SUPREME COURT COPY

SUPREME COURT No. S015384 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RICHARD LACY LETNER, & CHRISTOPHER TOBIN

Defendants and Appellants.

Tulare County Superior Ct. No. TC 26592

SUPREME COURT
FILED
SEP 26 2006
Frederick K. Ohlrich Clerk
DEPUTY

APPELLANT LETNER'S REPLY BRIEF

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

HONORABLE WILLIAM SILVEIRA, JR., JUDGE

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DEATH PENALTY

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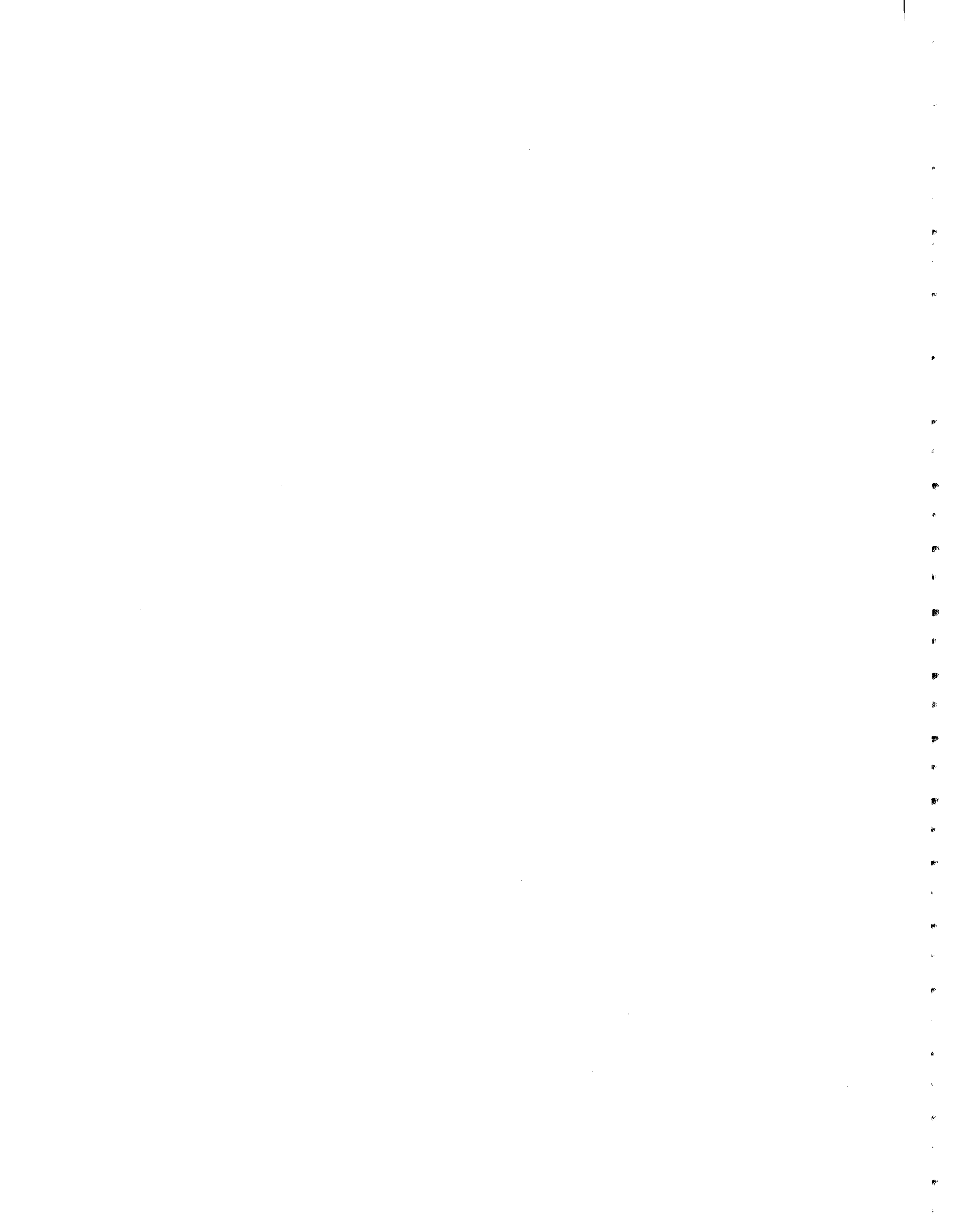

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SUPREME COURT No. S015384 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	)
	) Tulare County
v.	) Superior Ct. No.
	) TC 26592
	)
RICHARD LACY LETNER, &	)
CHRISTOPHER TOBIN	)
	)
	)
Defendants and Appellants.	)
	)
______________________________	)

APPELLANT LETNER'S REPLY BRIEF

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

HONORABLE WILLIAM SILVEIRA, JR. , JUDGE

GUILT PHASE ISSUES

I.

THE TRIAL COURT ERRED IN REQUIRING APPELLANT LETNER TO WEAR LEG SHACKLES DURING THE TRIAL

Summary of Appellant's Argument

In his opening brief, appellant Letner argued that he could not be shackled in

the courtroom except on a showing of manifest need and as a last resort in an extraordinary case. Here, despite seven weeks of proper behavior in the courtroom, the trial judge allowed the bailiffs to impose rigid leg restraints based solely on unverified hearsay reports that at some point during their incarceration the defendants were seen practicing martial arts kicks at the jail. The improper imposition of these restraints violated federal and state due process as well as appellant's Sixth Amendment rights to counsel and to present a defense. (Appellant Letner's aob at pp. 99-117.)

Summary of Respondent's Argument

Respondent makes a two part reply. First, respondent notes that restraints cannot be imposed arbitrarily. Nevertheless, respondent urges that there was manifest need for the leg restraints since appellant was seen practicing martial arts kicks in jail, he assaulted another jail inmate and he had previously escaped from custody when he was being transported back to California after his arrest. The restraints were further justified by the close quarters of the courtroom. (Respondent's brief at pp. 80-81.)

Second, respondent urges that any error was harmless. There is no evidence that any juror actually saw the restraints. and if none of the jurors saw the shackles, appellant was not prejudiced. Moreover, even assuming that some of the jurors might have seen the leg braces, the sight was merely a brief glimpse and not likely to have prejudiced any juror. (Respondent's brief at pp. 81-82.)

Errors in Respondent's Arguments

No "manifest need" for shackles

At the outset, it should be noted that respondent concedes that a defendant cannot be restrained at trial in the absence of manifest need and that such need

must be a matter of record. (Respondent's brief at p. 80.) Unaccountably, however, respondent then goes on to assert that the very instances that appellant demonstrated were NOT supported by evidence in the record, were nevertheless sufficient to support the trial judge's decision to impose shackles.

As appellant pointed out in the opening brief, appellant was not seen practicing martial arts kicks at the jail. The only evidence of record (other than blatant hearsay and speculation by Sgt. Pollack who did not witness any of this activity) is that codefendant **Tobin** was seen practicing such kicks. What the record reveals is that the affidavit proffered **by the prosecution** in support of the judge's ruling states that jail deputies reported to Deputy Stenback that **Mr. Tobin** had been seen practicing martial arts kicks in the exercise yard and in his cell. Further, Deputy Stenback reported this activity to the trial court and urged that the leg braces be employed as a security measure in court. (Declaration of Deputy Stenback filed April 5, 1996 at 8 Augmented Clerk's Transcript at pp. 1650-1651.)

Nothing in this affidavit states that anyone saw **appellant** practicing such kicks. Indeed, appellant's unrebutted affidavit states that he was always brought to the yard in chains (where his martial arts practice was alleged to have been observed) and hence he could not have practiced martial arts kicks. (8 Augmented Clerk's Transcript at pp. 1569-1576.) (see *Deck v. Missouri* (2005) 544 U.S. 622 , 632 125 S.Ct. 2007, 2014-2015; 61 L.Ed.2d 953. [death sentence reversed because trial judge failed to cite any reason specific to that particular defendant showing that visible shackles were necessary].)

Additionally, appellant's reported attempted assault on a jail inmate hardly justifies leg restraints during trial. The record reveals that appellant and another inmate exchanged words. During this argument, appellant **attempted to** assault

this other inmate. (31 R.T. 4463.) There is no evidence, however, that he actually struck the other inmate. Morever, common experience shows that belligerence among jail inmates is a fairly frequent occurrence and many of these mutual insults result in at least some pushing and shoving or minor fisticuffs. Indeed, if even one of these minor altercations involving mutual pugnacity was sufficient to justify shackles at trial, few defendants would ever appear unshackled. There is no evidence anywhere in the record showing that this altercation was anything more than a minor dust up based on verbal provocation. Belligerent attitudes among jail inmates, however, are NOT sufficient justification for shackling at trial. Shackling is a measure of **last resort** based on a demonstrated need for physical restraints on a particular defendant. (*Deck v. Missouri, supra,* 544 U.S. at pp. 627-630 [125 S.Ct. 2007, 61 L.Ed.2d 953]; *People v. Duran* (1976) 16 Cal.3d 282, 290-291.) Nothing in the evidence supports a manifest need for shackling here based on a minor jail conflict.

Additionally, the fact that appellant escaped from custody while being transported from Iowa to California is largely irrelevant to the trial court's shackling decision. The trial judge never indicated that he relied on this factor in any way. Further, counsel for appellant noted that the trial had been underway for seven weeks and nothing in appellant's behavior warranted the sudden imposition of the restraints. (31 R.T. 4462.) Underscoring the validity of defense counsel's argument, when the shackles were ultimately removed a day after they were placed on the defendants (and the day that codefendant Tobin damaged his leg restraint), the trial court admitted that the defendants' courtroom behavior had not been a problem and the shackling was discontinued. (32 R.T. 4693.)

As a last resort, respondent alleges that the close quarters in the courtroom

justified restraints. As appellant pointed out in his opening brief however, inadequate courtroom facilities have been repeatedly rejected as a sufficient reason by itself to impose physical restraints. (See, e.g., *People* v. *Ceniceros* (1994) 26 Cal.App.4th 266, 278; *Solomon* v. *Superior Court* (1981) 122 Cal.App.3d 532, 536; *People* v. *Prado* (1977) 67 Cal.App.3d 267, 276.)

As appellant explained in his opening brief, the "manifest need" required for the imposition of physical restraints "arises only upon a showing of unruliness, an announced attention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .' ([*People v. Duran*, *supra*, 16 Cal.3d. at p. 292, fn. 11.) "The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Id*., at p. 291.) (*People v. Cox* (1991) 53 Cal.3d 618, 651.) Nothing in this record demonstrates that manifest need.

Significantly, left unaddressed in respondent's reply is any notion that the trial court actually understood the limits of its discretion. Instead, the judge advised that he was simply "going to defer to the opinion of the sheriff's office." (31 R.T. 4465.) Nevertheless, "the determination to impose restraints and the nature of the restraints to be imposed are judicial functions to be discharged by the court, not delegated to a bailiff." (*People v. Jacla* (1978) 77 Cal.App.3d 878, 885; see also *People v. Jackson* (1993) 14 Cal.App.4th 1818.) In context, therefore, it appears that the trial judge simply acquiesced in the jail deputies' desire for absolute security, a desire that was in turn based largely on the availability of the restraints rather than any showing of actual need. Certainly, nothing in the trial court's comments indicates it was aware of the procedural and substantive

requirements established in *Duran* that should have governed its determination of defendants' objection to the leg restraints. (*People v. Mar* (2002) 28 Cal.4th 1201, 1222; see also *Deck v. Missouri, supra,* 544 U.S. at pp. 634-635 [125 S.Ct. 2007; 61 L.Ed.2d 953] [trial judge failed to make clear why shackles were neccessary at this time with this defendant, thus abusing his discretion]) Under these circumstances, the record fails to demonstrate that the evidence supports the trial court's decision or that the trial court even understood the requirements for shackling a criminal defendant before a jury. Thus, the trial judge abused his discretion as a matter of law in ordering the defendants to be shackled. (Cf. *People v. Cox*, *supra*, 53 Cal.3d at pp 650-651.)

Prejudice

Respondent asserts that there is no evidence that the jury saw the restraints. (Respondent's brief at p. 81.) Moreover, even if the jury saw the shackles, it was doubtless just a brief glimpse and this court has often held that a brief glimpse is harmless. (Respondent's brief at p. 81.) Further, it is simply inconceivable that wearing shackles for one day impaired appellant's right to a fair trial. (Respondent's brief at p. 82.)

As appellant noted in his opening brief, however, if the defendant was improperly shackled in the courtroom, the error is of constitutional magnitude. (See *Deck v. Missouri, supra,* 544 U.S. 626 [125 S.Ct. 2007; 61 L.Ed.2d 953] *Estelle v. Williams* (1976) 425 U.S. 501, 504-505; *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712 .) Thus, there is no burden on the defense to prove the error was harmless; **prejudice is presumed**. (*Deck v. Missouri, supra,* 544 U.S. 635 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953]. The burden is on the respondent to prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California*

(1967) 386 U.S. 18, 24; see generally *Yates v. Evatt* (1991) 500 U.S. 391, 402-405 [114 L.Ed.2d 432, 111 S.Ct. 1184][overruled on a different ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72].)

Here, there is obviously a conflict in the evidence concerning whether jurors could or could not see the restraints. The judge said he did not think the jurors could see the leg restraints (31 R.T. 4464, 8 Augmented Clerk's Transcript at pp. 1655-1656); counsel for the defendants argued that the jury could see the restraints and that is what prompted the defense objection. ((31 R.T. 4464; see also 8 Augmented Clerk's Transcript at pp. 1633.) The judge could have easily resolved this conflict by asking the jurors what they saw. He failed to do so. Instead, during the record correction process, the judge inserted photographs into the record using jail deputies in a reenactment to demonstrate what the leg restraints might have looked like to the jury. As appellant pointed out in the opening brief, however, the problem with the pictures is that the judge never gave the defense the opportunity to comment on the accuracy of his reenactment with the jail deputies. Indeed, one photo shows the restraint being worn on the **outside** of the pant leg rather than underneath the pant leg as the defendants wore them. Thus, aside from the trial court's bare proffer, there is nothing in the record showing that the pictures are an accurate reflection of what the restraints would have looked like to the jurors. Therefore, this court has no factual basis upon which to make a determination that the jurors could NOT see the leg restraints. (See (*Deck v. Missouri, supra,* 544 U.S. at p. 634 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953] [Record ambiguous about whether the jury saw the restraints or the effect the restraints had on the jury, but Deck's attorney said on the record that the jury could see the shackles.]

Additionally, if the defendants were correct that jurors could surmise from the circumstances that the defendants were wearing leg restraints, the trial court prejudicially erred in failing to *sua sponte* instruct the jury not to speculate on the reasons for the restraints. (CALJIC 1.04; *People v. Duran, supra,* 16 Cal.3d at p. 292.) Respondent makes absolutely no reply to this problem.

Respondent's argument concerning the jury's brief glimpse of the shackles is also flawed. It is undisputed that the shackles were on the defendants for an entire day. If jurors could see the shackles, an entire day is certainly well in excess of a brief glimpse and would have given the jurors more than ample time to speculate about why the defendants had to be physically restrained, an issue that would have prejudiced appellant at both the guilt and penalty phases of the trial. Thus the factual basis for respondent's assertion that the jury only got a brief glimpse of the shackles is unsupported by the record.

Finally, without citation to the record or any legal authority, respondent baldly asserts that wearing leg braces for a day had no effect on appellant's ability to participate in his trial. (Respondent's brief at p. 82.) Analysis of the five factors set forth in *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, 105-106, cert. denied, 416 U.S. 959 (1974) is intended to resolve this precise problem of prejudice. Although appellant analyzed each of these factors carefully in his opening brief and demonstrated how each contributed to the prejudice in this case (appellant's opening brief at pp. 113-117), respondent ignores these factors completely. Absent argument or even citation to authority on the point, respondent cannot be said to have carried its heavy burden to demonstrate beyond a reasonable doubt that shackling the defendant in the courtroom in deference to the Sheriff's Department's wishes fully comported with appellant's constitutional

trial rights.

More importantly, respondent's argument attempts to shift the burden to the defense. The presumption is that the jury **WAS** prejudiced by viewing the shackles. (*Deck v. Missouri, supra,* 544 U.S. at p. 635 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953].) The burden is on the respondent to show that it was not. Respondent's bare assertion that the jury only saw the shackles briefly is far short of meeting that heavy burden. As the United States Supreme Court observed: "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. [Citation]. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.' [Citations]" (*Deck v. Missouri, supra,* 544 U.S. at p. 630 [125 S.Ct. 2007, 2013; 61 L.Ed.2d 953.]) Even a brief glimpse of shackles establishes this prejudice. Nothing in respondent's argument demonstrates how this prejudice was ameliorated or otherwise dissipated.

For these reasons, and those set forth in appellant's opening brief, an unjustified shackling in the courtroom without an affirmative showing of dissipation of the taint is a violation of federal and state due process that compels reversal of both appellant's convictions and the sentence of death. (*Deck v. Missouri, supra,* 544 U.S. 635 [125 S.Ct. 2007, 2015; 61 L.Ed.2d 953].) Further, because this error prejudiced the jurors and their assessment of the defense and the defendant, it necessarily affected the reliability of the fact finding process. As such, the error violates the Sixth Amendment right to a jury trial and the heightened reliability standard of the Eighth Amendment as well. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

II.

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

Summary of Appellant's Argument

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

As appellant pointed out in his opening brief, there is precious little evidence that both defendants had a hand in killing Ms. Pontbriant. Forced to

stand trial together, however, the defendants ended up pointing fingers at each other and the forensic evidence did little to sort out the dichotomy.

More importantly, the prosecutor even admitted that the evidence could not show which defendant was the perpetrator. Instead, she argued that the jury should simply find both men equally guilty. The prosecution's approach avoided the hard problem of fixing individual responsibility and allowed the jury to simply take the path of least resistance. Doing so, however, deprived appellant of his fundamental right to a jury trial and his due process right to individual consideration.

Severance should be granted where there are mutually antagonistic defenses, where a weak case against one codefendant is joined with a strong case against the other, and where one defendant is prejudicially associated with the other. Perhaps most significantly, however, where the prosecution continually urged the jury to view the two defendants as a single criminal entity, **the denial of the severance motion put the trial court's imprimatur on that error**. It placed the state's interest in an efficient prosecution above Mr. Letner's constitutional right to individual consideration. Such circumstances present a clear abuse of discretion and hopelessly compromised the jury's fact finding function. (Appellant Letner's opening brief at pp. 118-151.)

Summary of Respondent's Argument

Respondent urges that the decision to sever is discretionary with the trial court and the court did not abuse its discretion here. There was no danger of confusion of issues because there was a single murder; no danger of excluding exonerating testimony by one defendant because even severed defendants would likely blame one another, and no danger of joining a weak case to a strong one because these defendants were "crime partners" and thus their association in a

single trial was not unduly prejudicial. (Respondent's brief at pp. 83-85.)

Additionally, the mere fact that the defendants presented different and possibly antagonistic defenses does not render their trial fundamentally unfair. Indeed, the only antagonistic defense that came out at the guilt phase of trial was Mr. Tobin's assertion that Mr. Letner and Ms. Pontbriant were alone in her house when he left and went back to Mr. Letner's apartment. Mr. Letner showed up later with Ms. Pontbriant's car and asked him to load items into it. Thus, a jury could infer that Mr. Letner committed the murder alone. During the guilt phase, appellant Letner did not comment on Mr. Tobin. (Respondent's brief at pp. 85-86.)

It wasn't until the penalty phase that appellant Letner sought to blame codefendant Tobin, but by then the jury already found both men guilty of murder and found the special circumstances true. Thus, at the guilt phase, the jury clearly rejected Mr. Tobin's defense. Further, the death decision in the penalty phase indicates that the jury also rejected appellant's testimony that codefendant Tobin acted alone in the homicide. (Respondent's brief at pp. 86-87.)

Finally, respondent urges that at the guilt phase the jury was instructed to decide each count separately while at the penalty phase it was instructed to decide the issue of penalty separately as to each defendant. Therefore, any error in conducting a joint trial was harmless. (Respondent's brief at pp. 88-89.)

Errors In Respondent's Arguments

As appellant pointed out in his opening brief, whether the operative legal provision is Penal Code section 1098 or the Eighth or Fourteenth Amendment, the danger to be avoided is the same: that the jury will treat the co defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (*Woodson v.*

North Carolina, *supra*, 428 U.S. at 304.) It is against this backdrop of the mandate of the Eighth and Fourteenth Amendments then, that the trial court's exercise of discretion in refusing to sever these trials must be evaluated.

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

As the Ninth Circuit observed in *Tootick, supra*, "[p]rejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual basis." (*Id.* 952 F.2d at 1082.) Indeed, "the ultimate question is whether under all of the circumstances, it is within the capacity of the jurors to follow the court's admonitory instructions and, correspondingly whether they can collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements, and conduct." (*United States v. Brady* (9th Cir. 1979) 579 F.2d 1121, 1128; *see also United States v. Marshall* (9th Cir. 1976) 532 F.2d 1279, 1282; *United States v. Donaway* (9th Cir. 1971) 447 F. 2d 940, 943.)

The seminal flaw in respondent's argument is that it casts aside the foregoing considerations and fails to come to grips with the evidentiary deficiencies relating to appellant's individual criminal culpability. Indeed,

conspicuously missing from respondent's argument is any discussion of the prosecutor's repeated assertions that even though she could not show which of the defendants was the actual perpetrator, that evidentiary deficit did not matter. The defendants could be treated equally. Even on appeal, respondent insists that there is no difference between the two. Respondent refers to the codefendants as "crime partners," and as such the trial court was within its discretion in refusing to sever the trials. (See e.g. Respondent's brief at pp. 83-85.)

Because of the close association between the two defendants, the prosecution created an impermissible likelihood that the prejudicial information from or about Mr. Tobin would implicate Mr. Letner. *(Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454; see also *People v. Mitchell* (1969) 1 Cal.App.3d 35, 39 ["It is . . . more than likely that the jury would have found appellant guilty if for no other reason than by association. Appellant was not only apprehended with Watkins . . . , but Watkins testified that he was appellant's brother-in-law and that they were reared in the same neighborhood."]; *United States v. Sampol* (D.C. 1980) 636 F.2d 621, 647 [reversal required when two brothers were tried together and the prosecution failed to make any meaningful distinction between the defendants, resulting in violation of each defendant's constitutional right to a fair trial]. Not only is deliberate blurring of individual responsibility a fundamental denial of appellant's due process right to a fair trial, but the error is particularly acute with regard to fixing the penalty at death.

As if the blurring of criminal liability was not bad enough, respondent's argument on the problem of antagonistic defenses wholly fails to address the real problem faced by appellant Letner. Respondent urges that the only potentially antagonistic defense presented at the guilt phase of trial was Mr. Tobin's assertion

that when he left Ms. Pontbriant's residence she was alive and later appellant Letner showed up driving her car. (Respondent's brief at pp 85-86.) The clear inference was that appellant Letner killed Ms. Pontbriant and took her car.

Missing from respondent's argument, however, is any acknowledgment **that the motion to sever was not decided on the evidence presented at trial**. Rather, it was decided on the basis of the moving papers presented by each side.[1] As appellant Letner explained in his opening brief, the moving papers presented decidedly antagonistic defenses.

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

The moving papers revealed a completely different scenario presented by Mr. Letner. In letters addressed to Danny Payne, Mr. Letner stated that all three people had been drinking heavily during the evening. (2 C.T. 270.) Mr. Letner told Mr. Tobin that he would try to borrow Ms. Pontbriant's car but they had to have sexual relations first. (2 C.T. 270.) After he and Ms. Pontbriant became sexually involved, Mr. Tobin left the house. When Mr. Tobin returned later, he

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

became impatient because Mr. Letner had not secured permission to use Ms. Pontbriant's car. When he confronted Mr. Letner about the matter in front of Ms. Pontbriant, the situation quickly deteriorated into physical violence. (2 C.T. 270-271.) Mr. Tobin then killed Ms. Pontbriant to silence her and threatened to kill Mr. Letner if he interfered. (2 C.T. 271.)

The prosecution opposed the motions to sever arguing that the defenses were not antagonistic and, even if they were, the court could empanel dual juries. (2 C.T. 484-493.) Mr. Letner filed a reply noting that the evidence against Mr. Letner was considerably short of substantial. (2 C.T. 496.) There were only a few hairs consistent with Mr. Letner that were found on the decedent, and they were found in the proximity of several animal hairs that were also found on the body. (See 41 R.T. 5963-5970.) Clearly both sets of hairs were already on the floor and simply adhered to Ms. Pontbriant when she fell or was forced to the floor.

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

Once the trial judge denied the motions for separate trials, **Mr. Letner's defense team changed its presentation on the merits**. At the guilt phase, there was no mention of obtaining Ms. Pontbriant's car through sexual persuasion, nor was there any allegation that Mr. Tobin was the sole perpetrator of the homicide. By contrast, Mr. Tobin's presentation, remained pretty much consistent with his moving papers.

As noted above, nowhere in respondent's argument does it mention the antagonistic defenses presented in the moving papers. More importantly, there is no discussion of the problem that the trier of fact could not accept one defendant's

version of the incident without convicting the other. Severance may be required where acceptance of codefendant's defense would preclude acquittal of defendant. (*People v. Hardy* (1992) 2 Cal.4th 86, 168 [citing federal precedent as the logical and philosophical basis for state law governing the requirements for severance].

Indeed, defenses may prevent a reliable judgment of guilt or innocence, and therefore require separate trials, when they "'move beyond the merely inconsistent to the antagonistic'" to the point of being "mutually exclusive." *(United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 899, quoting *United States v. Tootick, supra*, 952 F.2d at p. 1081, cited with approval in *United States v. Zafiro, supra*, 506 U.S. at pp. 542-543, conc. opn. of Stevens, J.; accord *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362.) Mutually exclusive defenses exist where "'the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'" (*United States v. Mayfield, supra*, at pp. 899-900, quoting *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1072; accord *People v. Hardy, supra*, 2 Cal.4th 86, 168 [where "defenses are irreconcilable" or "acceptance of one party's defense will preclude the acquittal of the other"]; *United States v. Tootick, supra*, 952 F.2d at p. 1086 ["mutually exclusive defenses are said to exist when acquittal of a codefendant would necessarily call for conviction of the other"]; *United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1415, cert. denied 520 U.S. 1258 (1997) [mutually antagonistic defenses exist "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of another"]; *United States v. Rucker, supra*, 915 F.2d at p. 1512; *United States v. Romanello, supra*, 726 F.2d at pp. 178-181) A classic case is when the evidence demonstrates that

one of the defendants must be guilty, one defendant can only deny his guilt by attributing it to the other, and consequently the jury cannot reasonably believe both defenses. (See, e.g., *United States v. Tootick, supra*, 952 F.2d at p. 1082; *United States v. Rucker, supra*, 915 F.2d at p. 1513; *United States v. Crawford* (5th Cir. 1978) 581 F.2d 489, 490-491.)

Further, defenses may be mutually antagonistic even where the prosecution's evidence against each defendant is strong (*United States v. Crawford, supra*, 581 F.2d at p. 492 ["Although the evidence of each defendant's individual guilt was strong, this joint trial was intrinsically prejudicial"]); or weak. (*United States* v. *Romanello, supra,* 726 F.2d at 179.)

The problem becomes particularly acute when the defendant admits being present at the scene. A defendant's only realistic defense in such a situation is the lack of any intent to assist in the perpetration of the crime, and proof of his innocent mental state will depend on proving that the codefendant was guilty. The special risks in this situation are obvious. On one hand, the defendant's admission of conduct that the prosecution will argue is consistent with guilt -- particularly where these admissions directly implicate the codefendant -- gives dramatic force to the prosecution's case against the codefendant, while on the other hand, a defense based on lack of intent is inherently vulnerable to attacks leveled by an alleged co- participant in the crime. Where both defendants attempt to demonstrate that their innocent mental states are based on the guilty conduct of the codefendant, the danger is maximized that "'the jury will unjustifiably infer from the conflict alone that both defendants are guilty."' *United States v. Peveto* (10th Cir. 1989) 881 F.2d 844, 857 (quoting *United States v. Esch* (10th Cir 1987) 832 F.2d 531, 538).

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

In *United States v. Tootick, supra*, 952 F.2d 1078, for example, "the principle defense of each defendant was that the other alone had committed the assaults." The Ninth Circuit held that the defendants should have been tried separately because "[e]ach defense theory contradicted the other in such a way that the acquittal of one necessitate[d] the conviction of the other." (*Id.*, 952 F.2d at 1081.)

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

Letner was at the scene, nothing ineluctably showed that he was the killer or assisted in the killing. More importantly, nothing in respondent's argument deals with these most basic problems raised in the codefendants' antagonistic defenses.

Similarly missing from respondent's argument is any acknowledgment that the trial court's refusal to sever resulted in a change in appellant Letner's defense strategy. That is, if Mr. Letner persisted in presenting antagonistic defenses at trial, the jury would be faced with choosing between one defendant or the other on evidence that was ambiguous, or more likely playing into the hands of the prosecutor by allowing her presentation to be the only cohesive theory of the case.

Moreover, as appellant explained in his opening brief, the trial court's *Aranda* ruling was particularly prejudicial. It allowed the prosecution to present evidence from Mr. Bothwell that Mr. Tobin admitted being the killer while Mr. Tobin's trial testimony clearly implicated appellant as the perpetrator.

If the trials had been severed, not only would the People have been unable to compel Mr. Tobin to testify against appellant, but Mr. Tobin's purported admission to Bothwell would have been irrelevant to the prosecution's case against Mr. Letner. Nowhere in respondent's brief does it address this *Aranda* problem. Additionally, without Mr. Tobin's testimony, there was virtually no other evidence showing that Mr. Letner was the perpetrator.

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

Letner.

It is true that appellant went back to his original strategy at the penalty trial, taking the stand and testifying to his version of what actually transpired, i.e., that Tobin and Tobin alone killed Ms. Pontbriant. He did so, however, only after a guilt phase trial during which codefendant Tobin testified and attributed guilt solely to appellant, and appellant's counsel, perhaps anxious to avoid mutually destructive finger pointing, argued to the jury that the prosecution had not proved that either defendant was responsible for Ms. Pontbriant's death. Against this backdrop, appellant's penalty phase testimony was no doubt accorded less weight by the jury than it might otherwise have been. Nonetheless, the jury had difficulty appraising his culpability at the penalty trial, and after five days of deliberations, while having determined death was the appropriate sentence for Mr. Tobin, remained hung as to the appropriate sentence for appellant. (5 C.T. 1262, 1268, 1269, 1274; 69 R.T. 9833-9834, 70 R.T. 9848) Had severance been granted, and appellant been free to testify concerning Tobin's role in the killing without counter testimony by a hostile codefendant - a prospect encouraging jurors to convict both men - it's likely that the jury would have been able to make a more focused determination as to appellant's guilt or innocence and that the result of the trial would have been different.

Respondent attempts to counter this problem by noting that in the guilt phase, the jury was instructed to give each defendant separate consideration. As appellant pointed out in his opening brief, however, the presumption that limiting instructions can cure any prejudice from joinder is inconsistent with the reality of trial practice generally and certainly under the facts of this case. Given the nature of this case, it is simply unrealistic to expect that a jury could limit its

consideration of numerous pieces of evidence to one defendant or the other. Indeed, given the ambiguities in the forensic evidence and the conflicting evidence presented by each defendant, even the prosecutor admitted that she could not tell which defendant did which act. (53 R.T. 7582.) The obvious solution for the jury was exactly that condemned in *Tootick*; that is, instead of going through the hard work of deciding individual culpability, it could simply convict them both. *(United States v. Tootick, supra*, 952 F.2d at 1082-1083.)

For these reasons and those set forth in appellant's opening brief, the trial court's refusal to sever the defendants' trials was not a proper exercise of discretion and appellant suffered accordingly. Thus, his convictions must be reversed and his death sentence set aside.

Appellant Joins Codefendant's Brief

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

III.

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

Summary of Appellant's Argument

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

Driving at a speed slower than the posted speed limit, here about 40 miles per hour in a 55 mph zone (R.T. 6/7/89, pp. 10-12), is certainly not unlawful on a California highway unless the slow speed impedes or blocks "the normal and reasonable movement of traffic." (Veh. Code, § 22400.) The speed in this instance presented no such impediment or blockage because the officer testified that there were no other vehicles in sight. (Preliminary hearing transcript at p. 626.) Further, it rained heavily during the night which would have made travel at a slower speed prudent and safe. (Preliminary hearing transcript at p. 594.) Additionally, Officer Wightman observed that the vehicle's engine was running "rough" which provided a further innocent explanation for the slower speed. (Preliminary hearing transcript at p. 626.)

At no time did the officer observe any indication of unsafe driving or any

traffic violations. (Preliminary hearing transcript at pp. 595-596.) Under these circumstances, reliance on the slow speed of the vehicle was an insufficient justification for stopping the vehicle. Indeed, "[i]f an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver." (*United States v. Mariscal* (9th Cir.2002) 285 F.3d 1127, 1130.)

Appellant was prejudiced by the stop because there was incriminating evidence found in the vehicle and because the jury could infer that if the defendants left the scene in Ms. Pontbriant's vehicle, that action demonstrated consciousness of guilt.

Respondent's Argument

Without explicitly conceding that a slow although legal speed is insufficient to justify an investigative vehicle stop, nevertheless, on appeal, respondent does not appear to rely on that factor to justify the stop of appellant's vehicle. Instead, respondent argues that slow speed was not the only justification for a vehicle stop. (Respondent's brief at p. 72.) Additionally, the vehicle had water droplets on it. Because the rain in the area had been over for more than two hours, Officer Wightman could reasonably conclude that the vehicle had recently been moved from the downtown area. Further, Officer Wightman knew that there had been several vehicle thefts from auto dealers in the downtown area. Thus, the car was properly stopped because of its slow speed and partly because officer Wightman suspected that the vehicle might have been stolen from a car dealer. (Respondent's brief at pp. 72-73.) Finally, respondent urges that the stop was a "minimally intrusive" method to dispel the officer's suspicions. (Respondent's brief at p. 73.)

On the issue of prejudice, respondent urges that even if the stop was inappropriate, the only matters requiring suppression are those resulting from the detention of the defendants, not the search of the vehicle. Neither defendant could have a reasonable expectation of privacy in a stolen vehicle or its contents. Therefore, the vehicle itself could be lawfully searched independent of the illegal stop.

Even if that were not so, the other evidence in the case, specifically the testimony of Messrs. Gilliland and Bothwell, the evidence that the defendants intended to leave for Iowa and appellant's hairs found on Ms. Pontbriant's body were more than sufficient to uphold the convictions. Thus any error in admitting evidence resulting from the vehicle stop was harmless. (Respondent's brief at pp. 73-78.)

Errors in Respondent's Arguments

Vehicle Stop

Significantly omitted from respondent's argument is any mention of the fact that Officer Wightman ran a license check on the vehicle BEFORE stopping it. The license check revealed that the car belonged to a private individual (not a car dealer) and nothing in the license check revealed the vehicle to be stolen. (R.T. 43-44, 6/7/89 hearing.) Thus, as appellant explained in his opening brief, nothing in the "stolen car" theory could have ripened into a reasonable suspicion to stop the vehicle. (Appellant's opening brief at p. 159.) Further, just plain common sense suggests that since there probably were a number of wet vehicles driving around downtown Visalia at that hour of the night, it is hard to imagine that all of them (or indeed any of them) were stolen from used car dealers.

If there was any doubt about the matter, even the trial judge recognized that

a wet vehicle would not have given officer Wightman a reasonable suspicion to stop the vehicle, particularly after he ran the license check. While the Officer might have been justified initially in following the vehicle because of his information about other stolen cars, the judge specifically ruled that such information would **not** justify a stop. (R.T. 36-37, 6/8/89 hearing.)

Additionally, to the extent that respondent continues to rely on the slow speed of the vehicle as justification for the stop (respondent's brief at pp. 72-73), that theory is thoroughly discredited on the facts of this case. Driving at a speed slower than the posted speed limit is certainly not unlawful on a California highway unless the slow speed impedes or blocks "the normal and reasonable movement of traffic." (Veh. Code, § 22400.) The speed in this instance presented no such impediment or blockage because the officer testified that there were no other vehicles in sight. (Preliminary hearing transcript at p. 626.)

Nevertheless, respondent insists that slow speed has been "an important factor in determining the reasonableness of a temporary detention for investigation." (Respondent's brief at pp. 72-73.) As explained in appellant's opening brief, however, the cases cited by respondent do **not** stand for the proposition that slow speed alone is sufficient to justify a stop. Instead, in those cases slow speed is only one of several factors that caused the police to stop the vehicle. (Appellant's opening brief at pp. 163-166.)

Here by contrast, there were only two factors that the trial court found would justify the stop, possible vehicle theft and slow speed. Since Officer Wightman took steps to ensure that the vehicle was not stolen from an automobile dealer **BEFORE** he effected the stop, the **ONLY** factor that could justify the actual stop itself was the slow speed of the vehicle. Therefore, as explained

above, based on the "totality of circumstances," the slow speed of the automobile did not amount to a "particularized and objective basis" for suspecting the occupants of the car were engaged in criminal activity. (*U.S. v. Arvizu* (2002) 534 U.S. 266 [122 S.Ct. 744, 750, 151 L.Ed.2d 740].)

Finally, as to respondent's argument that the stop was a "minimally intrusive" method of assuaging the officers suspicions, such an assertion flatly contradicts established case law. In a free society such as ours, the "[p]olice do not have unfettered authority to stop people lawfully using public highways." (*United States v. Diaz Diaz* (D. Mont 2002) 211 F.Supp.2d 1252, 1254.) The Fourth Amendment constitutional prohibition against unreasonable search and seizure extends even to a brief investigatory stop of a vehicle. (*See United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 878 [95 S.Ct. 2574, 45 L.Ed.2d 607].) Thus, the argument that because the stop was "minimally intrusive" it somehow evades Fourth Amendment protections is patently specious. Absent reasonable suspicion, there is no ground justifying the vehicle stop in this case, no matter how "minimally intrusive."

Prejudice

Respondent concedes as it must, that if the stop was illegal, then all "fruit of the poisonous tree" of the illegal stop and search should have been suppressed. (Respondent brief at p. 73; see also, *Wong Sun v. United States* (1963) 371 U.S. 471, 488.) The defense motion in the trial court argued that those fruits included: (1) all observations of appellant in the vehicle and thereafter at the scene of the stop; (2) all observations of the contents of the vehicle from the inception of the stop and thereafter; (3) all statements made by appellant and codefendant Tobin at the scene of the stop; (4) all evidence seized from the vehicle; and (5) any and all

other evidence obtained as a result of the stop of the vehicle, subsequent detention of appellant and search of the vehicle. (1 C.T. 76.)

Respondent urges that even if the stop was illegal, the only matters that should be suppressed are those resulting from the detention, not the search of the vehicle. Since the vehicle was stolen, neither defendant could have a reasonable expectation of privacy in the vehicle or its contents, and here neither had standing to challenge the search of the vehicle itself. The only thing that would have had to have been suppressed was the evidence derived from the defendants' improper detention. That would include such things as any statements the defendants made to Officer Wightman and the items resulting from the pat down of the defendants, such as appellant Letner's buck knife. (Respondent's brief at pp. 73-75.) The rest of the evidence, according to respondent, "flowed solely from the subsequent searches of Ms. Pontbriant's stolen car ...[which] consists of everything observed during the search of the car which includes the presence of Letner and Tobin themselves." (*Id.*, at p. 75.)

Additionally, according to respondent, even if the stop was improper, the evidence obtained as a result of searching the vehicle should not be suppressed because its discovery was inevitable. That is, once the murder was discovered by the authorities, they would soon have found Ms. Pontbriant's vehicle since it was still parked by the side of the road where appellant Letner left it. Moreover, once discovered, the police would have impounded the car and inventoried its contents. (Respondent's brief at p. 75.)

Finally, respondent argues that even if all the evidence should have been suppressed, the error is nonetheless harmless. The jury still would have convicted both defendants based on the other evidence in the case. That other evidence

included: Gilliland's testimony that the defendants were aware that he gave Ms. Pontbriant a sizeable sum of money for the rent and that the money was missing at Ms. Pontbriant's death; both men intended to leave for Iowa; Earl Bothwell testified that both defendants told him they were wanted for murdering a woman in California, and there was incriminating evidence from the crime scene including hairs from appellant that were found on Ms. Pontbriant's body. (Respondent's brief at pp. 75-78.)

Flaws in Respondent's Prejudice Analysis

Vehicle Search

There are several flaws in respondent's prejudice analysis. With regard to the search of the vehicle, it is certainly true that this court has held that a defendant does not have a legitimate expectation of privacy in a stolen vehicle. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141-1142.)[2] But this general principle does not deprive appellant of standing to seek suppression of all the evidence obtained as a consequence of his unlawful stop by Officer Wightman - which in this case includes all of Wightman's observations at the time of the detention and all the evidence discovered during the subsequent car search.

Respondent suggests that the defendant's situation in this case is analogous to that of a burglar discovered in someone else's home as the result of an officer's illegal entry into the home, and hence the defendants have no standing to challenge Officer Wightman's observation of them in Ms. Pontbriant's car at the time of the detention. (Respondent's brief at p. 75.) Respondent's analog is simply inapt. The hypothetical burglar observed in another's home as the result of a

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[2] It should be noted, however, that in *Carter*, the detention was lawful.

violation of the homeowner's Fourth Amendment rights is a constitutional infringement the burglar has no standing to assert. Officer Wightman's observation of the defendants in Ms. Pontrbriant's car at the time and place of the vehicle stop was clearly a product of their unlawful detention - a violation of the **defendants'** Fourth Amendment rights. The officer could not have seen and identified them as being in the car unless he detained them by requiring them to stop the car. The defendants clearly have standing to challenge that evidence.

For much the same reason, they also have standing to challenge the evidence obtained as a result of the subsequent search and inventory of the car. But for the unlawful detention of the defendants, there is simply no basis for concluding that the car would have been found and searched, or if it was found, that it would have contained the evidence found in the car at the time the search was actually conducted.

The authorities did not discover the vehicle was stolen until **after** it had been improperly stopped by Officer Wightman and until **after** Officer Wightman ordered the defendants to get out of the vehicle and leave it parked by the side of the road. Indeed, Officer Wightman testified that after he came on duty the next day and found out about the homicide, he put two and two together and determined that the vehicle he stopped the previous evening was Ms. Pontbriant's car. He then went back to the vehicle where it was still parked along side the road and secured it until it could be impounded and searched. (42 R.T. 6176-6177.) Thus it was many hours after the stop before the police discovered that the vehicle was stolen.

Had the officer not stopped the vehicle improperly and thereafter made the defendants lock it and walk away, the vehicle would not have been parked

alongside the road. Moreover, depending on how many license checks the officer ran in an evening (a matter not in evidence), it is unlikely he would have even remembered running a license check on the Pontbrtiant vehicle had he not illegally stopped it and conducted an extensive illegal interview with Mr. Letner and Mr. Tobin. More importantly, had Officer Wightman not improperly stopped the vehicle and made the defendants leave it, he could not have secured the vehicle so that later it could be impounded and searched. By way of analogy, in *United States v. Connor* (8th Cir 1997) 127 F.3d 663, 667 the court held that the inevitable discovery doctrine did not apply and that suppression of evidence was proper where police would not have conducted a search of appellant's apartment or tried to obtain a warrant absent information obtained through a prior illegal entry. The same problem exists in this case.

The evidence suggests that the police suspicion focused on appellant only **after** his illegal seizure by the officers. That is, it wasn't until **after** the discovery on the homicide that Officer Wightman recalled his stop of the defendants the previous evening and his examination of the car they were riding in. Therefore, the later vehicle impound and search was solely the result of the improper stop and a direct exploitation of the primary illegality. (*Wong Sun v. United States, supra,* 371 U.S. 471, 484 [9 L.Ed.2d 441, 453, 83 S.CT 407] ["... a search unlawful at its inception may [not] be validated by what it turns up. [Citations]"]; *People v. Brown* (1955) 45 Cal.2d 640, 643.)

For these reasons, not only must the items found as a result of the illegal detention be suppressed, but the items located as a result of the search of the vehicle must be suppressed as well. The evidence found in the car and all of Officer's Wight man's observations, including the identities of the vehicle's

occupants and all of their statements, were fruit of the unlawful detention.

Moreover, even if the only thing that was required to be suppressed was the defendants' various statements plus appellant's buck knife, the prejudice would still be overwhelming. The jury could still find that if the defendants fled the scene in Ms. Pontbriant's car, they were exhibiting consciousness of guilt. Indeed, the flight instruction was given. (3 C.T. 802, 51 R.T. 7479-7480.) Further, the prosecution specifically argued that the flight from the scene in Ms. Pontbriant's car showed that the defendants were guilty. (See, e.g., 53 R.T. 7593.) Additionally, their possession of her car on the evening she was killed was independently incriminating.

Other Evidence

As to respondent's contention that even if the contents of the vehicle should have been suppressed the other evidence in the case would have resulted in conviction, the argument is not well taken. As appellant pointed out in his opening brief, the other significant prosecution evidence in the case was not only implausible on its face, it would not support a conviction for (robbery) felony murder either. For example, the incriminating testimony of both Warren Gilliland and Earl Bothwell is completely contradicted by incontrovertible fact. (Appellant's opening brief at pp. 238- 245, 247-264.)

Warren Gilliland was a late stage alcoholic with a glaring reputation for mendacity. (38 R.T. 5374; 45 R.T. 6738.) When Warren Gilliland first talked to the police about the death of Ms. Pontbriant, he was intoxicated or pretty close to it. (45 R.T. 6644.) Nevertheless, he told Det. Logan that there were no large sums of money in the house at the time of the homicide and he could think of no motive for murdering Ms. Pontbriant. (45 R.T. 6647, 6670.) It wasn't until the second

police interview that he told Det. Logan that he had given Ms. Pontbriant $340 just before he left from Visalia and that appellant and perhaps Mr. Tobin were present when he gave her this money. (45 R.T. 6651-6652.) Of course, Mr. Gilliland was intoxicated during this and every other interview as well. (45 R.T. 6695.)

At trial, the defense proved conclusively that NONE of the many and shifting stories that Mr. Gilliland claimed as the source of this money were true. For example, Gilliland eventually testified that on Sunday, February 28, 1988, appellant and Mr. Tobin came over to Ms. Pontbriant's house on North Jacob with some Kahlua and two cartons of cigarettes. Gilliland, Ivon Pontbriant, appellant and Mr. Tobin then all sat at the kitchen table and drank coffee. (36 R.T. 5122-5124.) Gilliland talked about planning to leave for Modesto. Ivon mentioned that the rent was due in two days, so he opened up his wallet and gave her approximately $340 to $350. She put the money in her blue checkbook which was inside her white purse. (36 R.T. 5124-5126.)

According to Gilliland's first story, he got most of this $340 from his Social Security disability check, and about $20 came from money he made selling appliances. (36 R.T. 5135-5136.) On cross-examination, Gilliland testified that after he got out of jail on December 19, 1987, his Social Security benefits were reinstated within a few weeks. (36 R.T. 5193-5194, 5196.) He claimed very specifically that he got a check for $575 during the first part of January 1988, as well as another check in early February 1988. (36 R.T. 5196-5197.) He also asserted again that he used the money from his February Social Security check to pay his share of the March rent. (36 R.T. 5198.)

In fact, Gilliland could not have given Ms. Pontbriant *any* money from his

February Social Security disability check, because he had not received one. Etta Gilliland, who was Warren Gilliland's Social Security payee, testified that after Warren's release from prison she received Warren's first Social Security disability benefits check on March 11, 1988, ten days *after* Ms. Pontbriant had been murdered. (38 R.T. 5360-5361.)[3]

Additionally, before trial, Gilliland told prosecution Investigator Johnson that he gave Ms. Pontbriant money on February 28, 1988, from a washer and dryer he just sold for $185. (45 R.T. 6791.) That was not true either. Sandra Saulque testified that her daughter, Kelly Saulque, paid Gilliland $185 by check for the purchase of a washer and dryer, however, the sale occurred on February 12, 1988, two weeks before February 28. (RT 7288-7289; Defense Exhibit D [a check for $185 made out to Warren Gilliland].) The check from Kelly Saulque cleared her bank on February 16. (49 R.T. 7290-7291.) The check had been deposited in Ms. Pontbriant's account at Wells Fargo Bank, and $85 was taken back as cash – *by Ms. Pontbriant*. (49 R.T. 7291; see also, 53 R.T. 7700-7701 [closing argument by Wainwright].) Thus, the evidence is incontrovertible that Mr. Gilliland gave the $185 to Ms. Pontbriant more than two weeks before the murder, not two days as he testified, and he gave it to her in the form of a check, not cash. Moreover,

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[3] Etta Gilliland testified that she stopped receiving Social Security disability checks for Warren when he went to jail in December 1986. She was still Warren's payee when he got reinstated after his release from prison. The first check she received was for $2,700 on March 11, 1988. (38 R.T. 5360-5361.) She deposited the money into her own account, and never put any money into Warren's account at First Interstate Bank. (38 R.T. 5362-5363.) Warren did not open the First Interstate Bank account until after he returned to Visalia from Modesto after the death of Ms. Pontbriant. (38 R.T. 5365-5366.) This also contradicted Warren's testimony that the Social Security disability payments went into his First Interstate Bank account before Ms. Pontbriant was murdered. (37 R.T. 5103-5104.)

this money could not have been in Ms. Pontbriant's checkbook two days before the homicide [when the defendant's purportedly saw it] since it was in the bank two weeks prior to Ms. Pontbriant's death.

Gilliland also could not have given Ms. Pontbriant money on February 28, 1988, taken from his account at Coast Savings. He did not have the funds. Gilliland opened this account in November 1987, and on January 7, 1988, the balance was $170.29. However, on February 16, the balance was only $13.11. On February 25, 1988, Gilliland made a $40 deposit. On March 1, 1988, at the Modesto Coast Savings branch, Gilliland withdrew the $40. (49 R.T. 7292-7298, 7332.) This would have brought the balance back down to $13.11.

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

There were additional lies as well. Gilliland first testified that he gave the money to Ms. Pontbriant in her kitchen on Monday or Tuesday. (45 R.T. 6652, 6673.) The transaction could NOT have taken place on either of those days because he was not in Visalia at that time. Instead, the previous Sunday evening he spent in a motel and he left at approximately 4 or 5 a.m. on Monday to visit his ex wife in Modesto. (45 R.T. 6709-6710.) Further, after Mr. Gilliland changed his story on the stand and suddenly recalled that it was Sunday, the day before he left from Visalia when the transaction took place (45 R.T. 5121, 5138-5139), the evidence shows that appellant and Mr. Tobin could not have been present on that date either. On that day, appellant and Mr. Tobin were at a flea market selling

items early in the morning (46 R.T. 6824-6825) and the rest of the day they spent at a park with Mr. Tobin's ex wife. (46 R.T. 6833-6835; see also 38 RT 5409-5415, 5461-5462, 5466-5467 and 45 R.T. 6742-6750.) Given these undisputed facts, there are no circumstances under which the jury could find that Gilliland's testimony was sufficiently credible to support appellant's conviction for stealing money from Ms. Pontbriant's checkbook. Nor could that testimony have served to establish a motive for killing Ms. Pontbriant.

As for the testimony of Mr. Bothwell that both defendants admitted the murder to him, that testimony isn't even minimally credible. Bothwell testified that on March 28, 1988, appellant told him about "an incident" involving a woman in California, in which appellant purportedly took a small amount of money, about $12-14, and her car. (44 R.T. 6421.)[4] Appellant supposedly also told Bothwell that appellant and Mr. Tobin would have "got to Iowa in it" if they "had not been stopped by the police in Visalia." (44 R.T. 6422.) Subsequently, Mr. Tobin then came into the room and admitted that he was also wanted for murder in California, that he had killed "the old bitch," and that they had only gotten $12-13, some small amount, from the woman. Mr. Tobin allegedly told Bothwell the woman "was hollering, and screaming." She "would have called the cops, or had them there." Mr. Tobin then asked Bothwell, "What would you do?" (44 R.T. 6423.)

Mr. Bothwell however, was a convicted felon who was serving a sentence

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[4]Bothwell did not state the date on which these alleged admissions were made. But he testified that the admissions were made during the morning of the night on which Bothwell and Mr. Tobin got into a fight. (44 R.T. 6426). Council Bluffs police were called to the Iowana Motel about 2:00 a.m. on March 29, 1988, and arrested both defendants at that location. (44 R.T. 6470-6472, 6480-6481.) Thus the admissions, if made, were made on the morning of March 28, 1988.

for fraud at the time he testified. (44 R.T. 6416-6417.) He had a history of using aliases and admitted to having used at least five. (44 R.T. 6438.) He had gotten into a fight with Mr. Tobin on the evening of the day he said appellant and Mr. Tobin each made the alleged admissions to him. (44 R.T. 6434-6435.) Mr. Tobin bested him in the fight and broke four of his ribs. Nonetheless, he testified he was not angry about the matter. (44 R.T. 6458-6459.)

The record reveals that Bothwell testified that appellant made his admissions sometime between 9:00 a.m and noon, in appellant's room at the Iowana Hotel. (44 R.T. 6463.) According to Bothwell, Mr. Tobin was not there because he was out buying a six-pack of beer at the store. (44 R.T. 6421.)

Significantly, Bothwell testified that he sought out appellant on the morning of March 28, 1988, to ask him whether he was wanted for murder because Bothwell was going "to let him go" as an employee if he said yes. (44 R.T. 6372-6373, see also, 44 R.T. 6463.) Bothwell went to appellant's room at the motel to "find out if he [Bothwell] should let *them* go" [italics added]).

Later in his testimony, however, Bothwell admitted that appellant **never** actually worked for him. (44 R.T. 6436.) Indeed, he admitted that appellant found employment with an electrical contractor right away after arriving in Council Bluffs. (44 R.T. 6420, 6456.) Significantly, therefore, not only was appellant NOT in Bothwell's employ at the time of these purported admissions, but appellant was likely at work at the time he purportedly made these admissions.

Additionally, after Mr. Tobin returned, and allegedly made his incriminating admissions to Bothwell, Tobin also asked about working that day. (44 R.T. 6424.) Bothwell testified he told Mr. Tobin that he had no work for him, but if he got work he would let Tobin know. Bothwell told the jury that during that

conversation, he just wanted "to get away from him [Tobin]." (44 R.T. 6425.)

However, Mr. Bothwell's testimony about Mr. Tobin's alleged admissions was completely contradicted by a Ms. Brasel. Ms. Brasel testified that she hired Bothwell to provide painting services, and that Mr. Tobin spent all day on March 28, 1988, painting her house. Earl Bothwell brought Tobin out to her house early in the morning and picked him up when it was "getting dusk." (51 R.T. 7436-7442.) Ms. Brasel paid Bothwell $50 for the paint work that day. She gave him a check dated March 28, 1988. (RT 7442; Defense Exhibit P.) Mr. Tobin had been coming to her house for several days to paint, and he finished the paint job that day. (51 R.T. 7444-7446.)[5]

Ms. Brasel's testimony was entirely credible and was corroborated by the evidence of the $50 check she wrote to Bothwell dated March 28, 1988. (Defense Exhibit P.) Therefore, her testimony proved that Mr. Tobin did not speak with Bothwell in the motel room he shared with appellant between 8:00 a.m. and 9:00 a.m., or between 9:00 a.m. and noon (the two different time frames Bothwell testified to) on March 28, 1988, as Bothwell claimed.

As a side note, allowing improbable testimony to infest the courtroom under the usual rubric that only the jury will assess the credibility of the witness is, as Justice Frankfurter observed: "to be ignorant as judges of what we know as men." (*Watts v. Indiana* (1949) 338 U.S. 49, 52 [93 L.Ed. 1801, 69 S.Ct. 1347].) The testimony of both Bothwell and Gilliland certainly fall within that caution here.

Even if this case does not involve the knowing or reckless use of false testimony, it certainly presents the "exceptional circumstance" where it is clear

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[5] Mr. Tobin also testified that he worked all day on March 28, 1988, painting the house in Carter Lake. (46 R.T. 6882-6883.)

that a witness's critical testimony was "inherently improbable." (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) Although the fact that a witness's testimony is false in part "does not preclude a trier of fact from accepting as true the rest of it" (*ibid.*), in the case of both witnesses, the part which was proven false *was* the very part which was the essential incriminating core of the witness's testimony – for Gilliland, his tale about handing Ms. Pontbriant a substantial amount of cash in the defendants' presence, and for Bothwell, the alleged admissions of culpability by both defendants. Neither witness produced any credible evidence relevant to proving that a robbery occurred, to establishing a motive for the defendants to have committed the homicide, or to otherwise connect the defendants to the offense.

Moreover to the extent that the jury relied on this evidence to support appellant's convictions as respondent urges, the verdicts are fatally compromised. In *Beck v. Alabama, supra,* 447 U.S. 625, the United States Supreme Court held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination, which necessarily includes a reliable guilt determination. (*Id.* At p. 637.) For this reason, "the risk of an unwarranted conviction . . . cannot be tolerated in a case where the defendant's life is at stake." (*Ibid.*) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a noncapital guilt verdict, but which is equivocal, or comes from witnesses whose reliability is in serious doubt, is nonetheless insufficient to uphold a conviction of capital murder and a sentence of death. Certainly predicating appellant's conviction and death sentence on the testimony of either Gilliland or Bothwell violates the *Beck* proscription.

Turning to the evidence that the defendants intended to leave for Iowa, as appellant explained in his opening brief, it is virtually beyond reason to believe that the impetus for this murder was to take Ms. Pontbriant's car in order to drive it to Iowa. (Appellant's opening brief at pp. 234-238.) Murder would be an extravagant and risky criminal enterprise simply to obtain a car that might be more easily obtained in other ways. Moreover, if the object was to steal Ms. Pontbriant's car, the defendants would not have sat around for two hours or more inside the house drinking beer with Ms. Pontbriant and then killed her. Given the undisputed evidence that Ms. Pontbriant was extremely intoxicated at the time she died, it would have been easier and much less risky to simply wait for her to pass out and then take the car.[6]

Additionally, the prosecution offered no evidence that after leaving Visalia, either appellant or codefendant Tobin stole or attempted to steal another car in order to get to Council Bluffs, Iowa. According to Mr. Tobin, after sleeping in the vacant house on Crenshaw (46 R.T. 6872-6874), they traveled to the bus station at Goshen, bought bus tickets to Sacramento, then bought bus tickets to Reno, and then hitchhiked their way to Council Bluffs, Iowa in winter weather. (46 R.T. 6876-6878.) Further, the fact that the defendants were able to get to Iowa without stealing a car contradicts any inference that they intended to steal Ivon Pontbriant's car in order to get there.

Additionally, Ms. Pontbriant, subsequently joined by appellant, called Ed Bourdette from Ms. Pontbriant's phone at least five times over the course of one-half hour to an hour on the evening of March 1, 1988. (39 R.T. 5566-5573, 5580-

[6] Ms. Pontbriant's blood/alcohol level at the time of her autopsy was .29 percent. (34 R.T. 4938.)

5581.) The exchanges on the telephone grew heated. Both Ms. Pontbriant and appellant accused Bourdette of helping Warren Gilliland move things out of the house on North Jacob Street and of harboring Gilliland. (39 R.T. 5567-5573.) During these angry conversations, appellant was seeking information on where Gilliland was and where appellant's tools were. (RT 5583-5584.) Thus, both appellant and Ms. Pontbriant apparently did not know that Gilliland had gone to Modesto and believed that he was staying at Bourdette's house in Visalia. The prosecution's own witnesses, therefore, contradicted the prosecution theory that the defendants came to Ms. Pontbriant's house on March 1, 1988, knowing that Gilliland was out of town. (53 R.T. 7542-7543 [prosecutor's closing argument].)

No rational trier of fact could conclude that either defendant had planned to steal Ms. Pontbriant's car, or anything else for that matter. The evidence was uncontradicted that the defendants allowed Ms. Pontbriant to telephone Ed Bourdette several times; appellant got on the telephone to talk with Bourdette who would recognize his voice because Bourdette had met appellant on three to five previous occasions (39 R.T. 5559-5560); appellant told Bourdette he wanted his tools back, thus in no uncertain terms identifying himself to Bourdette; and appellant apparently escalated the acrimony in the telephone calls by not only calling Bourdette a liar, but also swearing at him, challenging him to a fight, and speaking in an obscene manner to Bourdette's girlfriend, Kathy Coronado. (39 R.T. 5571-5572, 5598.) If the defendants had any plan to steal Ms. Pontbriant's car or any money she may have had, it is hard to imagine that either one would have let Ms. Pontbriant initiate this series of phone calls, or become involved in the heated exchanges.

Certainly appellant's behavior during the telephone calls to Bourdette

contradicted any conclusion that he intended to steal Ms. Pontbriant's car or money following the telephone calls. No rational trier of fact could conclude that appellant behaved this way because he wanted to locate his missing tools in order to get them back and then put them in Ms. Pontbriant's car before he stole it to drive it off to Iowa.

Further, any inference that the defendants intended to use force or fear to take Ms. Pontbriant's car in order to drive it to Iowa must be based solely on speculation. The defendants did *not* drive the car to Iowa, and they did not pack the car as if they were preparing to drive it cross-country. Rather than suitcases, only beer bottles populated the backseat. (40 R.T. 5712.)

Finally as to the hairs from appellant found on Ms. Pontbriant's person, as appellant also explained in his opening brief, these hairs were clearly transferred to Ms. Pontbriant's chest from the carpet where she fell, along with the animal hair that was also found in close proximity on her chest. (Appellant's opening brief at p. 208.)

Conclusion

For these reasons, and the reasons set forth in appellant's opening brief, respondent's arguments must fail. The vehicle stop was blatantly illegal and based on nothing more substantial than Officer Wightman's "hunch." The vehicle was being operated in a lawful manner on a public street and neither Officer Wightman not the trial judge articulated and "reasonable suspicion" that there was a proper justification for the stop. Further, any incriminating items found as a result of the vehicle search were illegally seized and should have been suppressed as fruit of the poisonous tree. Because the police illegally stopped the vehicle and improperly required the defendants to lock and leave it, the subsequent impound and search of

the vehicle was simply an exploitation of the primary illegality.

The other evidence is the case will not support appellant's conviction either. The testimony of Bothwell and Gilliland was both inherently improbable and flatly contradicted by uncontroverted fact. Moreover, the events of the evening in question, including several surly phone calls to Bourdette and Coronado wherein appellant identified himself as being at the Pontbriant residence, no reasonable trier of fact could believe that the defendants went to visit Ms. Pontbriant with the intent to steal her vehicle or forcibly take anything from her. Finally, appellant's hairs found on her chest in close proximity to animal hairs is apropos of nothing. Appellant's hair got on her body the same way the animal hair did. The hair was already on the floor and it simply transferred to her body when she fell.

Given these circumstances, respondent cannot show beyond a reasonable doubt that Officer Wightman's observations of the detained defendants and the evidence subsequently found in the vehicle did not contribute to the verdict. Accordingly, appellant's convictions must be reversed.

Appellant Joins Codefendant's Brief

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

IV.

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

Summary of Appellant's Argument

In his opening brief, appellant argued that the evidence was insufficient to show beyond a reasonable doubt that there was any sexual motivation for the assault on Ms. Pontbriant. More importantly, even if the evidence could be construed to support a sexual assault [which it cannot] , there is simply no evidence that appellant attempted to rape Ms. Pontbriant or did anything intended to aid and abet an attempted rape by Mr. Tobin. The evidence is thus insufficient to support the attempted rape conviction, the conviction for murder on a felony murder theory or the true finding on the rape/murder special circumstance.

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

After conceding that there was no actual evidence of rape (53 R.T. 7584), the prosecution urged that several factors constituted proof of attempted rape (and the attempted rape special circumstance) beyond a reasonable doubt. These factors

included: (1) the deceased was discovered naked except for her bra and socks; (2) her sweater had been torn down the front; (3) there was a bloodstain on the side of that sweater that might have come from appellant; (4) a beer bottle was lodged between the deceased's legs that was near, although not touching her genital area; (5) hair was found on the deceased's chest (after her body was rolled over) which might have come from appellant; (6) two months after the murder the police collected carpet fibers from the bedroom on which semen was found, which possibly could have come from codefendant Tobin, and which might have been deposited in the carpet on the night of the homicide; (7) blood smears were found on a pillowcase and on a doily from the bedroom, as well as on a rag found in Ms. Pontbriant's car and they could have come from codefendant Tobin; and (8) Mr. Tobin testified that "sexual contact was beginning to take place between appellant and the victim." (53 R.T. 7585-7587.)

Appellant argued that although Ms. Pontbriant was found partly unclothed and with multiple wounds, no sperm or semen was found on or near the body of Ms. Pontbriant or on the clothes of either the deceased or the accused.

Additionally, there were no wounds of a sexual nature at all. Indeed, none of Ms. Pontbriant's blood was found in the bedroom, where the prosecution urged that the sexual attack occurred. (42 R.T. 6158-6159.) Moreover, Ms. Pontbriant's body was located face down on the floor between the coffee table and couch while her legs were together. (39 R.T. 5620.)

Indeed, if any struggle did take place, it occurred only in one room, the living room. Even in the living room, however, there was no evidence to support an inference that Ms. Pontbriant resisted a sexual attack so vigorously that she caused her assailant to abandon a sexual attack and instead attack her with a knife.

To the contrary, the evidence showed that Ms. Pontbriant was tied up and lying face down on the living room carpet when her assailant cut the back of her neck. These facts simply do not support the prosecution's attempted rape theory.

Further, if the assault on Ms. Pontbriant began with an intent to commit rape, the prosecution presented no evidence explaining why the rape was not completed. Certainly, there was no evidence that the assault was interrupted by any outside agency. On the other hand, the simple explanation for the lack of sperm or genital trauma is that no sexual assault occurred or was even attempted.

Additionally, the blood stain found on Ms. Pontbriant's sweater was as consistent with Ms. Pontbriant's blood as with appellant's. (41 R.T. 5884.) Moreover, because the blood stain was pretty much "insoluble" during testing, the prosecution expert, Mr. Andres determined that it was probably "an aged or degraded specimen." (41 R.T. 5884.) Given the specimen's insolubility, however, it is unlikely that it was deposited on the sweater on the night of the homicide. Even if it was, the violent circumstances of Ms. Pontbriant's death make it more likely that the blood belonged to her rather than appellant and its presence sheds no light at all on the issue of whether her assailant attempted to rape her.

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

residence (including the bedroom), doesn't suggest that it was shed during an attempted rape or that such a crime was ever committed.

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

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

The positioning of the beer bottle was highlighted by the prosecution during its closing argument as additional support for its argument that Ms. Pontbriant was subjected to a sexual attack. (53 RT 7585-7586; 7616.) The prosecutor reminded the jurors of Dr. Walter's testimony that feces can be released involuntarily during times when a person is experiencing trauma or at the time of death. Deputy District Attorney Reed then argued: "Because this bottle is covered with feces down to the top portion of the bottle, I would submit that it is clear that the bottle was kicked or shoved in its place prior to [Ms. Pontbriant's] death." (53 RT 7586.)

Further, although the bottle likely did come to be lodged between the victim's legs before she died, the prosecutor's assertion that the bottle was either kicked or shoved into its location is pure speculation.

Police technician Rains testified that the beer bottle was "securely placed between the victim's legs" (40 RT 5623) and that he could not remove it until the body was rolled over. However, neither Rains nor Dr. Walter, the prosecution pathologist, testified that the bottle appeared to have been kicked or shoved into

place. Moreover, Dr. Walter did not note any bruising on the victim's legs around the area of the bottle. Dr. Walter did not address the issue of whether the bottle was "securely placed between the victim's legs." However, Rains' testimony that he could not remove the bottle until the body was turned over has to be considered in conjunction with Dr. Walter's testimony regarding the effects of rigor mortis. (40 RT 4951-4952.) Because Ms. Pontbriant's body was not discovered until the evening of March 2, 1988, rigor mortis had set in (see, e.g., 35 R.T. 5038), which would have caused the victim's legs to stiffen.

The prosecutor argued that the bottle did not get between the victim's legs because it was lying on the carpet already, or because it was knocked onto the carpet as Ms. Pontbriant came to the position in which she was found. (53 R.T. 7777.) However, in answer to a question from the trial judge, Rains reviewed People's Exhibit 13 (a photo which showed the location of the bottle after Ms. Pontbriant's body was turned over), and Rains then stated, "it appears, your Honor, that a portion of the bottle would have been resting on the floor." (40 R.T. 5757.) Rains also stated that a portion of the bottle was underneath the victim before her body was turned over. (40 R.T. 5754.) He agreed that he easily removed the bottle once he turned the victim's body over, because then "the entire weight of the victim was not resting upon it." (*Ibid.*)

Thus the prosecution's own witness testified directly contrary to the prosecutor's scenario that one of the defendants kicked or shoved the bottle between Ms. Pontbriant's legs after she was lying on the floor.

A more elaborate theory would be that the victim at some point was lying on the floor on her back, before one of the defendants turned her over and inflicted the lethal cut to the back of her neck. But this scenario requires even more speculation

than the first scenario. Rains described the positions of the victim's body (face down) and of the beer bottle as he saw them. No testimony supported a theory that the beer bottle was shoved between the victim's legs when she was in a different position.

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

Most importantly, however, Dr. Walter found *no evidence* either of penetration or of sexual trauma to the victim's genital area. (34 R.T. 4935-4936.) Dr. Walter testified specifically, on cross-examination, that he did not observe any vaginal or anal changes consistent with rape – by a human penis *or* by a foreign object. (35 R.T. 5046.) This finding by Dr. Walter was precisely the reason the prosecution had to charge each defendant only with attempted rape.

Even assuming arguendo that the evidence was sufficient to support the inference that the beer bottle *had* been pushed or shoved between the victim's legs by appellant or by codefendant Tobin, the trier of fact still could not reasonably infer from the location of the bottle or its condition that appellant – or codefendant Tobin – possessed either a specific intent to rape the victim, or took any overt action toward raping the victim. To sustain a conviction, the evidence must be sufficient to support a conviction of *the specific type of sexual offense alleged.* As appellant pointed out in his opening brief, if the prosecution wished to urge the presence of the beer bottle as evidence of a sexual assault, it should have alleged a

violation of Penal Code section 289 (penetration by a foreign object). The beer bottle was not evidence of an attempted rape. (See, e.g., *People v. Craig* (1994) 25 Cal.App.4th 1593, 1601.)

In any event, as the foregoing demonstrates, the physical evidence that the attack or murder of Ms. Pontbriant was motivated by sex was insubstantial. (See *People* v. *Craig* (1957) 49 Cal.2d 313, 315-119, *People* v. *Anderson* (1968) 70 Cal.2d 15, 21-24 and *People* v. *Granados* (1957) 49 Cal.2d 490, 484; *People* v. *Johnson* (1994) 6 Cal.4th 1.

As a matter of law, therefore, the fact that Ms. Pontbriant was nearly decapitated and bled to death did not prove or support the theory that she was also sexually attacked before she was murdered. Therefore, considered in its totality, the evidence offered to prove that an attempt to rape Ivon Pontbriant occurred before her death was far too equivocal to sustain appellant's conviction of attempted rape or the special circumstance finding of attempted rape-murder.

Summary of Respondent's Argument

The essence of respondent's argument is simply a recitation of the same prosecution facts set forth above, coupled with the bald assertion that these are more than sufficient to allow a jury to convict the defendants of attempted rape. Further, on review, the appellate court must accept all the logical inferences from the evidence and "'resist attempts to reargue the persuasiveness of the evidence.' (citations)" (Respondent's brief at pp. 93-97.)

Respondent also challenges the defense argument that the evidence is insufficient to show that the defendants jointly attempted to rape Ms. Pontbriant or that each one aided the other. Respondent asserts that the defendants were "joint venturers" in that they were both present at Ms. Pontbriant's home the evening she

died, both were planning to leave for Iowa and neither had a car, both were present when Mr. Gilliland handed Ms. Pontbriant a large sum of money, hairs consistent with appellant were found on Ms. Pontbriant's body after her death, and blood and semen stains consistent with codefendant Tobin were found in the bedroom. (Respondent's brief at p. 98.)

Although respondent concedes that it is possible there was only one killer, respondent suggests that the lack of any defensive wounds and the violent nature of the attack suggest both were involved. Additionally, both defendants were seen driving Ms. Pontbriant's car shortly after the attack and the car contained some of their personal belongings. On this evidence, a jury could reasonably conclude that both men participated in an attempted rape or that at the very least, one aided and abetted the other. (Respondent's brief at pp. 98-99.)

Finally, respondent challenges the defense argument on the insufficiency of the evidence to support the rape special circumstance. Relying on its prior recitation of the facts relating to Ms. Pontbriant's death, respondent urges that the evidence shows that the defendants murdered Ms. Pontbriant during or immediately after the rape and that the rape was not "merely incidental" to the murder. (Respondent's brief at pp. 99-100.)

Errors in Respondent's Arguments

Insufficient Evidence of Attempted Rape

Before discussing the evidence itself, it is important to focus on the standard of review. The standard of review is NOT whether there is "some evidence" to support a jury verdict , as respondent's arguments seem to imply. Rather, the record must contain **substantial** evidence of each of the essential elements of the offense. In order for the evidence to be "substantial," it must be "of ponderable

legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, 578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, interior quotation marks deleted.)

Moreover, because attempted rape requires a specific intent and intent can rarely be shown by direct evidence, inferences are critical. *(Cf. People v. Anderson* (1983) 144 Cal.App.3d 55, 62 [a defendant's state of mind is almost always an inference to be drawn from circumstantial evidence].) This distinction between valid inferences and strong suspicions is not always an easy one to draw. Nevertheless, even though the distinction may be subtle, it is also crucial. To convict the jury must be convinced beyond a reasonable doubt. Where the evidence is such that it will support **two inferences**, one inculpatory and one exculpatory, the jury **must** accept the inference showing innocence. (CALJIC 2.01)[7] While the

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7 CALJIC 2.01 provides in pertinent part:

"[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, (1), consistent with the theory that the defendant is guilty of the crime; but, (2), cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which that inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence permits two reasonable inferences, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to [his] [her] guilt."

latter is a standard for the trier of fact rather than an appellate court (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054), nevertheless, it is certainly the lens through which this court must view the jury's determination on whether the evidence was substantial enough to support a verdict beyond a reasonable doubt. More importantly, this court is not required to defer to the jury's choice among conflicting inferences. That is, the mere fact that the jury chose among conflicting inferences does not ipso facto make that choice reasonable as a matter of law. It is still subject to appellate scrutiny to determine if the evidence was substantial enough to support that choice beyond a reasonable doubt or whether the evidence simply raised a suspicion.

Turning to the evidence itself, the essential problem with respondent's arguments on all of these issues is that it points to evidence of a brutal and violent death and argues that based on that evidence a jury could fairly infer specific intent to commit rape. The argument simply lacks support in the law. It is based on nothing more than suspicion. Moreover, it is a lurid suspicion that clearly had an inflammatory effect on the jury.

Despite efforts to show that Ms. Pontbriant was brutally treated and terrorized, respondent never identifies any evidence pointing specifically to an intent to rape her, or to an actual attempt to do so. The evidence respondent relies upon (the same evidence as relied upon by the trial prosecutor) shows considerable violence, but even insofar as any of it could support any inference of a sexual motive (e.g., torn clothing, a beer bottle lodged in the victim's buttocks), nothing points to rape. (See appellant Letner's opening brief at pp. 177-219.)

As appellant pointed out in his opening brief, the substance of the prosecution's evidence was a naked Ms. Pontbriant, semen (of an undetermined

age) in another room, and a beer bottle found near Ms. Pontbriant's genital area. None of this evidence was of solid value in proving attempted rape. As this court emphasized in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, it is not enough to present evidence of motive, opportunity and means of committing a particular act. Such evidence merely allows speculation about the defendant having committed the particular act. "Speculation, however, is not evidence." (*Id.* at p. 864.) Even considered in its totality, the evidence offered to prove that an attempt to rape Ivon Pontbriant occurred before her death was far too equivocal to sustain appellant's conviction of attempted rape or the special circumstance finding of attempted rape-murder. Violence, nudity and torn clothing are insufficient. (see appellant's opening brief at pp. 178-191

For example, in *People v. Guerra* (2006) 37 Cal.4th 1067, this court noted that a jury might be able to find evidence of intent to rape based on the condition of the victim's body and other evidence of sexual intent. (*Id.*, at p. 1131.) In that case, however, there was also evidence that the defendant previously mentioned to others that he was sexually interested in the decedent as well as evidence that the decedent had shown no sexual interest in him. Further, there was evidence that on multiple occasions the defendant tried to isolate the decedent in her home alone and evaded inquiries about his activities. Finally the autopsy showed that the defendant poked the decedent in both breasts with his knife and eventually slashed them both open. (*Id.*, at p. 1131-1132.)

Similar evidence is NOT present here. To the extent that there is evidence of **any** sexual contact based on the codefendant's testimony, that contact was consensual. (53 R.T. 7585-7587.) Further, there is no evidence that the defendants tried to conceal their presence at Ms. Pontbriant's home or contrived to isolate her.

Appellant's multiple rude telephone calls to Mr. Bourdette and Ms. Coronado certainly revealed his presence. Additionally, the injuries to Ms. Pontbriant, while brutal were not sexual in nature.

For these reasons, the evidence was insufficient to permit the jury to find beyond a reasonable doubt that appellant harbored the specific intent to rape Ivon Pontbriant at the time she died or that he ever attempted to do so.

The Evidence Did Not Prove Beyond a Reasonable Doubt That Each Defendant Separately Committed Attempted Rape; That Appellant Committed Attempted Rape or That Appellant Aided and Abetted Tobin's Commission of an Attempted Rape.

In his opening brief, appellant argued that even assuming arguendo that the totality of the evidence was sufficient to prove an attempted rape of Ms. Pontbriant, the prosecution failed to present sufficient evidence on which to base an inference that each defendant *separately* attempted to rape Ms. Pontbriant. It also failed to present sufficient evidence to ground an inference that if only one defendant attempted to rape Ms. Pontbriant, that person was appellant Letner or that Letner aided and abetted the commission of an attempted rape by Tobin.

Respondent again points to evidence showing both defendants were out of work, wanted to go to Iowa and had no car. Further, they were both present in Ms. Pontbriant's home when Mr. Gilliland gave her a large sum of money; they were both in the house on the evening she was killed; hairs similar to those of appellant were found on Ms. Pontbriant's body and blood and semen consistent with codefendant Tobin were found in a bedroom. (Respondent's brief at p. 97-98.)

Further, respondent argues the evidence is consistent with multiple killers because Ms. Pontrbrtiant showed few defensive wounds. Thus, one defendant probably held her down while the other stabbed her. (Respondent's brief at p. 98.)

Additionally, the defendants were driving Ms. Pontbriant's car after the homicide and had some personal belongings inside. Neither attempted to retrieve clothing from their residence and they tried to persuade the wife of a former coworker to give them a ride out of town. They then hitchhiked to Iowa with nothing but the clothes on their backs and eventually admitted to Earl Bothwell that they killed a woman in California. (Respondent's brief at pp. 98-99.)

On this evidence, asserts respondent, any reasonable jury could conclude that the two men acted in concert during the homicide and thus jointly participated in the acts leading up to it, including attempted rape. Moreover, even if the evidence showed that one or the other did not actually participate in the attempted rape, the jury could reasonably find that the nonparticipating defendant "somehow aided, encouraged, facilitated, or assisted in the offense..." (Respondent's brief at p. 99.)

Finally, respondent asserts that even if one defendant intended only to commit robbery or burglary, the codefendant's attempt to rape Ms. Pontbriant could be considered a natural and probable consequence of the home invasion thus making both liable for the attempted rape. (Respondent's brief at p. 99.)

There are three major flaws in respondents argument. The first is respondent's continued reliance on thoroughly discredited evidence. As appellant explained previously, it is virtually beyond dispute that Mr. Gilliland never gave any money to Ms. Pontbriant in the defendants' presence because he did not have any money to give her and neither he nor the defendants were at Ms. Pontbriant's house on any of the dates when this transaction purportedly took place. (See appellant's opening brief at pp. 247-270.) Additionally, neither defendant could have admitted to Mr. Bothwell that they murdered a woman in California because neither was present when Bothwell testified that the admissions took place. (See

appellant's opening brief at pp. 238-247.) Further, the hairs on Ms. Pontbriant's body came from her contact with the floor, the same way the animal hairs were transferred to her body. Finally the tiny amount of blood found on a pillowcase and a doily in the bedroom could have come from either Tobin or Gilliland, but most likely Gilliland because there is no evidence of a struggle in that room. The struggle clearly took place in the living room where Ms. Pontbriant's body was found.

The semen evidence is even less probative. As appellant explained in his opening brief (at pp. 209-216), a year after the carpet fibers were collected, they were tested by criminalist Andres. (41 R.T. 5872-5874.) The carpet fibers from one of the two carpet sections contained no material of evidentiary value. (41 R.T. 5875.) Andres located semen on the carpet fibers from the second carpet section. (41 R.T. 5875.) However, he did not locate any sperm. Further testing of the carpet fibers revealed no identifiable PGM activity; his ABO testing did not achieve any conclusive results; and his testing for secretor/non-secretor markers also was inconclusive. (41 R.T. 5876-5879.) The reasons for these negative results included "the age of the specimen" and the "lack of sufficient sample." (41 R.T. 5875.) Andres was also unable to date the semen stain. (41 R.T. 5880.) The semen could have been deposited in the bedroom carpet at any point before or after the murder occurred, up to May 5, 1988. Significantly, Mr. Andres' testimony on whether the semen could be identified as coming from a secretor or a non-secretor was hedged so significantly that there is no solid basis to conclude that the semen found in the bedroom carpet came from a secretor (which would have made it consistent with Mr. Tobin).

The semen also could have been deposited in the carpet *before* Warren

Gilliland and Ivon Pontbriant ever moved into the house. In fact, Mr. Andres admitted, it could have been deposited even years before the time of testing. (40 R.T. 5726, 41 R.T. 5880.) This last possibility was all the more likely, given that all the testing Andres performed on the carpet fibers for identifying markers yielded only negative or inconclusive results. PGM markers deteriorate over time. (41 R.T. 5885, 5899-5900.)

Finally, there is simply NO evidence that one defendant held Ms. Pontbriant down while the other stabbed her as respondent alleges. To the contrary, the evidence shows that at the time of her death, Ms. Pontbriant's wrists were bound with a cord that ran from one wrist to a loop around her neck and then to the other wrist. (39 R.T. 5620.) Binding Ms. Pontbriant's wrists in such a manner would have been unnecessary if one man was holding her down while the other stabbed her. Instead, what this binding shows is that the person who killed her did NOT have help. Thus, the actual perpetrator had to immobilze her by tying her wrists before he stabbed her.

The second flaw in its argument is the failure to distinguish the evidence supporting a homicide from the evidence showing an attempted rape. The lengthy evidentiary recitation in respondent's brief simply lumps all of the evidence together and asserts that "somehow" a jury could find that this evidence supports a finding of aiding and abetting an attempted rape. (Respondent's brief at p. 99.) "Somehow" is not a legally valid theory of conviction. As appellant explained above, while there is considerable evidence of a violent and brutal death, the evidence will not support a finding of attempted rape at all, let alone aiding and abetting an attempted rape. In order to sustain a finding of aiding and abetting an attempted rape, respondent has to show more than just that the two defendants were

associates on the night of the homicide. Nothing in respondent's argument, however, shows any evidence of aiding and abetting an attempted rape.

A related problem with respondent's argument is respondent's continued failure to address what we know about appellant's behavior at Ms. Pontbriant's house as the evening began. If either defendant planned to rape, rob and murder Ms. Pontbriant when they arrived at her house, they certainly behaved in a way contrary to such a plan. They socialized with Ms. Pontbriant, drank beer with her, then appellant got on the telephone with her to argue with people who knew him. The behavior of both defendants contradicted the basic premise of any criminal plan – that you do not identify yourself as the perpetrator just before the crime is committed. Further, if the brutality of the murder itself was evidence that the defendants entered Ms. Pontbriant's house with the intent to rape and rob her, it is a wonder why this level of brutality was necessary. After all, how much effort would it take to incapacitate (or kill) a 59-year-old woman with a .29 percent blood/alcohol level? The murder makes sense only if it was committed by someone who was acting irrationally and/or in a fit of rage. That scenario is not compatible with an aiding and abetting theory. Respondent's argument here amounts to nothing more than guilt-by-association.

The third flaw in respondent's argument is the continued failure to distinguish between the defendants and address the need for evidence to reliably establish individual criminal responsibility. Respondent, unable to identify such evidence, goes so far as to suggest that if appellant agreed to rob Ms. Pontbriant in her home, he would be liable for an attempted rape committed by Tobin, because an attempted rape was a "natural and probable consequence" of the intended crime of robbery. (Respondent's brief at p. 99.) This argument is simply nonsense. Rape

and robbery are quite different offenses, committed for very different reasons. Absent some known history of repeated sexual offenses by Mr. Tobin, agreeing with him to rob Ms. Pontbriant would not create a foreseeable risk of a probable rape. Even if there were evidence of an agreement to rob, respondent's "natural and probable consequences" theory does not provide a basis for finding appellant guilty of attempted rape or attempted rape felony murder.

All the more clearly, this natural and probable consequences theory cannot support a finding of a rape special circumstance. The jury was expressly instructed not to rely upon such a theory in evaluating the truth of a felony murder special circumstance allegation, because such a special circumstance finding requires a finding that the killing was committed for the purpose of furthering the felony (here, rape) and that the non-killer acted with an intent to assist in that killing. (CT 817, 876.)

The United States Supreme Court has also specifically held that mere liability for felony-murder is not sufficient to warrant imposition of the death penalty. (*Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed. 2d 127, 107 S.C. 1676].) At a minimum, to be eligible for death a non-triggerman liable for felony-murder must have acted with at least a reckless indifference to human life and as a major participant in the felony. (*Ibid.*) Respondent's natural and probable consequences theory makes little sense as applied to the alleged attempted rape and clearly has no role to play in establishing death-eligibility or special circumstance liability, and there is no evidence to establish on any other theory that appellant is guilty of attempted rape or rape-felony-murder, or subject to liability for a rape special circumstance.

Conclusion

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

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's argument IV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of either the sex offense or the homicide.

V.

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

Summary of Appellant's Argument

In his opening brief, appellant noted that the prosecution relied on three theories to support the robbery and robbery murder special circumstance charges. First, the defendants murdered Ms. Pontbriant to steal her car and use it to relocate to Iowa where work might be more plentiful. Second, they murdered her in order to take rent money that was purportedly in her purse. Third, the defendants did both. None of these theories has support in the evidence.

Even assuming it was admissible (which it was not), the law enforcement testimony showed only that the defendants were riding in Ms. Pontbriant's car subsequent to her demise. Any inference that she was murdered in order to gain possession of the car, however, was contradicted by the evidence. If the purpose of getting the car was to go to Iowa, killing Ms. Pontbriant to get it was a highly risky venture, particularly under the circumstances of this case. On the evening of the homicide, the defendants first went to a bar for a few hours and then went to Ms. Pontbriant's house. Once there, the defendants spent most of the evening drinking with Ms. Pontbriant. Moreover, during the course of the evening, appellant and Ms. Pontbriant had been involved in heated exchanges on the telephone with people who knew appellant. Thus, if the defendants intended to kill Ms. Pontbriant to steal her car, they certainly made it easy for law enforcement to discover their identities.

Additionally, after the car was taken from the residence, there was no evidence showing that the defendants intended to use it as transportation for their relocation to Iowa. Items owned by the defendants that could be sold were placed in the trunk, but most of the defendants' personal possessions that normally would be transported in any relocation were left behind.

Most importantly, however, if a vehicle was so critical to the defendants' plans for relocation that they were willing to commit murder to get it, why did they not steal another after they were released by the police or why did they not simply recover the same vehicle after the police left the area? Certainly there was nothing preventing them from doing either. Additionally, since Ms. Pontbriant was so very drunk, why wouldn't the defendants eliminate the risk altogether and simply wait until she passed out and take the keys? Given the state of the prosecution evidence, the only reasonable conclusion is that taking the vehicle was an afterthought rather than a means of executing a preconceived relocation plan.

The evidentiary support for the purported theft of property and cash is even more tenuous. Earl Bothwell testified that the defendants admitted to him that they killed Ms. Pontbriant and took some of her property. At the time of his testimony, Mr. Bothwell was serving a prison sentence on an unrelated charge. Moreover, the evidence shows that at the time the defendants' admissions were purportedly made to Mr. Bothwell in his motel room, appellant was employed full time as an electrical contractor and was at work, while codefendant Tobin was in another town painting a house. Additionally, when the defendants were arrested, Mr. Bothwell had the opportunity to tell the police about these purported admissions to robbery and murder, yet he failed to do so. The first time he even mentioned these matters was when he made contact with law enforcement after he was imprisoned

on an unrelated offense. Further, the defendants' purported admissions to Bothwell concerning small amounts of stolen cash do not correspond to any property found missing from Ms. Pontbriant. Instead, they correspond fairly closely to property the police found and inventoried at Ms. Pontbriant's home and that the prosecution investigator knew about when he *interviewed* Bothwell.

Finally, under no circumstances could a rational trier of fact conclude that the defendants stole any rent money from Ms. Pontbriant. The sole basis for concluding that Ms. Pontbriant was missing any rent money was the testimony of Mr. Gilliland. Mr. Gilliland testified that several days before the homicide, the defendants saw him give $340-$350 to Ms. Pontbriant for the house rent. Moreover, at that time, according to Mr. Gilliland, he told the defendants that he was leaving for Modesto. Allegedly this took place in Ms. Pontbriant's home.

The evidence, however, does not support Mr. Gilliland's tale in ANY particular. As appellant has repeatedly explained, Mr. Gilliland was an alcoholic and was inebriated on virtually every occasion he spoke with the police about this incident. He provided police with multiple dates on which this alleged transfer of funds took place, and on each of those dates, the defendants were undeniably elsewhere. Moreover, when queried about the source for the funds he purportedly gave to Ms. Pontbriant, every single source cited by Mr. Gilliland was unequivocally repudiated by incontrovertible evidence.

Additionally, neither Ms. Pontbriant nor the defendants were aware that Mr. Gilliland was going to Modesto and would not be at the residence on the night of the homicide. In fact, on the night of the homicide, appellant and Ms. Pontbriant accused Mr. Bourdette of harboring Mr. Gilliland in Visalia. Further, Mr. Gilliland's ex-wife, with whom he was staying, testified that it wasn't until the

evening before he left that Mr. Gilliland even called to ask if he could stay at her house in Modesto.

Further, the evidence presented by Mr. Gilliland was so inherently incredible, so completely contrary to the facts and so inconsistent with the previous stories he told law enforcement, that his presentation as a witness at least bordered on the knowing or reckless use of false testimony.

In any event, given the evidence in this case, no rational trier of fact could reasonably infer that either defendant intended to rob Ms. Pontbriant of any rent money at the time of her death. (Appellant's opening brief at pp. 224-272.)

Summary of Respondent's Argument

Respondent first notes the evidence showing that the defendants were at Ms. Pontbriant's house a few days before her death and witnessed Mr. Gilliland hand her about $340 in cash which she placed in her checkbook in her purse. During that period of time, both defendants were planning to leave for Iowa but neither had a working vehicle. The defendants were at Ms. Pontbriant's house on the night of her death. Later that evening they were seen by law enforcement driving her car. When police searched the crime scene, they found that Ms. Pontbriant's purse had been rifled. Moreover, after the defendants returned to Iowa, they confessed to Earl Bothwell that they robbed and murdered a woman in California and had taken her automobile. (Respondent's brief at pp. 101-102.)

Respondent further asserts that on this evidence, any jury could find that the defendants went to Ms. Pontbriant's house with the intent to steal. While it is true that the defendants left items of value in the house and left some currency in her purse, nonetheless, a jury could have concluded that the defendants were in a hurry and simply did not inventory all the valuables that could have been taken.

(Respondent's brief at p. 102.)

Additionally, although Gilliland's testimony was "somewhat confused and inconsistent" (respondent's brief at p. 103), the jurors were able to assess his credibility. The same is true of the testimony of Earl Bothwell. (Respondent's brief at pp. 103-104.)

Respondent then addresses the standard of review for this court. Respondent asserts that a reviewing court may not reweigh the evidence or reevaluate the credibility of the witnesses. Moreover, all conflicts must be resolved in favor of the prevailing party. On that basis, there is no reason for this court to overturn the jury verdicts. (Respondent's brief at pp. 103-104.)

Respondent also challenges appellants' claims that there is insufficient evidence to show that either defendant aided or abetted the other in committing any robbery. Respondent reiterates the evidence set forth above and asserts that the fact that the two were seen in Ms. Pontbriant's vehicle after the homicide and that they fled to Iowa shows consciousness of guilt. Further, even if only one of the defendant's actually took any money or property from Ms. Pontbriant it would be reasonable for the jury to conclude that they both shared a common intent to rob and murder or at the very least they aided and abetted one another in all aspects of the offenses. (Respondent's brief at pp. 105-106.)

Additionally respondent urges that the evidence was sufficient to support the robbery/murder special circumstance. The fact that Ms. Pontbriant was killed and the defendants took property from her permitted the jury to infer that the murder was for the purposes of robbery. That is, the murder facilitated the robbery. (Respondent's brief at pp. 106-107)

Errors in Respondent's Arguments

Respondent's arguments about how a rational jury could view the evidence are simply *post hoc* rationales that attempt to weave together disparate threads of evidence. Nevertheless, all of respondent's discussion about the defendants' knowledge of the rent money transfer, the impending trip to Iowa and the borrowing of the vehicle are predicated on a preconceived plan of action. **There is no evidence anywhere in the record of any such preconceived agreement**. More importantly, if there was such an agreement the most basic ingredient would be the designation of time and place of the assault on Ms. Pontbriant. What the evidence shows, however, is that there was no designated time and place of the assault. With no prior warning, Ms. Pontbriant telephoned the defendants as they were passing time drinking and socializing in the Break Room bar. (48 R.T. 7162-7164.) Prior to that invitation, the defendants had no idea that they would even be in contact with Ms. Pontbriant, let alone invited to her home.

Additionally, there is no credible evidence that Mr. Gilliland gave $340 to Ms. Pontbriant a few days before the homicide and no credible evidence that either defendant was present or otherwise knew about any such transaction on the dates when Mr. Gilliland stated those transactions occurred. Indeed, the prosecution's own witness, Ms. Mayberry was one of the persons who testified that the defendants were in a public park with Tobin's ex wife on that Sunday when the rent money was purportedly given to Ms. Pontbriant. (See, e.g., 38 RT 5409-5415, 5461-5462, 5466-5467.) Given the independently verifiable evidence that none of the sources he claimed could have provided him the rent money, Mr. Gilliland's rent money story makes no more sense than the tale he told Martin Mendoza about meeting the defendants in a Visalia alley several days after Ms. Pontbriant's death

and getting in a "huge fight" with them. (45 R.T. 6736-6737.) Moreover, if the defendants took all that money, why did they have to hitchhike back to Iowa with nothing but the clothes on their backs? The answer obviously is that the defendants didn't take any such large sum of money and did not know that any large sum of money was in Ms. Pontbriant's purse. Thus the evidentiary support for the predicate knowledge upon which respondent relies to show an intent to rob is simply not present on this record.

Moreover, with regard to the special circumstances, "[a] murder is not committed *during* a robbery within the meaning of the statute unless the accused has 'killed . . . *in order to advance an independent felonious purpose*, ...' [Citation.] A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder . . . .'[citation]" (*People v. Morris* (1988) 46 Cal.3d. 1, 21, italics in original; cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

If the defendants entered the house with the intent to take Ms. Pontbiant's car or steal her money, they could have simply waited for her to pass out and helped themselves. After all, Ms. Pontbriant had a blood alcohol level of .29 (34 R.T. 4938), more than three times the legal limit for driving in California. It made no sense whatever to kill her to obtain these things. This is particularly true as to appellant, since his obscenity laced telephone calls during the evening to Mr. Bourdette and Ms. Coronado, both of whom knew him, certainly broadcast where he was.

Additionally, an inference that appellant and Mr. Tobin planned to steal Ms. Pontbriant's car so they could drive it to Iowa was implausible in light of the fact

that the defendants subsequently stopped at the Murray Street apartment or at Jeannette Mayberry's apartment, or at both apartments while in possession of the car. Mr. Tobin put his shotgun and ornamental sword into the car trunk, and appellant put a bag containing hair products, plus a laundry basket of clothes, a tool box and a few other miscellaneous possessions into the car trunk (40 R.T. 5714-5718 [Rains]; 46 R.T. 6862-6864 [Tobin]; 38 R.T. 5438-5439 [Mayberry]), but neither defendant packed up any other belongings, like warm clothing for Iowa weather, and put those possessions into the car. The items they placed in the car were clearly items meant for sale rather than items necessary for a trip to Iowa.

Further, Officer Wightman ordered the defendants to lock the car and leave it on the side of Highway 198. Even though they had the opportunity to do so after waiting for Officer Wightman to leave, the defendants did not thereafter return to the car, unlock it and drive it away. Instead, they abandoned the car. This evidence directly contradicted any inference that taking the car was important enough to murder Ms. Pontbriant to get it. Certainly there was no basis for finding beyond a reasonable doubt that either defendant had planned to take the car prior to the homicide, rather than just taking the car as an afterthought, perhaps to flee the scene, after an angry, drunken, lethal assault triggered by something unrelated to Ms. Pontbriant's car.

Thus, the only rational inference from the evidence, particularly the evidence of Ms. Pontbriant's brutal and violent death, is that the homicide resulted from a sudden, random explosion of violence rather than any preconceived plan to rob or rape her. Indeed, as more fully described in Issue VI, *infra* [error to permit the prosecutor to allege burglary or the burglary special circumstance in the information], any property taken from Ms. Pontbriant's residence was obviously an

afterthought, rather than a part of a preconceived plan. Indeed, on similar evidence, even the preliminary hearing magistrate properly found that the decedent invited the defendants into her home for a little "party" and they did not form any intent to commit crimes prior to consuming substantial amounts of beer. (Preliminary hearing transcript of 10/11/88, p. 8.)

For these reasons, respondent's bare assertion that the defendants entertained an independent felonious purpose to rob, rape and brutally murder Ms. Pontbriant is completely inconsistent with uncontradicted evidence showing they had no knowledge of any substantial sum of money in her purse and inconsistent with the evidence showing how they comported themselves during the evening of her death. Thus, the defendants' convictions on the rape, robbery, and felony murder counts, as well as the associated special circumstances must be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument VI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

VI.

THE TRIAL COURT SHOULD HAVE STRICKEN THE BURGLARY COUNT AND THE BURGLARY SPECIAL CIRCUMSTANCE AFTER THE MAGISTRATE FOUND AN INSUFFICIENT FACTUAL BASIS FOR THE CHARGES

Summary of Appellant's Argument

The law is clear that if a magistrate finds an insufficient factual basis for the charges or special circumstances, that factual determination is binding on the trial court if supported by substantial evidence. (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 666.) The only way a trial court could overturn the magistrate's ruling on the point is if the magistrate made an erroneous *legal* conclusion that an allegation in a criminal complaint is not true, rather than a *factual* determination. (*Ibid.*, see also *People v. Brice* (1982) 130 Cal.App.3d 201, 206.)

At the preliminary hearing in this case, the prosecution presented evidence similar to that presented at trial concerning the burglary count. Additionally, however, the prosecution presented testimony from codefendant Tobin's mother that Mr. Tobin told her that he and appellant were just visiting with Ms. Pontbriant all evening and they were there drinking and talking about an upcoming trip to Iowa. (Preliminary Hearing Transcript at pp. 734-735.) She also testified that Tobin told her that it was **NOT** the defendants' intent to take Ms. Pontbriant's vehicle to Iowa nor did they go to Ms. Pontbriant's home with the intent to obtain the vehicle in order to use it to travel to Iowa. (Preliminary Hearing Transcript at pp. 736-737, 739.) Instead, they were going to borrow the car to take some items to a friend's house to sell in order to obtain money for the trip. (Preliminary Hearing Transcript at pp. 737-738, 743.)

The trial court also considered Prosecution exhibits 70-78 which were letters that appellant wrote to Danny Payne, an informant. (Preliminary Hearing Transcript at p. 988.) These letters assert that on the night of the homicide, the codefendants were simply visiting Ms. Pontbriant at her invitation. The evening was spent drinking beer and conversing. The defendants wanted to borrow Ms. Pontbriant's car, but appellant told Mr. Tobin that he [Letner] had to have sex with Ms. Pontbriant before she would let him borrow her vehicle. When appellant and Ms. Pontbriant began to become intimate, Mr. Tobin went outside the house. When he returned, Ms. Pontbriant was only partially clad. Mr. Tobin was intoxicated and wanted to know if appellant had been able to borrow the car. Ms. Pontbriant became angry and a physical confrontation ensued. Ms. Pontbriant threatened to call the police and Mr. Tobin lost control. He began to kick, strangle and stab Ms. Pontbriant and threatened to kill Mr. Letner if he interfered. Mr. Letner was very much afraid and did not prevent the killing.

After hearing this and the related evidence, the magistrate specifically concluded: " ...but I just can't find any evidence that [the defendants] entered that residence with the intent to commit a felony at the moment of entry. In other words there is no forced entry. It appears that there was a party going on and thus it would be a situation where they were invited in." (Preliminary hearing transcript of 10/11/88., p. 8.) The magistrate thus concluded that *factually* there was not enough evidence to bind the defendants over for charges involving an alleged burglary.

More importantly, however, because the magistrate's finding is supported by substantial evidence, the trial court had no authority to reverse the magistrate's decision and allow the prosecution to reinstate these charges in superior court. Over vigorous defense objection, however, the trial judge allowed the prosecutor to

go forward on these charges and special circumstances.

Nevertheless, when ruling on the defense objection, the critical question before the superior court judge was not whether the magistrate's ruling on the burglary count and the burglary special circumstance allegation was correct, but rather, was the ruling supported by substantial evidence? (*People v. Slaughter* (1984) 35 Cal.3d 629, 639; *Pizano* v. *Superior Court* (1978) 21 Cal.3d 128, 133.) It appears from the record, however, the trial judge simply used the wrong standard in reversing the magistrate's ruling. The trial judge used the more familiar standard applicable to Penal Code section 995 motions. That is, the trial court must draw "every legitimate inference that may be drawn from the evidence" in favor of the prosecution. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

This rule does **not** apply, however, if the magistrate has not found probable cause for the inclusion of a count or allegation in the information. The rule flows from the principle that "a reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate . . . ." (*Ibid.*)

Further, there was substantial evidence supporting the magistrate's finding that the defendants did not have the intent to rob or to rape at the time of entry into Ms. Pontbriant's home. The magistrate properly found that the decedent invited the defendants into her home for a little "party" and they did not form any intent to commit crimes prior to drinking substantial amounts of beer. (10/11/88, Preliminary Hearing Transcript, p. 8.) These factual findings supported by the evidence should have been upheld and the burglary charges should have been dismissed. (Appellant's opening brief at pp. 273-282.)

Summary of Respondent's Argument

While respondent concurs that if the magistrate made factual findings the

trial judge would be powerless to reverse them, nevertheless, respondent urges that the magistrate's findings were legal conclusions rather than factual findings. Respondent argues that even though the magistrate twice said that he found the "factual basis" for the burglary charges and the burglary special circumstances invalid, that is not what the magistrate actually meant. In respondent's view, the magistrate accepted the preliminary hearing evidence (similar to the evidence respondent relied upon at trial to prove the burglary) but simply concluded that as a *legal* matter this evidence did not amount to burglary. For this reason, the trial judge was free to reverse the magistrate's conclusion because there was substantial evidence supporting the charge and the special circumstance. (Respondent's brief at pp. 115-120.)

Errors in Respondent's Argument

As a preliminary matter, the magistrate did not state precisely what evidence (or lack of it) he relied upon to reach his conclusion that there was insufficient evidence to support the burglary charges and special circumstances. Nevertheless, respondent's argument that the magistrate accepted the evidence as the prosecution presented it misses an important truth. As explained above and in the opening brief, part of the evidence was the testimony of defendant Tobin's mother and the letters from appellant to the prosecution's own informant which specifically ***denied*** any intent to commit a felony before being invited to Ms. Pontbriant's house. Thus, there is certainly substantial evidence supporting the magistrate's factual findings that the defendants did not entertain any felonious intent before entering the house.

More importantly, however, the magistrate specifically noted that the defendants were invited to the house by Ms. Pontbriant. There isn't even a scintilla

of evidence that the defendants knew they would be invited to the house that evening. Further, the defendants' behavior during the evening belies any notion of a preexisting plan to commit any felony. Appellant Letner's telephone calls to Burette and Coronado who knew who he was and where he was, certainly call into question any preexisting plan to rob or rape. Thus, other than respondent's *post hoc* rationales that try to tie together disparate circumstances concerning the defendants' unemployment, planning for a trip to Iowa and the meager fiscal resources available to them, there isn't a shred of evidence showing entry into Ms. Pontbriant's home with felonious intent. Moreover, what little evidence there is of the defendants' intent is provided by Tobin's mother and appellant's letters. That evidence directly contradicts respondent's claim.

For these reasons, the argument that the magistrate's rulings are based on legal conclusions rather than factual findings are simply unsupported by the record. That being so, the trial judge had no authority to overrule the magistrate's findings and the prosecution should have been precluded from charging the defendants with burglary or the burglary special circumstance.

Appellant Joins Codefendant Tobin's Arguments

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

VII.

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

Summary of Appellant's Argument

The burglary count and the burglary special circumstance were predicated on the underlying felonies of rape and robbery. That is, the prosecution contended that the defendants entered Ms. Pontbriant's residence with the intent to rape or rob. As appellant explained in prior arguments, there was no proof that the defendants entertained either intent at the time of entering the residence or at any time thereafter. Absent proof of either intent at the time of entry, the jury's findings on the burglary charge and the burglary special circumstance must be reversed.

Summary of Respondent's Argument

Respondent urges that the evidence was sufficient to support the burglary count and the burglary special circumstance. Respondent again refers to Gilliland's testimony that on the day prior to Ms. Pontrbrian't death, Mr. Gilliland gave Ms. Pontbriant a substantial amount of rent money. Further, both appellant and codefendant Tobin were out of work, intended to go to Iowa and presumably needed money for the trip. Therefore, according to respondent, it was certainly reasonable to assume that they intended to rob Ms. Pontbriant and take her car before they entered her house. The fact that they socialized with Ms. Pontbriant before the robbery/murder does not alter their original intent. The jury could infer that they wanted to fortify themselves and use Ms. Pontbriant's money to buy the

beer to do it. (Respondent's brief at pp. 107-109.)

As to the burglary special circumstance itself, respondent urges that the evidence shows that the codefendants had the intent to rob before they entered the home, and here the burglary could not have been merely incidental to the homicide. Indeed, since the defendants probably also intended to murder Ms. Pontbriant before coming to her home, this intent would form an additional basis for the burglary special circumstance. Further since the homicide was intended to facilitate the other crimes as well, the evidence was sufficient to support the burglary special circumstance. (Respondent's brief at pp. 109-110.)

Errors in Respondent's Argument

Even assuming arguendo that the evidence was sufficient to prove that an attempt to rape Ms. Pontbriant occurred, and/or that Ms. Pontbriant was robbed before she was killed, the evidence was still insufficient to prove that appellant entered Ms. Pontbriant's house with the intent to commit either a rape or a robbery. As explained in the prior issues, on the evening of her death the defendants were drinking in the Break Room bar. Neither defendant even knew he would be in contact with Ms. Pontbriant, let alone invited to Ms. Pontbriant's house. (48 R.T. 7162-7164.) Additionally, there was no basis for concluding that either defendant believed that Gilliland had given Ms. Pontbriant any rent money because there is no credible evidence that he ever did so, or if he did, that he did so in their presence. Further, neither defendant knew that Gilliland would be in Modesto on the evening when they were invited to the house - as the several telephone calls to Bourdette and Coronado attest. (39 RT 5567-5573.) Moreover, the telephone calls to Bourdette and Coronado also show that defendants made no secret of their presence at her residence during the evening.

For these reasons, and the reasons set forth in Argument VI, no rational jury could find that there was a secret plot to rape or rob Ms. Pontbriant before the defendants even entered her residence. Indeed, as appellant explained in issue VI, even the magistrate concurred in the defense assessment of the sufficiency of the evidence. Further, because there is no evidence of burglary, obviously the true finding on the burglary murder special circumstance must be reversed as well.

Based on the reasons set forth herein and in appellant's opening brief, appellant's conviction for burglary and the true finding on the burglary special circumstance must be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument VII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

VIII.

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

Appellant's Argument

Appellant and codefendant Tobin were each charged with three felony murder special circumstances: burglary, robbery and attempted rape. As established in arguments IV, V and VII, *supra*, the evidence was insufficient as a matter of law to prove that an attempted rape, or a robbery, or a burglary ever occurred in connection with Ms. Pontbriant's murder, and also insufficient to show that if any of these offenses was committed, it was committed or aided and abetted by appellant. Therefore, each of the special circumstances findings against appellant must be reversed. (*People v. Morris, supra,* 46 Cal.3d at pp. 21-23; *People v. Marshall* (1997) 15 Cal.4th 1, 81.) If each of the special circumstances findings is reversed, appellant's sentence of death must also be reversed.

Respondent's Argument

Respondent does not make a specific reply to this issue. Instead, respondent has argued in issues IV and V of its reply brief that the evidence was sufficient to support all the special circumstances. (Respondent's brief at pp. 90-114.) Respondent also argues in the next issue that even if the evidence is insufficient to support any particular special circumstance the death penalty is still appropriate for the remaining special circumstances. (Respondent's brief at pp. 121-123.)

Appellant's Reply

Since respondent has declined to specifically reply to this argument,

appellant simply relies on its argument set forth in the opening brief.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument IX on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

IX.

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

Summary of Appellant's Argument

If one or more of the special circumstances is set aside, the validity of the sentence of death is called into question. This court has previously held that it has the power to determine whether the penalty is still appropriate under the totality of the circumstances. After the United States Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428], however, it appears that that power belongs solely to the jury. Moreover, even aside from *Ring*, the defendant has a constitutionally protected liberty interest that prohibits the reviewing court from reimposing sentence. Further, each of the invalid special circumstance findings in this case served to mistakenly inflate appellant's apparent moral culpability, and hence would be prejudicial under any standard of harmless error review.

Summary of Respondent's Argument

Respondent first notes that this court has found the *Ring* decision inapplicable to the California capital sentencing scheme. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263.) Additionally, this court has held that even if one or more special circumstances are deemed invalid, that circumstance does not necessarily invalidate the death sentence. (See, e.g., *People v. Rich* (1988) 45 Cal.3d 1036.) Further, respondent argues that given the egregious nature of the underlying facts in this

case, no jury would have given significant independent weight to the special circumstances such that the death judgment would have been affected if one or more of special circumstances was found invalid. (Respondent's brief at pp. 121-123.)

Errors in Respondent's Argument

The key to respondent's argument is that this court has found the *Ring* and *Apprendi* decisions inapplicable to the California sentencing scheme. Indeed, this court has applied this holding to both capital and non capital sentencing schemes. (See, e.g., *People v. Black* (2005) 35 Cal.4th 1238 [holding that *Blakely v. Washington* (2004) 542 U.S. ___ 124 S.Ct. 2531 and therefore *Ring* and *Apprendi*[8] upon which *Blakely* was based, do not apply to California's non capital sentencing scheme].) Nevertheless, subsequent to this court's decision in *Black,* the United States Supreme Court granted certiorari in *Cunningham v. California*, No. 05-6551, cert. granted Feb. 21, 2006. ___U.S. ___, ___ S.Ct. ___, 2006 WL 386377 to determine if this court was correct in *Black* that *Blakey* (and therefore *Ring* and *Apprendi*) do not apply to California's sentencing scheme.

While California's capital and non capital sentencing schemes differ, the essential Constitutional element imposed under *Ring* and *Apprendi* is that any sentencing determination must be based on facts found by a unanimous jury based on proof beyond a reasonable doubt. That element is common to both the capital and non capital sentencing schemes in California. Thus, if the United States Supreme Court holds in *Cunningham* that *Blakey* (and therefore *Ring* and *Apprendi*) apply to California's sentencing scheme in a non capital context, that holding would cast grave doubt on the holdings in *Griffin*, *Prieto*, et al. that *Ring*

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[8] *Apprendi v. New Jersey* (2000) 530 U.S. 466

and *Apprendi* do not apply in capital cases.

For the reasons set forth more fully in Issue XXIX, *infra*, however, *Ring* and *Apprendi* do apply to capital cases in California. As appellant pointed out in his opening brief, when a jury makes a decision concerning the imposition of the death penalty it must weigh all the factors it is allowed to consider. When one of those factors, such as a special circumstance is determined to be invalid, it is the province of the **jury**, not the reviewing court, to determine if the death penalty is still appropriate after the reweighing process takes place.

While it is certainly true that the *Ring* decision left open the question of appellate reweighing (*Id.* at p. 2437, fn.4), as appellant pointed out in his opening brief, the ramifications of the holding are evident in the majority and concurring opinions. In his concurring opinion, Justice Scalia wrote: "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." (*Id.* at p. 2445) In another concurring opinion, Justice Breyer noted: "I therefore conclude that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." (*Id.* at p. 2446.)

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

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to the jury, and proven beyond a reasonable doubt.

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

In light of *Jones, Apprendi*, and *Ring*, California's capital sentencing scheme requires that the existence of aggravating circumstances and the weighing of the aggravators against the mitigating evidence, **be made exclusively by the jury**. Appellate court reweighing of aggravating and mitigating circumstances in California is therefore inconsistent with constitutional principles.

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

That is, should this Court reverse one or more of the special circumstances in this case for insufficiency of the evidence, the jury's erroneous conclusion(s) – findings of underlying felonies not shown by the evidence – would have to be taken out of the mix of factors lawfully supporting the death sentence. As the U.S. Supreme Court pointedly observed in *Stringer v. Black, supra*, 503 U.S. 222, the reviewing court "may not assume it would have made no difference if the thumb had been removed from death's side of the scale." (Id. at p. 232.)

Moreover, even assuming arguendo that *Ring* and *Apprendi* permit appellate harmless error analysis in this setting, reversal is still required. Since the jury's erroneous finding(s) went to the heart of the jury's understanding of the capital offense, there is no way to be confident that, but for those errors, the jury would have returned a sentence of death. Each erroneous special circumstance finding, unsupported by substantial evidence, artificially inflated appellant's moral culpability. In the context of this case, an erroneous burglary or robbery special

circumstance finding added an element of premeditation that would have made appellant appear more fault-worthy than the evidence actually showed. And an erroneous rape special circumstance finding obviously supplied an unwarranted additional basis for finding moral depravity. Any one of these erroneous special circumstance findings, set aside because of insufficient evidentiary support, is enough to require reversal of the death sentence. Under the state law harmless error standard applicable to penalty phase error, it is certainly true that but for the jury's erroneous conclusion that appellant was guilty of attempted rape, of burglary, or of robbery, "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." *(People v. Brown* (1988) 46 Cal.3d 432, 448 [emphasis added].) Similarly, under the test for federal constitutional error, respondent cannot meet its burden of showing beyond a reasonable doubt that any of these invalid special circumstance findings did not contribute to the sentencing verdict. (*Chapman v. California, supra,* 386 U.S. 18, 24.) Further, since the jury's erroneous findings reflect a misreading of the evidence and/or the applicable legal standards, the jury's death verdict can't be deemed sufficiently reliable to satisfy the heightened reliability standards which the Eighth and Fourteenth Amendments require for capital sentencing determinations.

Further, even if the United States Supreme Court does not specifically apply *Ring* or *Apprendi* to California's capital sentencing scheme, state law requires a reversal of the death judgment and a remand for a new penalty phase trial. As appellant pointed out in his opening brief, the California death penalty statute limits the determination of the death sentence to the jury and/or the trial judge (Pen. Code § 190.4 subd. (e)) and the California Constitution limits the original jurisdiction of this court to habeas corpus, mandamus, certiorari and prohibition.

(Cal. Const., art. VI, sec. 10.) Therefore, when this court overturns a special circumstance on appeal, it should remand for a new penalty phase trial rather than attempt either to re-weigh the evidence or to do a harmless error analysis. (See *State v. Reeves* (2000) 258 Neb. 511, 604 N.W. 2d 151.)

In *Reeves*, the Nebraska high court found that when it resentenced Reeves after finding error in a prior appeal of his death sentence, that re-sentencing constituted an erroneous assertion of authority under state law and denial of his "life interest and due process rights." (*Id.*, 604 N.W.2d at p. 164.) The court determined that this re-sentencing (1) violated the state statute governing procedures for homicide cases and (2) amounted to an unreviewable sentence in violation of state law, thus denying Reeves due process of law. The court noted that while *Clemons v. Mississippi* (1990) 494 U.S. 738 held that re-weighing and re-sentencing by a state appellate court would not offend federal constitutional principles, that decision was premised on the fact that state law authorized such action. (*State v. Reeves, supra,* 604 N.W. 2d at pp. 164-165.) Here, however, the California death penalty statute, Penal Code section 190.2 *et seq.*, does not authorize this court to re-weigh and re-sentence after it has determined that a special circumstance must be reversed because of insufficient evidence.

Additionally, the Nebraska Supreme Court found that re-sentencing by an appellate court violated state law when it stepped into the sentencing panel's shoes by considering and weighing a factor that the panel had not considered and by rendering a sentencing decision which was, in effect, unreviewable. (*State v. Reeves, supra,* 604 N.W.2d at p. 167-168.)

Respondent counters with the argument that the evidence was so egregious that the jury would have voted for death **regardless** of whether one or more of the

special circumstances was invalidated on appeal. That argument, however, overlooks the problem that the error here is not simply a technical impropriety in the return of one or more special circumstance findings, but rather the jury's return of such findings without evidentiary support for doing so – an error going directly to the jury's understanding of what transpired and its appraisal of appellant's conduct and culpability. As appellant pointed out in the opening brief, the absence of any record clearly setting forth what the jury determined to be the mitigating and aggravating factors makes it impossible to engage in meaningful harmless error analysis. The record in this case does not disclose which aggravating factors and which mitigating factors were actually found by the jury. Without such information, it is impossible to know whether the invalidation of one or more of the special circumstances would tip the balance for life.

For these reasons and the reasons set forth in appellant's opening brief, this court must reverse appellant's death sentence and remand for a new penalty trial.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument X on this issue, except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

X.

APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER MUST BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION AND DELIBERATION

Summary of Appellant's Argument

Here, since there was no evidence of planning, no viable evidence of motive and the manner in which Ms. Pontbriant was killed showed a sudden, random explosion of violence, there is no evidence to support a finding of premeditation and deliberation. Thus the first degree murder conviction must be reversed.

Summary of Respondent's Argument

Respondent combines two of appellant's arguments into one and makes a single reply.

Respondent first urges that there was ample evidence from which a jury could infer premeditation and deliberation. Respondent notes that appellant brought a buck knife to the premises and asserts that the defendants intended to commit a sexual assault or a robbery. On that basis, the jury could conclude that the defendants were motivated to kill Ms. Pontbriant to conceal their crimes. (Respondent's brief at pp. 124-125.)

Additionally, the manner of the killing suggests premeditation and deliberation. Ms. Pontbriant was beaten, stabbed in the neck and bound with a telephone cord. According to respondent, these facts also establish premeditation and deliberation. (Respondent's brief at p. 125.)

Respondent then addresses the felony murder theory raised in appellant's Issue XI. Appellant will respond to those arguments in the next issue.

Errors in Respondent's Arguments

Turning first to the evidence of appellant's buck knife; omitted from respondent's argument is any acknowledgment that appellant took his buck knife with him virtually everywhere he went. (See, e.g., 38 R.T. 5402, 5403; 46 R.T. 6906, 6907; 47 R.T. 7075.) Thus bringing it to Ms. Pontbriant's home was no special event.

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

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

Even Officer Wightman testified that he took the knife from appellant and examined it after the vehicle stop. (42 R.T. 6158.) There is no indication that the officer found any traces of blood on the knife and he testified that he paid no particular attention to it. (42 R.T. 6185.)

On this evidence, no rational jury could conclude that appellant brought the buck knife with him to Ms. Pontbriant's home for the specific purpose of killing her as part of a premeditated plan to rob and rape her.

Additionally, as appellant explained in previous arguments, the defendants had no plan to visit Ms. Pontbriant on the evening of her death. With no prior warning, Ms. Pontbriant telephoned the defendants as they were passing time drinking and socializing in the Break Room bar. (48 R.T. 7162-7164.) Thus, neither of the defendants knew they would even have contact with Ms. Pontbriant that evening, let alone be invited to her home. Thus, it is difficult to imagine that by the time they arrived, they somehow cooked up a plan to rape, rob and kill her using a knife.

As appellant also previously explained, the defendants' behavior as the evening progressed was certainly inconsistent with any such premeditated or preconceived plan. Indeed, the defendants and Ms. Pontbriant spent most of the evening drinking and socializing. (46 R.T. 6851-6860.) Moreover, appellant's obscenity laced telephone calls to Bourdette and Coronado certainly informed them where he was and when he was there. In fact, the calls were sufficiently provocative that Ms. Coronado might well have summoned the police instead of simply unplugging the telephone.[9]

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[9] Ms. Coronado testified that during the phone conversations she kept hanging up, and Ms. Pontbriant and appellant kept calling back and "threatening." Appellant "wanted

Finally, the wounds suffered by Ms. Pontbriant did not exhibit a particular and exacting manner of killing or a preconceived design. The brief, clumsy effort at strangulation, the multiple blunt force traumas, and the many stab wounds are consistent only with a fit of rage and a sudden explosion of violence. Certainly that much force would not be required to relieve a drunken woman of her property or even to kill her. This sudden random display of violence is inconsistent with premeditation and deliberation. (*People* v. *Alcala* (1984) 36 Cal.3d 604, 623; [abrogated by statute on another point, as recognized in *People v. Falsetta* (1999) 21 Cal.4th 903, 911].)

For these reasons and those set forth in appellant's opening brief, the homicide conviction must be reversed, the death sentence set aside and the case remanded.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XI on this issue.

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

XI.

BECAUSE THE JURY MAY HAVE RELIED EXCLUSIVELY ON AN INVALID FELONY-MURDER THEORY TO CONVICT APPELLANT OF FIRST DEGREE MURDER, APPELLANT'S MURDER CONVICTION MUST BE REVERSED

Summary of Appellant's Argument

Even if the evidence were sufficient to support the first degree murder conviction on a theory of premeditation and deliberation, since the felony murder theories are unsupported by the evidence and there is no way of knowing which theory the jury relied upon to convict, the murder conviction must be reversed.

Summary of Respondent's Argument

Respondent urges that since all of the felony murder special circumstances were found true, the jury actually found the defendant guilty of felony murder. Moreover, as it has argued in the previous issues, not only is there sufficient evidence to support the associated felonies, but the felony murder special circumstances as well. (Respondent's brief at p. 126.)

Errors in Respondent's Argument

Respondent's argument is valid only if there is sufficient evidence to support the underlying felonies of attempted rape, robbery and burglary. If the evidence is **insufficient** to support those felonies and the jury relied on that evidence to convict of murder using a felony murder theory, then the conviction must be reversed. (*People v. Guiton* (1992) 4 Cal.4th 1116, 1122.)

As appellant has explained at length in the previous issues, the evidence is insufficient to support the attempted rape, robbery or burglary charges or their attendant special circumstances. For these reasons and the reasons set forth in

appellant's opening brief, appellant's murder conviction must be reversed and the the death penalty set aside.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XII.

THE GUILT PHASE JURY INSTRUCTIONS CONCERNING AN AIDER AND ABETTOR'S SCOPE OF LIABILITY WERE BOTH INCOMPLETE AND CONFUSING

Summary of Appellant's Argument

The trial judge instructed jurors that an aider and abettor is liable not only for the crime he intentionally aided and abetted, but also for the natural and probable consequences of that originally contemplated crime. The instruction given was erroneous for three reasons. The instruction failed to identify (and define) any potential, originally contemplated target crime that could have served as a basis for such expanded liability, thereby, in effect, failing to define an element essential for conviction of the charged crimes, in violation of the Sixth, Eighth, and Fourteenth Amendments.

The instruction was ambiguous and confusing about the specific mental state the prosecution was required to prove with regard to each defendant.

Finally, the instruction made an aider and abettor liable for various charged felonies, felony murder, and a death sentence, even if he did not share the intent needed for those felonies, for felony murder, or for capital murder. All of these errors violated both Due Process and the Eighth Amendment. (Appellant's opening brief at pp. 316-325.)

Respondent's Argument

Respondent first argues that this court's prior decision in *People v. Coffman* (2004) 34 Cal.4th 1 is dispositive. In that case, this court rejected the argument that the natural and probable consequences doctrine could be predicated on

negligence. In *Coffman*, the court ruled that since an aider and abetter must know that the perpetrator intends to commit a criminal act and share the perpetrator's intent, if the perpetrator commits a different act, aider and abetter liability is limited solely to those of the perpetrators acts that are reasonably foreseeable. Additionally, as to the argument concerning target crimes, the jury was told that it had to determine whether the offenses charged in counts 1-5 (or their lesser included offenses) were the natural and probable consequences of the originally contemplated crimes. The court then defined each "target" offense short of murder. According to respondent, "[t]aken as a whole" these definitions would have told the jury that the defendants would have had to intentionally aid and abet one of these target offenses in order to be liable for murder under the natural and probable consequences doctrine.

Finally, the murder convictions were not based on the natural and probable consequences doctrine at all. Since the doctrine was not applicable to the special circumstances and since the jury found the special circumstances true, the jury necessarily found that each defendant had the specific intent to kill. (Respondent's brief at pp. 127-129.)

Errors in Respondent's Arguments

As to the natural and probable consequences doctrine itself, the language from *Coffman* cited in respondent's brief[10] does not resolve the negligence question. As appellant explained in his opening brief, the natural and probable consequence theory is unconstitutional in a capital case because it permits criminal liability to be imposed upon an aider and abettor based on the finding that the crime

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[10] The language appears at 34 Cal.4th at p. 108, not p. 96 as it appears in respondent's brief.

committed by the perpetrator was a "natural and probable consequence of that target crime which was aided and abetted." (*People v. Croy* (1985) 41 Cal.3d 1, 12.) Thus, the natural and probable consequence doctrine is based on what a reasonable person would foresee as probable and natural consequences. Unfortunately, the doctrine then uses that standard to impute conclusively a higher degree of criminal culpability to a person who may not, in fact, have foreseen, let alone intended or deliberated, such consequences. In a prosecution for murder, the doctrine operates as an irrebuttable presumption that a non-killer (i.e., an aider and abettor to some contemplated offense) has malice and/or some alternative mens rea sufficient to establish guilt of murder, even though such a state of mind could not be presumed and would have to be proven in order to convict the actual killer. (*Ibid.*)

As the concurring opinion in *People v. Luparello* (1986) 187 Cal.App.3d 410, 452 observed, a natural and probable consequence doctrine can produce anomalous results by basing an accomplice's culpability, not on his own intent, but rather on the intent of the perpetrator or on other circumstances of the crime. Thus, the liability of the aider and abettor is not based on his individual mental state but instead turns on the jury's finding as to the perpetrator's mental state. (Kadish, "Complicity, Cause and Blame: A Study In the Interpretation of Doctrine," 73 Cal.L.Rev. at p. 346 (1985).) Such a result offends the due process clause of the Fourteenth Amendment.

Additionally, CALJIC 3.02 as it was given in this case, based on CALJIC's 5th edition (1988), did not even include the "reasonably foreseeable" language set forth in Coffman. More recent versions of this CALJIC instruction explicitly advise the jury about the necessary relationship between foreseeability and the

ultimate determination of guilt. (See CALJIC 3.02 (7th ed. 2003) and CALJIC 3.02 (April 2006 ed.).) Other instructions where reasonable foreseeability is crucial in determining guilt do the same. No such language was in the instruction given to appellant's jury. Moreover, as is made clear in the more recent versions of CALJIC 3.02, the test of natural and probable consequences is an objective one. *(People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) Nothing in the version of CALJIC 3.02 used at appellant's trial told the jury what sort of test to apply. Absent some standard to guide the jury's deliberations in this area, the instruction was fatally flawed.

Therefore, to the extent instructions on the natural and probable consequence doctrine permit the jury to find essential elements of the crime by reference to the perpetrator's mental state rather than to the actual mental state of the aider and abettor, such instructions violated both state and federal due process. Moreover, in a case where the death penalty could result from convictions based on such instructions, they violate the Eighth Amendment. This instruction on the natural and probable consequence doctrine would allow for a death sentence based on a vicarious negligence theory of liability and thus offends the requirement that the death penalty is reserved for those killings which society views as the most grievous affronts to humanity. (*Zant v. Stephens* (1983) 462 U.S. 862 at p. 877, fn. 15.)

As to respondent's argument that "taken as a whole" the target crimes were adequately defined for the jury, the argument is not supported by the record. While it is certainly true that the trial court instructed on the offenses listed in counts 1-5 and their lesser included offenses, nowhere did the court explain exactly what the "target" offenses were. Thus, as appellant pointed out in the opening brief, the jury

could well have concluded that the murder was based on nothing more than the "natural and probable" consequences of drunken fornication.

Finally, as to respondent's assertion that because the jury found the special circumstances true, the natural and probable consequences doctrine played no part in the decision, the argument is incorrect. Certainly a finding of specific intent to kill is necessary for a constitutionally reliable death penalty determination based on the special circumstances. The instruction, however, directed that such a finding was necessary **only if the jury could not decide whether appellant was the actual killer or an aider and abettor**. (3 C.T. 817, 4 C.T. 872.) As appellant explained in the opening brief, if the jurors found the special circumstance allegations true on an aider and abettor theory, the jurors would **not** have made the necessary additional finding that appellant had an intent to kill. Therefore, the mere fact that the jurors returned a true finding on the special circumstances does not, ipso facto, mean the jurors actually found that each defendant possessed a specific intent to kill. Therefore, this confusing instruction made it reasonably likely that the jurors misunderstood and misapplied the applicable law.

Accordingly, for all of the foregoing reasons and those set forth in appellant's opening brief, the erroneous instruction on the natural and probable consequences doctrine requires reversal of appellants convictions, the specific circumstances findings, and appellant's sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XIV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XIII.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY REGARDING THE EFFECT OF VOLUNTARY INTOXICATION ON THE MENTAL STATE NECESSARY TO CONVICT UNDER A THEORY OF AIDING AND ABETTING.

Summary of Appellant's Argument

The jury instructions were particularly confusing in this case because they did not carefully differentiate between the different defendants and the different theories of guilt. Exacerbating this overall problem was the failure of the voluntary intoxication instruction to convey that an alleged aider and abettor could have a lesser degree of culpability than the perpetrator or no culpability at all if intoxication prevented him from realizing what the perpetrator intended to do or otherwise kept him from forming the specific intent to aid the commission of the perpetrator's intended crime. (Appellant's opening brief at pp. 326-324.)

Summary of Respondent's Argument

Respondent urges that at the very worst, the voluntary intoxication instructions were harmless. Although the intoxication instruction refers to defendant rather than defendants, the jury could not be misled. The jury would not have regarded the defendants as "fungible entities."

Additionally, the claim made here was waived since neither defendant specifically requested a voluntary intoxication instruction.

Finally, because the jury found all the special circumstances to be true, it necessarily found that voluntary intoxication did not preclude each defendant from specifically forming the intent to kill. (Respondent's brief at pp. 130-132.)

Errors in Respondent's Argument

As appellant has repeatedly explained, the whole thrust of respondent's argument to the jury was to treat the defendants as fungible entities. The prosecutor specifically argued that although she could not tell from the evidence which person did which act, that problem was immaterial. The jury could find them equally guilty. (53 R.T. 7582.) Further, the prosecutor argued that the jury could find either defendant guilty of first degree murder as an aider and abettor, or as the actual killer. (53 R.T. 7582.) The prosecutor also argued, and the jurors were instructed, that the jury could find either or both defendants guilty of first degree murder, either on a theory that the murder had been committed in the course of the commission of one or more felonies, or that the murder was a premeditated murder. (53 R.T. 7607-7611; 3 C.T. 848-853.)

Nevertheless, as respondent ultimately concedes, intoxication bears on the mental state of an aider and better. (Respondent's brief at p. 131.) That is, because of intoxication, an aider and abetter may not share the requisite intent of the actual perpetrator. *(People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.) The failure of the trial court to distinguish between the defendants in the intoxication instruction simply exacerbated the overall problem of treating the defendants as fungible entities sharing precisely the same intent.

As to respondent's waiver argument, as appellant explained in his opening brief, Penal Code section 1259 provides that if the defendant's substantial rights are affected, an appellate court may review any instruction even though no objection was made in the trial court. In *People v. Saille* (1991) 54 Cal.3d 1103, 1120, this court found that defense counsel have an obligation to request a "pinpoint instruction" to relate "the evidence of [the accused's] intoxication to an

element of a crime, such as premeditation and deliberation." Nonetheless, because the judge recognized that intoxication was an issue in the case, the question should have been put to the jury. (See *People v. Baker* (1954) 42 Cal.2d 550, 573. Further, since the judge recognized that there was at least some duty to instruct on intoxication, he had the concomitant responsibility to fully instruct on the matter and to do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [analyzing whether the pinpoint instruction on voluntary intoxication had to specify both the specific intent necessary for a murder conviction as well as the additional mental states of premeditation and deliberation].

Further, the trial court's instruction, with its long listing of ways in which intoxication might be relevant with no mention of its bearing on the mens rea required for accomplice liability, was likely to have led the jury into thinking that intoxication had no bearing in this context. When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency can prejudicially mislead the jurors. (*People v. Salas* (1976) 58 Cal.App.3d 460, 474; see also *United States v. Echeverri* (3rd Cir. 1988) 854 F.2d 638, 643 [giving a special unanimity instruction as to predicate acts under a RICO charge, but not as to predicate acts under a concurrent CCE (Continuing Criminal Enterprise) statute charge, violated due process, since jurors may have inferred from this discrepancy that unanimity was not required as to the CCE related predicate acts].)

"Although the average layperson may not be familiar with the Latin phrase inclusio unius est exclusio alterius, the deductive concept is commonly understood . . . ." (*People v. Castillo, supra,* 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *United States v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim

expressio unius est exclusio alterius "is a product of logic and common sense"].)
That is how this Court reasoned in *People v. Dewberry* (1959) 51 Cal.2d 548, 557:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

Thus, the trial court's intoxication instruction was not only incomplete, it was misleading.

As to respondent's argument that the true findings on the special circumstances mean that the jury rejected any notion that intoxication affected either defendant's specific intent, the argument is without merit. Respondent's argument ***presumes*** that the jury was correctly instructed on the effect of voluntary intoxication on aider and abetter liability and that having been correctly instructed, the jury then specifically rejected any notion that intoxication affected defendant's mental state. As appellant explained above and in his opening brief, however, the voluntary intoxication instruction given in this case ***does not even mention*** aider and abetter liability, let alone explain how intoxication might affect it.

This error affected appellant particularly because the evidence pointed to codefendant Tobin as Ms. Pontbriant's killer, and suggested that if appellant participated in any crimes at all, it was only as an aider and abettor. There was no evidence upon which to base a finding that it was appellant rather than Mr. Tobin who committed any of the crimes.

Finally, because the basis for the murder conviction in this case cannot be

determined and the jury may have relied on an incomplete and inadequate definition of aiding and abetting without properly considering the effect of intoxication, the error was not harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

For these reasons and those set forth in appellant's opening brief, appellant's convictions and death sentence must be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XIV.

THE TRIAL JUDGE VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS BY INSTRUCTING ON FELONY MURDER WHEN THE INFORMATION CHARGED ONLY PREMEDITATED MALICE MURDER, AND, HAVING DONE SO, BY FAILING TO REQUIRE JURY UNANIMITY AS TO THE BASIS FOR ANY FIRST DEGREE MURDER VERDICT.

Summary of Appellant's Argument

Premeditated malice murder and felony murder have different elements. Yet jurors were not instructed that they had to be unanimous with respect to the elements proven. Further, only malice murder was charged, thus violating the defendant's right to proper notice of the felony murder offense as well as subjecting him to conviction for felony murder, an offense that was not charged. Acknowledging this court's decision in *People v. Hughes* (2002) 27 Cal. 4th 287, 369-370 which addressed many of the claims raised in this issue, appellant explained why the *Hughes* decision should be revisited.

Further, because of the problems with the differing elements of felony murder and premeditated malice murder and the failure to ensure juror unanimity on the elements proven, appellant was denied his rights to due process, to be informed of the nature and cause of the accusation against him, to a unanimous jury verdict on his guilt or innocence, and to reliable capital guilt and sentencing determinations, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article 1, sections 1, 7, 14, 15, 16, and 17 of the California constitution. (Appellant's opening brief at pp. 326-334)

Summary of Respondent's Argument

Respondent urges that all the claims raised in this issue were resolved against appellant in *People v. Hughes, supra* 27 Cal. 4th at pp. 369-370 and *People v. Nakahara* (2003) 30 Cal.4th 705, 712.) Although respondent quotes extensively from *Hughes*, it makes no further argument on the matter. (Respondent's brief at pp. 133-135.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged the *Hughes* opinion and explained his reasons for requesting that this court revisit that decision. Since respondent has chosen not to address the merits of appellant's request that the decision be revisited, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XVI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XV.

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT

Summary of Appellant's Argument

The consciousness of guilt instructions given at appellant's trial (CALJICs 2.03 and 2.06) were constitutionally infirm for two reasons. First, they created permissive inferences that were overbroad. They allowed the inference of guilty mental state from conduct unrelated to the mental state; they permitted an inference of guilt of many offenses from a single untoward act or statement, and the jury could draw adverse inferences about a defendant's guilt based solely on untoward conduct or statements by the codefendant.

Second the instructions are impermissibly argumentative. They highlight particular evidence for the specific purpose of inferring consciousness of guilt. Effectively, they focused the attention of the jury on evidence favorable to the prosecution, thus lightening the prosecution's burden of proof. Compounding the problem, they placed the trial judge's imprimatur on the prosecution's evidence.

Summary of Respondent's Argument

Respondent urges that all the claims raised in this issue were resolved against appellant in numerous cases. (See, e.g., *People v. Hughes, supra,* 27 Cal. 4th at p. 348.) Respondent makes no further argument on the matter, but asserts that it stands ready to make a supplemental response if this court requests one. (Respondent's brief at pp. 136-137.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged that this court has approved

these instructions generally but explained in detail why the instructions were not appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

Additionally, however, appellant opposes respondent's request for supplemental briefing should this court conclude that respondent's answer is not complete. The whole point of the briefing process is to resolve issues on the merits in one set of briefs. (See California Rules of Court, rule 13(a)(4)and rule 14(a)(B).) Respondent has been given the opportunity to address the merits of appellant's arguments in its briefing and simply chose to pass on the opportunity. That being so, it has waived the opportunity to address the issue further in some sort of piecemeal appellate briefing process. (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [reviewing court may disregard claims perfunctorily asserted without development]; see also *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 649) [It is the general appellate policy to avoid piecemeal review of litigation]

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XVII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XVI.

THE USE OF CALJIC NO. 2.15 VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BECAUSE IT CREATED AN IRRATIONAL INFERENCE AND REMOVED AN ELEMENT OF THE CRIME FROM THE JURY'S CONSIDERATION

Summary of Appellant's Argument

If a defendant is found in possession of recently stolen property, CALJIC No. 2.15 permits an inference that the defendant committed a robbery. In a case like the present one, however, in which the evidence is unclear as to whether the larcenous offense was a robbery or a post-homicidal theft, the defendant's subsequent possession of the stolen property sheds no light at all on how the property was acquired and hence provides no logical basis for inferring that the defendant committed a robbery. Further, because the instruction not only authorizes an unwarranted inference, but goes on to advise the jury that only "slight corroboration" is required to turn this unwarranted inference into a sufficient basis for a robbery conviction, the instruction undermines the constitutionally mandated burden of proof applicable in a criminal proceeding.

Additionally, the instruction functions as an improper pinpoint instruction prejudicially highlighting prosecution evidence and suggesting how the jury should interpret it. (Appellant's opening brief at pp. 357-367.)

Summary of Respondent's Argument

Respondent first suggests that the instruction is appropriate since it creates a permissive inference rather than a mandatory one. Additionally, although CALJIC 2.15 should not be given where the evidence is conflicting or unclear, here the evidence supported the instruction. The evidence showed that both defendants

needed a car to get to Iowa, they were both at Ms. Pontbriant's home on the night of the murder, they were both in her car after the homicide, and the defendants had some of their personal belongings in the car. Finally, given what respondent characterizes as the overwhelming evidence supporting the robbery offense and the panoply of other instructions guiding the jury's consideration of the evidence, any error in giving CALJIC 2.15 was harmless beyond a reasonable doubt. (Respondent's brief at pp. 140-144.)

Errors in Respondent's Argument

Respondent acknowledges as it must that CALJIC 2.15 should **not** be given in situations where the robbery evidence is conflicting or unclear. *(People v. Morris, supra,* 46 Cal. 1, 40.) The seminal flaw in the respondent's argument is its claim that the robbery evidence was overwhelming. It was not.

As appellant explained at length in issue V, the evidence was insufficient to convict either defendant of robbery. Respondent's arguments about how a rational jury could view the evidence are simply *post hoc* rationales that attempt to pull together disparate evidence into a coherent pattern based on a preconceived plan. That is, all of its discussion about the defendants' knowledge of the impending trip to Iowa and the borrowing of the vehicle are predicated on a preconceived plan of action. There is no evidence anywhere in the record of any such preconceived agreement. More importantly, if there was such an agreement the most basic ingredient would be the designation of time and place of the assault on Ms. Pontbriant. What the evidence shows, however, is that there was no designated time and place of the assault. With no prior warning, Ms. Pontbriant telephoned the defendants as they were passing time drinking and socializing in the Break Room bar. (48 R.T. 7162-7164.) Prior to that invitation, the defendants had no idea that

they would even be in contact with Ms. Pontbriant, let alone be invited to her home.

Moreover, if the defendants entered the house with the intent to take her car or steal her money, they could have simply waited for her to pass out and helped themselves. After all, Ms. Pontbriant had a blood alcohol level of .29 (34 R.T. 4938), more than three times the legal limit for driving in California. It made no sense whatever to kill her to obtain these things. This is particularly true as to appellant, since his obscenity laced telephone calls during the evening to Mr. Bourdette and Ms. Coronado, both of whom knew him, certainly broadcast where he was.

Additionally, an inference that appellant and Mr. Tobin planned to steal Ms. Pontbriant's car so they could drive it to Iowa was implausible in light of the fact that the defendants subsequently stopped at the Murray Street apartment or at Jeannette Mayberry's apartment, or at both apartments while in possession of the car. Mr. Tobin put his shotgun and ornamental sword into the car trunk, and appellant put a bag containing hair products, plus a laundry basket of clothes, a tool box and a few other miscellaneous possessions into the car trunk (40 R.T. 5714-5718 [Rains]; 46 R.T. 6862-6864 [Tobin]; 38 R.T. 5438-5439 [Mayberry]), but neither defendant packed up any other belongings, like warm clothing for Iowa weather, and put those possessions into the car. The items they placed in the car were clearly items meant for sale, such as at a flea market, rather than items necessary for a trip to Iowa.

Further, Officer Wightman ordered the defendants to lock the car and leave it on the side of Highway 198. Even though they had the opportunity to do so after waiting for Officer Wightman to leave, the defendants did not thereafter return to

the car, unlock it and drive it away. Instead, they abandoned the car. This evidence directly contradicted any inference that taking the car was important enough to murder Ms. Pontbriant to get it. Certainly there was no basis for finding beyond a reasonable doubt that either defendant had planned to take the car prior to the homicide, rather than just taking the car as an afterthought, perhaps to flee the scene, after an angry, drunken, lethal assault triggered by something unrelated to Ms. Pontbriant's car.

Thus, the only rational inference from the evidence, particularly the evidence of Ms. Pontbriant's brutal and violent death is that the homicide resulted from a sudden, random explosion of violence rather than any preconceived plan to rob her.

Therefore, possession of the automobile, under the circumstances of this case, does not afford a rational basis from which the jury could infer the manner in which the property was taken. The only rational inference of prior criminal activity that may be drawn from the conscious possession of recently stolen property by the accused is simply that the accused stole that property.

The inference that the defendant was a thief because he was in a possibly recently stolen automobile is based solely upon the temporal proximity of his possession to the property's theft. The temporal proximity of the possession to the theft, however, does not prove the manner in which the property was taken. (See, e.g., *Cosby* v. *Jones* (11th Cir. 1982) 682 F.2d 1373, 1381, fn.16.) Temporal proximity provides a convenient *post hoc* rationale, but in and of itself, says nothing about whether the larcenous offense was theft or robbery.

As to respondent's argument that given the state of the evidence and the entire panoply of instructions guiding the jury's consideration the error must have been harmless, the argument is without merit. As appellant explained in his

opening brief, the jury instructions must be considered as a whole and in the context of companion instructions. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 74-75.) Although the trial judge delivered the standard robbery instructions, because the jury heard the CALJIC No. 2.15 instruction as well, there is a "reasonable likelihood" that the jurors understood CALJIC No. 2.15 to mean that the only issue for them to decide was whether or not appellant and/or his codefendant were the persons who committed a robbery in the case, **not** whether or not a robbery ever actually occurred.

Taken together, these instructions told the jury that even though generally the prosecution must prove a taking from a person with force or fear in order to prove robbery, under the facts of this case, possession of recently stolen property plus "slight corroboration," sufficed to prove a robbery had occurred. It does not. As the Supreme Court observed in *Francis* v. *Franklin* (1986) 471 U.S. 307, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Id.* at p. 332.) The instructional error here therefore effectively eliminated from the jurors' consideration an essential element of both the robbery charge and the robbery felony murder special circumstance allegation, thus impermissibly lightening the prosecution's burden of proof and undermining appellant's rights to trial by jury, to not be convicted of an offense except upon proof beyond a reasonable doubt and reliable capital guilt and sentencing determinations in violation of the Sixth, Eighth, and Fourteenth Amendments.

Under the appropriate harmless error analysis, reversal is required. As appellant explained above, the circumstantial evidence presented by the prosecutor to prove robbery was weak. CALJIC 2.15 was therefore critical to the prosecution

meeting its burden of proof because it allowed the jury to find appellant committed robbery by merely finding him in possession of stolen property, without focusing on the critical element of a robbery -- a taking by force or fear. It is likely that the improper instruction was misapplied so as to lessen the prosecution's burden on this charge. Such an error cannot be considered harmless, and hence requires the setting aside of the robbery conviction and robbery special circumstance finding. Further, because there is no basis for concluding that appellant's first degree murder conviction is not based upon a robbery-felony-murder theory and because, as demonstrated above (see Arguments V,VI,VII and XI), none of the other available theories of first degree murder was supported by sufficient evidence, the instructional error also requires reversal of appellant's first degree murder conviction. Finally, even if that conviction and a special circumstance finding other than the robbery special could be upheld, this error tainted the penalty phase verdict because the robbery special circumstance finding was reached improperly because of the faulty instruction and the invalid findings skewed the death penalty determination.

For all of the foregoing reasons and the reasons set forth in appellant's opening brief, the court should reverse appellant's convictions for robbery and first degree murder, the robbery special circumstance finding, and appellant's sentence of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XVIII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XVII.

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE TRIAL JUDGE INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.50

Summary of Appellant's Argument

CALJIC 2.50 is constitutionally overbroad because it allows a jury to draw a permissive inference of guilt from evidence of other uncharged offenses that are completely unrelated to the charged offenses. In this case, the instruction allowed the jurors to convict appellant because of Mr. Tobin's prior assaultive behavior on his girlfriend or because appellant might have been involved in unrelated criminal activity. Despite some minor cautionary language, the practical effect was the instruction allowed jurors to convict on the basis of evidence that amounts to nothing more than criminal disposition. (Appellant's Opening brief at pp. 368-372.)

Summary of Respondent's Argument

Respondent urges that the instruction is carefully tailored to deal with uncharged offenses that related solely to the motive for flight or to facilitate flight from the crime. That is, the jury would have focused on flight related misconduct such as the presence of stolen merchandise in Ms. Pontbriant's vehicle, the breaking and entering into the vacant house after the homicide, and appellant Letner's citation for driving a vehicle without a license. The jury would have understood that instances of misconduct unrelated to flight were not encompassed within the meaning of the instruction.

Even if that was not so, any error in giving the instruction was harmless. On

the evidence in this case, any reasonable juror would have found that the defendants fled the state to avoid capture for murder. That is, the jurors would have understood that the defendants fled the state and that their flight overwhelmingly established consciousness of guilt. There is no possibility that any other uncharged misconduct would have influenced jury deliberations on those points. (Respondent's brief at pp. 145-147.)

Errors in Respondent's Argument

While respondent focuses on the uncharged misconduct that occurred **after** the homicide urging that it was flight related, it makes no mention of the evidence of misconduct occurring **before** the homicide that might be flight related. As appellant explained in his opening brief, there was evidence presented regarding some commercial burglaries that appellant was involved in **before** the murder of Ivon Pontbriant. (38 R.T. 5435-5438.) The prosecution also presented the testimony of Jeannette Mayberry about a physical confrontation between her and Mr. Tobin a couple of days before Ms. Pontbriant's killing. (38 R.T.5415-5416.) Since Ms. Mayberry described an assault on her and the destruction of some of her property, the jury could have treated this testimony as evidence of "other crimes", as referred to in CALJIC 2.50, and thus the necessity for flight.

Underscoring that very point, the prosecutor's closing argument to the jury at the guilt phase mentioned the burglaries as a motivation for appellant Letner to want to leave town. (53 R.T. 7570.) The prosecutor also argued that Mr. Tobin had reason to want to leave Visalia because of his argument with Ms. Mayberry. (53 R.T. 7544-7546, 7570.) By failing to direct the jury to consider this instruction individually as to each defendant, there is a reasonable likelihood that the jury improperly used conduct by Mr. Tobin as a basis for finding motive on the part of

appellant as well. This is especially likely here because of the prosecution's repeated theme that the defendants were operating in tandem (53 R.T. 7540) and the prosecutor's tendency not to distinguish between the conduct of the two defendants. (53 R.T. 7582.)

Further, to the extent that CALJIC No. 2.50 referred to appellant's conduct involving possession of property stolen from commercial establishments, such "other crimes" evidence could not lawfully provide the basis for an inference of motive with respect to any of the crimes of which appellant was charged in the instant case. Thus, the inference which the instruction permitted the jury to make was not logical, nor was it permissible under California law. As such, the instruction violated appellant's Fourteenth Amendment rights to due process.

As to respondent's claim that the error was harmless, the claim will not withstand scrutiny. As appellant explained in his opening brief, a constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt. (*United States* v. *Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 296, fn.3.) Moreover, an error is harmless beyond a reasonable doubt only when "there is no reasonable possibility that the error materially affected the verdict." (*Ibid.*) Here, there is more than a reasonable possibility that the jury misapplied the instruction. The jury failed to receive adequate guidance to consider this instruction individually as to each defendant. Based on this instruction and the prosecutor's argument treating both defendants as working in tandem, it is likely that the jury attributed to appellant (to find motive) Mr. Tobin's assaultive conduct with Ms. Mayberry. Given the otherwise equivocal nature of the evidence against appellant, it cannot be said that this error was harmless.

For these reasons and those set forth in appellant's opening brief, his

convictions and death sentence must be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XIX on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XVIII.

THE TRIAL COURT INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

Summary of Appellant's Argument

CALJIC 2.51, as given in appellant's case, was constitutionally infirm because it placed a burden on the defense to show absence of motive in order to demonstrate innocence. Further, it was defective because it did not clearly tell the jury that motive alone is insufficient to prove guilt. (Appellant's opening brief at pp. 374-378.)

Summary of Respondent's Argument

Respondent urges that all the claims raised in this issue were resolved against appellant in numerous cases. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Respondent makes no further argument on the matter, but asserts that it stands ready to make a supplemental response if this court requests one. (Respondent's brief at pp. 137-138.)

Errors in Respondent's Argument

Since respondent has chosen not to address the merits of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

Additionally, however, appellant opposes respondent's request for supplemental briefing should this court conclude that respondent's answer is not complete. The whole point of the briefing process is to resolve issues on the merits in one set of briefs. (See California Rules of Court, rule 13(a)(4)and rule 14(a)(B).

Respondent has been given the opportunity to address the merits of appellant's arguments in its briefing and simply chose to pass on the opportunity. That being so, it has waived the opportunity to address the issue further in some sort of piecemeal appellate briefing process. (See *People v. Turner, supra,* 8 Cal.4th at p. 214, fn. 19 [reviewing court may disregard claims perfunctorily asserted without development]; see also *Art Movers, Inc. v. Ni West, Inc.* , *supra,* 3 Cal.App.4th at p. 649) [It is the general appellate policy to avoid piecemeal review of litigation]

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XIX.

THE TRIAL JUDGE ERRED AT THE GUILT PHASE BY FAILING TO GIVE ACCOMPLICE INSTRUCTIONS SUA SPONTE.

Summary of Appellant's Argument

An accomplice is one who is equally liable for prosecution for the same offense as the defendant. Here, Mr. Tobin was not only liable, but actually prosecuted and convicted for the same offenses as appellant. Indeed, it is the defense position that Mr. Tobin was the actual perpetrator of the homicide. The trial court erred in failing to give *sua sponte* accomplice instructions, particularly instructions that required the jury to view his testimony with caution, and not to convict on the basis of his testimony without corroboration.

Summary of Respondent's Argument

Respondent concedes, as it must, that the trial court erred in failing to give accomplice instructions *sua sponte*. Codefendant Tobin was unquestionably an accomplice under the prosecution's theory of the case. (Respondent's brief at p. 152.) Nevertheless, respondent urges that any error was harmless. In respondent's view, it is not reasonably probable that the jury would have reached a different conclusion. The evidence of appellant's guilt was overwhelming and the jury surely knew enough to distrust codefendant Tobin's testimony. (Respondent's brief at pp. 152-153.)

Errors in Respondent's Argument

The primary flaw in respondent's argument is similar to that made in many of its previous arguments, the paucity of the evidence against appellant Letner. While

there is certainly evidence that appellant Letner was at Ms. Pontbriant's house on the night she died, and there is certainly evidence that she died a violent and brutal death, the evidence showing that appellant was the killer rather than a bystander is virtually nonexistent. There were only a few hairs consistent with appellant Letner that were found on the decedent, and they were found in the proximity of several animal hairs that were also found on the body. (See 41 R.T. 5963-5970.) Clearly both sets of hairs were already on the floor and simply adhered to Ms. Pontbriant when she fell or was forced to the floor. No other evidence marks appellant as the killer.

By contrast, the evidence against Mr. Tobin is much stronger. While the blood on the pillow, the doily and the cleanup towel found in the car is as consistent with Mr. Gilliland as with Mr. Tobin (40 R.T. 5825-5841), there is no evidence that Mr. Gilliland was ever in the car with the cleanup towel. Thus, the blood on the towel from the car likely came from Mr. Tobin.[11] Further, the blood on the pillow and the doily was relatively fresh (40 R.T. 5685-5686) and there was no evidence that Mr. Gilliland had been bleeding recently. Since there is no evidence that Mr. Tobin received any wounds prior to entering Ms. Pontbriant's residence, the only logical explanation is that he received them in his struggle to kill Ms. Pontbriant. Additionally, to the extent that they implicate anyone, the semen stains found in Ms. Pontbriant's bedroom carpet implicate Mr. Tobin. These stains are indicative of secretor status (41 R.T. 5879), thus eliminating both appellant and Mr. Gilliland.

The more difficult problem, however, is the issue of appellate fact finding under the mandate of harmless error assessment. The omitted instruction requires

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[11] Appellant Letner testified in the penalty phase that Tobin used the towel to wipe his bloody nose. (61 R.T. 8679.)

the jury to find corroborating evidence. The mere presence of corroborating evidence in the record does not necessarily render the instructional error harmless. Respondent fails to address the underlying problem of exactly what elements of the offenses were corroborated. While it is certainly true that the evidence need not corroborate every aspect of every element of the offenses (*People v. Tewksbury* (1976) 15 Cal.3d 953, 969), nonetheless, there must be some evidence which actually connects appellant with the elements of the crimes, not just the location or the other persons involved. (*People v. Szeto* (1981) 29 Cal.3d 20, 43.)

Nothing in the evidence in this case provides the requisite connection of appellant to the elements of the offenses. Not only did the defense vigorously contest every element of every offense, the facts are entirely consistent with appellant's status as a bystander during the homicide. As appellant explained previously, the only rational inference from the evidence, particularly the evidence of Ms. Pontbriant's brutal and violent death is that the homicide resulted from a sudden, random explosion of violence; an explosion of Mr. Tobin's emotion.

Even the taking of the vehicle is consistent with theft after the homicide was complete. Certainly there was no basis for finding beyond a reasonable doubt that either defendant had planned to take the car prior to the homicide, rather than just taking the car as an afterthought, perhaps to flee the scene, after an angry, drunken, lethal assault triggered by something unrelated to Ms. Pontbriant's car.

Moreover, the case of *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct 1827, 144 L.ED.2d 35] does not compel a different result. In *Neder*, the Supreme court observed that the failure to instruct on an element of an offense is not subject to harmless error analysis where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding. (*Id.* at 19.)

Thus it is **the jury**, **not the reviewing court**, which must make the factual determination as to corroboration in this case. Even if the appellate court considers the evidence to be overwhelming, unless the record demonstrates that "the jury actually rested its verdict on [the] evidence ...", the appellate court may not supply the missing determination by its own evaluation of the evidence. (See *Yates v. Evatt* (1991) 500 US 391 [114 L.Ed.2d 432, 449; 111 S.Ct 1884]; see also *People v. Sims* (1993) 5 Cal.4th 405, 476, dis. op. of Mosk, J.[By its very terms, *Chapman* precludes a court from finding harmlessness based simply "upon [its own] view of 'overwhelming evidence.'"].)) Otherwise the "wrong entity" would be judging guilt. (*Sullivan v. Louisiana* (1993) 508 US 275 [124 L.Ed.2d 182, 190; 113 S.Ct 2078].) ""The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt ... That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action ...." (*Sullivan v. Louisiana, supra*, 124 LEd2d at 190; see also *Carella v. California* (1989) 491 US 263, 270 [105 LEd2d 218; 109 S.CT 2419] [Scalia, J. concurring] [citing *United Broth'd of Carpenters v. U.S.* (1947) 330 US 395, 408-09 [91 LEd2d 973; 67 S.CT 775]; see also *United States v. Dunkel* (7th Cir. 1991) 927 F.2d 955, 956 [where a jury instruction removes an element of the offense from the purview of the jury, "the error cannot be harmless" even if no rational jury could have believed a defense predicated on the proper instruction].)

Under these circumstances, instructional error which authorizes the jury to convict without specifically requiring it to find the necessary corroboration violates the defendant's rights to trial by jury and due process under the Sixth and Fourteenth Amendments, and should be reversible per se.

XX.

THE TRIAL JUDGE ERRED IN GIVING INSTRUCTIONS WHICH DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Summary of Appellant's Argument

In addition to CALJIC 2.90 which defines reasonable doubt, the trial court gave numerous other instructions that defined the way jurors were to view various types of evidence. Individually and cumulatively, these other instructions lessened the prosecution's burden to prove the offenses beyond a reasonable doubt.

Summary of Respondent's Argument

Respondent urges that all the claims raised in this issue were resolved against appellant in numerous cases. (See, e.g., *People v. Stewart* (2004) 33 Cal.4th 425, 521.) Respondent makes no further argument on the matter, but asserts that it stands ready to make a supplemental response if this court requests one. (Respondent's brief at pp. 138-139.)

Errors in Respondent's Argument

Since respondent has chosen not to address the merits of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

Additionally, however, appellant opposes respondent's request for supplemental briefing should this court conclude that respondent's answer is not complete. The whole point of the briefing process is to resolve issues on the merits in one set of briefs. (See California Rules of Court, rule 13(a)(4)and rule 14(a)(B). Respondent has been given the opportunity to address the merits of appellant's

arguments in its briefing and simply chose to pass on the opportunity. That being so, it has waived the opportunity to address the issue further in some sort of piecemeal appellate briefing process. (See *People v. Turner, supra,* 8 Cal.4th at p. 214, fn. 19 [reviewing court may disregard claims perfunctorily asserted without development]; see also *Art Movers, Inc. v. Ni West, Inc. supra*, 3 Cal.App.4th at p. 649) [It is the general appellate policy to avoid piecemeal review of litigation].)

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXII on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXI.

TISON V. *ARIZONA* SETS A MINIMUM LEVEL OF CULPABILITY FOR ALL DEFENDANTS CHARGED WITH THE FELONY-MURDER SPECIAL CIRCUMSTANCE, INCLUDING "ACTUAL KILLERS"; MR. LETNER DOES NOT MEET THAT STANDARD, SO THE SPECIAL CIRCUMSTANCE FINDING MUST BE STRICKEN

Summary of Appellant's Argument

Tison v. Arizona, supra, 481 U.S. 137 applies to every defendant charged with the felony-murder special circumstance under Penal Code section 190.2 This Court has never squarely confronted the question, but Mr. Letner's position, that the *Tison* standard applies to "actual killers," has been adopted by other courts and is the only one which will withstand analysis. Moreover, to the extent that the jury concluded that appellant was the actual killer, the failure to instruct that it must also find that he was a major participant and that he acted with reckless indifference to human life constituted clear error. (Appellant's opening brief at pp. 394-412.)

Summary of Respondent's Argument

Respondent urges that the requisite level of criminal culpability for capital punishment is either an intent to kill or reckless disregard for life while engaged in a felony. The requirement for reckless indifference is an alternative element, not an additional one. Additionally, even if that was not so, as a matter of law, reckless indifference is demonstrated when a defendant personally kills during an inherently dangerous felony. Finally, any error in failing to instruct on the *Tison* requirements was harmless. Because the jury found that this was not an accidental killing, the

jury also must have found that the defendants acted with reckless indifference. (Respondent's brief at pp. 150-151.)

Errors in Respondent's Arguments

Respondent argues that a finding of an intentional killing during the commission of an inherently dangerous felony is sufficient to support the felony murder special circumstance, but that argument falls short.

As appellant explained in his opening brief, the felony murder special circumstance, Penal Code section 190.2 (b) merely codifies this court's holding in *People* v. *Anderson* (1987) 43 Cal.3d 1104 that an actual killer need not be shown to have a specific intent to kill. It does not state what culpable mental state *is* required for an actual killer. The answer to that question is found in *Tison* and *People* v. *Estrada* (1995) 11 Cal.4th 568, 575-576.). Those cases require a finding of reckless indifference to human life, subjective appreciation of the grave risk to life, and major participation in the underlying felony.

More importantly, however, the prosecutor told the jurors that they did NOT have to find a specific intent to kill in order to find the felony murder special circumstances to be true. She told the jurors that merely finding that the defendants were the actual killers was sufficient. As she explained it::

> "Under the felony murder rule we have both the robber who's got the gun that's killed the customer accidentally on the other side of the room, and the person in the get-away car guilty of first degree murder. Because they are both principals. And the killing has occurred during the certain dangerous felonies. Now, do the special circumstances, however, apply to both the robber in the bank and the person in the car? That's when you come down here and you have to look at the different mental states of the two. The law says because the person who dropped the gun, the bank robber dropped the gun, caused the killing, he's the actual killer. *It doesn't matter whether he still did not intend that person die. He's the actual killer. He dropped that gun in*

the commission of the bank robbery. And the gun went off and killed the customer. The special circumstances apply to him because he's the actual killer."

(53 R.T. 7613-7614; emphasis added.)

Given this argument, there is certainly no assurance that simply because the jurors found the felony murder special circumstances to be true, they also necessarily found that each defendant had the specific intent to kill. Moreover, the prosecutor's argument at trial was not only wrong, it is completely inconsistent with respondent's position on appeal.

Additionally, the lack of clarity in the jury instructions on these crucial issues was prejudicial because the evidence regarding the respective roles of the two defendants in the crimes was far from clear or persuasive. Indeed, the prosecutor conceded in her closing argument to the jury that she could not say which of the defendants actually killed Ms. Pontbriant. Thus, the closing argument to the jury given by the deputy district attorney shows that she was trying to finesse the problems with the state's evidence on the crucial question of which of the defendants actually killed Ms. Pontbriant and also on the issue of whether the non-killer had the necessary mens rea. Her claim that it really didn't matter which of the defendants was the actual killer or that perhaps they were both involved in the killing was an attempt to evade this issue.

Moreover, the confusing nature of the jury instructions concerning the homicide made it more likely that any instructional error on the special circumstances was not harmless. That is, because the prosecution insisted on having the jury instructed not only on felony murder but on premeditated murder (as well as its lesser included offenses), it is impossible to know what the jury's verdicts

as to each defendant meant for purposes of determining whom they believed was the actual killer. Therefore, the failure to properly instruct on the *Tison* principles made it reasonably likely that the jurors misunderstood and misapplied the applicable law.

For these reasons and those set forth in appellant's opening brief, reversal of appellant's sentence of death is required.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXIV on this issue.

XXII.

APPELLANT'S TRIAL WAS MARRED BY PERVASIVE PROSECUTORIAL MISCONDUCT AT ALL STAGES OF THE PROCEEDINGS

Summary of Appellant's Argument

During both the guilt and penalty phases of the trial, the prosecutor engaged in numerous instances of misconduct. This misconduct occurred during the presentation of evidence, the examination of witnesses, the failure to comply with discovery and *Brady* obligations, and during closing arguments to the jury. Specifically, after being firmly admonished by the trial court not to do so, the prosecutor repeatedly referred to "instant death" during the presentation of evidence and again during closing argument. The prosecution failed to properly advise the defense of witness Jeanette Mayberry's criminal record. The prosecution also made several improper comments during closing argument, including assertions that appellant was a criminal associating with other criminals, and urging improper inferences from the fact that no money was found in Ms. Pontbriant's checkbook, thus the defendants must have stolen it. Individually and cumulatively these instances of misconduct deprived appellant of a fair trial as well as a fair and reliable death penalty determination.

Summary of Respondent's Argument

The essence of respondent's argument is that there was no misconduct under any circumstance, so there was no prejudice, individually or collectively. Turning to the first allegation of misconduct, the forbidden subject of "instant death," the prosecutor's questions were, "at worst, a reasonable mistake." (Respondent's brief

at pp. 155-157.) The trial court's original ruling prohibited inquiry into this subject during the prosecution's case in chief. Accordingly, respondent argues the prosecutor could reasonably assume that it would be an appropriate subject for cross-examination on codefendant Tobin's case in chief, particularly since Tobin claimed no knowledge of the murder. (Respondent's brief at p. 157.)

Moreover, even if the prosecutor erred, the questions were harmless. The answers were in the negative and there is no indication that the jury failed to follow the trial court's admonition to disregard the questions.

Further, the prosecutor's closing argument on this same subject was a permissible inference from the evidence. Moreover, since the defense did not object to the prosecutor's remarks during closing argument the issue was waived. (Respondent's brief at pp. 158-159.)

As to the next allegation of misconduct, the embellishing of evidence and slandering of appellant during closing argument, since the defense did not object to any of these matters at trial, they are waived. In any event, respondent contends they were within the prosecution's right to vigorously argue its case. The fact that the empty checkbook was found near Ms. Pontbriant's rifled purse was corroborative of Gilliland's testimony about handing the rent money to Ms. Pontbriant in appellants' presence. (Respondent's brief at pp. 159-161.)

Additionally, given the defendant's attempts to discredit Mr. Bothwell because he was a convicted felon, it was fair to point out that appellants were likely to meet and associate with other criminals in the low rent Iowana Motel while they were trying to escape from a murder. (Respondent's brief at p. 161.)

In a separately numbered argument, respondent responds to appellant's claim that the prosecution failed to properly advise the defense of witness Jeanette

Mayberry's criminal record, a *Brady* violation.[12] Respondent urges that the impeachment evidence pertaining to Ms. Mayberry's outstanding criminal matters was not relevant under the *Brady* standard because the prosecution was unaware of them at the time of trial and she did not receive any consideration in those matters as a result of her testimony in appellant's case. (Respondent's brief at pp. 165-167.)

Errors in Respondent's Arguments

Waiver

Respondent argues that most of these matters were waived. As appellant pointed out in his opening brief, however, the waiver rule "applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.) If it is likely that the objection would have been overruled, the failure to object and request an admonition should be excused. (*People v. Green* (1980) 27 Cal.3d 1 at p. 35, fn.19.) Moreover, if an objection and admonition would not have cured the harm, the appellate court must determine ". . .whether on the whole record the harm resulted in a miscarriage of justice within the Constitution." (*Id.* at p. 34.)

Given the number and seriousness of the instances of prosecutorial misconduct in this case, it is unlikely that either objections or admonitions could have ameliorated the harm caused by the misconduct.

"Instant Death"

Respondent's argument that the questioning of Mr. Tobin concerning "instant death" was a "reasonable mistake" is not persuasive. In a fairly lengthy hearing out of the presence of the jury, the parties argued whether "instant death" was in any way relevant to the issues before the jury. (35 R.T. 4988-4989, 5049-5069.) The

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[12] *Brady v. Maryland* (1963) 373 U.S. 83.

trial judge specifically ruled that under Penal Code section 352, any evidence concerning "instant death" would be inadmissible because the probative value would be outweighed by the prejudice. (35 R.T. 5069.) Despite this very clear ruling by the trial judge, the prosecutor **twice** attempted to cross-examine Mr. Tobin about this subject when he testified at the guilt phase of the trial. (46 R.T. 6936.) After vigorous defense objection, the court again recessed and the trial judge again told the prosecutor that there was not to be any evidence concerning "instant death." (46 R.T. 6940.) Undeterred, the prosecutor then argued to the jury that the manner in which Ms. Pontbriant was stabbed created a condition called "instant death." (53 R.T. 7553.)[13]

Arguing that the prosecutor's actions here were somehow a "reasonable mistake" simply defies credulity. The improper cross-examination of Mr. Tobin was both deliberate and a blatant attempt to circumvent the trial judge's ruling. Certainly the prosecutor never apologized or claimed ignorance that she was violating the court's order. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 504-505 [deliberate and deceptive circumventing of the trial court's previous order constituted prosecutorial misconduct].)

While intentional conduct is not necessary in order to constitute prosecutorial

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[13] The prosecutor's exact words were:

> "We have purposeful, deliberate acts being done. The location of these stab wounds, as testified to through Dr. Walter, were placed very strategically, almost over vital blood vessels and arteries that supply blood and take blood from the head. That is something known to cause what's called "instant death", if the arteries are actually stricken.

(53 R.T. 7553.)

misconduct (*Smith v. Phillips* (1989) 455 U.S. 209, 219 ; *People* v. *Bolton* (1979) 23 Cal.3d 208, 214) , there is no question that deliberate, deceptive and reprehensible activities do so. *(People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215, see also *Gore v. State* (Fla.1998) 719 So.2d 1197 [death penalty reversed because prosecutor deliberately questioned witness about a matter the trial court previously ruled inadmissible]

Respondent urges that even if the prosecutor committed misconduct, the responses were negative and there is no evidence that the jury disregarded the trial court's admonition to disregard the prosecutor's questions. Thus, there was no harm. (Respondent's brief at p. 158.)

As appellant pointed out in his opening brief, however, the questions about "instant death" were highly prejudicial because - as the trial judge noted in his rulings- they tended to portray both Mr. Tobin and appellant as cold-blooded killers whose interest in the martial arts was related to a purported interest in murder. (35 R.T. 5069.) Given the prosecution's repeated insistence that the jury could find both defendants were the actual killers and that both defendants were involved in the martial arts, the error necessarily affected appellant.

Moreover, the impropriety of such cross-examination is not cured because the questions elicited negative answers. "By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. . . It is reasonable to assume that, in spite of [the] negative responses in the instant case, the jurors were led to believe that, in fact," the insinuations of the questions were true. *(People v. Wagner* (1975) 13 Cal.3d. 612, 619-620.)

Additionally, this misconduct likely misled the jury into believing that the

killing was pre-planned and deliberate and that appellant was guilty of deliberate, premeditated murder, whether as the actual killer or an aider and abettor. Further, by providing an improper and inflammatory basis for finding that the murder was planned, the misconduct necessarily also provided an improper and inflammatory basis for finding that the other charged offenses (robbery, burglary, attempted rape, and vehicle taking) were planned and committed. Given the weakness of the legitimate evidence that any of the charged offenses were committed, or if any were committed, that appellant was guilty of any of them (see Arguments V, VI , VII, and X, *infra*), the misconduct was prejudicial on all counts.

As to the improper argument, respondent contends that the prosecutor's comments were supported by the evidence. If the wounds were placed on the carotid arteries, death likely would ensue. (Respondent's brief at p. 159.)

Respondent's argument is disingenuous. The prosecutor's closing comments to the jury were not about the physical process of exsanguination. Instead, they were couched in the highly inflammatory and highly prejudicial rhetoric of "instant death." Because the trial court specifically prohibited the prosecution from eliciting any evidence supporting the notion of "instant death," it was obvious misconduct to argue that inference to the jury. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724.) There was simply NO factual support for this singularly improper argument. The argument was merely another deliberate attempt by the prosecutor to circumvent the earlier judicial ruling that the prejudice resulting from this matter outweighed any probative value. It's effect was to re-enforce the impact of the prosecutor's prior improper efforts to get "instant death" before the jury and help ensure the prejudicial impact she was seeking to achieve.

Moreover, as this court pointed out in *People* v. *Bolton*, *supra*, 23 Cal.3d at

p. 213, prosecutors are generally viewed with special regard by the jury and therefore improper statements by the prosecutor may be like "dynamite" blowing the proper evidence out of proportion and damaging the prospects for a fair determination. (*Id.* at p. 213.) In the same vein "[a] prosecutor's closing argument is an especially critical period of trial. [Citation] Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. [Citation] An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. [Citation]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) Similarly, the United States Court of Appeal observed in *Brooks* v. *Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399[14], that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct."

Under these circumstances, the prosecution cannot carry its heavy burden to show that the improper and highly inflammatory argument by the prosecutor here did not influence appellant's jury.

Missing Money

The essence of respondent's argument is that the rifled purse corroborates Warren Gilliland's testimony that he gave a substantial amount of rent money to Ms. Pontbriant in the defendant's presence which she put in her checkbook in her purse. Since no money was found in her checkbook, the defendants must have stolen it. (Respondent's brief at p. 161.)

Left unmentioned in respondent's argument is that there was a total of $18.29 still in the purse, including two five dollar bills, four one dollar bills and some

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[14] *Brooks v. Kemp,* 762 F.2d 1383, 1409 (CA11 1985) (en banc)vacated on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), judgment reinstated, 809 F.2d 700, 817 CA11) (en banc), cert. denied, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)

change. (40 R.T. 5745; 5781-5782, 5387.) Also still in Ms. Pontbriant's purse was her ATM card, together with a piece of paper with her ATM card PIN number written on it. (39 R.T. 5744-5745.) It is a little odd that if money was the reason the purse was dumped -as respondent alleges - the thieves would have left so much money behind.[15]

More importantly, however, as appellant explained previously, Warren Gilliand could not have given Ms. Pontbriant ANY rent money because he did not have any money. Every single source that Gilliland identified as the source of the money he gave to Ivon Pontriant was refuted beyond a reasonable doubt by unimpeachable testimony, documents or both. Thus, the fact that a substantial amount of money was not found in Ms. Pontbriant's checkbook is irrelevant.

Perhaps a hypothetical will make the point more clearly. Suppose Warren Gilliland testified that the source of the rent money was a gift bestowed on him by little green men from Mars. Would the fact that no rent money was found in Ms. Pontbriant's checkbook somehow corroborate his testimony? The answer is obvious in the question.

Under the circumstances of this case, the absence of any rent money in Ms. Pontbriant's checkbook is apropos of nothing. The inference that the appellants stole the rent money because none was found in the checkbook is simply unsupported by the evidence is this case. This court has recognized that the Due Process Clause of the Fourteenth Amendment requires that inferences "be based on a rational connection between the fact proved and the fact to be inferred." (*People*

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[15] As appellant Letner explained in his later testimony, the reason the purse was dumped was because Mr. Tobin grabbed it to pull out the keys for the car. (61 R.T. 8676.) Thus, the reason for dumping the purse and leaving the money in it was solely to obtain the keys in a hurry.

v. *Castro* (1985) 38 Cal.3d 301, 313.) "'An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.'" (*People v. Castro, supra,* 38 Cal.3d 301, 313-314, quoting *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [20 L.Ed.2d 476, 88 S.Ct. 1620]; see also (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1386 and *People v. Valentine* (1986) 42 Cal.3d 170, 177-178.) Here, an argument that the appellant stole substantial rent money because the checkbook was empty is an inference based on thoroughly discredited evidence. Fundamental errors such as the one here strike at the heart of a fair trial because they so infect the trial process that they undermine the validity of the fact finding process itself. (Cf. *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [116 L.Ed.2d 385, 94 S.Ct. 1868].)

Defaming the Defendant

During closing argument, the prosecutor asserted:

> "I would submit to you that if you have any expectation either one of these defendants are going to be associating, hanging around, socializing with people at the Iowana Motel like your Sunday school teacher, or, maybe, your state senator, you're sadly mistaken. I mean we have a situation here where this is the type of man Christopher Tobin is. Who do you think he's going to be hanging around with? He's going to be hanging around with other criminals and that's what Earl Bothwell is. I have no hesitation in saying that to you, obviously."

(54 R.T. 7801-7802.)

By the time of appellant's trial, Earl Bothwell was serving time in prison for fraud. (44 R.T. 6416-6417.) Additionally, he had numerous prior arrests and convictions and had served time in various state prisons. (44 R.T. 6416-6417, 6433.) By contrast, neither appellant nor Mr. Tobin were criminals. Neither defendant had a prior felony conviction. Both defendants had been working full-

time at Modulaire Manufacturing until being laid off (not fired). (46 R.T. 6897-6900.)

Moreover, there is no evidence that appellant or Mr. Tobin voluntarily chose the Iowana motel as a residence so they could associate with criminals. They were checked in to that motel by appellant Letner's grandfather because they had no money (46 R.T. 6880) and presumably because the motel was inexpensive.

Given these circumstances, respondent's assertion that the prosecutor's comments were appropriate rebuttal in light of the defense attempts to "besmirch" Earl Bothwell (Respondent's brief at p. 161) are simply wrong. Given Bothwell's criminal record, it would be hard to "besmirch"or unjustly defame him by pointing out its truth. Further, since there is no evidence that the defendants chose the motel, the prosecutor's insinuations of nefarious reasons for associating with Earl Bothwell are inferences piled on speculation.

Nothing in the prosecutor's argument on this point "rebuts" anything presented by the defense. Instead, as appellant pointed out in his opening brief, portraying both defendants as criminals associating with criminals was just another example of the deputy district attorney's proclivity for misrepresenting the evidence and stretching the truth to obtain a conviction and death sentence.

Brady Violation

Respondent urges that it was simply unaware of the pending criminal matters involving Ms. Mayberry. Moreover, Mayberry testified at the preliminary hearing before the theft charges were instituted and that her preliminary hearing testimony was consistent with her trial testimony. (Respondent's brief at p. 167.) Further, she received no favorable consideration on her theft charge as a result of her testimony in the instant case. Additionally, her testimony was largely duplicative of other

testimony in the case so nothing in her testimony would have affected the outcome of the case. Thus, there was no *Brady* violation. (Respondent's brief at p. 167.)

Respondent is in error when it asserts that there is no *Brady* violation if the prosecutor did not actually know of the pending theft charges. As appellant pointed out in the opening brief, a prosecutor's claim of ignorance does not excuse a *Brady* violation. (*United States v. Auten* (5th Cir.1980) 632 F.2d 478, 481.) The information was certainly available had the prosecution chosen to seek it out and nothing in respondent's argument shows otherwise. (See *United States v. Perdomo* (3rd Cir.1991) 929 F.2d 967, 971.)

The fact that Ms. Mayberry's testimony was largely consistent in the preliminary hearing and the trial is of no consequence whatsoever. The issue is the credibility of that testimony. It is reasonably probable that the jurors would have viewed Mayberry's testimony with significantly greater skepticism had they known that there were criminal charges pending against her. Furthermore, the charges against her were traditional examples of crimen falsii; that is, the charges involved thefts and fraud which went directly to the question of her honesty.

As to respondent's claim that Mayberry was a minor witness whose testimony could not have had an impact on the outcome of the trial, the argument lacks merit. As appellant explained in the opening brief, Ms. Mayberry was a key witness because she alleged that Mr. Tobin had committed violent acts in an altercation with her the night before the murder. Ms. Mayberry testified that she had argued with him because he had been visiting his ex-wife. (38 R.T. 5412-5415.) Moreover, she also testified that appellant was aware of her jealousy towards Mr. Tobin's ex-wife and it was he who told her where she could find Mr. Tobin and his ex-wife. (38 R.T. 5411-5412.) After the first encounter between Ms. Mayberry and Mr. Tobin

produced nothing more than a verbal altercation, and Ms. Mayberry went home, appellant showed up a little later, laughing and saying that Mr. Tobin and his ex-wife were together again in a nearby park. (38 R.T. 5414.) Another confrontation between Ms. Mayberry, Mr. Tobin and Mr. Tobin's ex wife took place in the park. (38 R.T. 5414.) This evidence portrayed appellant as emotionally insensitive, manipulative and prone to stir up controversies which he knew would end in violence.

According to Ms. Mayberry, she did not see either defendant again until the next night. On that occasion, she saw both men at her apartment complex. (38 R.T. 5414.) Mr. Tobin was so upset that he broke her bedroom window and grabbed her by the hair and hit her. (38 R.T. 5416.) After neighbors yelled that they were calling the police, Mr. Tobin purportedly went to Mayberry's car and broke out the windows with the butt of his shotgun. (38 R.T. 5418.) This testimony depicted Mr. Tobin as bad-tempered and violent and appellant as the instigator as well as an aider and abetter of this violence.

More importantly, the trial court also found that Mayberry's testimony about the altercation provided a motive for both defendants to flee and thus the motivation to get Ivon Pontbriant's car to do so. (1 R.T. 53, 4/17/90.) Additionally, Ms. Mayberry provided further testimony about Mr. Tobin's prowess in karate by claiming that he was proficient at roundhouse kicks, which supported the prosecution's claim that Mr. Tobin kicked Ivon Pontbriant in the face prior to the murder. (38 R.T. 5425-5426.)

This testimony made Mayberry a critical witness supporting the prosecution's claim that both defendants planned to flee prior to the murder and wanted Ms. Pontbriant's car. Impeachment of her testimony would have cast doubt on Ms.

Mayberry's claims and seriously weakened the prosecution's theory of motive and involvement in the crimes.

Prejudice

Respondent urges that even if these instances constituted misconduct, appellant was not harmed. The prosecuctor's comments amounted only to a small portion of the prosecution's argument and would not have influenced the jury unduly. (Respondent's brief at pp. 163-164.) Moreover, the inability of the defense to impeach Mayberry's testimony did not undermine confidence in the outcome of the case.

As discussed above and in appellant's opening brief, the evidence supporting appellant's conviction for the murder and special circumstances was at best slight. The prosecutor's misrepresentation of the evidence and her inflammatory descriptions of the appellant during closing argument were intended to, and apparently succeeded in, persuading the jury to relieve the prosecution of its burden of proving appellant's guilt beyond a reasonable doubt.

Moreover the conduct here was flagrant. (*People v. Kirkes, supra,* 39 Cal.2d 719, 724.) "Rather than consisting of a single statement interjected in the heat of debate, they were interspersed throughout the closing argument in such manner that their cumulative effect was devastating. Repeated objections might well have served to impress upon the jury the damaging force of the challenged assertions. A series of admonitions to the jury could not have cured the harmful effect of such misconduct." (*Ibid.)*

Accordingly, the prosecutor's improper statements during closing argument, alone and in combination with other misconduct described herein, requires the setting aside of appellant's convictions and sentence to death.

Further, since Mayberry was a critical witness because she testified about critical prosecution facts, the *Brady* error violated appellant's Sixth Amendment rights to confrontation, cross-examination and effective assistance of counsel and his Eighth Amendment right to reliable guilt and penalty determinations. Accordingly, appellant's convictions and sentence to death must be set aside.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Arguments XXVII, XXVIII, XXIX, and XXX on prosecutorial misconduct except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXIII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTOR TO QUESTION MR. TOBIN ABOUT OTHER CRIMES

Summary of Appellant's Argument

Before trial, the charges relating to appellant's purported burglary of commercial establishments were severed from the charges in the instant case because they were unduly prejudicial. Nonetheless, the prosecution cross-examined Mr. Tobin on those purported burglaries by asking a series of questions about stolen merchandise. This improper "other crimes" evidence severely prejudiced appellant because it painted him as a burglar or a thief (before those charges were even adjudicated) and thus impinged on the reliability of the death penalty determination.

Summary of Respondent's Argument

Respondent makes a three part reply. First, respondent urges that the issue was waived. At trial the defense objected that the evidence was irrelevant. On appeal however the argument is that the evidence constituted improper "other crimes" evidence. Second, any objection would have been futile since the evidence was properly admitted. The stolen property was admissible to show (1) that the defendants were seeking to fund a trip to Iowa as well as (2) being appropriately within the latitude allowed on cross-examination to attack Tobin's credibility. Finally, even if the questioning was error, the error was harmless. It is not reasonably probable that absent the error the result would have been different. (Respondent's brief at pp. 168-170.)

Errors in Respondent's Arguments

Waiver

Respondent's waiver argument is not well taken. "Other crimes" evidence showing only criminal disposition is irrelevant. "Other crimes" evidence is relevant only if it is admissible for a legitimate specific purpose under Evidence Code section 1101. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Thus, trial defense counsel's objection that the "other crimes" evidence was irrelevant is entirely appropriate and certainly does not waive the issue on appeal.

"Other Crimes" Evidence Inadmissible

"Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid.Code, section 1101.)" (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.]"(*Id.* at p. 371.)

Nothing in the evidence relating to the stolen items relates to either identity of the perpetrator or common scheme or plan under Evidence Code section 1101 subd. (b). Nevertheless, respondent urges that the evidence was admissible to show intent because the defendants intended to sell the items to finance their trip to Iowa.

Respondent's argument is not well taken. The items clearly were stolen well prior to the death of Ms. Pontbriant and there is no evidence whatsoever that they were stolen **with the intent to finance an escape plan**. Thus respondent's argument is merely another *post hoc* rationale with no support in the record. That the stolen items in the car trunk may have been intended to finance an escape plan is entirely fortuitous and has nothing whatsoever to do with the fact that they were stolen. As the defense pointed out at trial, the prosecution could have simply asked Mr. Tobin whether the items were intended for sale. (33 R.T. 4701.) That question would have accomplished the same purpose with respect to the financing of a trip to Iowa. The fact that the items were stolen amounts to nothing more than criminal disposition evidence and is therefore both irrelevant and prejudicial.

While it is true that under Evidence Code section 1101 subd. (c) "other crimes" evidence may be used to impeach the credibility of a witness, that does not appear to be the rationale upon which the evidence was either argued or admitted. To make that argument now improperly changes the theory on appeal. (See *People v. Superior Court (Simon*) (1972) 7 Cal.3d 186, 198-199.)

Even if arguing a new theory on appeal was permissible, however, it is not persuasive on the facts of this case. Respondent now urges that the evidence was admissible to explain or refute Tobin's assertions that he knew the items were in the trunk of the car and he had no desire to go back to retrieve his other personal property. (Respondent's brief at p. 169.) However, whether or not Tobin knew these cosmetic items were stolen neither either explains nor refutes Tobin's assertions about where they were in the car or how he felt about his other possessions.

More importantly, however, even assuming that Tobin's knowledge that the

items were stolen was somehow relevant to the prosecution of Mr. Tobin, they were clearly NOT admissible on the charges against Mr. Letner. Moreover, respondent does not make such an argument, nor could respondent do so. All the evidence does with respect to Mr. Letner is cast him as a person with a criminal disposition. Once again, this is an example of prosecutorial overreaching to obtain a conviction and death sentence. It is also an example of the cumulative prejudice that arose from the trial court's refusal to sever the trial of the two defendants.

Prejudice

As appellant pointed out in his opening brief, unlike most evidentiary errors, the improper use of "other crimes" evidence is inherently prejudicial. (See, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 314-321.) Moreover, the reason Mr. Letner's burglary charges were severed in the first place is because the trial court believed they would prejudice appellant in front of his jury. (See 1 C.T. 26-41, 2 C.T. 418.)

Nevertheless, respondent takes the position that even if the cross-examination here was error, it is not reasonably probable that a different result would have occurred, because, according to respondent, the homicide evidence was overwhelming.

It is true that there was ample evidence that Ms. Pontriant was brutally murdered. But that does not resolve the prejudice issue. As appellant explained in his opening brief, no physical evidence tied **appellant Letner** to the murder; no physical evidence supported the attempted rape claim; and evidence of a burglary or a robbery was highly disputed. The "other crimes evidence here was prejudicial because it portrayed appellant as an individual with a criminal disposition. Further, and more specifically, by portraying appellant as a thief, the stolen

property/burglary evidence made it more likely that the jury would conclude that the killing was motivated by a plan to steal Ms. Pontbriant's money and car, rather than a killing resulting from an angry, drunken unplanned explosion of violence that was followed, but in no way motivated, by whatever taking of her possessions may have occurred. Thus, by appearing to show appellant's propensities to engage in criminal activity, the improper evidence bolstered an otherwise weak case. Given the paucity of credible evidence supporting appellant's convictions and the special circumstances findings, appellant was overwhelmingly prejudiced by admission of this improper evidence.

Additionally, this is yet another instance of prejudice resulting from the refusal of the trial court to sever the trials of the two defendants. Accordingly, the convictions, the special circumstances findings and the sentence to death must be set aside.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXIV on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

PENALTY PHASE ISSUES

XXIV.

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

Summary of Appellant's Argument

Appellant has previously shown that the trial court prejudicially erred in failing to sever appellant's guilt phase trial from that of codefendant Tobin, and appellant incorporates that argument herein. (See Argument II, *infra*.) The prejudicial impact of the improperly joint guilt phase trial, which prevented the jury from reliably evaluating the conduct and culpability of the individual defendants, continued into the penalty phase where it deprived appellant of the benefit of the lingering doubt jurors would have likely otherwise harbored even had they convicted him at a separate guilt phase trial. The trial court erred again in denying appellant's motion to at least accord him a separate penalty phase trial, and the joint penalty phase trial which ensued reinforced the prejudicial impact of the joint guilt phase trial and independently undermined appellant's right to a fair and reliable penalty determination.

The trial court's refusal to sever the penalty phase trials of the two defendants violated appellant's Eighth and Fourteenth Amendment rights to individualized consideration and his Fifth and Fourteenth Amendment rights to due process and a fair trial. Here the codefendants' defenses were mutually antagonistic, evidence relating to the codefendant was presented that otherwise would have been

inadmissible at a separate trial for appellant, the codefendant augmented the prosecution's case against appellant and attacked appellant's case in mitigation, thereby lowering the prosecution's burden of proof. Further, the prosecutor, as she did in the guilt phase, encouraged the jury to judge and condemn the two defendants as a single entity.

Summary of Respondent's Argument

Respondent's argument on the failure to sever at the penalty phase is entwined with its argument on the failure to sever at the guilt phase. (See Issue III of respondent's brief.)

The essence of respondent's argument on the failure to sever in the penalty phase is that there is preference for joint trials. (Respondent's brief at pp. 84-85.)

Further, although the penalty phase presented somewhat antagonistic defenses because appellant Letner blamed Tobin, this conflict occurred after the jury already convicted both men and found the special circumstances to be true. Thus, respondent argues, appellant Letner suffered no prejudice. (Respondent's brief at pp. 86-87.)

Moreover, according to respondent, although some of the prior crimes presented in the penalty phase involved Mr. Tobin, appellant Letner was not prejudiced. The defendants were "crime partners" in most of these prior offenses. The jurors also were instructed to find the prior crimes to be true beyond a reasonable doubt and they were instructed to decide the punishment for each defendant separately. (Respondent's brief at pp, 88, 89.)

Finally, although codefendant Tobin presented evidence from Robert Hernandez and Leo Pike that implicated appellant Letner, had the defendants been tried separately the prosecution certainly could have presented the same evidence in

appellant Letner's separate trial. Thus, under the circumstances, appellant Letner suffered no prejudice. (Respondent's brief at p. 88-89.)

Errors in Respondent's Argument

Turning first to the problem of "crime partners," respondent continues to lump the defendants together urging joint criminal responsibility at the expense of individual consideration. As appellant has repeatedly stressed, this prejudicial association of the codefendants is the heart and soul of the problem in this case. (see *Williams v. Superior Court*, *supra* 36 Cal.3d at pp. 452-454; see also *People v. Mitchell*, *supra*, 1 Cal.App.3d 35, 39 ["It is . . . more than likely that the jury would have found appellant guilty if for no other reason than by association. Appellant was not only apprehended with Watkins . . . , but Watkins testified that he was appellant's brother-in-law and that they were reared in the same neighborhood."]; *see also United States v. Sampol, supra,* 636 F.2d at p. 647 [prosecution failure to make any meaningful distinction between the defendants, resulting in violation of each defendant's constitutional right to a fair trial].

Not only is deliberate blurring of individual responsibility a fundamental denial of appellant's due process right to a fair trial, but the error is particularly acute with regard to fixing the penalty at death. Death is a "normative" decision, thus the standard of care is higher than it would be at the guilt phase. (*People v. Brown, supra,* 46 Cal.3d 432, 448.) Therefore, urging the jurors to lump the defendants together as the prosecution did here presents an undue risk that appellant received the death penalty largely because the jurors felt it was appropriate for Mr. Tobin and appellant was his cohort.

Antagonistic Defenses

As noted above, although respondent acknowledges that there were

antagonistic defenses at the penalty phase, it urges that any error was harmless because by then both defendants had already been convicted. Left unaddressed in respondent's argument is any acknowledgment that appellant Letner **changed his defense** as a result of the trial court's erroneous refusal to sever the guilt phase trials.

As appellant explained in his opening brief, the trial court's refusal to sever at the guilt phase compelled appellant to waive his Fifth Amendment right to remain silent and take the stand at the joint penalty phase trial. At the guilt phase Mr. Tobin laid the entire blame for the homicide on appellant while appellant remained silent. By the time the penalty phase arrived, appellant clearly recognized that silence was no longer a realistic option. He explained that he had to take the stand in order to present the jury with the truth; that he did not kill Ms. Pontbriant. (61 R.T. 8644-8645.) That is, since Mr. Tobin's testimony essentially made the prosecution's case against him, appellant had no choice but to testify to avoid the death penalty.

Not only did this circumstance amount to cumulative prejudice resulting from the trial court's error to refuse severance in the guilt phase, but it provided Tobin's counsel with additional opportunities through cross-examination to exonerate Mr. Tobin at appellant's expense as well as reinforcing the state's case. Thus appellant was unfairly placed in the awkward position of defending himself against both the state and the codefendant. This situation unfairly lessened the prosecution's burden of proof. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 524 [jury instruction stating that defendant was presumed to intend the ordinary consequences of his voluntary actions constituted a denial of due process because it placed the burden on defendant to disprove intent, an element of the crime].)

Additionally, nowhere in respondent's argument is there any mention of the

fact that the deputy district attorney was aided by the codefendant in her effort to obtain a death sentence. Even the trial judge noted at the close of evidence at the penalty phase that the defendants had "[the] unenviable task of carrying some of the District Attorney's burden." (65 R.T. 9595.) This statement by the judge constituted an admission that appellant's constitutional rights had been violated under the principles set forth in *Sandstrom*.

Evidence Relating to Codefendant that Would Have Been Inadmissible at a Separate Trial for Appellant, and the Prosecutor's Continued Treatment of the Two Defendants as a Single Entity to be Convicted and Sentenced as a Unit

Respondent urges that because the jury was instructed to make findings on each prior offense separately using the "beyond a reasonable doubt" standard and to adjudicate the punishment of each defendant separately, appellant Letner suffered no prejudice from any evidence concerning codefendant Tobin's prior crimes. (Respondent's brief at pp, 88, 89.)

As appellant pointed out in his opening brief, the incidents involving David Bendowski, Kenny Warren, and Willy Healer would not have been admissible against appellant Letner in a separate trial. More importantly, they showed Mr. Tobin to be a physically abusive and brutal antagonist. This evidence, otherwise inadmissible against appellant Letner created "spillover" prejudice. It allowed the jury to view appellant in the same unfavorable light as codefendant Tobin. Moreover, despite a brief instruction that the evidence should be considered against each defendant separately[16], when summarizing the acts in aggravation, the

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[16] The instruction was as follows: "In this case, you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on both of the defendants, but do agree on the penalty as to one of them, you must render a verdict to the one on which you do agree."

prosecutor again lumped the defendants together. (67 R.T. 9666-9667.) As she had during the guilt phase, Deputy District Attorney Reed argued that it did not matter which defendant actually killed Ivon Pontbriant because they were acting in "complete tandem." (67 R.T. 9684.) She also argued that "two men committed this murder," that "two macho men rip[ped] off her clothes, and rip[ped] out her hair," and that these brutal acts "were committed for their enjoyment." (67 RT 9690-9691.)[17] And, as she approached her conclusion, she asked the jury to decide whether "the defendants deserve the death penalty" and urged the jury to consider "the choices they have voluntarily made" and "what they did to Ivon Pontbriant." (67 RT 9693-9694.)

The prosecutor's language is hardly a request for dispassionate consideration of the evidence against each defendant or a dispassionate evaluation of the appropriate punishment for individual culpability. Instead the prosecutor made an impassioned plea to execute both defendants because they acted together and the prior crimes show they are bad people. By treating the defendants as an inseparable unit rather than as individuals, the prosecutor violated a cardinal principle of death penalty jurisprudence: that a defendant is entitled to an individualized assessment by the jury of his character, history and actual participation in the crime before the death penalty is imposed. (See, e.g., *Penry v. Lynaugh*, *supra*, 492 U.S. 302.)

Under the well-established tenets of Eighth and Fourteenth Amendment law and under California law, appellant was entitled to have evidence of the

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(68 R.T. 9825-9826.)

[17]There was in fact no evidence permitting a reliable determination as to who did what to Ms. Pontbriant, as to how her clothes came to be removed or her hair pulled, and no evidence that the lethal assault was committed for the enjoyment of either defendant, let alone both.

codefendant's bad acts excluded from consideration by the jury deciding whether he would be sentenced to death. (*People v. Boyd* (1985) 38 Cal.3d 762, 773; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305 [the jury must focus on the defendant as a "uniquely individual human being"].)

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

Further, as the U.S. Supreme Court noted in *Satterwhite v. Texas* (1988) 486 U.S. 249, "[t]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given the sentence." (*Id.* at p. 258.)

Given the highly damaging and inflammatory nature of this evidence, plus the prosecution's continued exhortation to treat the defendants as a single entity, the brief instruction to consider the evidence separately as to each defendant was insufficient to overcome the prejudice resulting from the joinder of the penalty phase trials.

Codefendant Augmented the Prosecution's Case Against Appellant

Respondent urges that the evidence from Mr. Hernandez and Leo Pike that appellant was solely responsible for Ms. Pontbriant's death could have been presented by the prosecution in a separate trial so there is no prejudice to appellant simply because Mr. Tobin presented it in this joint trial. (Respondent's brief at p. 88-89.)

Omitted from respondent's argument is any acknowledgment that the prosecution **specifically declined** the opportunity to present the inculpatory

evidence from Hernandez and Pike. It was not until after the prosecution declined to present this evidence that Mr. Tobin chose to remedy this omission. (61 R.T. 8626, see also appellant's argument in support of his mistrial motion 65 R.T. 9526.) The defense objected vehemently on the ground that Mr. Hernandez was an informant of questionable veracity. Moreover, because of the way the prosecution structured its deal with Mr. Hernandez for his testimony in a prior unrelated case, the defense did not have full access to interview him prior to trial. (65 R.T. 9453-9458.)

The use of the Hernandez/Pike evidence by the codefendant here showcased the precise problem condemned in *Tootick.* Mr. Tobin distorted the fact finding process and lowered the prosecution's burden of proof by presenting evidence of highly questionable veracity that condemned Letner and exonerated him. Indeed, although not specifically set forth on the record, in context it appears that the reason the prosecutor refused to call Mr. Hernandez in the guilt phase of the trial to place appellant's purported "confession" on the record was precisely because Mr. Hernandez was of such questionable veracity. Thus, although the codefendant played the part of the prosecutor, he was not held to the same limitations or standards as the prosecutor. (*United States v. Tootick*, *supra*, 952 F.2d at p. 1082.)

Closing Argument

Although not specifically addressed by respondent in its answer, there was more to the problem than just the foregoing. As appellant explained in his opening brief, after presenting evidence in an attempt to persuade the jury that appellant was the actual perpetrator, not Mr. Tobin, Mr. Tobin's counsel argued at length that (1) that appellant lied on the stand (67 R.T. 9762, 9764-9770) (2) that appellant killed Ms. Pontbriant, (67 R.T. 9750-9764, 9770) and (3) that appellant (unlike Mr. Tobin) was not seriously intoxicated because he passed the field sobriety test when stopped

by Officer Wightman (67 R.T. 9756-9757). Thus, counsel for Mr. Tobin was able to attack appellant in a more focused way than the actual prosecutor. Of the 28 pages of transcript that encompassed the closing argument for Mr. Tobin's counsel in the penalty phase (67 R.T. 9746-9774), fully 20 of them were devoted specifically to attacking Mr. Letner's credibility and urging the jury to find that Mr. Letner was the sole perpetrator. (67 R.T. 9750-9770.)

By contrast, the prosecutor was stuck with an evidentiary record that even she admitted did not permit any reliable determination as to who did what. Moreover, rather than acknowledge the weakness in her case, the prosecutor opted to treat the two men as a single entity. From Mr. Letner's perspective, therefore, the prosecutor got to have her cake and eat it too. That is, she could argue that the two defendants could be judged and condemned as an undifferentiated duo, and, if that didn't persuade the jury, Tobin's counsel was there to argue that Mr. Letner did it.[18] This is just one more example of the problems condemned in *Tootick*, *supra*.

Prejudice

Omitted from respondent's argument as well is any acknowledgment that for a time the jury could not reach a verdict on the appropriate penalty for appellant. As appellant pointed out in his opening brief, on February 16, the fifth day of penalty phase deliberations, the jurors indicated that they reached a verdict regarding one of the defendants but were "hung" regarding the other. (72 R.T. 9837; 5 CT 1274.) After inquiring about the numerical split, the judge determined that further deliberations might prove fruitful and recessed the trial for a three day weekend to allow jurors to think about the matter. (72 R.T. 9849). After deliberations resumed

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[18] Even Mr. Tobin's counsel admitted that at times the jury might think there were two prosecutors in this case. (67 R.T. 9750.)

on February 20, the jury ultimately reached a death verdict on both defendants. (5 C.T. 1274, 1275.)

Thus, despite the enormity of the prejudicial material improperly admitted in the penalty phase, the record shows from the dates of the verdicts that the jury was comfortable with its relatively quick condemnation of Mr. Tobin but severely split over the fate of appellant. (5 C.T. 1274-1275.) (Cf., *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury evidence of a close case].)

Here, because the jury was exposed to prejudicial evidence that would not have been admitted in a separate trial of appellant, because appellant's hostile codefendant bolstered the prosecution's case against appellant and attacked appellant's case in mitigation, and because the prosecutor, as she had done at the guilt phase, continued to treat the two defendants as a single entity to be jointly judged and condemned, the erroneous failure to grant appellant a separate penalty phase trial cannot be considered harmless beyond a reasonable doubt.

For these reasons, respondent's assertion that appellant suffered no prejudice is unsupported by the record. Accordingly, appellant's death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 19, 23.) (See also *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, wherein the U.S. Supreme Court held that reversal is required unless the prosecution can show that the constitutional error had "no effect" on the death penalty verdict.)

XXV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT WAS TO PRESUME THAT ITS SENTENCING DETERMINATION WOULD BE CARRIED OUT

Summary of Appellant' Argument

The defense requested an instruction telling the jurors to presume that the sentence they adjudicated would be carried out. The trial court, however, refused the proposed instruction and gave the standard CALJIC 8.84 instead. Nevertheless, telling jurors that they had to presume the sentence they imposed would be carried out would have helped ensure the sentencing decision was made with a full appreciation of the gravity of the decision and an appropriate sense of responsibility. The trial court's error deprived appellant of a reliable death penalty determination. (Appellant's opening brief at pp. 462-468.)

Summary of Respondent's Argument

Respondent notes that similar arguments concerning the meaning of a sentence of life without parole have been rejected in other cases (see, e.g., *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271) and thus should be rejected in this case as well. Additionally, the defense proposed instruction concerning the meaning of execution should be rejected because it is inaccurate. There is no assurance that either defendant actually would be executed. The penalty might be modified on appeal or a defendant might die of natural causes in prison. Respondent's brief at pp. 174-175.)

Errors in Respondent's Argument

The holding in *Musselwhite* and similar cases is that the standard instruction,

CALJIC 8.84 is sufficient to convey the appropriate sentencing responsibilities to the jury. That is, a sentence of life without parole means that the defendant will spend the rest of his life in prison and that a sentence of death means the defendant will be executed. Nevertheless, this court has never rejected the equally appropriate formulation set forth in *People v. Fierro* (1991) 1 Cal.4th 173, 250, that the jury "must assume" that the sentence it adjudicates will be carried out. The defense proposed instruction here contained virtually identical language to that approved by this court in *Fierro*.[19] (4 C.T. 1074.)

The more fundamental problem is, as appellant explained in his opening brief, that although CALJIC 8.84 says that a defendant will be confined for "life without parole", the language of the South Carolina instruction [imprisonment until death] that the United States Supreme Court found defective in *Simmons v. South Carolina* (1994) 512 U.S. 154, 169, permits exactly the same conclusion.

Neither the South Carolina nor the California instruction fully addresses the empirical research showing that juries believe that through some formula, even a capital defendant might become eligible for parole. That is, most citizens believe that a sentence "to life" means that technically there will be no parole. Nonetheless, similarly sentenced defendants are routinely paroled. Thus, there is great skepticism that any "life" sentence absolutely precludes parole. It is for that reason that *Simmons* and later *Shafer v. South Carolina* (2001) 532 U.S. 36 [121 S. Ct. 1263,

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[19] The defense proposed instruction read:

"You are to presume that if a defendant is sentenced to life without the possibility of parole, he will spend the rest of his life in state prison.
You are to presume that if a defendant is sentenced to death, he will be executed in the gas chamber." (4 C.T. 1074.)

149 L. Ed. 2d 178] require that a jury be instructed that a sentence of life without parole means that there is, in fact, no possibility of parole. CALJIC 8.84 does not resolve that fundamental problem. Additionally, since the empirical research indicates that the problem with misperception of the reality of the penalty is so widespread, there is certainly good reason to at least try to prevent such misperceptions from tainting the jury's capital sentencing determination.

There is nothing inaccurate about telling the jury what it should presume in choosing between its sentencing options. The jury is not supposed to speculate about possible escapes or commutations. A rational and reliable determination of the appropriate sentence is best achieved if the jury refrains from such speculation and presumes that the sentences will actually be carried out. That's the choice the proposed instruction would have given the jury in this case. More importantly, that is why the defense proposed instruction is far superior to the standard CALJIC 8.84 instruction.

Additionally, CALJIC 8.84 as it was given here suffered from the same flaws in its description of the imposition of a sentence of execution as it did with the sentence of life without parole discussed above. As appellant pointed out in his opening brief, since at the time of appellant's penalty trial no one had been executed in California since Aaron Mitchell's execution in 1967,[20] the jurors, or at least some of them, were likely to doubt that a death sentence would be carried out. The proposed instruction remedied that flaw by telling jurors that they were to presume that a sentence of execution would be carried out. Thus, the proposed instruction corrected the federal due process problem that *Simmons* and *Schafer* addressed with

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[20] Robert Alton Harris was not executed until April 21,1992, more than two years after jury deliberations concluded here.

respect to jurors perceptions of the efficacy of their sentencing decisions and conformed to this court's direction in *Fierro* concerning the appropriate language necessary to counter these perceptions.

The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's somewhat similar Argument XXVI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXVI.

THE PROSECUTOR'S RELIANCE ON A RELIGIOUS "PROVERB" TO ADVOCATE FOR THE IMPOSITION OF THE DEATH PENALTY VIOLATED THE FIRST AMENDMENT PROSCRIPTION AGAINST THE ESTABLISHMENT OF RELIGION AS WELL AS APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Summary of Appellant's Argument

During closing argument, the prosecutor told the jury that Jesus approved of the execution of the thief nailed to the cross next to him, and, indeed, that the execution was an essential step in the thief's salvation as a prerequisite to receiving a place in heaven. Effectively, the prosecutor conveyed the notion that the Christian faith compelled the jurors to impose death, but the burden of that decision would be lightened by the knowledge that the defendants might then receive forgiveness in heaven. The prosecutor's argument introduced improper sentencing factors into the jury's deliberations and diminished the jury's individual and collective responsibility for the ultimate verdict. (Appellant's opening brief at pp. 469-475.)

Summary of Respondent's Argument

Respondent makes a three part reply. First respondent urges that the issue was waived because trial defense counsel failed to object to the prosecutor's remarks. Second, the remarks were appropriate because viewed as a whole, the remarks were a request from the prosecutor to jurors not to let their personal religious views deter them from imposing the death penalty. Finally, even if the remarks were improper, they were not prejudicial. They were only a small part of the prosecutor's closing argument. (Respondent's brief at pp. 161-164.)

Errors in Respondent's Argument

Waiver

As appellant explained in his opening brief, generally, in order to preserve the issue for appellate review trial counsel must not only object to prosecutorial misconduct but also request an admonition to cure the harm. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 914.) This rule, however, "applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton, supra,* 48 Cal.3d 1142, 1184, fn. 27.) If it is likely that an objection and admonition would not have cured the harm, the appellate court must determine ". . .whether on the whole record the harm resulted in a miscarriage of justice within the Constitution." (*Id.* at p. 34.)

The prosecutor's improper Biblical argument could not have been cured by an objection and admonition, for at least two reasons. First, there was a grave danger of offending religious jurors by objecting to the prosecutor's mentioning Jesus as a decision-making role model. Had defense counsel objected, the objection itself would likely have injured appellant's chances for a life sentence with some jurors. Second, as appellant's discussion below of the prosecutor's improper remarks makes clear, this was not a bell that could be "unrung." Once the prosecutor proffered Jesus as a decision-making role model, no admonition could have undone the impact on religious jurors who otherwise revere and strive to emulate Jesus.

Misconduct in Closing Argument

Respondent urges that the prosecutor's Biblical reference in closing argument was nothing more than a request not to allow personal religious beliefs from preventing the imposition of the death penalty.

That argument, however, is contrary to the language of the prosecutor's

comments. The prosecutor concluded her argument to the jury at the penalty phase by stating:

> Lastly, ladies and gentlemen, remember this proverb. Remember that Jesus forgave the thief on the cross next to him, who, by his own admission was justly condemned. He gave the thief a place in paradise. But the thief still had to die for his crimes. In the name of the people of the State of California, I ask you to return the death penalty.

(67 R.T. 9694.)

Far from asking the jurors not to let their individual religious beliefs interfere with their duty to follow the law, the prosecutor essentially argued that the Bible approved of the death penalty under the circumstances presented here. That is, jurors should impose the death penalty because Jesus approved of the thief's death sentence. The prosecutor clearly implied that if Jesus approved of a thief being executed, surely he would approve of executing someone who has murdered. Further, by telling the jurors that Jesus had forgiven the thief and would allow him a "place in paradise," but the thief still had to die for his crimes, the prosecutor suggested that if appellant were executed by the State of California, he might then hope to be accorded a place in paradise by virtue of Jesus' forgiveness.

This argument clearly implied that appellant would be more likely to obtain Jesus' forgiveness if sentenced to death, because he would then be forced to confront his responsibility for committing the crimes against Ms. Pontbriant. The prosecutor thus harnessed the religious force of the Bible to sanction the death penalty generally and its use against appellant specifically.

Respondent offers an additional, perhaps alternative, reading of the prosecutor's Biblical reference, arguing that the prosecutor was just using her understanding of Jesus' views concerning the thief "to illustrate that spiritual contrition and forgiveness does not itself relieve anyone of the consequences for

their crimes under the *secular* law." (RB 162, italics in original.) This is a far-fetched reading. There is no hint in the prosecutor's argument that the prosecutor believed that appellant had manifested spiritual contrition and was arguing against the jury's returning a life verdict on that basis. This was not an argument that secular law must trump spiritual concerns when it comes to selecting a sentence. Instead, the clear implication of the prosecutor's commentary that the thief would have a place in heaven but first had to die for his crimes was that spiritual concerns — appellant's chances for salvation – would be advanced by a death sentence. The prosecutor argued religion as a reason to impose death rather than using it as a shield from undue influence in this case.

As appellant explained in his opening brief, this type of argument is improper for a number of reasons. First, it invites the jurors to impose the death penalty based on factors not established by the evidence, nor contained in the court's instructions on the law. Second, it lessens the jurors' sense of personal responsibility for a death verdict by telling them that the responsibility really rests with Jesus or God. Third, it invites the jurors to impose the death penalty based on religious law rather than on secular law. Fourth, it renders the determination of penalty arbitrary and capricious because the decision will depend upon how much weight an individual juror may or may not attach to the religious authority cited by the prosecutor. In addition, such an argument violates the provisions of the United States and California Constitutions both of which guarantee the right to a fair and reliable capital sentencing determination as well as prohibiting the establishment of religion. (U.S. Constitution, First, Fifth, Sixth, Eighth and Fourteenth Amends.; California Constitution, article l, sections 4, 7 and 15.)

For these reasons, the prosecutor's argument here was grossly improper and

the error invoked the *Chapman* standard of prejudice.[21]

Prejudice

Respondent urges that even if the prosecutor improperly referred to biblical passages, the error is harmless. The reference was only a small part of a longer argument that focused the jury on the appropriate reasons for imposing death. (Respondent's brief at pp. 163-164.)

That argument lacks merit either in law or in practice. It allows the prosecution to use improper Biblical references virtually without restraint so long as those references are only part of a longer argument properly discussing aggravating and mitigating factors. More to the point, the error becomes irreversible no matter how closely balanced the aggravating and mitigating factors and no matter how vigorously the prosecution invites the jurors to resolve that balance using appeals to religion. (See *People v. Samuels* (2005) 36 Cal.4th 96, 147, dis. opn. of Kennard J.)

While discussions of religion arguably might be proper in the context of a prosecutor noting that the Bible did not compel a verdict either way (see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287), that was certainly not the situation in this case. Here, the prosecutor was unequivocal in urging the jurors to rely on Biblical teachings to impose the death penalty.

As appellant pointed out with respect to the other instances of misconduct in closing argument, "[a] prosecutor's closing argument is an especially critical period of trial. [Citation] Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. [Citation] An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. [Citation]" (*People v. Pitts, supra,* 223 Cal.App.3d at p. 694.) Similarly,

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[21] *Chapman v. California*, *supra,* 386 U.S. at p. 24

the United States Court of Appeal observed in *Brooks* v. *Kemp*, *supra,* 762 F.2d at p. 1399, that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct."

As appellant has repeatedly pointed out, the circumstantial evidence supporting the verdicts against appellant was weak. Although the jury reached a death verdict on codefendant Tobin fairly quickly (5 C.T. 1268, 1269, 1274), it was several more days before it reached a similar verdict regarding appellant Letner. (5 C.T. 1272, 1275.) Thus, as to Mr. Letner at least, this was a fairly close case. "Where the evidence, though sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense or to corroborate the prosecution, must be considered prejudicial' [Citation.]" (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494.)

Finally, while the improper Biblical remarks may have been relatively short, respondent overlooks their place in the prosecutor's closing argument. The prosecutor's statements about Jesus and the thief who "had to die" were her very last remarks before requesting a death verdict. (RT 9695.) It was her concluding thought for the jurors. Given these circumstances, the prosecutor obviously believed that her Biblical reference was important and that it would have an impact on the jurors. For this reason, there is no basis for concluding beyond a reasonable doubt that no juror felt the same way about the importance of those remarks, and hence no basis for finding beyond a reasonable doubt that the improper remarks did not influence the eventual verdict. Appellant's death sentence, therefore, must be set aside.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument

XXXI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXVII.

THE USE OF UNADJUDICATED OFFENSES AS EVIDENCE IN AGGRAVATION VIOLATED APPELLANT'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS.

Summary of Appellant's Arguments

Because neither defendant was a hardened criminal with a string of prior convictions, the prosecution was reduced to arguing that a series of old, and often minor altercations - several of which were among teenage boys - equated to a history of menacing violence. The use of these unadjudicated alleged offenses deprived appellant of a fair penalty phase hearing and undermined the reliability of the death penalty determination.

Summary of Respondent's Arguments

Without analysis, respondent notes that this court has rejected similar claims and urges the court to reject the claim in this case. (Respondent's brief at p. 176.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged that this court has rejected similar arguments but explained in detail why the argument is appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXXVI on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

XXVIII.

THE TRIAL JUDGE DID NOT COMPLY WITH THE MANDATE OF PENAL CODE SECTION 190.9 THAT ALL PROCEEDINGS IN A CAPITAL CASE BE RECORDED BY A COURT REPORTER

Summary of Appellant's Arguments

There were 62 unreported conferences during trial, including the critically important conference concerning jury instructions. Moreover, because of memory loss over time, even years of very expensive efforts at record reconstruction yielded negligible results. Indeed, trial counsel for codefendant Tobin failed to participate in at least some of the hearings because he claimed that he did not remember anything that would be helpful. The trial court's failure to comply with the requirement to place all conferences and proceedings on the record deprived appellant of his constitutional right to an adequate record on appeal.

Summary of Respondent's Arguments

Respondent concedes that there were numerous unreported conferences and concedes that the failure to record them was error. (Respondent's brief at p. 181.) The thrust of respondent's argument, however is that appellants have a remedy in the record correction and settlement process. That process was employed in this case and appellants have not shown any specific prejudice arising from the error. (Respondent's brief at pp. 181-182.)

Errors in Respondent's Argument

The fundamental flaw in respondent's argument is that although this court has imposed the burden on the appellant to show prejudice, it has allowed the trial courts to deprive the defense of any really effective means of carrying that burden. As appellant explained in his opening brief, in order to show prejudice the

appellant must be able to reconstruct what happened during each off-the-record proceeding. More often than not, such reconstruction -- at least *an accurate and complete* reconstruction -- is impossible because memories fade with time, and capital trials are usually long and complicated. Indeed, these problems underlie the purpose of section 190.9. It is therefore both illogical and unfair to require appellant to show prejudice when it is the trial court which has made it virtually impossible to do so by failing to meet its obligations under section 190.9.

In this case, Mr. Tobin's motion to correct and augment the record, including his request for settled statements regarding 62 incidents of off-the-record proceedings, was filed over two years after the end of the trial in this case. Appellant's motion to correct and augment the record, including his request for settled statements was filed over three years after the end of the trial in this case. It took more than five years after the end of trial to begin the hearings on the record correction process.

More recently, it appears that appellate counsel are not even appointed to capital cases for almost five years. Thus it could be closer to six or seven years after the trial before any hearing on record correction could take place. After the passage of so much time it is simply unreasonable to expect that the parties could accurately reconstruct what happened at trial. Indeed, here, Tobin's trial defense counsel told the trial judge that he had NO memory of what took place in these conferences. " (1 RT 2, 4/17-18/95 Hearing.)

Moreover, contrary to respondent's assertion that appellant has not demonstrated any prejudice, perhaps the most crucial failure to record the proceedings involved the conference on jury instructions at the guilt phase. (50 R.T. 7430; 51 R.T. 7432-7433.) During the hearing on April 18, 1995, the trial judge

dismissed the problem created by this failure by asserting that he and trial counsel had "summarized" the contents of this important discussion on the record. (51 R.T. 7456-7461)(RT 148-149, 4/18/95.)

As appellant explained in the opening brief, however, this summary completely fails to convey the back and forth which would typically occur during a discussion of proposed jury instructions. Moreover, it is this back and forth that provides both content and context for the jury instructions that were given and those that were refused. Additionally, it may be that the defense raised objections concerning particular instructions that were overruled by the trial judge, thus leaving counsel to make the best of a bad situation by changing strategy or emphasis in a way that is not adequately reflected in the summary of the conference that was placed on the record.

In point of fact, in virtually all capital cases there is expensive, time consuming, extensive record correction to remedy **exactly** the kind of problem that Penal Code section 190.9 was intended to forestall. In order to bring a halt to this virtually ubiquitous and costly problem, this court should take a more active role in fashioning an appropriate sanction for noncompliance with clear statutory mandates. Simply shifting the burden to the defense to remedy what is essentially an irremediable problem is not an effective solution to this problem.

Moreover, shifting the burden to the defense to prove prejudice and then depriving it of an effective means of carrying that burden violated appellant's rights to due process and to a fair appellate proceeding under the Fourteenth Amendment. It also violated his rights to a state-created liberty interest under *Hicks v. Oklahoma* (1980) 447 U.S. 343 at p. 346) and his Eighth Amendment right to a reliable death penalty adjudication. The United States Supreme Court has held that meaningful

appellate review requires an adequate trial record. (See, e.g., *Rushen v. Spain* (1983) 464 U.S. 114, 118.) While it is true that this court has held that the use of settled statements is a means of reconstructing missing trial records and meets the due process need for an adequate appellate record, the settled statements in this case do not meet this standard. First, there were so many off-the-record proceedings (some 62 incidents). Second, there is no guarantee that the parties' memories of the unrecorded portions of the trial are accurate. Third, at least one of the parties (codefendant's trial counsel, Mr. Staven) had no recollection of what transpired during unrecorded portions of the trial.

In this regard should this court rule that an issue or objection was waived by the failure of the defense to properly object, appellant will have been severely prejudiced because the appropriate argument or objection may well have been made in one of these numerous unrecorded conferences. Thus, the trial court's failure to comply with section 190.9, and provide the defense with an adequate record on appeal could be severely prejudicial. In view of this problem, appellant asks this court to take into account the numerous gaps in the trial record when it assesses the cumulative effect of all of the errors that occurred at his trial. The cumulative error necessitates a reversal of appellant's convictions and judgment of death.

Appellant Joins Codefendant Tobin's Arguments

Appellant specifically joins and incorporates codefendant Tobin's Argument XXVII on this issue.

XXIX.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Summary of Appellant's Argument

In his opening brief, appellant made numerous challenges to the California death penalty statute and the manner in which it is applied. (Appellant's opening brief at pp. 493-562.)

Summary of Respondent's Argument

Respondent urges that all the claims raised in this issue were resolved against appellant in numerous cases. Respondent makes no further argument on any of these multitude of challenges but asserts merely that it stands ready to make a supplemental response on any issue requested by this court . (Respondent's brief at pp. 177-180.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged that this court has approved these statutes generally but explained in detail why the application of these statutes was not appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

Additionally, however, appellant opposes respondent's request for supplemental briefing should this court conclude that respondent's answer is not complete. The whole point of the briefing process is to resolve issues on the merits

in one set of briefs. (See California Rules of Court, rule 13(a)(4)and rule 14(a)(B).) Respondent has been given the opportunity to address the merits of appellant's arguments in its briefing and simply chose to pass on the opportunity. That being so, it has waived the opportunity to address the issue further in some sort of piecemeal appellate briefing process. (See *People v. Turner, supra,* 8 Cal.4th at p. 214, fn. 19 [reviewing court may disregard claims perfunctorily asserted without development]; see also *Art Movers, Inc. v. Ni West, Inc. supra*, 3 Cal.App.4th at p. 649) [it is the general appellate policy to avoid piecemeal review of litigation]

Appellant Joins Codefendant's Argument

Appellant joins codefendant Tobin's argument XXXVIII on a somewhat similar issue.

XXX.

THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE REQUIRE THAT THE CONVICTIONS AND DEATH SENTENCE BE REVERSED

Summary of Appellant's Argument

In his opening brief, appellant argued that even if some of the errors in this case did not independently require reversal, considered cumulatively, these errors compel reversal. These errors often compounded the prejudicial effect of one another.

Summary of Respondent's Argument

Respondent replies that there were only a few possible individual errors and there was certainly no prejudice from those. (Respondent's brief at p. 183.)

Error in Respondent's Argument

The fundamental problem with respondent's argument is reliability. Reliability is the hallmark of capital litigation. Reliability, however, is not the primary focus of respondent's answer. Nowhere in respondent's answer does respondent explain how the challenged procedures in this case contributed to the overall reliability of the fact finding process. Instead, respondent's insistence on waiver and harmless error provide little assistance to this court in its duty to ensure fundamental fairness.

The errors in this case are overwhelmingly prejudicial, both individually and cumulatively. As appellant explained in his opening brief, the prosecution's case against appellant was extremely thin. While it was undisputed that appellant spent time with the victim at her house the evening before her body was discovered, there was no reliable physical evidence tying him to her murder. The evidence was not

sufficient to sustain the findings against appellant of the felony murder special circumstances of attempted rape, robbery and burglary.

On the night of the murder, appellant and his codefendant, Christopher Tobin, were stopped by a police officer in the car owned by Ms. Pontbriant. Appellant was at the wheel and Mr. Tobin was in the passenger's seat. That vehicle stop was not based on a reasonable suspicion or probable cause and therefore was unconstitutional. The trial judge erred in denying appellant's motion to suppress all fruits of that unlawful stop and search. He also erred in his determination of various evidentiary issues and in giving improper jury instructions.

The errors in the penalty phase of appellant's trial were equally grave. The failure of the trial judge to sever appellant's trial from that of his codefendant was error which denied appellant a fair trial in both the guilt and penalty phases of the trial. In addition, the inadequate instructions to the jury as well as prosecutorial misconduct tainted appellant's penalty phase trial.

Prejudicial Federal Constitutional Errors

When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not those of the reviewing court. A reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (See, e.g., *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669.) It certainly cannot be said that the errors in this case had "no effect" on at least one juror. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.)

Prejudicial Errors Under State Law

The combined errors in this case also compel reversal of appellant's death sentence under state law. In *People v. Brown*, *supra*, 46 Cal.3d 432, 446-448, this court held that the standard for penalty phase error in a capital case is the "reasonable possibility" harmless error standard. It is "the same in substance and effect" as the *Chapman* "reasonable doubt" standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) It is a more exacting standard than that used for assessing prejudice for guilt phase error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Brown, supra,* 46 Cal.3d at p. 447.)

The decision of whether to sentence a defendant to death or to life without the possibility of parole requires the personal moral judgment of each juror. (*People v. (Albert) Brown (Brown I) (1995)* 40 Cal.3d 512, 541 [rev'd on other grounds sub nom. *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).) In a death penalty case, "individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 311; internal citation omitted.) Different jurors will have different interpretations of and assign different weights to the same evidence. (*United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603.) These differences in the decision-making process in the penalty phase of a capital case necessarily complicate the task of an appellate court in assessing the effect of trial error.

Given the interrelationship and the severity of the trial court errors in this case, their cumulative effect was to deny appellant fair and reliable guilt and penalty determinations. Appellant's convictions and death sentence must be reversed.

Appellant Joins Codefendant Tobin's Arguments

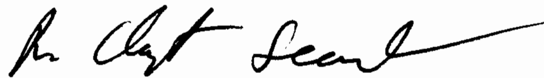
Appellant specifically joins and incorporates codefendant Tobin's Argument XXXIX on this issue except to the extent that codefendant Tobin argues that appellant was the actual perpetrator of any of the offenses.

CONCLUSION

For all of the foregoing reasons, appellant asks this court to reverse his convictions and set aside his sentence of death.

Dated: September 23, 2006

Respectfully submitted,



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Certificate of Word Count

I am the attorney for appellant Richard Lacy Letner. Based upon the word-count of the Word Perfect program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 48,145 words. (California Rules of Court, rule 36, subd. (b)(2).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: September 23, 2006

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PROOF OF SERVICE

STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 12008 Prescott, AZ 86304. On September 23, 2006 I served the within

REPLY BRIEF FOR APPELLANT
RICHARD LACY LETNER

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Prescott, AZ addressed as follows:

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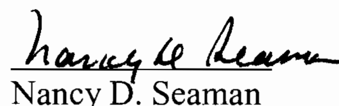
I declare that the document was printed on recycled paper. Further, I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on September 23, 2006 at Prescott, AZ.



Nancy D. Seaman