison Pease, am the Senior Deputy State Public Defender assigned to represent appellant, Christopher Allan Tobin, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 33,916 words in length excluding the tables and certificates.

Dated: September 25, 2006

Alison Pease

## DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Tobin***
Case Number: **Superior Court No. Crim. 26592**
**Supreme Court No. S015384**

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

**APPELLANT'S REPLY BRIEF**

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
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The envelope was addressed and mailed on **September 25, 2006**, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **September 25, 2006**, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez