Number S081148
(Superior Court Number FVI-04195)

SUPREME COURT COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. MARTIN CARL JENNINGS, Defendant/Appellant.	)

SUPREME COURT
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On Automatic Appeal from a Judgment of Death
Rendered in the Superior Court of the County of San Bernardino

Hon. Rufus L. Yent, Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

Number S081148
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Plaintiff/Respondent,	)
v.	)
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Number S081148

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

MARTIN CARL JENNINGS,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

INTRODUCTION

This case is unusual as capital case appeals go, in that the evidence showed that no one, including the appellant, took any action with homicidal intent, and yet the felony murder rule could not be applied, either. As a result, the government's case was and is fraught with causation problems, and the government's special circumstance theory is problematic, to say the least.

In his brief respondent repeatedly endeavors to make the case look solid by simply assuming away these significant

problems. Respondent argues as though the strong evidence that appellant committed acts of significant child abuse was also strong evidence that he was guilty of first degree murder and strong evidence to prove the "torture" special circumstance.

However, respondent cannot make the unusual features of this case go away. Appellant and his wife abused their little boy, but he died because the wife gave him some over-the-counter sleeping pills without any active participation by appellant and without any apparent intent to do him harm.

These unavoidable features decisively undermine the government's case on the evidence, both as to the murder finding and the special circumstance finding. They also render virtually every error committed by the trial judge a prejudicial error. They dictate reversal of the judgment in all respects.

REPLY TO RESPONDENT'S STATEMENT OF THE FACTS

Respondent's statement of the facts is a generally reliable presentation of the evidence in the light most favorable to the prosecution. However, three of respondent's factual points should be placed in context.

First, and most importantly, respondent states that the autopsy pathologist, Dr. Sheridan, testified that apart from the main cause of death - the drug overdose - "[a]nother contributing

factor was the 'smothering' injuries." (R.B. 11.) "In fact," respondent goes on, "Sheridan testified that absent the positive toxicology results, he would have concluded that smothering was the most likely cause of death." (*Ibid.*, citing 10 R.T. 2613-2614, 2618.)

This idea that it was proven that someone tried to smother the child was important to the prosecution, and is important to respondent, because it is the only suggestion of an action taken by one of the parents that seemed to evidence a present, deliberate intent to kill.

What Dr. Sheridan actually said was different in an important way. He testified there are "basically two" explanations for the mouth injuries he observed, "the more common [being] from pressure being applied directly over the mouth, by, for example, another person's hand as if any kind of action like smothering" (10 R.T. 2613), and the other being "a blow directly into that area" (10 R.T. 2614).

But additionally, Dr. Sheridan acknowledged that during trial preparation defense counsel had asked him to reply if he disagreed with the assertion that the whole of the autopsy findings greatly reduced the likelihood of smothering as a cause, and he did not reply. (10 R.T. 2626-2629.)

Furthermore, Dr. Sheridan acknowledged that the injuries he was talking about, when they are associated with actual

smothering, are the product of violent struggling by the victim. And in this case this would have been consistent with a smothering episode that occurred some hours before the death - i.e., before the fatal sleeping pills were administered and rendered the victim somnolent - and such an action, in turn, could not have been a cause of death. (10 R.T. 2638-2639.)

Second, respondent states that Dr. Sheridan testified that "acute and chronic abuse and neglect were significant contributing causes of death" (citing 10 R.T. 2604, 2615). Dr. Sheridan did not say these factors were a "significant" contributing cause of death. He testified they were "contributing causes - where, in other words, you list something else that contributed to the death but is separate from the main one . . . ." (quoting 10 R.T. 2604).

Third, it has been undisputed that the child victim was born with medical problems. Respondent states that "by the time he was five years old, most of his medical problems had been resolved." (R.B. 2.) The evidence on which this statement is based was the testimony of the child's aunt, who had raised him, and on some observations by acquaintances of the defendants that the child had looked normal to them. (9 R.T. 2315-2318, 10 R.T. 2471-2472, 2517, 11 R.T. 2661-2662.) The latter observations are essentially meaningless, in terms of the child's underlying medical condition, and the aunt was a person with no medical

expertise who had some motive to attribute good health to the child when she turned him over to the defendants, whether or not this was true. The underlying medical condition of the child was and is a key point of uncertainty in this case.

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I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE APPELLANT WAS GUILTY OF FIRST DEGREE MURDER

Appellant contends there was insufficient evidence in this trial to prove he was guilty of first degree murder. (A.O.B. 32-41.)

A. Introduction

Appellant begins by noting that three theories of first degree murder were possible on the evidence here - deliberation/ premeditation, poison, and torture. But the first two can be easily ruled out: the primary cause of death was a palliative act, and the jury expressly rejected the theory that the child was intentionally poisoned. Respondent disputes this preliminary assertion.

///

B. The Poison Theory Cannot be Sustained

Respondent contends the first degree murder finding can be affirmed under a poisoning rationale by utilizing the concept of implied malice. The theory would be that appellant was properly found guilty of first degree murder because Michelle Jennings knew when she gave the boy the sleeping pills that she was endangering his life, and she acted with conscious disregard of that risk. (See R.B. 18, citing, inter alia, People v. Blair (2005) 36 Cal.4th 686, 745.)

This theory is outlandish. There was no hint in the evidence here that Michelle Jennings intended by giving the boy the sleeping pills to do anything other than quiet him and palliate him, and no hint that this poorly educated woman had any idea that the pills could kill the boy. There was also never the slightest evidence that appellant had any knowledge of - let alone that he aided and abetted in - Michelle's decision to give the boy twice the adult dosage.

If the court is to adopt this rationale advanced by respondent for a finding of first degree murder, appellant requests that it be clearly articulated in the opinion, for further review in federal court.

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C. The Deliberation/Premeditation Theory Cannot be Sustained

Respondent also advances an argument for affirming on the theory that deliberate, premeditated murder was proven - by essentially incorporating respondent's argument on issue "III" in this case. (R.B. 28, third full paragraph, referring to the argument at R.B. 31-33.) But this argument is mainly about evidence - of varying degrees of persuasive force - which respondent offers as proof of *intent* to kill (or "get rid of") Arthur. That is not enough to prove deliberate, premeditated murder.

In this argument, respondent contends there was evidence of "a number of injuries . . . of the type that are likely to cause death" (R.B. 32). But there were *no* injuries of the sort that are likely to cause death. This has been, from the start, one of the fundamental flaws in the government's case for convicting appellant of capital murder.

One of respondent's "likely to cause death" examples is the "smothering" theory - the contention that appellant tried to smother Arthur. However, this framing of the case collapses on careful review of the record. It was noted at pages 3-4, *supra*, that not only was Dr. Sheridan, the autopsy pathologist, uncertain whether any act of smothering occurred, but more importantly, he acknowledged in his testimony that if there was

an act of smothering it occurred at some time significantly before the pill overdose occurred. That is, the smothering act necessarily was terminated without fatal, or potentially fatal, results. By definition, this act was not "likely to cause death."

Respondent next refers to the blow to the back of Arthur's head, but here again, Dr. Sheridan testified that this injury was "not life threatening" (10 R.T. 2653).

Respondent refers to an earlier head injury that had been sutured, and to a shaking injury. But the unmistakable implication of the evidence on these points is that these injuries were not "likely to cause death," either.

In sum, cruel injuries were inflicted on Arthur. But none of them manifested intent to kill - primarily because none of them was of the sort that is at all *likely* to cause death.

Respondent points to other evidence that did suggest appellant, at times at least, harbored intent to get rid of Arthur. However, none of these incidences of intent was linked in any significant way with the actual mechanism of death.

This can be illustrated by a hypothetical:

> X and Y both form a hatred for Z. Each knows the other hates Z, and each has heard the other state that somebody ought to kill Z. Without communicating further with one another, X and Y both form the intent to kill Z. X decides he will shoot Z dead when he

comes out of his house on Wednesday. Y decides he will visit Z on Wednesday morning and poison his oatmeal. Y does visit, and does poison the oatmeal, and Z eats it. Feeling woozy, Z heads out the door. X, who has stationed himself in a position to carry out his plan, fires a shot that misses Z. Z collapses and dies from the poison.

In this hypothetical, X is guilty of attempted murder, but not of murder - even though he formed the *intent* to kill Z, and (unlike appellant in this case) he acted on it, and Z ended up dead. X is not liable for murder because his act did not cause Z's death.

Elsewhere in this appeal the parties debate the causation issue - was it sufficiently proven that appellant *caused* Arthur's death. But for present purposes, the hypothetical defeats respondent's argument that there was sufficient evidence to prove *deliberate and premeditated* murder. Arthur's death obviously was not a result of a deliberate and premeditated act by appellant (or his wife, for that matter) that was taken with the intent that the act kill Arthur.

D. The Torture Theory Cannot be Sustained

Appellant contends the evidence was insufficient to prove him guilty of murder under the only seriously arguable theory

available on this evidence - the theory of torture murder - because the evidence insufficiently established causation. The evidence proved that the sleeping pills administered by Michelle Jennings were the immediate cause of death, and that the sleeping pills likely would have killed Arthur no matter what other circumstances existed. And conversely, had the sleeping pills not been administered, Arthur *possibly* would have died in the near future, *if* he was not properly cared for.

The law is settled that a person is guilty of causing someone's death if he commits an act or omission that sets in motion a chain of events that produces the death as a direct, natural and probable consequence, an act without which the death would not occur. (People v. Cervantes (2001) 26 Cal.4th 860, 866; CALJIC No. 3.40.) The cause of death must be a natural and probable consequence of the defendant's act, involving the same kind of injury or harm as the defendant designed or contemplated. (*Id.*, pp. 869-870.)

Appellant cannot be held liable for murder under these rules, because Michelle's act of accidentally overdosing Arthur on sleeping pills was not a natural or probable consequence of appellant's abusive acts, and not the sort of harm appellant engaged in.

Respondent cites law from the "provocative act" line of murder cases. (People v. Sanchez (2001) 26 Cal.4th 834; People

v. Briscoe (2001) 92 Cal.App.4th 568.) But the problem these cases address is dramatically different from the problem the instant case presents. In the "provocative act" cases, the defendant engages in gun play, or some other act that is potentially and immediately fatal, and someone dies by that very means - either by the self-defensive act of the defendant's intended victim, or under circumstances where it cannot be determined whether it was the defendant or the self-defending intended victim who actually killed the person. In these cases, the defendant certainly is guilty of murder under the law appellant summarized in the paragraph just above: the defendant took action that was likely to be fatal to someone, and his action directly, foreseeably triggered a response that was of the same order of violence, a response which did, indeed, result in a fatality.

These cases do not address the problem at hand here. A major part of the problem this case presents for the government is, again, that there was no evidence appellant *acted* with intent to kill Arthur, at least not in a way that was causally connected to Michelle's act of administering the over-the-counter sleeping pills in far too large a dose. It can be said that appellant acted cruelly toward Arthur, and apparently with hardly the slightest concern for the boy's well-being. But in this scenario the idea that his wife would accidentally overdose the boy with

sleeping pills was far from a direct or foreseeable or natural consequence of the abuse and neglect. Respondent's citation of "provocative act" case law does not alter this plain fact.

Respondent also cites a poisoning case that involved a victim who had some underlying medical problems. (People v. Catlin (2001) 26 Cal.4th 81.) But this case is inapposite. It suggests that *Michelle* Jennings could not escape liability for homicide on an argument that appellant's abuse contributed to Arthur's death, because her act clearly was the actual cause of the death. This does not assist in the analysis of whether the abuse attributed to appellant was a sufficient cause of Arthur's death to hold *appellant* liable for murder.

Respondent cites another series of inapposite cases, in all of which the victim was obviously deliberately killed, and the killer inflicted dozens or scores of wounds in the process of killing. (People v. Chatman (2006) 38 Cal.4th 344; People v. Elliot (2005) 37 Cal.4th 453; People v. Bemore (2000) 22 Cal.4th 809; People v. Proctor (1992) 4 Cal.4th 499.) Appellant concedes that if Arthur had died as a direct result of a beating, or shaking, or burning he inflicted on Arthur - or a whole series of such acts - the case for finding him guilty of murder would have been much stronger than it actually was.

However, this leads the discussion back to the original point: The evidence here proved that appellant committed acts of

abuse that could be called "torture," leaving Arthur in a pitiable state; and then the Jenningses gave the boy some prescription drugs as a palliative measure; and then Michelle Jennings tried to palliate him with over-the-counter sleeping pills, foolishly administering enough of this chemical that it killed the boy. Appellant maintains that this evidence fails to establish first degree murder by torture, because an insufficient chain of causation between the torture and the death was demonstrated.

Nothing respondent says in his brief refutes this basic point. All respondent establishes is that there was *some* causal link between appellant's acts and the death. This is not enough, under the established case law.

E. Conclusion

Respondent entirely fails to identify a theory of first degree murder that is supported by the actual evidence in this case. Unmistakably, the first degree murder verdict must be reversed.

///

II. ANY INTERPRETATION OF THE EVIDENCE IN THIS CASE AS BEING SUFFICIENT TO SUPPORT CONVICTION OF FIRST DEGREE MURDER UNDER THE PENAL CODE SECTION 189 PROVISO FOR "TORTURE" MURDER WOULD BE UNCONSTITUTIONAL

Appellant contends the constitutional protections against conviction under vague and arbitrary laws, and against death judgments imposed under standards that are not narrowly tailored to identify only the most culpable killers, forbid the conviction and death penalty in this case. (A.O.B. 42-44.)

Respondent contends the result is constitutional, in part because it is established that the death penalty can be visited upon a person who was not the actual killer acting with intent to kill. (Citing Tison v. Arizona (1987) 481 U.S. 137 [107 S.Ct. 1676; 95 L.Ed.2d 127], and following cases.) (R.B. 29.)

However, respondent's cases feature defendants who knowingly engaged in acts that were highly likely to end in someone's death. Only in the most extremely technical sense could it be argued that such a defendant did not "intend" to cause death. The instant case is meaningfully different.

Here there was no evidence that appellant engaged in any probably lethal acts; to the extent his acts constituted some cause of Arthur's death, the link was attenuated at most. Therefore the principle of Tison and like cases does not refute appellant's argument under the "narrowing" principle of death penalty jurisprudence.

Respondent offers no articulated response to appellant's specific claim that the conviction and death penalty here violated the constitutional protection against criminal penalties pursuant to vague and arbitrary laws. Respondent only ignores the actual cause of death, and recites that appellant "starved, beat, kicked, dragged, burned, smothered[[1]] and shook" (R.B. 30) Arthur. These things may be taken as true; however, what actually killed Arthur was the sleeping pill overdose, with some contribution from the other drugs. The "torture" played little, if any, role in Arthur's death. This is why the conviction and death sentence here violate the constitutional control on vague and arbitrary enforcement of laws that is discussed in such cases as Kolender v. Lawson (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 908-909, 103 S.Ct. 1855].)[2]

Accordingly, the first degree murder conviction is unconstitutional, and for that reason alone must be reversed.

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[1] As appellant has noted previously in this case, the evidence was that either there was a smothering incident that was terminated without any potentially fatal consequences, or else the child was not smothered but instead was struck in or around the mouth, also without potentially fatal consequences.

[2] Respondent also argues under heading "II" the general constitutionality of the torture-murder special circumstance. (R.B. 29-30.) This subject is discussed in argument "V," and to some extent also arguments "III" and "IV," of the opening brief, and of this reply brief (*infra*).

III. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE SPECIAL CIRCUMSTANCE ELEMENT THAT THE FATAL ACT INVOLVED "INTENT TO KILL"

Appellant contends the special circumstance finding fails because of three independent failures of proof. (1) The evidence was insufficient to prove there was any intent to kill involved in the fatal act - the administration of the sleeping pills; (2) the evidence was insufficient to prove appellant aided in the administration of the pills; and (3) the evidence was insufficient to prove appellant aided Michelle with personal intent to kill. Penal Code section 190.2, subdivision (a)(18), the "torture" special circumstance, requires substantial evidence that "[t]he murder was *intentional* . . .," and section 190.2, subdivision (c), requires substantial evidence that a person who was "not the actual killer" aided the actual killer, and did so "with the intent to kill." (A.O.B. 45-49.)

Respondent's whole argument on this point is that there was evidence that appellant intended to kill Arthur, and therefore, under People v. Bemore, *supra*, 22 Cal.4th 809, the special circumstance finding should be affirmed. (R.B. 31-33.)

Appellant discussed the Bemore case at some length in argument "V" in the opening brief, and discusses Bemore further in argument "V," here. (*Infra*.) For present purposes it suffices to say that Bemore does not address any of the points at issue in argument "III." Bemore featured a more typical fact

pattern where the defendant himself inflicted numerous stab wounds during a robbery; it did not in any way present or discuss the problem of applying this special circumstance where there were torturous, non-fatal acts done by person A, followed by a non-torturous, fatal act done by person B.

Thus, respondent fails to address appellant's actual argument, at all. To repeat the argument: Section 190.2 requires proof that the killing was *intentional*, and - as respondent's failure to address this issue implies - there was no substantial evidence that Michelle Jennings acted intentionally to kill Arthur. Also, because appellant was "not the actual killer," section 190.2 required proof that appellant *aided* Michelle in administering the pills, and engaged in that very act of aiding her *with intent to kill*. Here again, respondent's silence on the issue suggests a concession that there was no substantial evidence to prove either of these facts.[3]

Accordingly, the special circumstance finding must be reversed.

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[3] In this argument respondent also contends, as he did in argument "I," that appellant inflicted injuries of the sort that were "likely to cause death," giving as examples the "smothering" theory, the blow to the back of Arthur's head, the earlier, sutured head injury, and the shaking injury. (R.B. 32-33.) This is a side issue, as to argument "III," because argument "III" is focused on the evidence about the defendants' intent with regard to the act of administering the fatal pills. But it cannot be repeated often enough, in this appeal, that none of these injuries respondent identifies could be described as "likely to cause death."

IV. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE SPECIAL CIRCUMSTANCE ALLEGATION THAT THE MURDER "INVOLVED THE INFLICTION OF TORTURE"

Appellant contends the evidence was insufficient to satisfy the further requirement of Penal Code section 190.2, subdivision (a)(18), that the murder "*involved* the infliction of torture," because - assuming some or many of appellant's acts were torturous - the fatal act was the administration of the pills, and this did not in any way "involve" torture. (A.O.B. 50-52.)

Here again, respondent simply relies upon People v. Bemore, *supra*, 22 Cal.4th 809, contending that because some of appellant's acts could be assigned as *a* cause of Arthur's death, the death could be described as "involving" torture, notwithstanding that what killed the boy was the pills Michelle Jennings administered in a non-torturous manner. (R.B. 34.)

For the most part, appellant's reply is his discussion of the Bemore case, in argument "V," *infra*.

Appellant does emphasize that the only relevant evidence on the subject of cause of death was the testimony of Dr. Sheridan and the stipulation regarding toxicologist Baselt, and these experts' evidence established that *without* the sleeping pills Arthur would *not* have died at the time he did, and in fact he would have survived if treated properly; and conversely, *with* the pills, he died. (10 R.T. 2564-1566, 2602-2604, 2614-2618.) The death of the child in this case did not "involve" torture in any

way the United States Constitution will permit as a basis for a death judgment.

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V. THE SPECIAL CIRCUMSTANCE FINDING AND DEATH VERDICT MUST BE REVERSED AS VIOLATIVE OF APPELLANT'S CONSTITUTIONAL RIGHTS, BECAUSE THE EVIDENCE DID NOT PROVE, AND THE JURY DID NOT FIND, THAT THE "TORTURE" THAT CONSTITUTED THE SPECIAL CIRCUMSTANCE WAS THE CAUSE OF THE DEATH WHICH WAS THE BASIS OF THE MURDER CONVICTION

Appellant contends the torture murder special circumstance provision (Pen. Code, § 190.2, subd. (a)(18)) must be limited in its application to killings where the torture was the *sole*, or at least the *primary*, cause of death, in order to be constitutional. If the statute is so limited, the special circumstance in this case must be reversed. In advancing this argument, appellant notes that People v. Bemore, *supra*, 22 Cal.4th 809, generally rejected this claim. Appellant suggests that the court reconsider and overrule Bemore, but also argues that even under Bemore, he should prevail in this appeal. (A.O.B. 53-59.)

Respondent essentially points to Bemore, and several cases leading up to Bemore, and offers nothing more. (R.B. 35-36.) Therefore no occasion arises for appellant to repeat or embellish upon his constitutional argument, to the effect that Bemore should be overruled, and the special circumstance should be

limited to cases where the torture is the sole or primary cause of death.

Respondent's failure to discuss appellant's contention that the special circumstance finding in this case must be reversed even under the Bemore rationale is noteworthy.

Bemore acknowledges the existence of (as yet undefined) " 'outer limits of time or space proximity' " (22 Cal.4th at p. 843, quoting People v. Barnett (1998) 17 Cal.4th 1044, 1162) to the doctrine that the torture special circumstance can be invoked even where the torture was not a primary cause of death, limits which are necessary in order for the doctrine to meet the demands of the state and federal constitutions. Even if this court is not to reconsider the basic holding of Bemore and like cases, it must seriously consider whether the facts of this case exceed those "outer limits." Further, if the court decides the facts do not exceed the "outer limits," it must clearly articulate how this is so, how it is appropriate to deem the special circumstance finding in this case to be constitutional. In this case the death was not wholly unconnected to the acts of torture, but the connection was weak at most.

Appellant repeats his contention that, even under the broad rule articulated in Bemore, there was here too little connection between the torturous acts and the homicidal act for the torture special circumstance to be constitutionally applied.

VI. FOR NUMEROUS REASONS RELATING TO THE PROSECUTION'S THEORY THAT ARTHUR JENNINGS WAS TORTURED BY WAY OF DELIBERATE STARVATION, THE JUDGMENT MUST BE REVERSED

It was noted in the opening brief, and is confirmed in the respondent's brief, that the government's case for finding appellant guilty of torture murder and for finding true the torture murder special circumstance depended heavily on the theme that appellant tortured Arthur by deliberately starving him. In argument "VI," appellant identifies a host of reasons why the judgment must be reversed because of errors relating to the presentation of this theme to the jury. (A.O.B. 60-87.)

Appellant's argument is fortified by the respondent's brief, which for the most part simply fails to address the details of the argument. Respondent makes little effort to deny that error occurred, focusing primarily on claims that the errors were harmless. (R.B. 36-43.) But respondent's harmless error contentions do not withstand analysis.

Appellant's argument starts with the point that the prosecution put on no evidence whatsoever that appellant engaged in torturous acts of deliberate starvation. Instead, the prosecution relied on the conjecture, based on the child's emaciation, that appellant must have deliberately caused this emaciation.

There were double-hearsay statements in the co-defendant

Michelle Jennings' defense case, relating that appellant concocted the idea of withholding food as a form of discipline. Even these statements were mitigated, in effect, by the fact that Michelle said she withheld food sometimes, but not always, and by evidence of the child vomiting, and by evidence that the child ate on the day before he died.

The prosecution's success in pressing this theory rested on a series of errors:

First, it violated the substantial evidence rule.

Second, it violated the doctrine of Crawford v. Washington (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], which makes the hearsay statements of Michelle Jennings on which the theme rested strictly inadmissible against appellant.

Third, it rendered the trial judge's failure to sever the trials a reversible error.

Fourth, it violated the hearsay provisions of the Evidence Code.

For a series of reasons these plain errors compel reversal of both the conviction and the special circumstance finding. Most important among these is that the prosecutor pinned his entire case on the infected theme, and the jury clearly manifested that it relied on the theme.

Respondent impliedly concedes that the only direct evidence to support the starvation theme was part of the co-defendant's

affirmative case, but blatantly asserts that there was "overwhelming" (R.B. 40) circumstantial evidence that appellant deliberately starved the child. The "overwhelming" evidence of conscious action on appellant's part to starve the child turns out to be the fact that the child lost weight and became emaciated. (R.B. 41.) Obviously, under the substantial evidence rule this evidence alone could not support the conclusion that appellant deliberately starved the child in such a way as to torture him. On the evidence here this conclusion is completely speculative and conjectural.

At one point respondent makes the surprising assertion that the judgment should be affirmed in the face of these errors because "the prosecutor never referred to *Michelle's statement* in his closing arguments." (R.B. 43.) As noted at length in the opening brief, the prosecutor's featured theme in closing argument was the *direct inference from* Michelle's statement. The fact that he did not mention the source of the inference is completely insignificant in the calculation of prejudice.

Respondent suggests the errors should be deemed harmless because there were other theories of torturous acts. (R.B. 42.) In this passage respondent pointedly ignores the detailed discussion in the opening brief (A.O.B. 74-75) of exactly why this effort to shore up the judgment must be rejected. Under this court's holding in People v. Guiton (1993) 4 Cal.4th 1116,

the facts that the prosecutor rested his case on the flawed theory, and that the jury asked whether it could base its findings on the infected deliberate starvation theory only about an hour before they returned their verdicts, absolutely prohibit a finding of harmless error in this respect. These errors were obviously prejudicial and reversible.

One of the elements of the prejudice of the error which was noted in the opening brief, and is not discussed at all in the respondent's brief, is the possibility that to the extent there was deliberate starvation, it was the work of *Michelle* Jennings. The universal custom in families is for the mother to be in charge of feeding the children. In the absence of any *evidence* of participation by appellant in a campaign of deliberate starvation, the natural inferences would be that the *mother* was failing to feed the child properly, and the father simply did not notice or did not care.

Respondent does advance an argument for finding there was no error in one respect, contending that there was no Crawford error because Michelle's statement that appellant initiated a deliberate starvation campaign was not admitted to prove the truth of the statement, but as a part of the basis of the opinion of the testifying witness, Dr. Nancy Kaser-Boyd. (R.B. 38-40.)

Quite obviously, this was not Michelle's counsel's intention in eliciting this statement. The obvious intention was for the

jury to act on the gist of the statement itself, to shift blame onto appellant. This is why, as respondent concedes in a footnote, "the jury was not instructed on" (R.B. 40, fn. 10) this distinction between admitting the statement for the truth of the matter asserted, and admitting the statement as part of the basis of Dr. Kaser-Boyd's opinion. No one involved in this trial thought for a moment that this was the point of admitting Michelle's hearsay statements.[4]

It is highly noteworthy that respondent makes no effort to argue that this *instructional* error, manufactured by respondent as a bypass around the *evidentiary* error, was harmless. Clearly, for exactly the reasons appellant has argued that the evidentiary error was prejudicial, respondent's newly-created instructional error was likewise prejudicial and reversible error. Respondent concedes that the jury was not instructed *not* to consider this evidence against appellant, in a trial where the jury clearly revealed that it *did* consider this evidence against appellant, and it did so in circumstances that compel the inference that the

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[4] It is all but certain that in appellant's companion petition for writ of habeas corpus, an action which is dormant at this writing because counsel has not yet been appointed, one significant theme will be trial counsel's inexplicable failure to object to the admission of the double hearsay discussed in this argument, and his parallel failure to request a limiting instruction that would have forbidden the jury to consider Michelle's statement as evidence that appellant was involved in a campaign of deliberate starvation.

Additionally, counsel's failure to request a limiting instruction is discussed later in the text of this argument, *infra*.

jury found the evidence at least highly important, if not compelling.

Furthermore, the Crawford case does not support respondent's claim that an out-of-court testimonial statement is admissible if it can be claimed the statement is only a part of the basis for expert opinion.

In Crawford, the U. S. Supreme Court engaged in a lengthy discussion to support its conclusion that the confrontation clause of the Constitution applies not only to in-court testimony, but to out-of-court testimonial assertions such as Michelle Jennings' assertions here: "[W]e . . . reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.' [Citations.] Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless . . . ." (541 U.S. at pp. 50-51.)

Thus, a state rule of evidence that would permit the hearsay to be introduced is powerless to overcome the fundamental constitutional rule that a statement may not be introduced against a defendant in a criminal trial unless the declarant is subject to confrontation and cross-examination. Therefore respondent's dodge that Michelle's statements were only admitted as a basis for the expert's opinion must be rejected.

Respondent points to a summary statement in a footnote in Crawford that its holding does not apply to "the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (R.B. 39, see 541 U.S. 59, fn. 9.) However, this statement refers to the case of Tennessee v. Street (1985) 471 U.S. 409 [85 L. Ed. 2d 425, 105 S. Ct. 2078], where the defendant first testified about a co-defendant's confession, and the prosecution responded by introducing the co-defendant's confession to rebut the defendant's testimony.

The situation here is different in a decisive way. Whenever a defendant chooses to testify, he opens the door to evidence that proves, or tends to prove, he is lying. Where that evidence includes incidental elements that tend to prove the truth of the charge against the defendant, the only fair approach is to admit the rebuttal evidence with a jury admonishment to disregard the secondary effect of the statement.

Here, appellant did not testify and open the door to rebuttal, and here the purpose of admission of the out-of-court statement was not nearly such an obvious non-hearsay purpose. Tennessee v. Street does not control this situation.

Furthermore, as suggested just above, it was critical to the decision in Street that the judge had instructed the jury carefully on the limited use of the co-defendant's confession, and the prosecutor argued that the confession should be used for

this purpose, alone. The situation here was exactly the opposite - the judge gave no limiting instruction, and the prosecutor rested his entire case on the truth of the out-of-court statements, on the aspect of the statements that directly violated Crawford.

One of the reasons respondent offers for finding no error under Crawford is that Dr. Kaser-Boyd was subject to cross-examination. The flaw in this approach is that Dr. Kaser-Boyd was not, and could not be, subject to cross-examination on the truth of the matter asserted in Michelle's statements. That is, the fundamental constitutional interest Crawford protects is confrontation and cross-examination of the *declarant*; this interest is not served at all by the right to cross-examine some witness who repeats in court what the declarant said out of court.

In sum, respondent's effort to get around the Crawford error utterly fails.

Respondent hardly makes any effort at all to contest appellant's claim that the judgment must be reversed because appellant was prejudiced by being jointly tried with Michelle, because Michelle's statements suggesting a starvation campaign would not have been proffered or admitted in a separate trial. Respondent only summarily claims that "[f]or all the reasons previously stated, this is not" a case where a joint trial was

unfair (quoting R.B. 43). But respondent fails to identify what "reasons previously stated" he refers to. Presumably, this is a reference to respondent's failed effort to demonstrate that the errors were harmless - i.e., it is just a repetition of the claim that the judge did err, but the judgment should be affirmed because appellant was not prejudiced by the joint trial.

The reasons why this contention must be rejected also have been "previously stated," in this brief and in the opening brief. The *only* affirmative evidence to support the prosecution's main theory of guilt and of the special circumstance was evidence the jury should not have heard. A death penalty judgment simply cannot be affirmed in these circumstances.

Finally, respondent also claims appellant's argument under the hearsay provisions of the Evidence Code should be rejected, for the same reason respondent advances under appellant's other claims - namely, that Michelle's statements about appellant triggering a starvation campaign were not admitted to prove the truth of the statements. (R.B. 39-40.) This claim has been adequately addressed already in this brief.

However, in this respect, also, respondent claims the error was waived because defense counsel did not object to the admission of the evidence. In this respect, and also in connection with counsel's failure to request a jury instruction limiting consideration of Michelle's statements to only the

impact they had on Dr. Kaser-Boyd's opinion (see fn. 4, *supra*), respondent's claim does not lead to affirmance of the judgment, but only to a further analysis under the ineffective counsel doctrine which, for reasons parallel to those argued in appellant's briefs, also leads to reversal.

The well-known ineffective counsel doctrine was discussed in the opening brief, at pages 163-164. In sum, a judgment must be reversed if counsel acted or failed to act in a way that is consistent with prevailing professional norms, and counsel's error was prejudicial to his client. (Strickland v. Washington (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693, 104 S.Ct. 2052]; In re Jones (1996) 13 Cal.4th 552, 561.) Obviously, Michelle Jennings' statements were crucial to the prosecution's theory of first degree murder and of the torture special circumstance, and were crucial to the jury's findings in these respects. Counsel's failure to seek to exclude the evidence of these statements, or to seek a limiting instruction, is utterly inexplicable in terms of acceptable professional representation. Undoubtedly, counsel must have made a simple, but crucial, mistake - thinking there was already evidence before the jury to suggest that appellant consciously undertook a campaign of withholding food, and thus, thinking that the proffered statements in Michelle's defense case were merely cumulative.

But whatever counsel was thinking, respondent's effort to insulate the judgment because of counsel's omissions must be rejected. Counsel surely should have sought exclusion of the evidence, and failing that, should have sought a limiting jury instruction. This omission surely was prejudicial, as it allowed into evidence what may have been the single most important bit of evidence supporting the prosecution theories.

For each and all of the many reasons discussed here, and in argument "VI" in the opening brief, the murder conviction and the special circumstance finding must be reversed.

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VII. THE COURT'S FAILURE TO INSTRUCT THE JURY THAT ANY "AIDING AND ABETTING" BY APPELLANT WHICH OCCURRED AFTER THE CO-DEFENDANT ADMINISTERED THE FATAL DOSE OF SLEEPING PILLS WOULD SUPPORT LIABILITY AS AN ACCESSORY, BUT NOT LIABILITY AS A PRINCIPAL IN THE HOMICIDE, WAS REVERSIBLE ERROR

Appellant contends that while the jury was advised of the principle of aiding and abetting - that a person who aids in a crime is a principal - reversible error occurred when the court failed to instruct the jury on the parallel principle embodied in Penal Code section 32 - i.e., that a person who "aids and abets" a perpetrator only *after* the crime has been committed is *not* a principal, but is instead guilty of a separate crime. (A.O.B. 88-92.)

This was error, because although there was strong evidence that both Jenningses were complicit in the injurious and grossly negligent acts that occurred before Michelle Jennings overdosed Arthur on sleeping pills, there was hardly any evidence to suggest appellant aided, abetted, or assisted in administering the pills. Yet appellant obviously willingly participated in the effort to conceal the crime.

In other words, there was evidence to prove appellant aided and abetted in most of the acts *before* Michelle administered the pills, and aided and abetted, so to speak, in the acts *after* Arthur died, but good reason to conclude appellant *did not* aid and abet in the act that directly caused Arthur's death. Under these circumstances, the jury needed to be aware of the possibility of convicting appellant of violating Penal Code section 32, under which "every person who, after a felony has been committed, harbors, conceals, or aids a principal in such felony . . ." is himself guilty as "an accessory to such felony."

Respondent repeatedly characterizes appellant's argument as reliance on a "defense" of being an accessory - apparently as a basis for arguing the law that instruction on a defense is not necessary if the defense is not one the defendant is relying on. (See R.B. 59-63.) It should be noted in this connection that the word "defense" appears nowhere in appellant's argument number "VII." The principle at issue here is not a *defense*, it is a

potential and reasonable construction of the facts that results in conviction of a crime other than the one charged.

Also, in this connection, although respondent argues at times that the defense did not rely on the accessory theory, he actually acknowledges that the defense *did* rely on it - that this theory "was not entirely inconsistent with appellant's defense" (R.B. 62). This is correct. The defense did not dispute at all that appellant participated in the cover-up after Arthur died, and accepted the general theme that appellant engaged in acts of abuse before Arthur died, but did not accept in any way the idea that appellant was involved in administering the pill overdose.

Relying on People v. Riley (1993) 20 Cal.App.4th 1808, respondent claims that a person can be guilty both as a principal and as an accessory to the same crime. This is a dubious proposition (see discussion in In re Eduardo M. (2006) 140 Cal.App.4th 1541), but the court need not decide here whether Riley is correct. The issue here is not whether the jury could have convicted appellant of both murder and accessory, but whether the jury should have been instructed on the law of accessories, and thus given the option of convicting appellant of *only* that crime.

Respondent argues that there was "overwhelming[]" evidence that appellant's acts were a cause of Arthur's death, apparently intending to invoke a rule that the sua sponte duty to instruct

on defenses is limited to defenses that have the support of substantial evidence. (R.B. 62-63, citing People v. Barton (1995) 12 Cal.4th 186, 195.)

In Barton this court discussed at length the trial judge's general obligation to instruct on possible defenses and on included offenses. Broadly, the judge must instruct on a *defense* "if there is substantial evidence supportive of such a defense" (12 Cal.4th at p. 195), but must instruct on a *lesser offense* whenever there is evidence of it that is substantial enough to merit consideration by the jury (*ibid.*, fn. 4).

In neither event does the decision turn on whether there is substantial - or even, to quote respondent, "overwhelming" - evidence to the contrary. The question is about the quantum of evidence to support giving an instruction, not the quantum of evidence against the defendant.

Here, of course, there was ample evidence to support instruction on the accessory rule under either the "substantial evidence supportive of the defense" theory or the "evidence sufficient to merit consideration" theory.

Furthermore, the issue in the Barton case was whether it was error to refuse a defendant's request *not* to instruct on an alternative conception of the evidence - namely, in that murder case, the alternative of voluntary manslaughter. Initiating its discussion of that question, this court noted that "the

difference between the two categories [defense or lesser included offense] is not always clear" (12 Cal.4th at p. 199), that the voluntary manslaughter option bears some of the characteristics of a "defense" and some of the characteristics of a "lesser offense."

Appellant submits that this discussion comfortably fits the issue here. The optional offense of guilt as an accessory, rather than guilt of the charged crime, likewise falls in that "unclear" area between classic defenses and classic included offenses. And therefore the rule of Barton should be applied here.

In Barton this court concluded that a trial court should instruct on voluntary manslaughter "when there is substantial evidence that the defendant killed in unreasonable self-defense, not when the evidence is 'minimal and insubstantial' " (12 Cal.4th at p. 201), noting that by "substantial evidence" it meant "evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive" (*ibid.*, fn. 8).

This is the rule that applies here. And certainly, there was here "evidence sufficient to deserve consideration by the jury" that appellant, though guilty of acts of child abuse, was not guilty of the homicide, but was instead guilty of being an accessory to the homicide.

Respondent also suggests it is decisive that "appellant did not rely on a defense [*sic*] that Michelle murdered [*sic*] Arthur and he only aided her in hiding the crime after it had been committed" (R.B. 62). However, the Barton case is one of many that state a trial court must instruct on theories the jury could believe the evidence reflects, whether or not a party requests such instruction. (See discussion at 12 Cal.4th pp. 196-198, 201-202.) Under Barton, the court here was required to instruct on accessory liability, whether or not it appeared the defense was "relying" on the accessory theme.

Respondent claims "[t]he evidence . . . established that appellant aided Michelle in giving Arthur the sleeping pills." (R.B. 63.) But this was not "aiding" in the culpable sense, any more than it would be culpable for a person to drop off a friend at a store, completely unaware that the friend was planning to commit a robbery. Appellant suggested that Michelle get some sleeping pills to give to Arthur to help him sleep; he did not suggest that she give him far more than his system could tolerate, so much more that he would die.

Finally, respondent argues the error was harmless, because "the jury could not possibly have based its guilty verdict on a finding that appellant only aided Michelle in covering-up the murder after it was committed." (R.B. 63.) Appellant disagrees; this construction of events is certainly plausible.

But moreover, the question is not so much how the jury *did* construe the evidence as how it *might have* construed the evidence if it had been aware of the distinction between guilt as a principal and guilt as an accessory. The jury in this case was not informed of one of the reasonable theories of guilt. This error cannot be swept aside because the jury did pigeonhole the facts under another theory.

In sum, respondent plainly fails to make the case for finding the trial court's failure to instruct on Penal Code section 32 was not error, or finding this error was harmless. The jury in this case was not instructed that one reasonable construction of the facts would lead to the conclusion that appellant was indeed guilty, but he was guilty as an accessory, not as a principal. Because of this error alone, the judgment must be reversed.

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VIII. THE JURY WAS ERRONEOUSLY INSTRUCTED ON THE ISSUE OF CAUSE OF DEATH, UNDER CALJIC No. 3.41

Appellant contends the jury was erroneously instructed under CALJIC No. 3.41.[5] (A.O.B. 93-99.)

Appellant's argument is based on the established rules that (1) in order for a defendant to be liable for having caused the victim's death, he must have committed an act or omission that set in motion a chain of events that produced the death - an act without which the death would not have occurred; and (2) if there has been another contributing cause, the defendant will be liable if the intervening cause was a normal and reasonably foreseeable result of the original act.

Here the jury was erroneously instructed that appellant caused Arthur's death, and was criminally liable, if appellant's act was "operative at the moment of the death and acted with

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[5] As give here, the instruction reads:

> There may be more than one cause of the death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is the cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death and acted with another cause to produce the death.
>
> If you find that the defendant's conduct was a cause of the death to another person, then it is no defense that the conduct of some other person contributed to the death.
>
> (C.T. 550; R.T. 3172.)

another cause to produce death" (quoting CALJIC No. 3.41). This language is starkly different from the actual law.

Appellant notes that CALJIC No. 3.41 might be construed as not erroneous so long as CALJIC No. 3.40 is also given; but CALJIC No. 3.40 was not given in this case.

Respondent argues (R.B. 68-72) that appellant is only contending that CALJIC No. 3.41 was *incomplete*, not that it was *incorrect*. The issue of this instruction as arguably "incomplete" will be discussed in this argument (*infra*), but initially it must be emphasized that appellant argues the instruction is *incorrect*. In People v. Cervantes, *supra*, 26 Cal.4th 860, 866, this court stated the law of causation in this connection, and what is required is evidence that the defendant committed an act or acts without which the death would not have occurred, and an absence of an intervening cause or causes that were not normal and reasonably foreseeable results of the defendant's act(s). Under this rule, it is essentially impossible to discern substantial evidence in this case to support the finding of cause that must underlie the judgment. (See argument "I," *supra*.) But applying the rule stated in CALJIC No. 3.41, the result is quite different. Surely appellant's acts were "operative at the moment of death" - for example, the recent head injury had not healed, there were bruises on the body, there were mouth injuries, etc. - and these

effects might have played some role in Arthur's death at the time it occurred. This instruction was flatly *incorrect*.

Respondent does not address the case law indicating that CALJIC No. 3.41 can be considered correctly given *if* CALJIC No. 3.40 is also given. This omission is highly significant. The reason is obvious: there can be no avoiding the conclusion that if the court gives *only* CALJIC No. 3.41, the court errs.

Additionally, respondent's effort to make an important distinction between instructions that are "incomplete" and instructions that are "incorrect" should be rejected. It is essentially meaningless. If one were to exhibit a picture of an item labeled a "football," and the picture showed only half of a football, the picture would be "incomplete," but it would also be "incorrect." The error discussed in this argument can be labeled in one way or another, but the important point is that it *was* an error. Respondent's "incomplete / incorrect" distinction impliedly concedes this to be true.

It is equally noteworthy that respondent makes no effort to discuss the discrepancy appellant has identified between the case law on causation in homicide cases and the language in CALJIC No. 3.41. Again, the reason is obvious: Any discussion of this discrepancy leads to the conclusion that the trial court erred.

Appellant included in the opening brief a further reason why CALJIC No. 3.41 was erroneous as given in this case, namely, that

the vague terms "operative" and "substantial factor" were not defined for the jury. (A.O.B. 97-98.) Respondent's presentation reads as though this was appellant's *only* claim of error in connection with the instruction.

Respondent contends these terms have plain meanings that do not require any further definition, relying on People v. Bland (2002) 28 Cal.4th 313, 337-338, and People v. Sanchez, *supra*, 26 Cal.4th 834, for this proposition. But in neither of those cases was the court asked to decide, nor did it decide, the question appellant poses here. Neither case holds that the terms "operative" and "substantial factor" in CALJIC No. 3.41 are commonly understood terms that do not need further definition.

Furthermore, People v. Bland undercuts respondent's argument in the instant case, by stating that because an issue of causation was presented, "the trial court *should have given an instruction like CALJIC No. 3.40* and, because the evidence suggested more than one cause, No. 3.41 (today CALJIC No. 17.19.5, augmented, when the evidence suggests more than one cause, by CALJIC No. 3.41)." (28 Cal.4th at p. 338, emph. added.) That is, not only does Bland not say the key terms in CALJIC No. 3.41 need no further definition; it also is one of the cases indicating that in a homicide with causation issues, CALJIC No. 3.41 must be supplemented with CALJIC No. 3.40.

Appellant contends this error was surely prejudicial. Had the jury been properly instructed, they would have been hard pressed to find the "torture" by appellant was an actionable cause of Arthur's death; yet instructed as they were, a finding that appellant's actions were a culpable cause of death was nearly certain. (A.O.B. 96, 98-99.)

Respondent's argument for finding the error harmless (R.B. 72) is flawed. Respondent argues as though the question is whether there was substantial evidence to support the jury's findings, not how likely it is that the erroneous instruction affected the jury's decision-making process.

Thus, respondent asserts that there was evidence sufficient for the jury to find appellant's acts were "a significant contributing cause of Arthur's death," and that there was evidence that at some point or other "appellant intended to kill Arthur," as though there was no dispute as to whether appellant's acts <u>were</u> a significant contributing cause of death, no dispute as to whether appellant's expression of intent to kill Arthur was linked to any actual <u>*effort*</u> to kill the child. Respondent goes on to assert that "there was uncontradicted evidence [*sic*] that Arthur's death was a direct, natural, foreseeable consequence of the torture" - as though this point, too, was undisputed or indisputable in this case.

All of these points were in dispute. On the evidence here, a properly instructed jury easily could have decided that appellant's acts were *not* an actionable cause of death, that appellant never *acted* to kill Arthur, and - most likely of all - that his wife's act of fatally overdosing the child on over-the-counter sleeping tablets was *not* a natural or foreseeable consequence of appellant's abuse.

Because of these undeniable possibilities, the erroneous giving of CALJIC No. 3.41 was a prejudicial and reversible error. Respondent offers no basis for concluding otherwise. And as a result of this prejudicial error, the judgment must be reversed.

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IX. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GIVE THE JURY INSTRUCTION CALJIC NO. 3.40, OR A LIKE INSTRUCTION

In an argument that parallels and supplements argument "VIII," appellant contends the trial court committed reversible error when it failed to give CALJIC No. 3.40, or a like instruction, on causation.[6] (A.O.B. 100-102.)

CALJIC No. 3.40 was obviously a sua sponte instruction on the evidence in this case. And this error was obviously prejudicial, because the jury was not told of the crucial aspect of the law of causation that the killing of the child had to be a direct, natural, and probable consequence of the defendant's act or acts - i.e., the child abuse - in order for them to find appellant guilty of murder. They were left free to find appellant guilty based on the mere (and well established) fact that the child abuse was a remote cause of the death.

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[6] CALJIC No. 3.40 reads:

> [To constitute the crime of ______ There must be in addition to the __(result of the crime)__ an unlawful [act][or][omission] which was a cause of that __(result of the crime)__.]
>
> The criminal law has its own particular way of defining cause. A cause of the __(result of the crime)__ is an [act][or][omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act][or][omission] the __(result of the crime)__ and without which the __(result of the crime)__ would not occur.

Respondent argues that CALJIC No. 3.40 was unnecessary, and CALJIC No. 3.41 (see argument "VIII," *supra*) was sufficient, relying primarily on the Court of Appeal decision in People v. Pock (1993) 29 Cal.App.4th 1263, and on this court's decision in People v. Sanchez, *supra*, 26 Cal.4th 834. (R.B. 64-65.) But these cases fully support appellant's position on this issue.

Both Pock and Sanchez were cases featuring a radically different fact pattern from the one here - namely, the defendant was a participant in a shooting incident, but the evidence was inconclusive as to which shooter actually fired the fatal bullet.

In Sanchez, the trial court gave both CALJIC No. 3.40 and CALJIC No. 3.41 (26 Cal.4th at p. 845), and thus, the clear implication of this court's Sanchez opinion is that the court in the instant case *did* err in omitting No. 3.40.

The issue in Pock was not, as here, whether CALJIC No. 3.40 *should have* been given, but whether CALJIC No. 3.41 should *not* have been given. The Pock case says nothing about the efficacy of, or need for, CALJIC No. 3.40.

Furthermore, Pock was concerned with only the special circumstance finding and the rule of Tison v. Arizona, *supra*, 481 U.S. 137, concerning when a person not the actual killer may nevertheless be held liable for a special circumstance. This is entirely unrelated to the issue appellant raises in argument "IX."

Both <u>Sanchez</u> and <u>Pock</u> deal with the problem of a defendant who fires a shot or shots with homicidal intent, along with other shooters, where it cannot be determined whose bullet actually hit the victim. This fact pattern raises some interesting academic questions about causation, but the cases dealing with it contribute nothing to the issue before the court here, which is quite different.

Here, appellant took various actions constituting child abuse, following which his wife gave the child sleeping pills that killed the child. In this situation, appellant asserts, it is error to fail to give CALJIC No. 3.40, or like instructional language, because the jury is not informed of the key decision it must make about the foreseeability of death occurring in the manner in which it actually did occur. Nothing in the cases respondent cites is of any assistance in the analysis of this problem.

At heart, respondent's argument on this issue suffers from two closely related flaws. First, respondent impliedly *assumes* that it was established Arthur would have died even without the sleeping pills. (R.B. 64-65.) This is simply false. The evidence was to the contrary; Dr. Sheridan testified that absent the pill overdose, *if* nothing had been done to salvage the situation, in his opinion Arthur likely would have continued to decline and would have died.

Second, and even more importantly, respondent suggests a trial court has no duty to instruct on theories that are inconsistent with the prosecution's theory or conception of the facts. (See paragraph at R.B. 65-66.) This is wrong, of course. The court's duty is "to instruct on all principles closely and openly connected with the facts of the case, and which are necessary for the jury's understanding of the case." (People v. Boyer 38 Cal.4th 412, 469.)

To make the same essential point in another way, it can be noted that respondent's argument on this issue is mere sophistry, an exercise in identifying distinctions that make no difference. Respondent contends the prosecution's theory was that appellant's acts were "an intentional, direct, substantial contributing cause of death, not that the torture appellant inflicted set in motion a chain of events which led to the giving of the fatal overdose of pills." (R.B. 65.) Respondent fails to explain how these are different, in the sense of requiring different jury instructions on causation. Likewise, respondent claims "the question was whether appellant's torture of Arthur was a concurrent cause of his death . . . [i.e.,] a substantial factor contributing to Arthur's death[,] . . . not whether giving Arthur a fatal combination of pills was a foreseeable, natural and probable consequence of the torture." (R.B. 65-66.) Respondent does not explain the difference between these two ideas, and does not

explain how CALJIC No. 3.40 should be given under the latter scenario, but not under the former.

In sum, respondent's effort to portray the judge's failure to give CALJIC No. 3.40 as proper and not erroneous is a failure.

Respondent's argument for finding this obvious error to be harmless is similar - it points to distinctions that generally are not valid, and which make no difference, in any event.

Thus, respondent claims Dr. Sheridan testified that the abuse was a "significant contributing cause[]" (quoting respondent, not Dr. Sheridan) of death, and claims this was not disputed. To the contrary, the defense *did* dispute the question of whether appellant was liable for having caused Arthur's death. Respondent's problem here is, again, the false idea that appellant could be found guilty of first degree murder and a special circumstance even if Arthur's death was not a direct, natural, or probable result of his actions.

Respondent claims the defense did not dispute causation, but rather, disputed appellant's state of mind. This is simply false. Counsel directly disputed whether appellant caused Arthur's death in any culpable sense. (See 12 R.T. 3072-3106.) Furthermore, here again, respondent seeks to mask the problem by creating a false dichotomy between disputing "state of mind" and disputing "causation." Taken together, defense counsel's argument was that appellant acted with a culpable state of mind

in abusing Arthur, but could not be assigned culpability for the pill overdose because, among other things, the idea that the act of overdosing Arthur evidenced intent to kill was outlandish. Directly implied in this defense argument was the idea that the intentional child abuse could not be a basis for finding murder or the special circumstance, because the *cause* of death was not the child abuse, but the pill overdose.

Similarly, respondent's harmless error argument emphasizes that defense counsel conceded that appellant was guilty of "horrible child abuse," and "should be convicted of that." While this expression was somewhat inartful, counsel's message was clear enough: appellant was guilty of child abuse, and should not escape liability for that, but this did not mean appellant was guilty of murder. This statement by defense counsel does not support respondent's argument, at all.

Respondent seeks to rescue the judgment by conflating death *by pill overdose* with death *by any means whatsoever*, contending the question was whether *death* was foreseeable, generically. (R.B. 68.) This is not the law, and it is not what CALJIC No. 3.40 says the law is. CALJIC No. 3.40 correctly states that causation can be found if the defendant's act *produces the death* as a direct, natural, probable consequence, not if *death might occur* as a result of the act. And CALJIC No. 3.40 also correctly states that the defendant can be held liable only if the death

would *not* *have* *occurred* in the absence of the defendant's act(s). The evidence in this case was ambiguous, at most, on this point. Therefore the omission of CALJIC No. 3.40 was not harmless.

Respondent's final argument for finding the instructional error harmless is that it was Michelle Jennings and *appellant* who gave Arthur the overdose of sleeping pills, and Arthur's death was foreseeable under these circumstances. (R.B. 68.) If the facts had been thus, this case would be much different. But of course, the problem with the prosecution's case from the start was that appellant was not involved at all in the decision to give Arthur two whole sleeping pills. It was Michelle Jennings, *alone*, who made that decision. This is exactly why the error in omitting CALJIC No. 3.40 was prejudicial and reversible.

Accordingly, the judgment must be reversed.

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X. OMISSION OF THE JURY INSTRUCTION THAT A SEEMINGLY CRIMINAL ACT COMMITTED BY ACCIDENT OR MISFORTUNE IS NOT A CRIME (CALJIC No. 4.45), AND THE JURY INSTRUCTION DEFINING CRIMINAL NEGLIGENCE, OR LIKE INSTRUCTIONAL LANGUAGE, WAS REVERSIBLE ERROR

Appellant contends the trial court committed reversible error by failing to instruct the jury on the law that causing harm by accident is not a crime. (A.O.B. 103-108.)

Here again, in his presentation (R.B. 72-75) respondent seemingly confuses the substantial evidence rule with the rule for review of instructional error. Respondent suggests there was no evidence on which the jury could base a conclusion that the pill overdose was an accident, and not a matter of criminal negligence. But this was a question for the jury to decide, not for the government to decide. A properly instructed jury might well have found criminal negligence, not accident, but this does not mean the jury should not have been instructed on the distinction between the two.

Respondent contends the error was harmless, because the jury found appellant acted with malice and he "intentionally killed Arthur" [*sic*] (R.B. 74). But even if this were true, which it is not, these "facts" would not ameliorate the error. Given that the jury found appellant at some time formed an intent to kill Arthur, nevertheless they were not told that this finding would not support a murder conviction if Michelle killed Arthur by accident.

Accordingly, the failure to instruct on accident was prejudicial error, and the judgment must be reversed.

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XI. BECAUSE THE TRIAL COURT ADMITTED INTO EVIDENCE IN APPELLANT'S TRIAL A NUMBER OF EXTRA-JUDICIAL STATEMENTS BY MICHELLE JENNINGS WHICH INCULPATED APPELLANT, STATEMENTS AS TO WHICH APPELLANT HAD NO OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE MICHELLE, THE JUDGMENT MUST BE REVERSED

A. Introduction

As part of his argument "VI," which concerned the many flaws in this case relating to the idea that appellant was guilty of starving Arthur as a form of torture, appellant contended it was error for the trial court to admit some statements by Michelle Jennings about withholding of food. In argument "XI," appellant contends it was reversible error for the court to admit against appellant numerous other statements Michelle made out of court - statements she made to the psychologist, Dr. Kaser-Boyd, and statements she made in the joint interrogation. (A.O.B. 109-128.)

B. Statements Michelle Jennings Made to Dr. Kaser-Boyd Were Erroneously Admitted

As for the statements to Dr. Kaser-Boyd, respondent first repeats the claim that they were admissible because they were not admitted to prove the truth of Michelle's assertions, but instead, were admitted as part of the basis of Dr. Kaser-Boyd's opinion. (R.B. 46.) This contention was fully addressed in

argument "VI," *supra*: The obvious purpose of putting these statements in evidence was for the jury to act on the truth of the assertions, not to fortify the opinion of Dr. Kaser-Boyd. And furthermore, there was no limiting instruction telling the jury not to consider the statements for the truth of the assertions.

Respondent also discusses the statements to Dr. Kaser-Boyd under the Aranda-Bruton rule,[7] which forbids admission of a co-defendant's statement that incriminates the defendant. First, respondent argues that Michelle's statements to Dr. Kaser-Boyd did not incriminate appellant. But this does not withstand analysis:

Michelle said that appellant had abused her; this supported the prosecution's theories that appellant was the one in charge of parenting Arthur, and that appellant did abuse Arthur.

Michelle said appellant told her Arthur's fits were purposeful, not involuntary; this supported the prosecution's theory that appellant looked for reasons to inflict punishment on the boy.

Michelle said appellant talked of shooting Arthur. This very statement is relied on in the respondent's brief as evidence that appellant harbored intent to kill (R.B. 32).

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[7] People v. Aranda (1965) 63 Cal.2d 518; Bruton v. United States (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620].

Respondent goes on to urge the court to reconsider and overrule its holding in People v. Anderson (1987) 43 Cal.3d 1104, that statements with incriminating characteristics are not admissible under the Aranda-Bruton rule, even if they are proffered for a purpose other than the truth of the statements. (R.B. 48.) Appellant requests that if the court has any inclination to consider overruling this precedent, it request supplemental briefing on that specific point.

A part of respondent's argument for overruling Anderson is that in People v. Combs (2004) 34 Cal.4th 821, this court held a statement otherwise violative of Crawford v. Washington, *supra*, 541 U.S. 36 (discussed in argument "VI," *supra*) could be admitted because it was not admitted as hearsay, but instead as an adoptive admission by the defendant. Appellant's full analysis of Combs, and of why the court should reconsider and disapprove that decision, is contained in the opening brief (A.O.B. 118-121), and need not be repeated here.

C. Statements Michelle Jennings Made in the Interrogation Were Erroneously Admitted

Respondent's principal response to appellant's claim that it was error to admit statements made by Michelle in the interrogation session is, again, to rely on this court's decision

in People v. Combs, *supra*, that a co-defendant's incriminating out-of-court statements can be admitted as "adoptive admissions" of the defendant. (R.B. 52-57, passim.) Here again, appellant refers back to his opening brief argument that Combs flatly contradicts Crawford v. Washington, elevating state hearsay law to a position superior to the constitutional guarantee of confrontation and cross-examination, and must be overruled.

But furthermore, respondent fails to discuss in any way appellant's contention in the opening brief (A.O.B. 120-121) that the statements under discussion here should have been excluded even under Combs, because the record reveals that appellant did not in any meaningful way *adopt* Michelle's statements.

" 'There are . . . two requirements for the introduction of adoptive admissions: "(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his *adoption* of, or his *belief in*, the truth of such hearsay statement." ' " (People v. Combs, *supra*, 34 Cal.4th at p. 843.) Here, the record reveals appellant did not indicate his adoption of, or his belief in, the *truth* of Michelle's statements. Rather, appellant "adopted" the statements only in the sense that he expressed willingness to take responsibility upon himself, and to shield Michelle from responsibility, regardless of the actual truth.

Respondent's silence on this point strongly suggests that appellant is correct, that even under the Combs limitation of Crawford, Michelle's statements in the interrogation should have been excluded.

Separately, respondent contends that most of Michelle's statements were not sufficiently incriminating as to appellant - i.e., they were not " 'powerfully incriminating' " (quoting R.B. 56) - to trigger relief under the Aranda-Bruton line of cases.[8] But this claim by respondent rests on a studied disregard for the actual facts, here. This case involved the death of a little boy at the hands of one or both of his parents. The mother's assertions that she did not kill him, she did not want to kill him, she did not hit him in the head, she did not abuse him, etcetera, were obviously "powerfully incriminating" as to the father.

Moreover, as respondent impliedly concedes, a number of Michelle's assertions - e.g., that appellant threw the child and caused bruising, punched the child, kicked the child, held the child's hand over a cookstove flame, duct-taped the child's mouth - were directly incriminating of appellant.

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[8] The forms of relief that are recognized are to admit the statement after having deleted any statements that could work against the codefendant, or to sever the defendants' trials, or to exclude the statement in its entirety. (People v. Aranda, *supra*, 63 Cal.2d 518, 530.)

In short, respondent's argument that admission of Michelle's statements was not Aranda-Bruton error is clearly wrong, and must be rejected.

Furthermore, Crawford v. Washington eviscerates the sub-doctrine of the Aranda-Bruton cases under which respondent seeks refuge. A careful review of the whole text of Crawford reveals that the court there was not concerned at all about *how* incriminating the out-of-court statement is, or whether it is *directly* incriminating. The Crawford opinion concerns itself much more broadly, with (any and all) "statements." The only qualifier the court recognized in Crawford had to do not with the content of the statement, but the setting in which it was taken: The Crawford rule applies only to statements that are "testimonial." But this qualifier does not disqualify Michelle's statements to the police officers here, because "[s]tatements taken by police officers in the course of interrogations are . . . testimonial" (541 U.S. at p. 52) under any standard.

In short, under Crawford the single question is whether the statement by the non-witness which the prosecution seeks to introduce against the defendant is "testimonial." Since Michelle's statements indisputably were testimonial, they were flatly inadmissible, under Crawford v. Washington, notwithstanding anything to the contrary in any case respondent finds that came after Bruton but before Crawford.

D. The Error Was Prejudicial and Reversible

Respondent contends the error in admission of Michelle's out-of-court statements was harmless beyond a reasonable doubt.[9] (R.B. 51, 58-59.)

First, respondent asserts that the evidence against appellant was "overwhelming" (R.B. 51). This mistakes the question of whether appellant was proven guilty of some criminal conduct - a fact which was overwhelmingly proven - with the questions of whether appellant was proven guilty of first degree murder or of the special circumstance of torture murder. These were the real questions in this case, and the evidence to prove them was minimal to nonexistent. Under any fair assessment of the evidence in this case, respondent's assertion of "overwhelming evidence" as a basis for finding the error harmless beyond a reasonable doubt must be rejected.

Respondent points to the evidence that appellant gave Arthur some prescription medications, and appellant suggested that Michelle get the sleeping pills. (R.B. 58.) But these facts were not probative, at all, on the key questions of murder and torture-murder. It was obvious that both parents harbored a grossly misguided intent to help or quiet the child by giving him the pills. Therefore these facts do not reduce the prejudice of

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[9] It should be noted that respondent concedes the strict harmless-beyond-a-reasonable-doubt test for constitutional errors is the one that applies here.

Michelle's statements in the interrogation about the beatings and other harms visited upon Arthur, at all.

In a second assertion of the "overwhelming evidence" theme, respondent points to the testimony by persons other than Michelle "which established that appellant tortured Arthur by systematically starving him and physically abusing him," citing 10 R.T. 2463-2464, 2472-2475, 2517-2521, 11 R.T. 2662-2664 (R.B. 58).

This assertion reflects the essential flaw of the government's entire case against appellant. A review of these segments of testimony cited by respondent reveals that *not one word* of it was about an observation - either direct or circumstantial - of *appellant* "tortur[ing] Arthur" or "systematically starving him and physically abusing him." These segments of testimony tended to establish that the child was being abused, and that he was malnourished. The only evidence about what actions either of the parents took in this connection, or what the parent(s) intended in taking certain actions, was what the parents said in the interrogation.[10]

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[10] In fact, as noted in the opening brief (see A.O.B. 122-124), the testimony of the friends and acquaintances which respondent here cites tended to suggest that it was *Michelle* Jennings who was committing the acts of abuse. One witness recalled *Michelle* having said she "socked the damn little brat between the eyes, knocked him out" (R.T. 2677). Another witness commented to the Jenningses that there was something wrong with Arthur, and appellant responded by saying that *Michelle* had knocked him out. (R.T. 2664.) Another witness, who never observed acts of child abuse, testified about a time that

[FOOTNOTE 10 CONTINUES, p. 60]

unattributable to this important error (Sullivan v. Louisiana (1993) 508 U.S. 275, 278 [124 L.Ed.2d 182, 113 S.Ct. 2078]).

Accordingly, the judgment must be reversed.

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CONCLUSION

For each and all of the reasons discussed in the opening brief and in this brief, the judgment in this case, including especially the judgment of death, must be reversed.

CERTIFICATION OF WORD COUNT

The undersigned counsel hereby certifies under penalty of perjury that the word count of this brief is: 13,417 words.

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Respectfully submitted,

DATE: January 31, 2007

GREGORY MARSHALL

Attorney for Appellant

PROOF OF SERVICE BY MAIL

CASE: People v. Jennings, no. S081148

DATE: January 31, 2007

I am a citizen of the United States and am employed in the County of Shasta, State of California. I am over 18 years of age and not a party to the within action. My business address is P.O. Box 996, Palo Cedro, CA 96073.

On the date stated above I served the following document(s) on the parties indicated, by placing a true copy of each in an envelope, bearing first class postage prepaid, addressed as indicated below, and deposited the same in the U.S. mail at Palo Cedro, California.

DOCUMENT(S): Appellant's Reply Brief

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I declare under penalty of perjury that the foregoing is true and correct.

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