SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **vs.** **ROBERT ALLEN BACON,** **Defendant and Appellant.**	**CAPITAL CASE** **S079179**

Solano County Superior Court No. F-C42606

The Hon. R. Michael Smith, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPELLATE JURISDICTION

This case is properly before this Court on automatic appeal following a judgment of death. (§§ 1237, 1239(b).)[1]

[1] Unless otherwise indicated, all code references are to the Penal Code.

STATEMENT OF THE CASE

In an information filed on October 31, 1996 (1CT 16), amended on December 21, 1998 (3CT 780), and then again on January 22, 1999 (4CT 1024; 1RT 35-36), the District Attorney of Solano County accused Robert Bacon of murder (§ 187) in count 1, with special circumstances alleged for a prior conviction of murder (§ 190.2(a)(2)) and for lying-in-wait (§ 190.2(a)(15)); count 2 charged forcible rape (§ 261(a)(2)); forcible sodomy (§ 286(c)) was charged in count 3; and count 4 charged the crime of accessory to murder (§ 32) as an alternative to the murder charged in count 1. (4CT 1024-1026; RT, Vol. Q, p. 6.) Mr. Bacon's prior convictions were alleged both as "strike" priors (§ 1170.12(a)-(d)) and as "serious felony" priors (§ 667(a)). (4CT 1026.)

On January 20, 1999, the court ordered a bifurcation of trial on the prior convictions; further, Mr. Bacon waived his right to jury trial on the issue of prior convictions alleged at least as strike priors. (4CT 928; RT 33-35.) Jury selection began on January 21, 1999 (4CT 932; 1RT 64, 69) and was completed on February 3, whereupon the presentation of evidence began. (4CT 1042-1043.) The jurors were instructed, and the case was argued and submitted on February 17. (4CT 1072.)[2]

On February 18, while the jurors were deliberating, the court conducted a court trial on the prior convictions after obtaining an expanded waiver of jury trial to include the prior murder special. (4CT 1143-1144.) The court found true the allegations of prior convictions. (4CT 1149.) At the end of the day, the jury returned a verdict of guilty for first-degree murder with a true finding of lying in wait. (4CT 1144.) Mr. Bacon was also found guilty of forcible rape and forcible sodomy. (4CT 1144.)

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[2] The trial was interrupted for a week between February 8 and February 16 because of a family emergency for lead counsel for the defense. (4CT 1063, 1070.)

Penalty trial began on February 23 (4CT 1185), with a death verdict returned on February 25. (5CT 1234.) On May 20, 1999, Mr. Bacon was sentenced to death. Concurrent terms of twenty-five years to life on counts two and three, and a five-year serious felony enhancement were stayed. (5CT 1300; 11RT 2566-2567.)

STATEMENT OF FACTS

GUILT PHASE

Prosecution Case

Shortly before midnight, on Thursday, October 26, 1995, some late-night anglers driving out on Grizzly Island Road to fish the sloughs came upon a white Mercury Sable nosed over the embankment at the foot of the bridge that crossed Montezuma Slough. The Sable's lights were on, the motor running, and the windows down. Sandra Hoffman, one of the fishermen, reached into the car and turned off the ignition. She noted a woman's purse on the front seat. Another, Edward Johnson, who had been driving out there with his wife Rosey, testified that at an earlier bridge on Grizzly Island Road, this same car had passed him at high speed and pushed him off to the side. (6RT 1124-1127, 1131-1132, 1134, 1135-1137, 1140-1141, 1283.)

The CHP was called. Officers Horsman and Morrell responded. After they established that the Sable was registered to Charles and Mrs. Deborah Sammons, the two officers began to inventory the car for towing. Morrell, intending to put the purse found on the front seat in a secure place, used the car keys to open the trunk. To Morrell's surprise, the open trunk revealed the clothed, supine body, obviously dead, of, as it turned out, Mrs. Deborah Sammons. (6RT 1138-1146, 1148-1150.) The autopsy conducted on her the next day established ligature strangulation, combined with a stab

wound to the left lung and to the heart, as the cause of the death. (6RT 1179, 1198-1201.) She also had nonfatal stab wounds below the left eye and on the underside of the chin. Extending on the right side of her face, from the ear to nose, was a band-like contusion caused by a "reasonable amount" of blunt-force trauma. (6RT 1192-1193.)

At the time of her death, 40-year-old Mrs. Sammons was separated from her husband, Charlie Sammons. She had been living with her friend Dixie Jensen in Vallejo while Charlie retained possession of the couple's house at 3541 Nut Tree Drive in Vacaville. (6RT 1146-1147, 1152-1154; 7RT 1487.) Mrs. Sammons was thirteen years the senior of her boyfriend, Bill Puengatte. The couple had previously had an affair in the late 1980's and had resumed their relationship in the summer of 1995 when Mrs. Sammons and her husband were separating. (7RT 1467, 1474-1475.)

In August 1995, as the marriage unraveled, Charlie initially moved out of the Nut Tree Drive house and stayed with Bill Puengatte in Fairfield. Charlie knew Puengatte only as a mechanic who fixed the family cars on occasion; he did not yet know him as his wife's lover. (7RT 1467, 1532.) Indeed, Charlie was so imperceptive that when Puengatte got a job in Vacaville at the county fair and needed a place to stay closer to work, Charlie encouraged him to lodge at the Nut Tree Drive house where Mrs. Sammons was still living. (7RT 1536.) When Puengatte actually followed this suggestion and moved in with her, the truth began to dawn on Charlie. (RT 1532.) Puengatte, for his part, testified that his contacts with Charlie were "not unfriendly". (7RT 1477.) In any event, sometime in September, Charlie himself moved back into the house, while Puengatte moved out. During the move, the two men encountered each other and argued. The confrontation escalated to a shoving match and an exchange of punches, until Mrs. Sammons intervened and separated them. (7RT 1477-1478, 1532-1533; 9RT 1840-1841.)

This revolving of residents, with Charlie restored and Puengatte out, was by no means a reconciliation between husband and wife. They did not share a bedroom, and she eventually moved out to avoid his importunate and unwelcome sexual advances. (7RT 1535-1537; 9RT 1859-1860.) Outside observers of the relationship during this period of time, from September to October, 1995, attested that Charlie was obsessively jealous of his wife and always wanted to know where and with whom she was; there was also evident tension over money, and a bitter determination on his part to retain the house in the face of an imminent divorce. (9RT 1840-1841, 1846, 1857, 1859, 1861, 1862-1863, 1864-1866, 1874-1875, 1876, 1878-1879, 1883, 1886.)

On October 25, 1995, Puengatte, who was staying with a friend in Fairfield, picked Mrs. Sammons up from her place of work, Bay Star Ambulance in Vallejo. She left her Mercury Sable parked there, and spent the night with Puengatte at Dixie Jensen's apartment. Puengatte drove her back to work the next morning, October 26. The couple made plans for dinner and shopping that evening at the Solano Mall to buy accoutrements for a costume she was going to wear to a Halloween ball sponsored by Kaiser Hospital. The ball was a business function, and Mrs. Sammons was going as a representative of Bay Star. She was going to bring Puengatte as her date. (7RT 1470-1471.) To finalize the dinner and shopping plans, Puengatte telephoned her at work toward the end of the day. She told him they would have to meet later because Charlie had called. She said she had to go to the Nut Tree Drive house to help Charlie pay some bills, and promised she would telephone Puengatte when she was finished. (7RT 1468-1471.)

As the evening advanced, Puengatte received no call from Mrs. Sammons, nor did she answer when he paged. He also called Dixie Jensen, who did not know where Mrs. Sammons was. Toward 11 p.m., Puengatte

drove from Fairfield to the Nut Tree Drive house in Vacaville. There were no cars in the driveway or lights on inside. (7RT 1471-1473.) Around midnight, on the drive back to Fairfield, he stopped to answer Ms. Jensen's page. Jensen had spoke to Charlie, who was now home, and the latter had reported to her that Mrs. Sammons car had been found by the police. (7RT 1473, 1480-1481.)

Puengatte turned around and arrived again at the Nut Tree Drive house at about 12:30 a.m. Charlie, freshly showered, answered the door. Puengatte walked in unceremoniously and asked to use the phone; Charlie answered, "Yeah", and with an equal lack of ceremony sat down and turned on the television. According to Puengatte, Charlie's entire manner was "evasive." (7RT 1481-1482.) After making his phone call, Puengatte drove out to Grizzly Island, having been informed by Dixie Jensen that the car had been found, and there he witnessed the coroner removing Mrs. Sammons' body from the trunk of the Mercury Sable. (7RT 1474.)

After Puengatte left, Charlie himself did not leave the house that night. (6RT 1170.) At about 6 a.m., Detectives Elliott and Travers of the Solano County Sheriff's went to the Nut Tree Drive house to notify Charlie of his wife's death, and to investigate him as a possible suspect, since they knew Charlie and his wife were separated. Charlie's face registered a moment of shock when he was told that Mrs. Sammons was dead, but this passed quickly and he returned to the interrupted task of cooking his breakfast. Both officers thought the reaction unusual, and when Elliott asked him if he was involved in his wife's death, he answered, "Not quite." (6RT 1152-1155, 1158-1159; 7RT 1352-1353, 1356-1357.)

With Charlie's permission, the detectives did a cursory search of the house and discovered a couple drops of blood on the washing machine in the garage. (6RT 1155-1157.) There were also some blood drops on a pair of white Nike running shoes on the floor of the living room. When Travers

asked Charlie to accompany them to the station for further questioning, Charlie, who was dressed but shoeless, was about to don the Nike's, but was stopped by the officers. Travers asked Charlie if those shoes were his, and if he had been wearing them the night before; Charlie answered yes to both questions, and the shoes were seized. (7RT 1353; 9RT 1785.)[3]

At the Sheriff's Department in Fairfield, the interrogation began at about 9 or 10 a.m. Charlie adamantly denied any knowledge of his wife's death, but at about 7:30 p.m, he started to concede that he did know something. At 10 p.m., as soon as he was formally arrested for murder, he announced, "I didn't do it. Boe did it." (7RT 1544; 9RT 1786-1787.) "Boe" was Robert Allen Bacon, who, at 11:30 p.m., was then arrested at his apartment complex in Vacaville, which was only a ten to fifteen minute drive from the Nut Tree Drive house. (6RT 1170-1171, 1175-1176.)

On Saturday, October 28, a search warrant was executed at the Nut Tree Drive house. (RT 1160, 1359.) The police found small traces of blood in the master bedroom. There was a smear on the bed frame, a drop inside the cabinet in the dresser, a smear on the dresser, and small stains on the side of the sliding door to the closet. An area of the carpet was still damp and tested positively for traces of blood. A washcloth in the shower off the master bedroom was stained with what might be blood, and there was cleanser residue on the shower floor, as though it had not been completely rinsed. In the living room on the brickwork in front of the fireplace, there were small stains of blood; inside the fireplace, the police recovered burnt fabric as well as the underwire and clasps of a bra. (6RT 1167, 1262-1265.) A single-edged serrated knife was recovered from the dishwasher. It had no blood on it, but the pathologist, Dr. Peterson,

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[3] Later testing established that the blood on the Nike's possessed DNA markers consistent with those of Mrs. Sammons' blood. (6RT 1285; 7RT 1324, 1401-1402.)

testified that the stab wounds on Mrs. Sammons' chin and chest were consistent with the size and configuration of this knife. (6RT 1167, 1203-1204, 1227, 1269.)

At the time Robert Bacon was arrested, the police recovered a tire iron from a plastic container under the coffee table in his bedroom. Dr. Peterson, who had done the autopsy on October 28, returned to the morgue on November 1 in order to compare the tire iron to the elongated contusion on the right side of Mrs. Sammons' face. According to Dr. Peterson, the pattern matched up well with the general width and shape of a portion of the tire iron; and Mrs. Sammons' broken nose at the end of the contusion was consistent with a blow from this object. (6RT 1173, 1194-1196, 1240, 1248.)[4]

While the Nut Tree Drive house was being searched on October 28, Detective Grate, along with Detective Travers, interrogated Bacon. (8RT 1638-1639.) The interrogation was videotaped and played for the jury. (8RT 1642.) The interview began with Grate asking Bacon to account for his activities for the past few days. Bacon related that he worked as a maintenance man for Prestar, a skydiving business at the Yolo County Airport. His father, with whom he had been living in the apartment complex in Vacaville since arriving in California from Arizona in August, was his direct supervisor. In the last week, he had taken a couple of days off to help Charlie Sammons, who suffered from multiple sclerosis, build and paint a patio for the house on Nut Tree Drive. This was on Wednesday and Thursday. Bacon did not do it for pay, but to reciprocate Charlie's help

[4] Bacon's shoes, like Charlie Sammons' Nike's, were also tested later, and a drop of Mrs. Sammons' blood was discovered on one of them. (6RT 1167, 1285; 7RT 1324, 1354, 1396-1397, 1401-1402, 1410-1411.)

in replacing the head gaskets on Bacon's car. (SCT 1st, pp. 32-37.)[5] Bacon stayed overnight at Charlie's house on Wednesday and returned home between 11 and 11:15 on Thursday night. (SCT 1st p. 37.)[6]

At this juncture, Grate announced, "We think Charlie offed his wife." Bacon expressed surprise and answered, no, when Grate asked if Bacon had ever met Mrs. Sammons. Grate then revealed that they had spoken with Charlie and that Bacon's name had come up. He represented to Bacon that Charlie had confessed to the killing and had said that Bacon had helped him dispose of the body. According to Grate, at this point in the investigation, they were unsure whether Bacon was simply a witness or an accessory or an accomplice. (SCT 1st, pp. 37-39.) There followed a lengthy disquisition by Grate on how the evidence now favored the conclusion that Charlie was the killer; but things could change if new evidence pointed toward Bacon. Now, Grate admonished, was the time for Bacon to give his version of events. (SCT 1st, pp. 39-44.)

After giving the matter some thought, Bacon announced, "Well, I'll give you this.. . . You're gonna find my semen samples in her. . . . Cause I fucked her." (SCT 1st, p. 46.) Grate then remarked that there was no sign of vaginal trauma, "[s]o I'm assuming it was consensual," to which Bacon replied, "It was." (SCT 1st, p. 46.)

Grate then urged Bacon to be even more forthcoming and explain his version of events. Bacon related that he and Charlie were outside in the backyard painting. A car pulled up to the front of the house, and Bacon heard the screen door slam. Charlie went inside; Bacon, who described

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[5] The transcription of the videotaped interview is contained in the First Supplemental Clerk's Transcript.

[6] Bacon's father's wife, Cheradee, testified that Sammons came over to their house a couple of days before the murder to ask Boe (i.e., Robert) to help him with some painting. (9RT 1878.)

himself as a "[o]ne hundred percent high octane testosterone-injected walking hormone", peered inside the glass patio door only to see "this fuckin' fine little blonde chick." (SCT 1st, p. 55.)

From his station outside, Bacon could overhear the woman tell Charlie that she did not want the house; however, she also did not want any other women living there, because they might come to mistake occupation for ownership. Bacon could not hear Charlie's response, but when the latter exited the house to the garage, Bacon took the opportunity to introduce himself to the woman. (SCT 1st, p. 56.) "And I don't know how it happened or why it happened, but the next thing I know we're on his bed fuckin'." (SCT 1st, p. 56.)

They finished quickly. Bacon returned to his chore in the backyard, and after 15 minutes, Charlie hollered through the screen for him to come inside. Charlie had blood on his hands and shirt; Mrs. Sammons' dead body was on the bed. Charlie ordered Bacon to help him with the body, threatening to accuse Bacon of having killed her if he refused. Bacon complied. They wrapped the body in bed sheets and then wrapped this in a tarpaulin cover. They carried the body into the garage, and placed it in the trunk of the red Mercury Topaz parked there. Bacon drove this car, following Charlie, who was driving the Mercury Sable. At some point, they stopped and switched the body to the trunk of the Sable. (SCT 1st, pp. 56-61.)

At this point in the interview, Grate and Travers left Bacon alone, with the video camera still rolling. It captured the following soliloquy: "Fuckin' Charlie . . . . . Why'd you . . . get me involved. Why did you get me involved. And why are you trying to pin it on me? Why did you fuckin' waste her. She was so pretty. Why? Why'd you . . . . You fucker. You fucker. Why me? Why'd you get me involved? Why did you get me involved? Why'd you kill her?" (SCT 1st, pp. 65-66.)

Grate returned and announced to Bacon that he was going to be arrested for rape and murder. The rape charge stemmed, according to Grate, from the implausibility that Mrs. Sammons would have sex with him after only a brief introduction. Grate wanted Bacon to give another account. (SCT 1st, pp. 66-67.):

"G[rate]: All right. So fillin' in the gap, dude. How did it go down?

"B[acon]: Charlie went to the store. On his way out the door, he told me I knew what needed to be done.

"G: Okay.

"B: I didn't put two and two together.

"G: (Positive response).

"B. I mean I, I didn't realize that . . . .

"G: Well, you'd talked, what did you talk about? Did he say he wanted her killed?

"B: He, he talked about that, killing her.

"G: Okay, and what did, and you agreed?

"B: I never said I'd do it.

"G: Okay.

"B: Never.

"G: Did he assume maybe that you would?

"B: I think he did, yeah." (SCT 1st, p. 67.)

Bacon then described his first encounter with Mrs. Sammons in more detail. After Charlie left for the store, Bacon talked to Mrs. Sammons for about five minutes. The next thing he knew he was kissing her and she did not resist him. They went into the bedroom. She declined to give him "head" because she thought that was disgusting; "[b]ut she liked to be eaten", and, for his part, he "liked eating pussy." So he orally copulated her for a while, "fucked her" for a while, and had some anal intercourse with her when she said she did not mind. (SCT 1st, pp. 67-69.)

As he had told Grate earlier, he returned to the patio. Charlie called him back in and threatened to accuse him of the murder if he, Bacon, did not help dispose of the body. Again, they put her in the trunk of the red car, switching the body to the white car on the way to the slough. Bacon tried to drive the white car into the water, but it stuck on the embankment. He also helped Charlie back at the house clean up the sheets and burn Mrs. Sammons' clothes. (SCT 1st, pp. 69-71.)

Regarding the sexual encounter between Bacon and Mrs. Sammons, the physical evidence was consistent with Bacon's statement. A "rape kit" taken as part of the normal protocol for the autopsy established the presence of semen and sperm in Mrs. Sammons' vagina. The genetic markers in these samples were inconsistent with the markers found in Charlie Sammons' blood and in Bill Puengatte's blood, but consistent with those found in Bacon's, the frequency being 1/66 million. (6RT 1231; 7RT 1390-1395, 1411.) Epithelial cells, which were characteristic of saliva, were found on the vaginal swab and contained markers also consistent with those of Bacon. These cells could have been deposited during oral copulation. (7RT 1403.)

Because no sign of sexual trauma was observed by the autopsy surgeon (6RT 1235), a colposcope examination was done by Elizabeth Cassinos, a nurse who had been trained and was experienced in such

examinations. The exam was conducted several days after the autopsy and, as Cassinos testified, revealed a microabrasion in the front of the vagina and some bruising inside the anus. The former, denominated a "mounting injury", was often seen as the result of even consensual relations. The latter also was not inconsistent with consensual relations. (6RT 1246-1250, 1256-1257.)

Martin L'Esperance, who had been in and out of jail for drug or theft crimes since he was 18, testified for the prosecution that in 1996 he was in jail for either theft or robbery – he was not sure which – when he met Boe Bacon. (7RT 1417-1418, 1429.) In the course of their acquaintance, according to L'Eserperance, Bacon related that he was in custody for murder. Bacon, according to L'Esperance, said he had stabbed a lady to death in the back room of her house in Vacaville, and had "'fucked the bitch in the ass.'" Bacon observed, according to L'Esperance, that murder produced a better "high" than methamphetamine, and that sex with a dead body was superior to relations with any vivified partner. (7RT 1418-1421.) According to L'Esperance, Bacon also mentioned that he made the husband help get rid of the body. (7RT 1426.)

L'Esperance, however, did not come forward immediately with his information. After a short sabbatical in a drug program he had to complete for Contra Costa County, he found himself back in the Solano County jail on a probation violation. There he encountered Charlie Sammons, whose acquaintance L'Esperance had made when both were previously incarcerated in the Solano County Jail. L'Esperance described Sammons as a bitter man in a wheel chair, whom, nonetheless, L'Esperance believed was innocent based on the confession of Boe Bacon. Acting on a selfless impulse, as he described it, L'Esperance, advised Sammons to have his attorney come speak to L'Esperance. This led to a meeting with the prosecution. (7RT 1422-1426, 1449-1452.) At this time, L'Esperance had

a pending sentencing, for which the prosecution was recommending state prison. L'Esperance denied that he expected any consideration, but fortunately for him, the probation officer, "got me out of it." (7RT 1442-1443.)

Charlie Sammons also testified for the prosecution while in custody with pending charges for the murder of his wife. He was awaiting trial, and came forward in Mr. Bacon's case only in order "to set the record straight." He had made no deals with the prosecution, and there was no future deal expected or connived at by the prosecution. Mr. Sammons had only his hope that the truth would come out and he, Sammons, would be vindicated and released. (7RT 1484-1485, 1512.)

Sammons testified that he had been suffering from multiple sclerosis for the past seventeen years, since his daughter, now twenty, was three years old. Currently he was in a wheelchair, but over the years the symptoms would recur and abate periodically. There were times he could walk and move around, and in October 1995, he was mobile for the most part. (7RT 1488-1489.)

In late 1995, he and Mrs. Sammons were separated. Sammons himself lived in the Nut Tree Drive house with their daughter, who, however, was in Reno at the time of the homicide. (7RT 1486-1487.) Sammons had met Boe Bacon through the latter's stepmother, who was a friend of Sammons' daughter. (7RT 1489-1490; 8RT1581.)

On Tuesday, October 24, 1995, Sammons was helping Bacon set the valves on the latter's car, in return for which Bacon offered to help Sammons with some painting. The two went to Sammons' house. Bacon stayed that night, continued helping the next day, Wednesday, and spent a second night at the Nut Tree Drive house. (7RT 1491.) Over the course of this sojourn, Sammons talked about his wife, telling Bacon that he and his wife were separated. He thought that at one point he might have said to

Bacon something to the effect of wanting his wife "out of the picture." According to Sammons, Bacon volunteered that he could "take care" of that for a price. Bacon's laugh suggested to Sammons that this was a joke, and Sammons said nothing in response. This conversation took place on Tuesday the 24th, the first day of Bacon's stay at the Nut Tree Drive house. (7RT 1492; 8RT 1580-1581.)

It was not unusual for Sammons to have his wife do the bills, and he had been asking her for a couple of days to come over and help with this task. She agreed to do so on Thursday, October 26. Sammons had mentioned to Bacon that she was coming over, and when she arrived at about 6 p.m. that day, Sammons and Bacon were in the kitchen. As Sammons headed outside to greet her, Bacon announced that he would wait in the bedroom, and that if Sammons "wanted her taken care of," he should just knock on the bedroom door. (7RT 1487-1488, 1493-1494.) Sammons, in his testimony, was equivocal as to whether or not he knew what this meant, asserting first that he did, and then denying he had any real understanding of Bacon's comment, since, as he qualified, "I was tired myself that day, been out painting all day." (7RT 1494.)

In any event, the couple returned to the kitchen. They talked and paid bills for a couple of hours before Mrs. Sammons went into the master bedroom to put away the checkbook and receipts in the filing cabinet they kept there. (7RT 1496-1497, 1525-1527.) After a short time, Sammons heard a "yelp" or "squeal," as though she were surprised by a mouse. (7RT 1497, 1557; 8RT 1581-1582.)

Sammons called out, asking if everything was all right. There was no answer, so he went back to the bedroom where he saw Bacon holding Mrs. Sammons off the floor by her neck while beating her with his free hand on the side of her head, from which she was bleeding. She appealed to her husband for help. Sammons mustered the courage to ask Bacon what

he was doing, but had to retreat, according to Sammons, when Bacon turned and pointed a gun at him. In obeisance to this show of force, Sammons removed himself to the kitchen and waited, crippled with fear. (7RT 1498-1499; 8RT 1588.) According to Sammons' testimony, he also noted that Bacon had a knife and a rope in his back pocket. (8RT 1591-1592.)

Sammons made one attempt to use the telephone, but Bacon, who was in the bedroom and had no way of seeing what Sammons was doing, uncannily cried out, "I told you not to try to do anything." Disconcerted by this omniscience, Sammons stifled any further impulse to save his wife. (7RT 1499-1500.)

Nonetheless, Sammons returned to the master bedroom after about five minutes. Bacon was standing over Mrs. Sammons, who was bent over the bed and was bleeding. Sammons did not know if she was alive or dead. Bacon ordered him back into the kitchen. Sammons complied. (RT 7RT 1500-1501.)

After a few minutes, Bacon emerged from the bedroom and left the house, saying he would be right back. He left, as Sammons testified, in order to move the Mercury Sable down the street. When he returned, he called to Sammons to retrieve the tarp from the back yard in order to help move the body. Sammons complied. (7RT 1501-1502; 8RT 1618-1619.)

Sammons testified that on his first two trips to the bedroom, when he witnessed portions of Bacon's assault, both Bacon and Mrs. Sammons were dressed. On the second trip, and perhaps on the first trip, he noted that her bra and panties were lying on the end of the bed. (7RT 1499, 1501; 8RT 1588-1599, 1606-1607.) On the third trip, when he had been ordered to move the body, he noted that she was still dressed as she lay on the floor of the bedroom. (7RT 1501; 8RT 1621.)

In any event, Bacon had to cover the body with the tarp before a fastidious Sammons could bear to do anything. With the body decently covered, Sammons could then tolerate helping to carry it to the garage and to place it into the red Mercury Topaz Sammons had borrowed from his stepmother for transportation. (7RT 1502-1503; 8RT 1620-1621.) When Bacon asked Sammons where they could dump the body, Sammons had difficulty thinking of a place until Bacon clarified Sammons' thoughts with a threat to shoot him. With this encouragement, Sammons thought of Grizzly Island. (7RT 1503-1504.) With Sammons driving, they stopped where Bacon had parked the Sable, and the latter got into that car to follow Sammons out to Grizzly Island. (7RT 1505-1506; 8RT 1618-1619.)

At one point on Grizzly Island Road, Bacon flashed his lights as a signal to stop. Bacon had Sammons help him transfer the body, removing it from the tarpaulin, and placing it in the trunk of the Sable. They threw the tarp over the side of the road. With this, Bacon drove the Sable off the road at the foot of a bridge. (7RT 1507-1508.)

Defense Case

Bacon's statement to Grate, used as incriminating evidence by the prosecution, was also exculpatory evidence for the defense, providing a mirror image of Sammons' testimony only with Bacon as the accessory and Sammons as the murderer. There was in addition other evidence to be garnered both from the prosecution case and from the defense case proper that favored the version of events related by Bacon to Detective Grate.

Sammons testified that in October, 1995, the symptoms of multiple sclerosis were in remission, but at the time of trial he was in a wheelchair, and the jurors were aware of this. (7RT 1488; see SCT 1st, pp. 272-273.) In order to rebut the *suggestion* that physical imbecility of any sort rendered it impossible or implausible for Sammons to have committed the murder,

the defense introduced evidence of Sammons' abundant vigor at the time of the murder. Thus, while receiving disability payments for his multiple sclerosis, Sammons built his own patio in the summer of 1995, cutting wood with a power saw, climbing ladders, and nailing the planks. (9RT 1844-1845, 1849-1852.) He was also working, doing jobs in Nevada installing sprinkler systems. (9RT 1854, 1858.)

In one instance, in September, 1995, Sammons took a car trip to Reno with his stepmother, his stepmother's daughter, Sheila Shelley, and Sheila's friend, Jeanette Preston. Sheila testified that Sammons appeared to have difficulty moving and walking and required her help. When they returned to Vacaville that evening, Sammons spryly jumped out of the car even before it stopped, rushed into the house, and there confronted his wife, demanding to know where and with whom she had been that day. (9RT 1863-1866, 1874-1876.)[7]

A physical capacity sufficient to effect a murder was coupled with emotion sufficiently violent to move him to murder. About a week before the murder, Sammons was at his parents' house. His parents' friends, June and Howard Wilkerson, were also visiting. They testified that Charlie stormed into the house enraged, having just talked to his wife. He declared, "I'm going to kill her," and "I would like to kill her." (9RT 1882-1886.) About a month before the murder, Lynette Hosley, Deborah Sammons' sister, was speaking to Charlie, who averred to her that if he could not have Deborah, then no one could. (9RT 1857.)

Sammons' version of the assault on his wife came belatedly, at least in describing Bacon's alleged use of a knife and a gun. When interviewed by Detective Travers on October 27, 1995, Sammons declared that he did

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[7] Detective Travers testified that when he first met Sammons on October 27, 1995, Sammons appeared to have no disability. During the interrogation he was able to sit and walk around the room. (9RT 1790.)

not see Bacon with a knife that night. (8RT 1595.) Later, when interviewed by Grate, Sammons stated, "I think I did see him with a knife. I think it was kitchen knife. Out of my kitchen." When asked if it was the one in the dishwasher, Sammons compliantly agreed, "It may be. Probably, if it's in there." (8RT 1597-1598.)

As to the gun, Sammons testified that he saw Bacon holding it, indeed pointing it at Sammons, only once that evening. (7RT 1498-1499; 8RT 1610, 1619.) On October 27, 1995, Sammons told police that he *thought perhaps* Bacon had a gun, but he did not see one. (8RT 1611-1612.) He did not mention a gun until February 3, 1996, when he wrote notes on a newspaper article about his case, saying, "I know he would be coming. He had a gun. With the threats he made, and what he told me to say, the shock I was in. I believe that it was why I said the things that I did because of the fear – fear I was in and the shock of my wife's death." (8RT 1613-1614.) The first time Sammons ever described the scene on his first entrance into the master bedroom, where, according to Sammons, Bacon was holding Mrs. Sammons off the floor by her neck while pointing the gun at Sammons, was at trial. (9RT 1789.)

Sammons testified that he himself owned a blue steel Taurus semiautomatic similar to the one he saw Bacon pointing at him; but it was not the same gun. (8RT 1611; 9RT 1814.) Sammons' gun was recovered by the police from the cupboard under the sink in the master bedroom. (7RT 1329-1330, 1362, 1383; 9RT 1783.) Charles Morton, a forensic scientist retained by the defense examined Sammons' handgun and found a small spec of blood just inside the crown of the barrel. There was enough to test positively as blood, but not enough to do any further testing. (9RT 1811-1812, 1815-1820, 1828-1830.)

Dr. Paul Hermann, who testified for the defense as an expert in pathology, examined the autopsy photos and averred that the elongated

contusion across the right side of Mrs. Sammons face matched very well in size and pattern with the barrel of Sammons' gun and was consistent with a pistol-whipping by that object. There was also an injury on the left side of the face that could be consistent with a pistol-whipping by the same gun as well. (9RT 1792-1795, 1796-1802.) Dr. Hermann conceded that there were aspects of the contusion on the right side of the face consistent with a blow from the tire iron recovered from Bacon's apartment. However, this was less likely, not only because a blow from a tire iron would probably have generated enough radial force to lacerate the cheek and smash the bone, which did not happen here, but also because there were aspects of the contusion inconsistent with the configuration of this tire iron. (9RT 1804-1806.)

Dr. Hermann also testified regarding the sexual assault findings. According to Hermann, a competent pathologist would not have missed sexual assault injuries, and Dr. Peterson, who did the autopsy, specifically noted an absence of such injuries. (9RT 1807-1808.) Regarding Elizabeth Cassinos's findings on the colposcope, Dr. Hermann testified that he had in his experience observed visible injuries having nothing to do with sex, but which were much worse than the microscopic ones Ms. Cassinos discovered. Such injuries were consistent with the normal stresses of life such as infections, irritation from underclothing or sanitary pads, etc. Indeed, in the initial autopsy, Dr. Peterson had noted that Mrs. Sammons had been menstruating. Further, the colposcope examination occurred seven days after the autopsy. Dr. Peterson, in his examination, would have manipulated the vaginal and anal tissues, and even simple swabbing could have abraded them to some extent. In short, Dr. Hermann would accord no significance to Elizabeth Cassinos's examination. (9RT 1807-1810.)

In addition to Dr. Hermann, the defense presented Kathy Allison. She was a neighbor, who had lived a block away from the Nut Tree Drive

house, and who had known the Sammons for about five years. Kathy testified that as she and her husband and daughter were driving by the house sometime in the early evening of Thursday, October 26 on their way to a softball game, she saw Mrs. Sammons' white Mercury Sable parked in the driveway, while Charlie Sammons was outside the house talking to an elderly man. (9RT 1837-1838.) This was consistent with Bacon's statement to Grate that Bacon had an opportunity to be alone in the house with Mrs. Sammons, but inconsistent with Sammons' own testimony. (7RT 1496-1501; SCT 1st, pp. 56, 68.)[8]

BIFURCATED TRIAL ON THE PRIOR MURDER CONVICTION

The question of Robert Bacon's prior convictions was tried to the court without the jury. Based on documentary evidence submitted by the prosecution (10RT 2064-2069; SCT 1st, pp. 73-75), the trial court found that on June 17, 1983, Mr. Bacon had been convicted in Arizona of second-degree murder and robbery. The Court also made the finding that the Arizona murder conviction constituted an adequate predicate for the special circumstance of prior conviction of murder, for a strike prior (§ 1170.1), and for a serious felony prior (§ 667(a)). The robbery conviction was found to meet the requirements of a strike prior (§ 1170.1). (9RT 2070-2071.)

[8] The defense also presented Eldon McComb, a print examiner for the Department of Justice. Through him, it was established that the latent fingerprint found on a can of air freshener found by police in the bathroom in the master bedroom was that of Mrs. Sammons, who had not lived at the Nut Tree Drive house for about a month. (9RT 1833-1834.) This suggested that she was in fact in the master bedroom at some time without any duress or coercion.

PENALTY PHASE

Prosecution Case

The prosecution presented evidence of the underlying facts of the Arizona murder and robbery conviction. At about 9:30 a.m. on October 26, 1982, Deputy Johnson of the Pima County Sheriff's Department stopped two hitchhikers for a field interview at Ina Road and Interstate 10 in northwestern Tucson. One man, John Noble, told the officer that he was on his way to Phoenix to explore the possibilities of a job at the Turf Paradise Race Track. The second hitchhiker identified himself as Boe Allen Rush, which was Bacon's name at that time. There was a large white dog with the two men. (10RT 2135-2137, 2147, 2151-2152.) The two men were on their way to a nearby Circle K, where, after Johnson finished with them, they bought some beer and hard liquor. (10RT 2152-2153.)

About an hour later, between 10:15 and 10:30 a.m., drivers passing the area reported that one man was pummeling and beating another man, first to his knees and then down to the ground, and then kicking the prone man in the head. (10RT 2142-2145.) When the police responded they found the dead body of John Noble; they arrested Bacon, who was about 100 feet north of the body. (10RT 2137, 2139, 2154, 2161.) Bacon appeared to be under the influence of alcohol, which could be smelled on his breath (10RT 2154-2155, 2163); Noble, as the later autopsy showed, had a blood-alcohol level of .18 and urine-alcohol level of .22. (10RT 2151.)

Noble's body lay beneath a paloverde tree off the side of the road. The blood spatter evidence indicated some movement, which may or may not have consisted in the body's having been dragged to where it was found. The autopsy revealed a multitude of contusions, abrasions, and lacerations to Mr. Noble's head, chest, and upper arms, and Noble's nose

was broken. Some of the injuries had a v-shaped and checked pattern, which seemed to match the shoes Bacon was wearing. (10RT 2139, 2141-2142, 2157.) There were also multiple sharp force wounds to the right side of Noble's neck, and there was a broken beer bottle found at the scene. The neck of the bottle appeared to have a lot of blood on it. (10RT 2140-2141.) The pathologist believed that the broken beer bottle could have caused the injuries on the neck, one of which was a piercing wound to Noble's right carotid artery causing death. (10RT 2149, 2276-2277.) No usable prints were found on the pieces of the beer bottle. (RT 2150-2151.)

At the station, Bacon, having waived his rights, was interrogated. At first, he claimed that he had had a fight with another John, who had kicked his dog, but not with the John who had been killed. In fact, it was this former John who had fought with the latter John and had killed him. During the interrogation, Bacon produced Noble's wallet, claiming he, Bacon, had approached the already dead body to retrieve the wallet to find out who the victim was. (10RT 2161-2165, 2177.)

Eventually, Bacon admitted to having fought with Noble himself. Noble and Bacon were drinking together. Noble talked about a job in Phoenix as a groom at the racetrack, and suggested that Bacon explore this possibility himself. After they finished drinking Noble decided to lie down and have a nap; Bacon, however, walked off to try to catch a ride, but returned to retrieve from Noble's wallet the paper with the address for the job. (10RT 2167, 2176-2177.) As Bacon prepared to take Noble's wallet, Bacon's dog, nosing around, woke Noble up; the latter lashed out and kicked the dog. When, despite Bacon's warning, Noble kicked the dog again, this precipitated a fight. (10RT 2168-2171, 2177-2178.) The two squared off and began trading punches. Bacon denied that he cut Noble's neck, but conjectured that Noble cut himself on the broken bottle when he fell to the ground. Bacon admitted that his fingerprints might be on the

bottle, because when he rolled Noble over, he, Bacon, saw the bottle, picked it up, and tossed it to the side. (10RT 2167, 2178-2180.) The interview ended with Bacon averring that Noble was a lot bigger than Bacon, and that, because of the alcohol, Bacon was overly afraid for his life. (10RT 2181.)

For the attack on John Noble, Bacon entered a plea to second degree murder and to robbery. (RT 2145.) He was released from prison on April 22, 1994 and was placed on parole in Arizona. On February 24, 1995, Bacon's parole officer, Ann Cleary, conducted a parole search of a room Bacon rented in a mobile home. Under the pillow of Bacon's bed, Ms. Cleary discovered a .25 caliber Raven, loaded. Bacon, who was present, adamantly denied it was his and professed to have no knowledge as to how the gun got there. Cleary arrested Bacon for a parole violation in possessing a handgun. Bacon served a parole sentence and was released again on July 24, 1995, after which he failed ever to report again. (10RT 2186-2190.)

Defense Case

Boe Bacon's mother, Kathleen Scott, one of six children, had a congenital heart condition, which kept her in the hospital for lengthy periods of time, to the serious detriment of her education. Additionally, her physical condition sheltered her from normal social intercourse and prevented her from working. (10RT 2202-2204.) At fifteen, Kathleen, living with her parents in Olympia, Washington, began having sexual relations with twenty-year-old Robert Bacon, who was on active duty in the Navy and stationed nearby in Seattle. At 16, she married Bacon, and the couple moved to California when Bacon was transferred to San Diego. (10RT 2206.)

While Robert Bacon was on sea duty, Kathleen began an affair with his friend, Gene Schroeder. She was four-months pregnant when Bacon returned, and on January 20, 1963, Boe Bacon was born. (RT 2206-2208.)[9] The couple separated and Kathleen moved with the baby back to Washington. (10RT 2208-2209.) In Washington, Kathleen engaged in prostitution. When she was arrested for this and for being an accessory to a robbery, Kathleen's mother had to retrieve the child, and Boe was placed in foster care. (10RT 2209-2210.)

Kathleen's mother, also named Kathleen, knew that her sister-in-law, Julie Waldrop, who lived in Shelton, Washington, was licensed for foster care. When Kathleen, Sr., asked Julie if she would take the baby, Julie agreed. Boe was now six months old. According to Julie, the baby came to her in a catatonic condition. He was unable to sit up; he had no facial expression; he did not cry; and he did not smile. This did not last long. Julie's house was lively and full of children of all ages, who adored the baby. With this stimulation, Boe's development improved to normal and he became an important part of the family. (10RT 2210, 2224-2226, 2229.)

Julie knew that Child Protective Services could take the child back at any time, but despite this she became very attached to Boe. After six months, CPS did contact her to announce that the child was to be returned to the mother. Despite Julie's protests, CPS insisted that the mother had seen the error of her ways and was ready to raise the child properly. Julie, who knew Kathleen, Jr.'s circumstances, believed CPS to be wrong. She made some effort to adopt the child and, failing that, even gave some thought to running away with him. (10RT 2227-2228.) At trial, she testified that she had not seen Boe since he was taken from her. (10RT

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[9] To avoid confusion between appellant and the supposititious father, Robert Bacon, appellant's nickname of "Boe" is used in the description in these passages.

2224.) She had not followed what had happened to him because, in her heart, she already knew and could not bear it. (10RT 2230.)

Kathleen's life continued in chaos. She and Boe lived in marginal economic circumstances, supported by welfare and living in substandard housing. She had some five or six relationships with men over the period of time until Boe was four years old, at which time she married Bill Garlinghouse, who brought his own three children to the marriage: nine-year-old Ervin; eight-year-old Annie; and six-year-old Billy. (10RT 2212-2214, 2263.) An auspicious beginning (10RT 2215) soon degenerated. (10RT 2215-2216.)

Bill Garlinghouse's sister, Ruby, testified for the defense. Having been born in 1953, she was considerably younger than her brother, who was born in 1937 or 1938. Ruby was 13 or 14, when Garlinghouse married Kathleen. Ruby, who lived nearby, often saw the family together since she was regularly called on to baby-sit. (10RT 2232-2233.)

According to Ruby, immediately before the marriage, during the courtship, Garlinghouse treated Bobby[10] even better than he treated his own children, and this caused jealousies, especially in Garlinghouse's oldest son, Ervin. After the marriage occurred, there was an immediate change; the preferential treatment ended, and Garlinghouse singled out Bobby for special abuse, which escalated from abusive language, telling Bobby he was a worthless little bastard, to slapping the child, and soon to knocking the four-year-old to the floor, then beating him down again and laughing at the child's clumsy efforts to get up under Garlinghouse's bullying assault. (10RT 2234-2235, 2237-2238.) These sadistic incidents often happened for no reason, according to Ruby (10RT 2235), but Garlinghouse also disciplined Bobby more often and more severely than he disciplined his

[10] The witnesses from the Garlinghouse family referred to Bacon as "Bobby".

own children, who, especially Ervin, would sometimes blame Bobby for their own misdeeds. (10RT 2241.) Ruby had no difficulty spotting the vestiges of Garlinghouse's abuse. Bobby always had bruises on his face, and Ruby once observed cigarette burns on Bobby and on Billy. The worst she had observed was the entire left side of Bobby's face marred by a knot on his head, a blackened and swelling eye, a nose cut and bleeding, and a cut and swollen lip. Bobby looked as though he had been slammed into a wall. (10RT 2236-2237.)

Ruby related another incident that occurred when she was 16 and Bobby was 6. Ruby was home when her mom, after a phone call, ordered her, "Go get Bill's kids, right now." When Ruby asked if this could wait, her mother insisted, "No, you go pick them up right now." (10RT 2238.) Ruby drove over to her brother's house and came upon the family sitting at the dinner table with Garlinghouse yelling and demanding to know who had broken a lamp. No one confessed, so Garlinghouse ranted out his suspicions, "Bobby did it, didn't he? I know Bobby did it." Still no one answered, but as Garlinghouse yelled more, Bobby rose from the table and ran into the living room. Garlinghouse trapped the boy in front of the couch, grabbed a board about 18 inches long, and started hitting him with it on the back of his legs and on his butt. It appeared to Ruby that Garlinghouse was using all the force he could. (10RT 2239.) Bobby was defiant, declaring, "You can't hurt me," which exacerbated Garlinghouse's anger and provoked a more vigorous effort to break the boy's defiance. Bobby repeated, "Hit me again, it doesn't hurt. You can't hurt me. Go ahead, hit me." (10RT 2240.) Eventually Garlinghouse tired; he placed Bobby on the couch and warned him, "So help me God, if you move, I will kill you." (10RT 2240.) Kathy[11], in the meantime, had called her own

[11] This was the name used by the witnesses from the Garlinghouse family for Kathleen, appellant's mother.

mother. Someone eventually came and took Bobby away. When Ruby saw that Bobby was safe, she took Garlinghouse's other three children to safety. (10RT 2240-2241.)

Garlinghouse's daughter, Elizabeth Ann Boyer, "Annie," testified for the defense. Before Kathy and Bobby moved in with the Garlinghouses, Bill Garlinghouse used to move the children around a lot. In one two-year period, they had moved as much as six times. This pattern continued after their father married Kathy. Garlinghouse's periodic unemployment and dependence on welfare also continued. (10RT 2245-2250.) According to Annie, Garlinghouse was abusive to all the children. He generally used a belt to discipline them, and if a belt was not handy, he would have the child pick a switch from a tree. If the switch was too small, he himself would supersede the choice and pick one much bigger. When he used a belt or switch, he hit them on the butt; when he used his hands, he would slap their faces or the sides of their heads. (10RT 2250-2251.)

Trivial offenses, such as being too loud, could provoke a beating; sometimes Garlinghouse was impelled simply by the need to displace his anger about something unconnected to the child. In any case, if the child cried during a beating, Garlinghouse would order him to shut up and threaten to give him something to cry about. (10RT 2251-2252.) Bobby was disciplined more than the others, although he did not do anything different from what they did. He also received a higher level of physical punishment. (10RT 2252-2253.) Annie confirmed Ruby's testimony that the children sometimes blamed Bobby for things in order avoid the consequences of Garlinghouse's wrath for themselves. (10RT 2256.) Annie attested that Kathy did nothing to stop Garlinghouse, but generously conceded that Kathy was not healthy and could not have physically confronted her husband. Indeed, when Garlinghouse was in a rage, not even a bigger, healthy man could handle him. (10RT 2255-2256.)

Annie also related Garlinghouse's gratuitous cruelty to pets. Once, the family cat jumped up to the counter and ate a roast that had been left out. In the presence of Bobby and the other children, Garlinghouse hurled the cat outside, grabbed his rifle, shot the cat in the head, and made the boys bury it. (10RT 2256-2257.) On another occasion, in the presence of the children, Garlinghouse kicked a puppy so hard that the creature yelped continuously for two hours. Rather than take the animal to the vet, Garlinghouse took it to the shed, shot it multiple times, and again had the boys bury it. (10RT 2257.)

Finally, Annie testified that her father sexually abused her when she was a child. It happened when Kathy was in the hospital for open heart surgery and Bobby was about 12. Eventually, the other children learned that this had happened, although Annie did not know how, since she had not revealed it. (10RT 2254-2255.)

William Garlinghouse, Jr., or "Billy", testified for the defense. He had last seen Bacon when the latter was 17 or 18, but still felt like a brother to him. (10RT 2261.) With a bitter, if earned, tendentiousness, Billy characterized his father's primary activity as beating the boys and molesting the girls. (10RT 2262.) The more objectively stated picture was not radically different, however. Ervin was rarely abused, usually listening to his father, and, at times, blaming the other kids if he did something wrong. Annie was disciplined but not whipped as much as the boys were. On Billy, his father used hands, belts, and switches. Billy confirmed Annie's anecdote about the risk of choosing too small a switch, and adding that if a switch broke in mid-thrashing Garlinghouse would continue the beating with anything at hand. Regardless of the implement, Garlinghouse always hit hard enough to leave marks. (10RT 2264-2266.) If the child cried, Garlinghouse would continue until the crying stopped, as it often did when properly schooled by this brutal pedagogy. (10RT 2265-2266.)

According to Billy, Bobby was beaten more often than the others and often for no reason. Sometimes Garlinghouse would slap the boy to the ground and kick him. (10RT 2266.) Once, Garlinghouse burned both Billy and Bobby with a cigarette. While Billy was burned on the face and arms, Bobby was burned all over. (10RT 2266-2277.) This was the discipline Garlinghouse reserved for the offense of bedwetting. (10RT 2268.) Billy also attested to the killing of pets. He remembered that the cat and dog that Garlinghouse shot were Bobby's pets. Garlinghouse killed the animals in front of Bobby, and then made Billy bury them. According to Billy, throughout their childhood, Garlinghouse often killed the children's pets. (10RT 2269-2270.)

As Bobby got older the physical abuse increased. Bobby began to stick up for himself, which only goaded Garlinghouse to higher levels of anger. He would then beat the child senseless. This happened to Billy a couple of times, but happened to Bobby much more. (10RT 2270.) Both boys, who shared a bedroom, could hear the sexual abuse of Annie when it occurred. Annie even asked the boys for help, but they did not know what to do. (10RT 2271.)

Finally, Glenna Healy, Kathy's older sister, testified to the confidences told to her by the now-dead Kathy. Kathy was afraid of her husband. She related to Glenna how Garlinghouse frequently beat Bobby up and put out cigarettes on him, and Glenna for her part had frequently observed bruises on Bobby's face and cigarette burns on his arm. (10RT 2215, 2217.) Kathy also told Glenna how Bobby once related that Garlinghouse put something up his butt and that it hurt. When Glenna asked Kathy what this was, Kathy said that Garlinghouse had put his "cock" up Bobby's butt. (10RT 2215-2216.)

Kathy's marriage to Garlinghouse ended when Bobby was 12. Over the years, Kathy herself was the object of Garlinghouse's brutality, and

Billy attested to one occasion in which Garlinghouse punched her so hard she fell back against the refrigerator and slid down to the floor unconscious. (10RT 2271-2272.) The marriage ended on this same note when Garlinghouse struck her in the chest so hard that he caused her to have a heart attack. While she was in the hospital, Garlinghouse stripped the house bare, took his children, and disappeared. He left only Bobby behind. (10RT 2272, 2218-2219.)

As Glenna Healy testified further, when Kathy was released from the hospital, she was not employed and had no stable home. She eventually moved back with Robert Bacon, whom, through the years, Bobby believed to be his father. (10RT 2219-2220.) According to Glenna, when Bobby found out the truth, he became very angry. (10RT 2220.) The elder Bacon, in Glenna's opinion, was not much of a surrogate father in any event. The pattern of constant moving continued, and there was little stability in Bobby's home life. (10RT 2221.) Glenna was also struck by Bobby's first Christmas with Robert Bacon, which Glenna witnessed. Kathy and her new, or renewed, husband went out for the evening leaving Bobby alone in the house. Bobby opened some of the presents and looked at them. He tried to tape them back up, but when Kathy and Bob returned, they detected the impropriety and punished Bobby by taking away the presents altogether. (10RT 2220-2221.) According to Glenna, Bobby eventually ended up in juvenile institutions. About that time, Glenna lost touch with him. She did not know what had happened to Bobby until she was contacted by the defense to testify in his capital trial. (10RT 2221.)

ARGUMENT ON APPEAL

GUILT PHASE ISSUES

I.
EXCLUSION OF EVIDENCE CORROBORATING APPELLANT'S CLAIM OF CONSENSUAL SEX WITH MRS. SAMMONS WAS AN ABUSE OF DISCRETION BOTH UNDER STATE EVIDENTIARY PRINCIPLES AND UNDER FEDERAL CONSTITUTIONAL PRINCIPLES

Introduction

Appellant's defense was that of reduced culpability for him and full third-party culpability for Charlie Sammons. Appellant neither committed nor participated in murder, but at most was an accessory to the murder committed by Sammons. Against the charges of rape and sexual assault, his defense was consent. The two defenses were, under the circumstances of this case, of a piece in that, if the credibility of the claim of consensual sexual relations with a woman appellant had known for only a few minutes were true, the credibility of appellant's claim of innocence of murder was corroborated and assured. For it would be paradoxical to the point of absurdity to believe that a man would take the trouble to induce (or seduce) the consent of a woman he intended to murder immediately afterwards in any event. Thus, whether or not appellant had had consensual sex with Mrs. Sammons before she was murdered was not only a material issue in the case for the sexual assault charges, but also for the murder charge. Thus too, evidentiary *corroboration* of the claim of consensual sex was material and relevant not only to the sexual assault charges but also to the murder charge. The defense, indeed, attempted to proffer such evidence.

In the Nut Tree Drive house, there were two other bedrooms besides the master bedroom where the murder occurred. (6RT 1281.) From one of these other bedrooms – one belonging to a teenage girl, presumably Sammons' daughter – the police seized a black nylon athletic bag containing men's shaving equipment. The bag also contained a piece of paper with a name, address, and telephone number on it. (6RT 1284.) This was as far as the defense was able to proceed in eliciting its corroborative evidence when the prosecutor interposed a relevance objection (RT 1285), which the Court eventually sustained (8RT 1568-1569), precluding the admission of the note, despite the offer of proof that it was written in appellant's hand, contained Mrs. Sammons' name, work-address, and work-phone, and thus corroborated appellant's claim to have had consensual contact with Mrs. Sammons. (6RT 1300-1301.)

It is appellant's contention that the trial court, analyzing the issue in terms appropriate to the weight of the evidence rather than its admissibility, not only abused its discretion under state rules of relevance (Evid. Code, § 210), but, under the circumstances of the case, committed a federal constitutional violation, first under the Eighth Amendment right to a heightened reliability in the factual determinations of a capital case (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623), and secondly under the Sixth and Fourteenth Amendment guarantees of a meaningful opportunity to present a defense. (*Crane* v. *Kentucky* (1986) 476) U.S. 683, 690; *People* v. *Cash* (2002) 28 Cal.4th 702, 727.)

A.

At the next recess after the prosecutor objected to any testimony about the contents of the note, defense counsel made his offer of proof outside the presence of the jury: appellant's possession of a note, which an expert would attest was written in appellant's hand, and which contained

Mrs. Sammons' contact information, was corroborative of the claim of consensual sex between appellant and Mrs. Sammons. The prosecutor, who recognized appellant's hand, and who was willing to stipulate to that fact, nonetheless objected that there was no foundational proof that Mrs. Sammons herself provided appellant with the information, and this, in his view, vitiated the relevance of the note. (6RT 1300-1303.) The court was inclined to agree, but reserved ruling, allowing that a sufficient foundation might be laid if Charles Sammons testified that *he* did not provide appellant with this information. (6RT 1306.)

Later in the case, defense counsel, in cross-examining Sammons, elicited from him, that he had never given appellant Mrs. Sammons' contact information. (7RT 1559.) In another discussion outside the presence of the jury, the court expressed doubt that even this addition to the attempt at a foundation for the note was sufficiently effective to establish relevance. (7RT 1562.) The next morning the court made its final ruling on the issue, abiding in its previous view that the defense failed to establish a sufficient foundation for the relevance of the note. (8RT 1564.)

As the trial court analyzed the issue, the defense had two hurdles to overcome in order to attain admissibility for the note. First, the defense was required to establish that the information written in the note came from Mrs. Sammons. Second, even if this were established, the defense still had to show that appellant's possession of this note had sufficient probative force to allow an inference of consensual sexual relations. (8RT 1565-1566.) In the court's view, there were several factors leading to the conclusion that Mrs. Sammons was not the source of the information on the note: 1) if she had given appellant the information, she would most likely have written the note herself rather than dictate the information to appellant; 2) appellant, having sojourned in a house in which Mrs. Sammons had recently lived, would have access to the type of information

appearing on the note; 3) Charlie Sammons, who claimed no involvement in the murder of his wife, could not admit he gave this information to appellant without undermining his, Sammons', broader exculpatory claim of non-participation in the murder; and 4) the brutal injuries to Mrs. Sammons were simply not consistent with a friendly exchange of information with appellant. (8RT 1566-1568.) The court then proceeded to analyze the deficiency of the defense's offering in relation to the second requirement that the note tend to prove consensual relations. In this regard, according to the court, even assuming, *arguendo*, that the information had come from Mrs. Sammons, "[w]ithout an explanation as to why that information was given to him, I don't think it's reasonable to conclude that presence of the note in his bag shows that any sexual contact between the two of them was consensual." (8RT 1569.)

This then was the ruling that appellant contends constituted an abuse of discretion. It will of course immediately strike the reader, and certainly respondent, that a detailed analysis of evidence, such as that rendered by the trial court, is at least apparently inconsistent with a claim of abuse of discretion. But the very details of the trial court's analysis define the nature of the transgression by the court in this instance. The court's analysis of the evidence might have been appropriate for the prosecutor in closing argument or for a trier-of-fact who must assess the *weight* and *significance* to be accorded to evidence, but was clearly not appropriate to a trier-of-law, who is to determine *admissibility*. This confounding of categories was so clear-cut in this case as to constitute an unreasonable determination by the court.

B.

The overarching definition of relevance is well known. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed

fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Of enormous consequence to the instant action was whether or not appellant had consensual or forcible sex with Mrs. Sammons. The note of course did not tend by itself to prove that relations between appellant and Mrs. Sammons were consensual, but the concept of relevance can be reformulated more precisely to define the relationship between facts that are corroborative and facts that are essential in a case:

> " . . . The relevancy of proffered proof in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of guilt [or innocence] of the defendant and, generally speaking, an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue more certain. It is not necessary that the incident fact should bear directly upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, however small, in a chain of evidence, and tends thereby to establish the existence of the main fact in issue." (*People* v. *Billings* (1917) 34 Cal.App. 549, 552-553; see also *People* v. *Torres* (1964) 61 Cal.2nd 264, 266.)

When the matter is viewed properly through the prism of these principles of relevance, the trial court's conclusion that the note lacked relevance on the issue of consensual sexual relations was clearly wrong. If the note, *ex hypothesi*, came from Mrs. Sammons, then it clearly tended to make the fact of consensual relations "more certain." For if Mrs. Sammons had just had intimate, consensual relations with appellant, it would have been natural for her to give appellant her telephone number and address.

Moreover, since Mrs. Sammons had a boyfriend, it was natural that she give appellant her work-phone and work-address where she could be contacted discreetly without Bill Puengatte finding out. Surely, despite other possible conclusions, the note constituted evidence that "tend[ed] to prove a material issue *in light of human experience*." (*People* v. *Adamson* (1946) 27 Cal.2nd 478, 485, emphasis added.)

But what of the claim that there was insufficient evidence that the information in the note came from Mrs. Sammons? This is specious. The inference that she was the source of the information was supported by *evidence* and was not merely speculative: 1) appellant had never met Mrs. Sammons before the night of the murder; 2) appellant, as he stated to Grate, had had consensual sexual intercourse with Mrs. Sammons that night; 3) Charlie Sammons had not given appellant any contact information for Mrs. Sammons; and 4) in appellant's overnight bag in the room he was staying at the Nut Tree Drive house, there was a note in his handwriting containing Mrs. Sammons name, work-address, and phone number. Could a trier-of-fact conclude from this that appellant obtained the information from Mrs. Sammons? Clearly, yes. Were there other possibilities for obtaining the information, such as appellant's having rifled through the drawers in the house? Yes, but these were truly speculative possibilities unsupported by hard evidence. Was it possible that Charlie Sammons was lying about not having provided the information? Yes, but that would go to the weight of the evidence and not its admissibility. (*People* v. *Torrez* (1995) 31 Cal.App.4th 1084, 1092.) In other words, the foundation demanded by the trial court was already there, based on specific evidentiary facts from which a reasonable inference could be drawn or rejected by a trier of fact depending on the assessment of the *weight* of the evidence. For the court to

allow *its* opinion as to that weight to determine the question of admissibility was an abuse of discretion.[12]

C.

The evidentiary error thus established by the application of simple principles of relevance to obvious and clear facts pertinent to the issue is confirmed from the perspective provided by other cases from this Court addressing the erroneous exclusion of corroborative evidence. In both *People* v. *Torres*, *supra*, 61 Cal.2nd 264 and in *People* v. *Carter* (1957) 48 Cal.2nd 737, this Court reversed convictions for the erroneous exclusion of corroborative evidence proffered by the defense but rejected by the trial court as somehow marginal or cumulative.

In *Torres*, the prosecution evidence established that defendant was dealing narcotics on January 25, 1961. The defendant, arrested fifteen months after the crime, testified that on the day in question, and at the pertinent time, which he remembered because of the rainy weather, he and his wife were at the movies watching "Sunrise at Campobello". His wife, sister, and mother corroborated his testimony, and the theater manager testified that that movie was shown at his theater from January 25 through January 31. Defendant further called a meteorologist who testified to the amount of rain that had fallen on January 25, but who was not allowed to testify that it did not rain on any other day while "Sunrise at Campobello" was playing at the theater. (*Id.*, at pp. 265-266.) Although the alibi was

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[12] The trial court's ruling also cannot be justified on the basis of Evidence Code section 352, although the court did not invoke that section or its principles. The probative value of the evidence has been discussed. That value was high. The undue prejudice that arises from this evidence is imperceptible, if it exists at all. There was nothing inherently inflammatory about the note, and there was nothing in it likely to mislead or confuse. The jurors, like the trial court, would be fully competent, with or without the aid of the prosecutor's argument, to identify those factors affecting the weight of the evidence.

presented by extensive evidence, and although the lack of rain on other days was hardly dispositive of the truth *vel non* of the alibi, this Court found prejudicial error because defendant was denied evidence which would render his defense "susceptible to more positive belief" and which would "tend[] in some manner to make the essential facts in issue more certain." (*Id.*, at p. 266.)

Similarly, in *People* v. *Carter*, *supra*, 48 Cal.2nd 737, this Court found error in not allowing evidence of defendant's spontaneous and contemporaneous statement as to why he attempted to commit suicide. Defendant's statement tended to refute the prosecution's interpretation of the event as manifesting a consciousness of guilt for the charged crime. This Court found the preclusion of the defense evidence to be erroneous even though defendant testified in court to his reasons for the attempted suicide, and even though the trial court found the evidence cumulative, which, literally, it was. However, "the testimony was not cumulative in respect to its evidentiary weight." (*Id.*, at p. 748.)

Thus in *Torres*, the absence of rain on January 26 through 31, when the movie was playing, did not establish an alibi, nor did it establish the defendant's alibi. It only corroborated defendant's credibility in claiming an alibi that he was at a specific movie at a time when it was raining – which time coincided with the day the alleged crime was committed. In *Carter*, the defendant himself testified and provided the evidence to rebut the prosecution's theory that his suicide was an act of consciousness of guilt. His spontaneous and contemporaneous statement made extrajudicially merely tracked the in-court testimony. Yet however cognitively marginal the evidence at issue in both cases was, the evidence nonetheless carried significant capacity to persuade, i.e., to add evidentiary weight, in regard to the ultimate question of guilt *vel non*. Because of the persuasive capacity of this evidence, its exclusion could not be pronounced

harmless error. In the instant case, the evidence, marginal when considered abstractly, was persuasive in the same way that the evidence in *Torres* and *Carter* was, and the trial court's preemption of the jury's assessment of this persuasiveness constituted the same type of error that occurred in those cases.

The trial court's ruling that the note was irrelevant cannot therefore be sustained, whether one considers that ruling from the point of view of evidentiary principles or from the point of view of the precedent that applies these principles. The trial court's ruling also cannot be sustained under federal constitutional principles, which now may be discussed before turning to the issue of prejudice.

D.

The Eighth Amendment guarantees a heightened level of reliability in capital cases, not only for penalty determinations, but also for capital guilt determinations. (*Beck* v. *Alabama*, *supra*, 447 U.S. 625, 638; *People* v. *Cudjo*, *supra*, 6 Cal.4th 585, 623.) As demonstrated above, the issue of consensual sexual relations between Mrs. Sammons and appellant was a central issue in the case, the note shed relevant and probative light on the issue, and any determination of the issue without a consideration of the note cannot be deemed reliable within the terms of Eighth Amendment.

The contention that the error also amounted to a violation of the Sixth and Fourteenth Amendment right to present a defense requires a more lengthy exposition because this Court has suggested that an evidentiary error that does not amount to a complete preclusion of evidence of the defense case cannot be constitutional in nature: "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People* v.

Boyette (2002) 29 Cal.4th 381, 427-428; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 999; *People* v. *Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

The range, of course, between complete preclusion of a defense and the preclusion of evidence on a "minor or subsidiary point" is broad, and it is not clear whether this Court is allowing for some intermediate grade of error to constitute a Sixth Amendment violation. In other words, are there cases in which the defense has not been completely precluded but where the precluded evidence is not minor or subsidiary at least in evidentiary force? The existence of such cases as *Torres* and *Carter* seem to counsel that there are cases that at least approach this condition, and it would seem that the preclusion of a discrete piece of evidence that is important to the defense can effectively amount to a denial of a meaningful opportunity to have one's defense presented and heard. Indeed, this Court itself has observed that the constitutional guarantee of the right to present a defense applies even when "[e]vidence that falls short of exonerating a defendant may still be critical to a defense." (*People* v. *Cash* (2002) 28 Cal.4th 708, 727) Thus, perhaps a more accurate statement of the line between a simple evidentiary error and a constitutional one is as follows: "To determine whether a constitutional violation has occurred, [a] court must examine whether the proffered evidence was relevant, material and vital to the defense, and whether the exclusion of that evidence was arbitrary." (*Lange* v. *Young* (7th Cir. 1989) 869 F.2nd 1008, 1011, citing *United States* v. *Valenzuela-Bernal* (1982) 458 U.S. 858, 867 and *Chambers* v. *Mississippi* (1973) 410 U.S. 284, 302.) The very jurisprudence of the United States Supreme Court confirms this, and appellant might be forgiven for belaboring the analysis in light of this Court's equivocal pronouncements on the issue.

The right to a meaningful opportunity to present a defense emanates not only from the Compulsory Process Clause of the Sixth Amendment

(*Washington* v. *Texas* (1967) 388 U.S. 14, 19), but also from the Sixth Amendment right to confront and cross-examine witnesses. (*United States* v. *Whitmore* (D.C. Cir. 2004) 359 F.3rd 609, 615 ["The Sixth Amendment guarantees a defendant the right to present a defense by calling witnesses on his own behalf and by cross-examining the witnesses against him."].) A violation of the Compulsory Process Clause will not necessarily entail the preclusion of an entire defense; and certainly a violation of the Sixth Amendment right to cross-examine may inhere in the quantitatively small, but qualitatively important, preclusion of a single piece of evidence impeaching the credibility of a prosecution witness on a critical matter in dispute. (See *Olden* v. *Kentucky* (1988) 488 U.S. 227, 228-232; see also *Davis* v. *Alaska* (1974) 415 U.S. 308.) If one examines the collection of United States Supreme Court cases through which the federal constitutional right to present a defense has been developed and clarified, in none of these cases was there a full or complete preclusion of a defense, and in most of them the defendant gave substantial testimony. (*Olden* v. *Kentucky*, *supra*, 488 U.S. 227, 229-233; *Crane* v. *Kentucky*, *supra*, 476 U.S. 683, 690-691; *Chambers* v. *Mississippi*, *supra*, 410 U.S. 284, 294; *Washington* v. *Texas*, *supra*, 388 U.S. 14, 16; see also *Rock* v. *Arkansas* (1987) 483 U.S. 44, 47-48.) Thus, to confine an erroneous and unconstitutional denial of the right to present a defense only to those cases where evidence of the defense has been completely precluded is inconsistent with the Sixth Amendment ground on which the right stands.

Skipper v. *South Carolina* (1986) 476 U.S. 1 perhaps most clearly illustrates how the erroneous exclusion of a discrete piece of evidence corroborative of the defendant's credibility can rise to the level of a Sixth Amendment violation, at least on analogy of the Eighth Amendment's regulation of the right to a meaningful opportunity to present a defense at a capital sentencing trial. The issue in *Skipper* was whether the defendant

could be precluded from presenting evidence through the testimony of various jail deputies as to his good conduct while incarcerated. The Court held that because this evidence was relevant to mitigation of penalty, the Eighth Amendment compelled its admission. (*Skipper*, *supra.*, at pp. 4-5.) Particularly pertinent to the instant case is the following passage:

> " . . . [T]he State seems to suggest that exclusion of the proffered testimony was proper because the testimony was merely cumulative of the testimony of petitioner and his former wife that petitioner's behavior in jail awaiting trial was satisfactory, and of petitioner's testimony that, if sentenced to prison rather than to death, he would attempt to use his time productively and would not cause trouble. We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses – and in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges – would quite naturally be given much greater weight by the jury. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates." (*Skipper*, *id.*, at pp. 7-8.)

Thus, in the instant case, the preclusion of a discrete piece of evidence that had a strong tendency to corroborate the central claim of the defense, made by appellant himself in his extrajudicial statements to Detective Grate, i.e., that appellant had consensual relations with Mrs. Sammons, was error that rose to the level of a constitutional violation just as the preclusion of discrete evidence did in *Skipper*, or in *Olden*, or in *Crane*. The trial court's abuse of discretion was therefore a denial of

appellant's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments.

E.

Prejudice then must be assessed by the standard for constitutional error, requiring a showing that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) But even under the more demanding (for appellant) standard for state-law evidentiary error, appellant can show a reasonable probability of a more favorable result absent the error in question. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

The prosecution case rested heavily on three props: the testimony of Charlie Sammons; the testimony of Martin L'Esperance; and appellant's statement to Detective Grate. None of these made for solid support.

Charlie Sammons, of course, was the aggrieved husband, shown overwhelmingly to have had a strong motive to commit the crime himself and then impute its perpetration to appellant. He also had the capacity physically to commit the murder of his wife since his multiple sclerosis, at least at the time of the murder, did not prevent vigorous or spry physical activity, whether Sammons was installing sprinkler systems (9RT 1854), building the patio for his own house (9RT 1848), or suddenly dashing into the house on a jealous impulse to catch his wife in some compromising situation. (9RT 1864-1866, 1875-1876.) His testimony was riddled with inconsistencies and absurdities, not the least of which was his portrayal of himself as a helpless, oddly passive and uninterested automaton as he sat fecklessly in his own kitchen while his wife was being murdered in the master bedroom by a man he barely knew, who himself had no motive to murder Deborah Sammons.

The prosecution could not, of course, endorse Charlie Sammons' credibility to the extent that Sammons exculpated himself for the crime of murder, but had to endorse his credibility to the extent that Sammons' incriminated *appellant* for murder, providing for the prosecution appellant's identity as the perpetrator as well as the special circumstance for lying-in-wait. (6RT 1098-1099; 9RT 1943-1944, 1945-1946.) The prosecution even had to go beyond Sammons' testimony to speculate that Sammons had offered to pay appellant to commit the murder (9RT 1949-1950), -- a speculation the State apparently could not risk endorsing by actually charging a special circumstance for financial gain. (§ 190.3(a)(1).)

As for Martin L'Esperance, he was not merely a young man who had committed thefts in the past; his curriculum vitae was such as to earn him the accurately distilled description of "thief." (7RT 1418, 1429.) Poor Martin, of course, had an excuse: he was an alcoholic and a drug addict, and these conditions carried with them a heightened capacity for "[l]ying, manipulating, stealing, whatever it takes." (7RT 1441.) Thus, he presumably withheld from the authorities appellant's alleged confession to murder until that information had some personal value to him when he later had a pending case for which he was facing a term in state prison. Although he claimed he had no hope or expectation of any profit from the performance of his civic duties, and thereby denied the very brand of his own name ("The lowest most dejected thing of fortune/ Stands still in esperance . . . ." (*Shakes., King Lear*, IV.i.4)), it was nonetheless fortunate that his probation officer unaccountably felt some unprompted impulse of beneficence to save Martin from a state prison sentence. (7RT 1442-1443.)

Thus, there were serious grounds to doubt L'Esperance's credibility in general. But there was specific reason to doubt the story inherently. His rendition of appellant's confession was interlarded with lurid details such as appellant's recommendation of the intoxicating thrill of murder (7RT 1420)

and the unappreciated joys of necro-erotic sodomy. (7RT 1421-1422.) Perhaps these representations were so outrageous they could not possibly have been made up; more likely, they were fictions calculated to increase the allure and interest of the overall fiction, which L'Esperance was trying to peddle as a valuable commodity to the prosecution.

The prosecution's best prop, then, for its case was in fact *appellant's* statement to Grate, in which appellant admitted he was at the Nut Tree Drive house during the murder, immediately before which he had engaged in consensual sexual relations with Mrs. Sammons, and immediately after which he helped dispose of the body. Paradoxically, this was also the prop on which the defense rested its case, and the prosecution had to invoke the evidence equally as much for its supposed falsehood in denying murder, rape, and sodomy liability as for its truth in admitting at least the opportunity to commit murder, rape, and sodomy. Appellant's statement to Grate was then the center of the factual dispute between the prosecution and the defense. Either appellant committed the murder, or he was only an accessory to murder. Crucial to this determination was the truth *vel non* of appellant's claim to have had consensual sex with Mrs. Sammons. If the sex were consensual, it would defy any natural probability that appellant committed the murder. For, while a contract-murderer might take the time to rape or sodomize the intended victim gratuitously for some perverse pleasure, he is hardly likely to bother with any inefficient *seduction* of his moribund victim. Thus, guilt *vel non* for the murder and the forcible sexual assault charges were in effect, if not in law, the same question in this case.

On the question of consensual sex, however, the prosecution started with an advantage, since such immediate physical intimacy with a strange woman in her estranged husband's house was an unusual occurrence. Corroboration was important for the defense, and there was in fact some corroboration of the defense claim in the evidence already presented.

There was first the negative corroboration from the prosecution's failure to find physical confirmation of forcible sexual assault. Because the initial pathologist saw no signs of sexual trauma (6RT 1235-1236, 1238), the prosecution, after obtaining appellant's admission of sexual relations with Mrs. Sammons, went so far as to arrange a post-mortem colposcopic examination several days after the autopsy. The effort was fruitless. Although the examining nurse claimed to have detected some microscopic damage, she admitted she had seen injuries like these on live women who had had consensual intercourse. (6RT 1249-1250.) Further, Dr. Hermann, the pathologist who testified for the defense, confirmed that urogenital injuries occurred simply through the stresses of life and not necessarily through forcible sexual intercourse. (9RT 1808.) In this regard, he noted Dr. Peterson's finding that Mrs. Sammons had been menstruating, which suggested that some damage could have been caused by use of a sanitary pad or tampon. Dr. Hermann also pointed out that at the autopsy, Dr. Peterson would have manipulated the tissue in the genital area, and that several days after the autopsy, the tissue in question would have also suffered bacterial deterioration. (9RT 1808-1810.)

The second piece of evidence came from the testimony of one of Charlie Sammons' neighbors. Kathy Allison, who lived a half block away, testified for the defense that on the evening of October 26, 1995, she and her husband drove past Sammons' Nut Tree Drive house on their way to their daughter's softball game. As they passed, she saw Charlie Sammons' outside the house talking to an elderly gentleman. Kathy also saw Mrs. Sammons' car was parked outside the house. (9RT 1837-1838.) The significance of this was to corroborate appellant's claim that Charlie's exit from the house presented appellant with the opportunity to approach Mrs. Sammons.

Finally, there was corroboration in the sartorial state of Mrs. Sammons' body at the time of her death. When her body was recovered from the trunk of the car, it was fully dressed in her outer clothing: a floral print dress that hung down from the shoulders on thin straps over a white t-shirt, albeit soaked red in blood. (Exs. 2(b), 8, 9; 6RT 1144, 1149-1150, 1182; 7RT 1371.) As to her underclothing, she was wearing only a half-slip. There were no panties or brassiere, and some of the metal parts of the latter were recovered from the fireplace in the living room. (6RT 1266-1267; 7RT 1371.) According to Charlie Sammons, on one of his voyeuristic interludes at the door of the master bedroom, he saw his wife clothed, but her undergarments were lying on the bed. (8RT 1588-1590, 1606-1607.)

Undoubtedly, a woman's body in a dress, but without any panties underneath, is not inconsistent with rape or sodomy. But that same body, fully clothed in outer garments with no brassiere underneath is more problematical in this regard. If she were raped, when would the bra have been removed? On the other hand, her state of dress was reasonably explicable by an exculpatory inference: when finished with *consensual* sex, she began dressing as her husband returned, forcing her to accelerate the process and omit the undergarments as unessential to meet the emergency.[13]

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[13] This evidence also suggested a scenario as to the murder itself. There was a laceration in Mrs. Sammons' dress that corresponded to the deadly stab wound to her lung. There was, however, no corresponding laceration in the t-shirt, which was soaked in blood in a way as to suggest that the shirt had been bunched up above the stab wound at the time that wound was inflicted. (6RT 1186, 1229; 7RT 1349-1351.) Thus, if she were dressing hurriedly to cover herself as her husband re-entered the house, she was also stabbed when her clothing was in disarray. It is hardly farfetched to conclude that Charlie Sammons, sexually obsessed with his wife, aware that he had been cuckholded by her before with a younger man, entered the room as she was trying to finish dressing, understood

Although both the negative and affirmative corroboration was significant in maintaining a degree of plausibility in appellant's claim of consensual sex, none carried the evidentiary weight of the note, which in itself provided a solid basis for inferring a consensual relationship between Mrs. Sammons and appellant in a way in which the absence of vaginal trauma, or the fact that Charlie Sammons was outside, or the oddities in Mrs. Sammons state of dress could not. These latter could be interpreted n ways that did not impede the prosecution while the note could not be dismissed or obscured by a broad range of inculpatory possibilities. If there were reasons short of sexual intimacy for Mrs. Sammons to give appellant further contact information, sexual intimacy was nonetheless a very good reason, while there was no evidence that the two of them shared some sort of hobby or other interest that would prompt an exchange of phone numbers. Appellant's possession of a note in his handwriting and containing Mrs. Sammons' name, address, and telephone number was strong, objective corroboration, especially when combined with the other corroboration, that appellant's claim to have had consensual sexual relations with Mrs. Sammons was true.

With the note, the credibility of appellant's claim of consensual sex would have increased significantly in plausibility, increasing in turn the plausibility of the claim that appellant did not commit murder, but was at most an accessory to murder. The increased weight of appellant's statement to Grate as exculpatory evidence for the defense decreased its weight as inculpatory evidence for the prosecution. Thus, a prosecution case relying on the weak supports of Charlie Sammons and Martin L'Esperance becomes even weaker if the note had been properly admitted into evidence. The trial court's erroneous exclusion of that evidence not

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what had happened, and in a rage beat and murdered his wife. (See 9RT 2015-2016.)

only raises a reasonable doubt that the error was harmless (*Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24), but also, on this record, it is reasonably probable that the case would have resulted more favorably for appellant if the note in question had been properly admitted into evidence. (*People* v. *Watson*, *supra*, 46 Cal.2nd 818, 836-837.)

II.
APPELLANT'S STATEMENT TO DETECTIVE GRATE SHOULD HAVE BEEN PARTIALLY SUPPRESSED PURSUANT TO THE FIFTH AMENDMENT

Introduction

Appellant's statement to Detective Grate on October 28, 1995 has been summarized above in the statement of facts. (See above, pp. 8-12.) The admissibility, or partial admissibility, of this statement was litigated before trial. (1CT, pp. 51 *et seq.*, and pp. 120 *et seq.*) After an initial waiver of *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) rights (1CT 58), appellant, about 40 minutes into the interrogation (RT, Vol. N, p. 132), stated, "Yeah, I think it'd probably be a good idea . . . for me to get an attorney." (1CT 85.)[14] This, as appellant claimed below, was an invocation of the right to counsel, which had to be honored by an immediate cessation of any interrogation by Detective Grate. (*Miranda*, *id.*, at p. 474; *Edwards* v. *Arizona* (1981) 451 U.S. 477, 484.) The trial court ruled, however, that Detective Grate was not obligated to stop interrogation because appellant's statement was ambiguous under the circumstances and therefore did not

[14] The unredacted version of the interview was before the Court for purposes of the suppression motion, and the references here are to the transcript of this unredacted version. At trial, all references to appellant's prior crime and prison term in Arizona were elided.

sufficiently signal an invocation of the right to counsel. (RT, Vol. N., pp. 134-135.)

The trial court erred. Appellant will demonstrate in the following that under the circumstances appellant had articulated "his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis* v. *United States* (1994) 512 U.S. 452, 459; *People* v. *Gonzalez* (2005) 34 Cal.4th 1111, 1125; *People* v. *Michaels* (2002) 28 Cal.4th 486, 510; *People* v. *Crittenden* (1994) 9 Cal.4th 83, 129-130.) This is the legal standard to be met, and when it was met here, it entailed the obligation on Detective Grate to end the interrogation, and on the trial court to preclude the use of the statement either for guilt or penalty purposes.[15]

Appellant will also proffer two alternative arguments that may not be necessary, but which prudence requires. For if this Court disagrees that appellant's statement was sufficiently clear to invoke the right to counsel, then, under *Davis* v. *United States*, Detective Grate was free either to clarify the ambiguous invocation or to ignore it altogether. (*Davis*, *supra*, 512 U.S. at pp. 461-462.) As will be seen, however, Grate did neither. Instead, he actively *dissuaded* appellant from invoking his right to counsel, and it will be appellant's contention that not only does nothing in *Davis* authorize this type of interaction, but that it is contrary to the purpose of *Miranda*'s assertion that "[o]ur aim is to assure that the individual's right to choose between silence and speech remains unfettered *throughout* the interrogation process." (*Id.*, at p. 469, emphasis added; see also *Connecticut* v. *Barnett* (1987) 479 U.S. 523, 528.)

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[15] The legal sufficiency of an invocation of the Fifth Amendment right to counsel is subject to *de novo* review. (*People* v. *Gonzalez*, *supra*, 34 Cal.4th at p. 1125; *People* v. *Crittenden* (1994) 9 Cal.4th 83, 128-130; *People* v. *Johnson* (1993) 6 Cal.4th 1, 25; *United States* v. *Williams* (9th Cir. 2002) 291 F.3rd 1180, 1190; *United States* v. *Doe* (9th Cir. 1999) 170 F.3rd 1162, 1166.)

Finally, appellant will argue that *Dickerson* v. *United States* (2000) 530 U.S. 428, grounding the *Miranda* rules squarely within the Fifth Amendment itself, has partially overruled *Davis* v. *United States*. The rationale in *Davis* for *not* imposing on police the obligation to clarify ambiguous invocations was that the *Miranda* right to counsel was not constitutionally based but rather was tangential to the Fifth Amendment and merely prophylactic of it. (*Davis* v. *United States*, *supra*, 512 U.S. 452, 458-462.) Because of *Dickerson* this rationale can no longer support this aspect of the holding in *Davis*, and, as appellant will demonstrate, the *constitutional*, rather than the merely prophylactic, principles inherent in the *Miranda* rules in fact require that an ambiguous invocation be clarified before interrogation proceed.[16]

A.

The legal framework for appellant's first contention, that his statement was a sufficiently clear invocation of his right to consult with counsel before proceeding further with the interrogation, is fairly well settled. The Fifth Amendment protection against self-incrimination bars custodial interrogation unless the accused has made a voluntary, knowing and intelligent waiver of the right to remain silent, the right to the presence of an attorney, and if indigent, to the presence of an appointed attorney. (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 444-445, 473-474; *Dickerson* v. *United States* (2000) 530 U.S. 428, 439-440; *People* v. *Cunningham* (2001)

[16] In *People* v. *Gonzalez*, *supra*, 34 Cal.4th 1111, this Court recently reaffirmed the declaration in *Davis* that an ambiguous invocation triggers no duty on the part of the police to ask clarifying questions. (*Id.*, at pp. 1124-1125.) However, the issue of whether or not this rule has to be modified in light of *Dickerson* v. *United States* was not raised in *Gonzalez*, and a case is not authority for a proposition not considered therein. (*People* v. *Gilbert* 1 Cal.3rd 475, 482, fn. 7; *People* v. *Toro* (1989) 47 Cal.3rd 966, 978, fn. 7; *Roberts* v. *City of Palmdale* (1993) 5 Cal.4th 363, 372.)

25 Cal.4th 926, 992.) "If a suspect indicates in any manner and at any stage of the process, prior to or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated." (*People* v. *Storm* (2002) 28 Cal.4th 1007, 1021, quoting *Miranda* v. *Arizona*, *supra*, 384 U.S. 436, internal quotation marks omitted.) Once there is an invocation of the Fifth Amendment right to the presence of counsel, then the interrogation must cease, unless the accused re-initiates further communication with the authorities. (*Edwards* v. *Arizona* (1981) 451 U.S. 477, 482-485.) Absent this, all statements made by the suspect after his invocation must be suppressed at trial as presumptively involuntary. (*McNeil* v. *Wisconsin* (1991) 501 U.S. 171, 176-177; *People* v. *Cunningham*, *supra*, 25 Cal.4th at p. 992.)

The rule that interrogation must cease does not apply, however, if the suspect's request for counsel is equivocal; "[r]ather, the suspect must unambiguously request counsel." (*Davis* v. *United States* (1994) 512 U.S. 452, 459; *People* v. *Sapp* (2003) 31 Cal.4th 240, 266.) As quoted above, the legal measure that determines the sufficiency of a request for counsel for purposes of the Fifth Amendment is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis* v. *United States*, *supra*, at p. 459; see also *Connecticut* v. *Barrett* (1987) 479 U.S. 523, 529-530.) This assessment is to be made "without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel . . . ." (*People* v. *Gonzalez*, *supra*, 34 Cal.4th at p. 1125.) With this, one may turn to the evidence, which consists solely of the videotape and transcript of appellant's statement to Detective Grate. (RT, Vol. N, p. 132.)

One may begin with the immediate context of the statement at issue. About a half hour to forty minutes into the interrogation, appellant revealed to Grate that he had had consensual sex with Charlie Sammons' wife.

(SCT 1st, p. 46.) Appellant did not, however, witness the murder. (SCT 1st, 46-48.) Grate kept urging nonetheless:

"G[rate]: What did he do, man? What the fuck did Charlie do?

"B[acon]: I don't know. I don't know. I've been asking myself that same question since we've been in this room and you told me this. What the fuck did Charlie do? Oh, my God.

"G: Ain't no doubt you're in the wrong place at the wrong time.

"B: (Positive response)

"G: With the wrong people, man.

"B: -- Yeah, I think it'd probably be a good idea . . .

"G: Well, listen listen.

"B: . . . for me to get an attorney.

"G: Alright. It's up to you.

"B: ___ tell me . . .

"G: Hmm?

"B: Listen, what?

"G: It's up to you if you, you know, if you want an attorney, I mean I'm I'm giving you the opportunity to talk.

"B: Well . . .

"G: You know . . . ___

"B: . . . That's what you're gonna say." (1CT 85-86.)

The trial court, parsing the statement, "Yeah, I think it'd be a good idea for me to get an attorney", noted that "it'd" was a contraction for "it would," which signified that there was no immediacy in appellant's request for an attorney. The Court believed that appellant's statement was therefore no different from the statement found to be an inadequate invocation of the right to counsel in *Davis* v. *United States*, *supra*, 512 U.S. 452. (RT, Vol. N, pp. 134-135.) In *Davis*, the statement at issue was, "'Maybe I should talk to a lawyer'" (*id.*, at p. 455), and the Supreme Court agreed with the lower court's determination that this was an ambiguous statement and not a clear invocation of the right to counsel.[17] But is the ambiguity apparent in *Davis*'s "maybe I should talk to a lawyer" present in "it would probably be a good idea for me get an attorney"?

In *Smith* v. *Illinois* (1984) 469 U.S. 91, the accused, when advised of his right to have a lawyer present during questioning, stated, "'Uh, yeah. I'd like to do that.'" (*Id.* at p. 93.) At issue in *Smith* was whether this statement could be interpreted in light of the accused's subsequent willingness to answer questions. The Court ruled that "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself" (*id.* at p. 100), and in making this ruling, the Court observed that the initial request, i.e., "I'd like to do that," had little or nothing that was equivocal or ambiguous about it. (*Id.* at pp. 96-97.) It, of course, contained the word, "I'd," a contraction for "I would," and was effectively indistinguishable from the "it'd" or "it would" used here.

"Would" as a conditional undoubtedly can imply a lack of immediacy. The defendant who states, "If you are going to charge me, I

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[17] The Court in *Davis* noted that this conclusion was buttressed by the fact that the officers in question did proceed to clarify that the accused clearly did *not* want a lawyer. (*Davis*, *id.*, at pp. 455, 462.)

would like an attorney" does not, by any objective measure, necessarily want an attorney until the specific condition is fulfilled. (See *People* v. *Gonzalez*, *supra*, 34 Cal.4th at p. 1126.) However, the defendant who asserts, "I'd like an attorney," without naming or implying a specific condition precedent for this desire, uses "would" as an optative, whose calculated effect is merely to soften the rude appearance of a dogmatic assertion, -- much like the customer who tells the waitress, "I would like a cheeseburger" without conveying any sense that the order should be delayed pending some conditional occurrence. "Would" here is merely designed to prompt a better reciprocation of good service than might the more abrupt, peremptory, and rude, "I want a cheeseburger."

This is what distinguishes the instant case from *People* v. *Gonzalez*, *supra*, 34 Cal.4th 1111. In *Gonzalez*, the defendant stated, before submitting to a polygraph examination during a custodial interrogation, "'[I]f for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. [*sic.*]'" (*Id.*, at p. 1116.) This Court held that this was not a clear invocation under *Davis*. "On its face, defendant's statement was conditional; he wanted lawyer *if* he was going to be *charged.* The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police." (*Id.*, at p. 1126, italics in original.) At issue in *Gonzalez* was a true conditional statement and not a mere optative form of expression as in *Smith*'s "Uh, yeah. I'd like to do that." (*Smith* v. *Illinois*, *supra*, 469 U.S. at p. 93.) This case falls on the *Smith* side of the line, and not on the *Gonzalez* side.

Not only is the use of "would" insufficient to render an invocation equivocal, but the use of "I think," even in conjunction with "would," is

insufficient. Indeed, locutions identical with, or similar to, the one at issue in this case have been repeatedly assessed under the federal constitutional standard of *Davis* as unambiguous and unequivocal invocations of the right to counsel. (*Commonwealth* v. *Contos* (Mass. 2001) 754 N.E.2nd 646, 655 ["I think I'm going to get a lawyer."] *McDaniel* v. *Commonwealth* (Va.App.1999) 518 S.E.2nd 851, 853 ["I think I would rather have an attorney here to speak to me."]; *State* v. *Munson* (Minn. 1999) 594 N.W.2nd 128, 139 ["I think I'd rather talk to a lawyer."]; *Alford* v. *State* (Ind. 1998) 699 N.E.2nd 247, 251 ["I think it would be in my best interest to talk to an attorney."]; *State* v. *Kennedy* (S.C. 1998) 510 S.E.2nd 714, 715-716 ["Well, I think I need a lawyer."]; *State* v. *Jackson* (N.C. 1998) 497 S.E.2nd 408, 411-412 ["I think I need a lawyer present."]; *Cannady* v. *Dugger* (11th Cir. 1991) 931 F.2nd 752, 755 ["I think I should call my lawyer."]; *Shedelbower* v. *Estelle* (9th Cir. 1989) 885 F.2nd 570, 571 ["You know, I'm scared now. I think I should call an attorney."]; *Jones* v. *State* (Tex.Crim.App.1987) 742 S.W. 2nd 398, 405 ["I think I want a lawyer."].) "Yeah I think it'd probably be a good idea . . . for me to get an attorney" is not substantially different from any of the articulations in these cases, and cannot be deemed ambiguous or equivocal. *Davis*'s "Maybe I should talk to a lawyer" is indeed objectively tentative because of the word "Maybe," but even in *Davis*, the Court had the benefit of a clarification by the officer, which then rendered an express statement by the accused that he *did not* want an attorney, and this weighed against a finding that the initial statement was a clear request for counsel. (*Davis* v. *United States*, *supra*, 512 U.S. 452, 455, 461.)[18]

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[18] There are some cases finding statements similar to the one at issue in the instant case equivocal and ambiguous. (*Clark* v. *Murphy* (9th Cir. 2003) 331 F.3rd 1062, 1065, 1071-1072 ["I think I would like to talk to a lawyer."]; *Burket* v. *Angelone* (4th Cir. 2000) 208 F.3rd 172, 197 ["I think I need a lawyer."]; *State* v. *Henness* (Oh. 1997) 679 N.E.2nd 686, 695-696 ["I think I need a lawyer because if

Thus, *Smith* is dispositive of the issue even under the *Davis* standard formulated after *Smith* was decided, and this should end the discussion favorably for appellant's contention. However, recently, this Court, in *People* v. *Stitely* (2005) 35 Cal.4th 514, has applied the *Davis* standard to find an invocation of the right to remain silent insufficiently clear to meet that standard. Because the invocation in *Stitely* bears a striking resemblance to the invocation of counsel in the instant case, *Stitely* requires special examination to show that the similarity is vitiated by the certain crucial distinctions between the invocation of the right to remain silent and the invocation of the right to counsel under *Miranda*.

B.

In *Stitely*, a woman, Carol, was found lying half-naked in an alley the day after she was seen leaving a bar with the defendant. (*Stitely*, *id.*, at pp. 523-524.) Detective Coffey and another officer met defendant at work and told him they were investigating a homicide. Defendant cordially

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I tell everything I know, how do I know I'm not going to wind up with a complicity charge?"]; *State* v. *Morgan* (Ia. 1997) 559 NW.2nd 603, 608 ["I think I need an attorney."] There are three things to note about these cases. First, they are a minority. Secondly, they seem to rest on a misapprenhension that *Davis* v. *United States*, *supra*, 512 U.S. 452, has rendered a stricter and narrower standard for determining whether or not an invocation is ambiguous. (See *Clark* v. *Murphy*, *supra*, 331 F.3rd at pp. 1070-1071.) *Davis* in fact did not purport to do this, but posed only the issue as to what the obligation of the interrogating officer is in the face of an ambiguous invocation. (*Davis*, *supra*, at p. 456.) The standard for what is or is not ambiguous preceded *Davis*. (See *Connecticut* v. *Barrett* (1987) 479 U.S. 523, 529-530; see also *Davis* v. *United States*, *supra*, 512 U.S. at p. 459.) Thirdly, in reference to *Clark* and *Burket*, at least, these cases consisted of federal habeas review of state court actions under Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), which established for federal habeas corpus a standard of broader deference toward state court legal rulings. Thus, the courts in *Clark* and *Burket* were not making an independent assessment of whether the invocation in each of those cases was ambiguous or not. (*Clark* v. *Murphy*, *supra*, 331 F.3rd at pp. 1071-1072; see also *Burket* v. *Angelone*, *supra*, 208 F.3rd at p. 198.)

offered to help, agreeing to go down to the police station to answer questions. (*Id.*, at p. 533.) In the police car, which defendant voluntarily entered, he began making unsolicited comments about his marital history and referred to women as "'bitches,'" whereupon Detective Coffey read defendant *Miranda* rights, which defendant waived. There was no further discussion in the police car. At the station, there were no new *Miranda* warnings, but defendant answered questions, at first denying that he knew Carol, but then, when he was told that witnesses had seen him leave the bar with her, defendant admitted that he had given her a ride home. (*Id.*, at pp. 525-526, 533-534.) When Detective Coffey suggested that defendant and the woman had fought, the following exchange occurred:

> "'DEFENDANT: Okay. I'll tell you. *I think it's about time for me to stop talking.*
>
> "'COFFEY: You can stop talking. You can stop talking.
>
> "'DEFENDANT: *Okay.*
>
> "'COFFEY: It's up to you. Nobody ever forces you to talk. I told you that. I read you all that (untranslatable).
>
> "'DEFENDANT: Well, I mean (untranslatable) God damn accused of something that I didn't do. I'm telling you the truth. And you're not believe [*sic*] me. You're not believing me. I'm telling you the truth.
>
> "'COFFEY: Richard, the only problem is, I can prove otherwise. The only reason I – listen to me.
>
> "'The only thing you can prove is I took her out of that bar, man. That's all I did. That's the only thing I've done.'" (*Id.*, at p. 534, italics added in *Stitely*.)

This Court found that "[a] reasonable officer in Detective Coffey's position would have concluded that defendant's first remark ('I think it's about time for me to stop talking') expressed apparent frustration, but did not end the interview." (*Id.*, at p. 535.) Further, according to this Court, the following "Okay" was not an invocation, but "merely implied that defendant understood what he had just heard, and that he could 'stop talking' if he so chose." (*Id.*, at p. 536.)

The assertion at issue in the instant case ("Yeah, I think it'd probably be a good idea . . . for me to get an attorney") resembles the assertion at issue in *Stitely* ("I think it's about time for me to stop talking"). The resemblance, however, does not entail the same conclusion regarding ambiguity for the simple reason that voluntary interaction with the police preceding an attempt to invoke silence will produce a greater ambiguity than voluntary interaction with the police as a preface to the attempt to invoke the right to counsel. This requires some explanation and elaboration.[19]

The purpose of *Miranda* warnings is to help assure in a custodial interrogation that any waiver of the Fifth Amendment right to remain silent was entered by the suspect voluntarily, knowingly and intelligently. (*Colorado* v. *Spring* (1987) 479 U.S. 564, 572-573.) The centerpiece of the Fifth Amendment right is of course the right to remain silent (see *Lefokowitz* v. *Cunningham* (1977) 430 U.S. 801, 810, Stewart, J., dissenting), and the *Miranda* advisement at the outset of the custodial interrogation informs the suspect directly of this right and explains that

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[19] In *Stitely*, this Court takes for granted that the *Davis* standard even applies to the invocation of the right to remain silent. This, however, has not been dispositively settled by the United States Supreme Court and is still something of an open question. (See *Soffar* v. *Cockrell* (5th Cir. 2002) 300 F.3rd 588, 594, fn. 5.)

"anything said can and will be used against [him] in court." (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 469.) The *Miranda* advisement of the right to counsel is more derivative, drawing its urgency only from the need to protect the right to remain silent. (*Miranda* v. *Arizona*, *supra*, 384 U.S. 436, 469-471; *Mississippi* v. *Minnick* (1990) 498 U.S. 146, 152, 154.) However, *qua* advisement protecting the central right to remain silent, the right to counsel is perhaps the primary protection when the custodial interrogation proceeds past the initial waiver and the interrogation commences:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights . . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during questioning if the defendant so desires." (*Miranda* v. *Arizona*, *supra*, 384 U.S. at pp. 469-470.)

The assumption contained in this emphasis on the right to the presence of counsel is that custodial interrogation, with its insidious techniques and subtle pressures, "blurs the line between voluntary and involuntary statements . . . . " (*Dickerson* v. *United States* (2000) 530 U.S.

428, 435.) Thus, at the outset of an interrogation, a suspect is much more likely to understand his right to remain silent and enter a waiver thereto than he might be as the interrogation proceeds. But the *uncertainty* as to the right to remain silent can co-exist with a *certainty* of a desire to consult an attorney or have an attorney present. (See *Michigan* v. *Mosley* (1975) 423 U.S. 96, 104, fn. 10.) Hence, a mid-interrogation reference to a right to remain silent, such as "I think it's about time for me to stop talking," *can be* ambiguous when the suspect has been advised of his right to remain silent, has waived it, and has willingly answered questions up to that point, while a mid-interrogation reference to an attorney, such as "I think it'd probably be a good idea for me to get an attorney," *can be* a clear invocation of the right to counsel where the suspect has also willingly answered questions up to this point.

This distinction is hardly a quibble and is clearly reflected in the more comprehensive protection provided when a suspect invokes the right to counsel. For when the right to remain silent is invoked, the authorities, after a break in time, may nonetheless resume questioning on a different matter once waivers are taken again (*Michigan* v. *Mosley*, *supra*, 423 U.S. 96, 101-104); when the right to counsel is invoked, the authorities may not re-initiate contact at all under any circumstances. (*Arizona* v. *Roberson* (1988) 486 U.S. 675, 683-684; see also *People* v. *Lispier* (1992) 4 Cal.App.4th 1371, 1324.) The conventional rationale for the stricter rule for invocation of counsel is to prevent the authorities from badgering the suspect into waiving his rights. (*Oregon* v. *Bradshaw* (1983) 462 U.S. 1039, 1044; *Arizona* v. *Roberson*, *supra*, 486 U.S. 657, 690; *Michigan* v. *Harvey* (1990) 494 U.S. 344, 350; *McNeil* v. *Wisconsin* (1991) 501 U.S. 171, 177.) And this assumes that a suspect who has invoked his right to counsel is more susceptible to such badgering than the suspect who has invoked his right to silence. The rationale of this assumption can only be

that the suspect, certain only of his desire to consult a lawyer, is very likely in that blurry state of uncertainty characteristic of custodial interrogation.

Thus, *if* the *Davis* rule applies to the invocation of the right to remain silent (see above p. 60, fn. 18), *Stitely* is distinguishable from the instant case. In *Stitley*, the defendant's cordial attitude of cooperation, his answering questions after advisements and a waiver, all rendered his statement, "I think it's about time for me to stop talking" ambiguous. In the instant case, appellant, who also answered questions willingly, but who had been arrested unlike the defendant in *Stitely*, might have felt as ambiguous about talking further as the defendant in *Stitley*, but expressed a not-inconsistent certainty that he would like to consult with counsel. *Stitley* therefore does not control the outcome of this case

C.

That the inherent difference between the invocation of the right to counsel and the invocation of the right to remain silent is crucial in the instant case finds further corroboration when one expands the inquiry from the immediate context of appellant's reference to an attorney to an analysis of the course of the interrogation up to that point. Indeed, the trial court thought it was significant that the reference occurred not immediately after the warnings were given, but about 40 minutes into the interrogation. (RT, Vol. N, pp. 134-135.) It will thus be appropriate to determine the soundness of this evaluation by the court, although, as noted above in discussing *Smith* v. *Illinois*, *supra*, 469 U.S. 91, appellant's "*postrequest* responses to further interrogation" cannot be used in assessing the clarity *vel non* of the request itself. (*Id.*, at pp. 99-100, emphasis in original.)

When the *prerequest* interrogation is examined, two features are striking: first, the extremely friendly and mutually deferential rapport between Detective Grate and appellant; and secondly the legal theme,

developed by Grate, of the difference between a witness who at most is an accessory to the murder, and a suspect in murder itself. The cordiality between Grate and appellant accounted for the softened form of invocation ("I think it'd probably be a good idea . . . for me to talk to an attorney"), while the legal theme, as it developed in Grate's lengthy discourses, accounted very well for the desire to consult with an attorney at all, since Grate was progressively painting appellant more and more as a suspect than as a witness.

The interrogation began at 10:55 a.m. The ambience in the interrogation room was cordial from the beginning, with Grate offering to share his cigarettes with appellant and providing appellant with a muffin. Detective Travers was also there, but was silent for the most part. (1CT 57-58.) The interrogation began with Grate announcing:

> "G[rate]: Okay, I do want to talk to you. Alright? Because you're in custody . . .
>
> "B[acon]: (Positive response)
>
> "G: . . . and you're not free to leave, and all that stuff, I have to read you your rights. Is that alright with you?
>
> "B: They didn't read me my rights last night.
>
> "G: They didn't? Did they talk to you? That's why. Anytime that you've been arrested, before we can talk back and forth, we have to read you your rights. You have any problem with that?
>
> "B: Well, I'm wondering why they didn't read me my rights last night.
>
> "T[ravers]: Hel . . ., help yourself. [Appellant is reaching for a muffin. (Ex. 29.).]

"G: Cause they didn't talk to you last night. You know? If they didn't talk to you, then they don't need to read you your rights. Basically, I guess they just slammed you and arrested you? Right? Yeah. They don't need to do that just for an arrest. But for this, you know, if they want to talk, then that's what they gotta do. Is that alright with you? Get that out of the way?

"B: Alright.

"G: Okay. Have you ever had your rights read to you before.

"B: Oh, yeah.

"G: Okay.

"G: Kind of figured that. Alright. You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed free of charge to represent you before any questioning, if you wish. Do you understand each of those rights?

"B: I do.

"G: Okay. No problem talking with us?

"B: Well, I don't know why you want to talk to me.

"G: I mean it's up to you.

"B: But . . .

"G: We'll get into that.

"B: . . . if I don't think that I want to answer a question –

"G: You don't have to. Hey. There you go, man. I ain't gonna pull the words out of your mouth.

"B: Hey, man. You know, I appreciate the cigarette and the muffin and all, man.

"G: Alright. Well, starting with, what I want to talk about is where you've been the last few days.

"B: Okay." (1CT 58-59.)

One might note at this point that appellant entered a waiver of his Fifth Amendment rights with the proviso that he could determine if he did not want to answer a specific question. Although the reservation was unnecessary, it is clear that appellant's caution stemmed from his ignorance of what subject Grate wished to discuss. When Grate indicated that it was appellant's whereabouts "the last few days", appellant agreed to talk.

Appellant told Grate that he was working at Prestar – a skydiving business – for the past week. This piqued Grate's curiosity to ask if appellant ever skydived, since Grate himself had tried it. Appellant, afraid of heights, had not. (1CT 60-61.) The conversation about appellant's job continued, with appellant relating that he had obtained the job through his father, who was his supervisor, and how he had been working there since July when he arrived from Arizona. (1CT 61-62.)

At this point Grate questioned appellant about the prison time he served in Arizona including a parole revocation term. (1CT 62-63.) When appellant began to describe the bureaucratic obtuseness of his parole officer, Ann Cleary, Grate expressed sympathy, chiming in with, "What's her problem?" (1CT 63.) Grate then switched the subject to appellant's sojourn in California, where appellant moved in with his father and started working at Prestar doing maintenance for $6 an hour. (1CT 63-64.)

Grate then focused on the period starting with the previous Monday through Friday, whereupon appellant told Grate that he, appellant, had taken two days off to help a friend named Charlie Sammons paint

Sammons' patio. (1CT 66.) Appellant did this in return for Charlie's help with appellant's car, and because Charlie had multiple sclerosis. Appellant stayed at Charlie's house Wednesday and returned home on Thursday night sometime between 11 and 11:15. (1CT 66-67.) This was when Grate revealed the ultimate purpose of the interview:

> "G: Okay. Well, what's going on with Charlie . . .
>
> "B: (Positive response)
>
> "G: . . . okay, is we think Charlie offed his wife.
>
> "B: No way.
>
> "G: Yeah. Did you know his wife?
>
> "B: I never met her. (Negative response)
>
> "G; You didn't?
>
> "B: (Negative response)" (1CT 67-68.)

At this point, the interrogation consisted primarily in Grate suggesting a scenario in which appellant was an accessory after the fact, but not involved in the murder itself, and further urging appellant to speak up and clarify whether this was true or not. Charlie, according to Grate, "gets in a beef with his old lady, gets carried away, alright, and then boom, you're in the middle of it, and you being on parole and all, you know, probably thinking, 'I don't want to be fuckin' part of this shit'", yet is forced to help Charlie "get rid of her . . . after the fact." (1CT 68.) That in fact was what Charlie had told them, but Charlie was not trustworthy and at this point, Grate did not know "whether you're a witness or a suspect in this thing." (1CT 69.) Nonetheless, Grate would eventually find out because of

the blood evidence. Now, however, was the time for appellant to come forward and clarify what had happened. (1CT 69.) Appellant's only response was, "I never even met her, dude." (1CT 69.)

Grate conceded the point. He was not saying that appellant had ever met her, that is, when she was alive. But the Department of Justice technicians were now scouring the scene collecting physical evidence, including DNA. Grate hoped that the physical evidence did not implicate appellant before appellant gave his explanation, since that would not "look good". (1CT 70-71.) Grate was giving appellant an opportunity to reveal whether he was a witness or a suspect, and Grate himself thought "at this point, you're a damn good witness." (1CT 71.) Grate continued describing a scenario that rendered appellant an accessory after the fact succumbing only to Charlie's extortion. But, as Grate urged, only appellant had the answers with which Grate could go to his superiors and assure them, "'Hey, you know, we talked to Boe, and he was in the wrong place at the wrong time. He got sucked into this thing. You know? Yeah, he did help after the fact. But he's not a, he's not a murderer in this case.'" (1CT 71.)

Grate continued with these themes, urging appellant to anticipate the incrimination of the physical evidence by explaining how he, appellant, was an accessory after the fact rather than a murderer, and how Charlie used appellant's parole status to blackmail him. (1CT 71-75.) For the most part, appellant sat silently listening to Grate discourse on these matters, but the first admission came as Grate was summing up:

> "G: . . . So I mean witnesses and suspects, dude. I don't want to, I don't want to see, you know, Charlie's fuck up drag you down. That's basically it. I don't, I know that you wouldn't be involved in something like this, this soon out

of the bucket.[20] There's absolutely no way. Just no way. And Charlie has every reason to have her gotten rid of, man. I mean he flamed out. It's not nothin' that, I know Charlie didn't plan this thing. You know? She'd planned to come over, just to do the, the, some bills and he probably was telling her, 'Hey, let's get back together.' You know, I, and that's what I'm curious, if you heard this conversation. I don't know if you were asleep. I don't know. But I know he flamed out.

"B: She came over that night." (1CT 75.)

When this was all that appellant said, Grate continued hammering the theme of accessory after the fact, and showing concern that Charlie would drag appellant down with him. Appellant did not respond, but instead took another cigarette, and then introduced himself to Travers, shaking his hand: "B: What was your name? T: Mike. B: They call me Boe. T: Boe." (1CT 76.)

Grate then continued:

"G: See, the thing, the problem is, Boe, is because, you know, just getting near someone that's bled, you know, if you just even walked on the carpet . . .

"B: I'm familiar with the forensics thing.

"G: Okay. I, you know, that, that could come back to haunt you. And if, if I don't hear your side of it, I can only assume the worst. Does that make sense to you?

"B: Oh, yeah.

"G: Alright. And that's why, you know, obviously I would like to hear your side of it, dude. I know something happened in there that you had no control over. And if you

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[20] The reference, redacted for trial, is to prison.

got wrapped into this thing after the fact, after she's dead, and, you know, obviously, you need to talk about it, rather than to have, you know, any physical evidence that may turn up come back to make you in a badder light. Then I can always say, 'Hey, we talked to Boe, and within ten minutes of talking to him, yeah, you know, he was in the wrong place at the wrong time. But, you know what? He told us what, what his role in this thing was. And he isn't the killer.' You know? 'And that explains why there's evidence on his shoes,' or whatever. 'That explains it. He explained it.'

"B: Still makes me an accessory.

"G: After the fact, yeah. That's a lot better than a murder. Straight up. I mean with the physical evidence in and by itself, then we just have to wonder, you know, is this, you know, two people, or is this just . . . and it doesn't make sense. It doesn't make sense that you would have been involved in a murder. Not to me. But if all I have to go on is the physical evidence, and you don't tell me what happened, you know, and, then that's all we have to go on. And that ain't cool. If, and this is the first time we ever talked, man. If this is your first shot you had to talk about it and you did, and you explain it, it's believable. I'll believe it. Do you know what I'm saying?

"B: Well forgive me for seeming a little doubtful on that. I've been dealing with officers . . .

"G: Okay. I understand but . . .

"B: For a long time.

"G: . . . I know this case. Okay.

"B: I know the ins and outs." (1CT 76-77.)

In the above passage, one sees appellant's diffidence expressed in polite language. ("Well, forgive me for seeming a little doubtful on that.") The diffidence relates to whether or not Grate is accurately portraying the

legal situation, while the politeness arises from the air of cordiality suffusing the interrogation to the point that appellant interrupted politely simply to introduce himself to Detective Travers.

Grate pressed on, representing, or implying, that there was a significant legal difference between murder and accessory after the fact. At this point, appellant stated to Grate that he, appellant, was painting when Charlie's wife came over to the house. Grate then pressed, further, "Okay. What happened?" (1CT 78.) He repeated the scenario in which appellant was forced to be an accessory, adding, "I mean you, unfortunately, Boe, you got stuck between a rock and a hard place. And . . ." (1CT 78), to which appellant answered, "That's a thought that was going through my mind too." (1CT 78.) With appellant asking if he could help himself to another cigarette, Grate pressed the advantage, urging appellant to tell what had happened. (1CT 78-79.) Appellant replied:

"B: Give me a minute, would you?

"G: Huh?

"B: Give me a minute, would you?

"G: Sure. Things [referring to cigarettes] are gonna kill me.

"B: Yeah. They'll probably wind up killing me too.

"G: Gotta go some way.

"T: I don't need to smoke. I'm getting enough of yours.

"G: Whining, quit whining, man. I hate them second-hand smoke whiners. Can't even smoke in a bar.

"T: It ain't even second-hand. I'm getting what's coming off of your cigarette. I'm . . .

"G: Why don't you just smoke one?

"T: I might as well.

"B: There's a lot of shit to weigh out here, man." (1CT 79.)

Again, here one sees the mixture of friendly banter with appellant's attempt to assess his legal situation. The exchange continued with Grate urging appellant to be forthcoming, assuring appellant that Charlie was in custody, and urging appellant to think about himself. (1CT 80-81.) When Grate asked if this made sense to appellant, appellant answered, "Oh, yeah. You also gotta remember the background, mine," which, as appellant related to Grate, was a prison term for second degree murder and armed robbery. (1CT 81.) Grate waved this off, with the observation, "I'm assuming that you learned something out of, you know, being down for a long time." (1CT 81.) He kept urging appellant to make a statement, whereupon this exchange occurred:

"B: Well, I'll give you this.

"G: Okay.

"B: You're gonna find my semen samples in her.

"G: Okay.

"B: Cause I fucked her.

"G: Alright. There was no sign of trauma, vaginal trauma. So I'm assuming it was consensual?

"B: It was.

"G: Okay. Well you need to tell us about it, dude. Did he get pissed off about that? You know, I'm not sure what, see I don't know the whole picture and you're the only one with the answers.

"B: I don't know if he did or not." (1CT 82.)

Grate kept pressing, but appellant gave no answers, except to say that he was not afraid of Charlie when Grate suggested as much. (1CT 83-84.) It is at this point that the statement in question arose:

"G: What did he do, man? What the fuck did Charlie do?

"B: I don't know. I don't know. I've been asking myself that same question since we've been in this room and you told me this. What the fuck did Charlie do? Oh, my God.

"G: Ain't no doubt you're in the wrong place at the wrong time.

"B: (Positive response)

"G: With the wrong people, man.

"B: ___. Yeah, I think it'd probably be a good idea . .

"G: Well listen, listen.

"B: . . . for me to get an attorney." (1CT 85.)

The salient theme preceding this reference to an attorney by appellant was the *legal* question of whether appellant was an accessory

after the fact or a suspect in the commission of murder. Grate presented it as a legal question and appellant clearly understood it as a legal question. He also understood, and made it clear that he understood, that Grate was not a reliable source of legal advice. Further, the form of discourse in this interrogation between appellant, Grate, and even Travers was one of almost exaggerated politeness, so that the expression, "I think it'd probably be a good idea . . . for me to get an attorney" sounded in the same tenor and, objectively, would be understood *in context* as a clear and unambiguous request for counsel. It therefore follows that Grate should have ceased the interrogation immediately, and the trial court should have suppressed everything from the invocation onward.

D.

But if this Court agrees with the trial court's finding that appellant's statement was ambiguous, the matter does not end favorably for respondent in any event. As foreshadowed in the introduction, in the face of an ambiguous invocation, the interrogating officer may either continue interrogation or resolve the ambiguity. (*Davis* v. *United States*, *supra*, 512 U.S. 452, 461-462.) He may not attempt to dissuade the accused from invoking his right to counsel, which Grate in fact did here. The legal claim must, of course, be justified, but first it will be helpful to frame the issue by examining Grate's response to appellant's supposedly ambiguous statement.

"B: ___. Yeah, I think it'd probably be a good idea . .

"G: Well listen, listen.

"B: . . . for me to get an attorney.

"G: Alright. It's up to you.

"B: ___ tell me . . .

"G: Hmm?

"B: Listen, what?

"G: It's up to you if you, you know, if you want an attorney, *I mean I'm, I'm giving you the opportunity to talk.*" (1CT 85-86, emphasis added.)

"It's up to you if you, you know, if you want an attorney" was a perfectly appropriate comment in clarification, *if* of course the invocation was ambiguous. However, "I mean I'm, I'm giving you the opportunity to talk" is what appellant here characterizes neither as clarification nor interrogation, but as argument and dissuasion designed to prevent an ambiguous invocation of counsel from becoming a clear one. The question is whether such argument and dissuasion is merely continued interrogation under *Davis* or something else entirely. Here again, one must address this Court's decision in *Stitely*.

It will be recalled that in *Stitely*, in the face of defendant's reference to his right to remain silent, Detective Coffee said, "It's up to you. Nobody ever forces you to talk. I told you that. I read you all that (untranslatable.)" (*People* v *Stitlely* (2005) 35 Ca.4th 514, 534.) This is very similar to what Grate said here, yet in *Stitely* this Court rejected defendant's characterization of this as badgering when all that Detective Coffey did was remind the defendant that talking was optional. (*Id.*, at p. 536.) But in the instant case, although Grate did merely remind appellant that his right to consult an attorney was optional, Grate added, "I mean I'm giving you an opportunity to talk." *This* was not responsive to a reference to counsel, and it implied that the resort to an attorney was a waste of an opportunity. *This*

was badgering, and *Davis* does not authorize this, as this Court impliedly recognized in *Stitely*.

For it must be remembered that, under *Davis*, an ambiguous invocation *does not* mean that the accused does *not* want to stop the interrogation and consult with counsel. Rather, it means that the language used by the accused in invoking his right does not necessarily comport with the desire. (*Davis* v. *United States*, *supra*, 512 U.S. at p. 460 ["We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects . . . ."].) That the error in expression is balanced against the accused's right to consult with counsel can only mean that it is constitutionally tolerable to err in favor of the police rather than in favor of the accused. (*Id.*, at p. 461 ["In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement."].) If, in the balance, *per Davis*, the scale may tip against the accused and require from him a clear invocation regardless of his actual desires, it should not follow that the consummation of a clear expression may be prevented or preempted by the officer's intervention. Law enforcement's interest is fully served by what *Davis* expressly allows: continued interrogation or clarification. Argument and dissuasion find no sanction in *Miranda* jurisprudence.

Thus, Grate's comment, that he was affording appellant an opportunity to talk, was constitutionally misconceived. Rather, he was *foreclosing* an opportunity for appellant to *perfect* his invocation of counsel. Nothing in *Davis* allows this. Much in the very premises of *Miranda* jurisprudence does not. Thus, even if appellant's statement about getting an attorney may be deemed to be ambiguous or equivocal, there is still constitutional error in Grate's having engaged in argument with appellant regarding the supposedly ambiguous invocation.

E.

Before advancing to the subject of prejudice, there is, as promised in the introduction, a further alternative argument. Appellant suggested there that the clarification of the constitutional basis for *Miranda* warnings has impliedly abrogated that portion of *Davis* v. *United States*, *supra*, 512 U.S. 452 in which the Court found there to be no obligation to clarify an ambiguous invocation. The reason for this is that the balance struck between the rights of the accused and the need for effective law enforcement has to be adjusted in light of a more compelling constitutional weight added by *Dickerson* v. *United States*, *supra*, 530 U.S. 428 to the accused's side of the scale.

In *Dickerson*, the Supreme Court held that Congress was without authority to enact legislation that abrogated the *Miranda* decision and its progeny, because those decisions were "constitutional" and could not be superseded by legislation. (*Id.*, at pp. 431-432, 437.) The Court noted that in previous cases there have been assertions that *Miranda* warnings were merely prophylactic and not grounded in the Fifth Amendment itself, and that characterization of *Miranda* as ancillary to, but not part of, the constitutional right might indeed lead to the conclusion that Congressional legislation could supersede *Miranda*. However, the Court's actions in imposing the *Miranda* requirement on the States, and the constitutional language of the *Miranda* decision itself reflected the proper conclusion: *Miranda* is *of* the Fifth Amendment as well as *prophylactic of* the Fifth Amendment. (*Id.*, at pp. 437-440.)

In *Davis* v. *United States*, *supra*, 512 U.S. 452, the Court, as noted above, set itself the question of the appropriate action for law enforcement to take should the accused ambiguously invoke his right to counsel under *Miranda*. (*Id.*, at p. 456.) Also as noted, the Court rejected any

requirement that interrogation end in the face of such an invocation, or that the police resolve the ambiguity by clarifying questions. Rather, absent a clear invocation, the police could proceed to continue interrogating. (*Id.*, at pp. 461-462.) But what rationale informed the Court's choice in this matter?

The Court in *Davis*, after noting the rules developed in *Edwards* v. *Arizona*, *supra*, 451 U.S. 477 regarding protection of the *Miranda* right to counsel, noted further that the *Edwards* rule, "like other aspects of *Miranda*[,] is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." (*Davis*, *supra*, at p. 458 quoting *Connecticut* v. *Barrett*, *supra*, 479 U.S. at p. 528.) This diminution of the *Miranda* rules as merely a practical prophylaxis of the Fifth Amendment, not within the Fifth Amendment itself, was, by the time of *Davis*, virtually a judicial commonplace. (See *Withrow* v. *Williams* (1993) 507 U.S. 680, 690-691; *Duckworth* v. *Eagan* (1989) 492 U.S. 195, 203; *Oregon* v. *Elstaad* (1985) 470 U.S 298, 305; *New York* v. *Quarles*, (1984) 467 U.S. 649, 654; and *Michigan* v. *Tucker* (1974) 417 U.S. 433, 444.)

This premise, that *Miranda/Edwards* is merely prophylactic, is the very axis on which the resolution in *Davis* turns:

> "We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. See *Arizona* v. *Roberson* [(1988)] 486 U.S. [675,] 688 . . . (KENNEDY, J. dissenting) ('The rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion'). The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the

> suspect wants a lawyer, a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,' [citation], because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." (*Davis* v. *United States*, *supra*, 512 U.S. at p. 460.)

The Court here introduces a balance between the interests of the accused and the interests of law enforcement. The Court also clearly considers that the calibration of the balance is affected by whether or not the *Edwards* rule is constitutional. The Court then proceeds to elaborate on ambiguous invocations in greater practical detail:

> "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who – because of fear, intimidation, lack of linguistic skills, or a variety of other reasons – will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. 'Full comprehension of the rights to remain silent and request an attorney is sufficient to dispel whatever coercion is inherent in the interrogation process.' [Citation.] A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection – if a suspect subsequently requests an attorney, questioning must cease – it is one that must be affirmatively invoked by the suspect.
>
> "In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards* rule – questioning must cease if the suspect

> asks for a lawyer – provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." (*Id.* at pp. 460-461.)

From here, the Court went on to reject a requirement that questioning may continue only to the extent necessary to clarify an ambiguous reference to an attorney:

> "Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspects statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions if the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." (*Id.*, at pp. 461-462.)

It is difficult to fit this further holding, eschewing any clarification requirement, into the balance because the *Davis* court does not justify it expressly. Indeed, the *Davis* Court touts clarification as good practice, and four concurring justices joined in the result because the police officers in

question in *Davis* in fact engaged *only* in clarifying questions once the suspect mentioned an attorney. (*Id.*, pp. 466 *et seq.*, Souter, J., joined by Blackmun, J., Stevens, J., and Ginsburg, J., concurring.) Nonetheless, the implication is clear: the needs of law enforcement prevail in the balance over the right of the accused to counsel, because that right is derivative and merely prophylactic, instead of constitutional. Does the balance change if the right is constitutional, since it is now settled, per *Dickerson*, that it is?

The answer can only be, yes. The Court in *Davis* found it tolerable that there was a margin of error in its disposition: "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who – because of fear, intimidation, lack of linguistic skills, or a variety of other reasons – will not clearly articulate their right to counsel although they actually want to have a lawyer present." (*Davis*, *supra*, at p. 460.) Can this be deemed tolerable if the right to have a lawyer present was not merely a prophylactic of the Fifth Amendment right to remain silent, but a right grounded in the Fifth Amendment itself? Since *Dickerson*, one may resurrect with new force the language of the older cases to assert that "an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights . . ." (*Fare* v. *Michael C.* (1979) 442 U.S. 707, 719), and that an impropriety under *Miranda* is "a flat violation of the Self-Incrimination Clause of the Fifth Amendment . . . ." (*Orozco* v. *Texas* (1969) 394 U.S. 324, 326.) If the *constitutional* balance of factors still requires a clear invocation of the right to counsel, such a balance *at least* requires that an ambiguous invocation be clarified by the police before interrogation proceeds. The risk of erring against the accused's desire to invoke his right to counsel is easily removed *without* prejudicing the fundamental requirements of good law enforcement.

F.

The question then is whether the admission of post-invocation statement was prejudicial in this case. The question is complicated by the dual function of the statement to Grate as both prosecution and defense evidence. Janus-like, the evidence looked in one direction toward appellant's incriminating presence at the Nut Tree Drive house, and simultaneously in the opposite direction toward appellant's exculpatory actions at the Nut Tree Drive house, with each respective party urging the truth and falsity of the different parts of the statement in accord with their respective positions. But on balance there was not a perfect symmetry, in that the defense could indeed still proceed effectively without the suppressible portion of the statement, while the prosecution in fact derived a much greater benefit from that same portion.

The portion of the statement preceding the invocation of the right to counsel was, of course, admissible in any event, and it was in that portion that appellant made the essential representations that he was at the house and had had consensual sex with Mrs. Sammons. (SCT 1st, pp. 36-48.) The bulk of appellant's statement, occurring after the reference to counsel, elaborated on the details and further described how appellant acted as an accessory after the fact, and not the perpetrator of, or aider and abettor in, murder. This, however, was not essential to the defense. As noted in the previous argument, consensual sex under the circumstances of this case would be so inconsistent with the ensuing events as to create almost in itself reasonable doubt that appellant was criminally involved in murder. When one combines with this the deficiencies of credibility in Charlie Sammons' testimony, reasonable jurors could well come to the conclusion that the truth was the mirror image of Charlie Sammons' version of events, with Charlie committing the murder while appellant only helped dispose of

the body. At least there could well be a reasonable doubt as to this possibility even without appellant's statement to Grate, who himself obviously entertained this possibility as the plausible one.

Thus, while the unsuppressible portion of the statement to Grate was a necessary adjunct to the defense case, the suppressible portion was not. This is important because the suppressible portion, for all its representation of appellant as a mere accessory after the fact, contained highly prejudicial material nonetheless, and this inhered not in the description of accessory actions, but in the repulsive and callous diction appellant used to describe his actions. This was especially so in the passages in which appellant, under Grate's questioning, described the details of the sexual encounter with Mrs. Sammons:

> "B: He always leaves the front door open and the screen closed and locked. A couple of minutes later, I heard it slam again. I kind of took a peek through the screen door and the sliding glass door out on the patio, and I saw this fuckin' fine little blond chick ___. I said 'Damn."
>
> "G: (Positive response)
>
> "B: I'm a walking hornball.
>
> "B: One hundred percent high octane testosterone-injected walking hormone.
>
> "G: Alright. I'm with you.
>
> "B: I love women. God I love women . . . ." (SCT 1st, p. 55.)

Appellant then described how he took the opportunity of Charlie's exit into the garage to introduce himself to Mrs. Sammons, "[a]nd I don't know how it happened or why it happened, but the next thing I know we're

on his bed fuckin'." (SCT 1st, p. 56.) Appellant then related how they finished copulating and he returned to his painting on the patio. He related further that when he returned later to the bedroom, she was on the bed. When Grate asked, "She's on the bed? What's she look like?," appellant answered, "I didn't want to fuck her", -- a macabre sort of locker-room witticism, meaning that she was now dead. (SCT 1st, p. 57.)

Later in the interview, with Grate's prodding, appellant gave a more detailed description of the sex that occurred prior to Mrs. Sammons' death:

"G: Alright. And what happened next?

"B: And next thing I know, I'm kissing her.

"G: (Positive response)

"B: She didn't struggle.

"G: Alright. And then what happened.

B: We wound up in the bedroom.

"G: Okay.

"B: She didn't give me any head. She said she thought that was disgusting.

"G: (Positive response)

"G: But she liked to be eaten.

"G: Okay.

"B: And I like eating pussy. So . . .

"G: No problem there.

> "G: So I ate her for a while, fucked her for a while, and I asked her if she ever had anal. She said yeah. She said it really didn't do anything for her, but she didn't mind it." (SCT 1st, p. 69.)

Appellant's manner of speaking betokened a callous insensitivity to the occasion – the murder of an innocent woman. This callous insensitivity was, if not the express purpose of the evidence, still part of its probative value for the prosecution in a case in which malice aforethought was an element of the crime, and where proof of a sensibility capable of malice aforethought could help prove commission of the crime. In other words, while the evidence in question, on its denotative level, established that appellant had sex with Mrs. Sammons, the concrete force of the evidence, with the full connotation emanating from the specific details of the form and substance of appellant's expression, established a man who at least was capable of acting with "an abandoned and malignant heart", the statutory formulation of the element of malice aforethought. (§ 188.) This was thus highly important evidence to a prosecution otherwise dependent on the credibility of Charlie Sammons and Martin L'Esperance.

Thus, without the suppressible portion of the statement to Detective Grate, the defense case, only somewhat diminished, still retained significant force and substance, while the prosecution's case was much more diminished. If the trial court had properly suppressed the prejudicial portion of the statement to Grate, there is indeed a reasonable doubt that the jury would have reached the same verdict. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) This is true *a fortiori*, if it is necessary to combine the prejudicial effect of the erroneous preclusion of the note, as discussed in issue I, with the failure to suppress a portion of the statement to Grate. (*Ibid.*)

III.
INSTRUCTION IN ACCORD WITH CALJIC No. 2.06, ON THE PERMISSIBLE INFERENCE OF CONSCIOUSNESS OF GUILT FROM SUPPRESSION OF EVIDENCE, SHOULD NOT BE GIVEN WHERE, AS HERE, THE FACTS AT ISSUE IN THE INSTRUCTION ARE NECESSARILY RESOLVED ONLY BY THE DETERMINATION OF GUILT *VEL NON* ITSELF

Over the objection of defense counsel (8RT 1672, 1752), the trial court instructed in accord with CALJIC No. 2.06:

> "If you find the defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide." (9RT 1916.)

As the prosecutor pointed out, this instruction was intended to draw attention to the burning of Mrs. Sammons' clothing in the fireplace and to the disposal of her body in the slough. (8RT 1672.) The suppression of this evidence, however, was also the act that constituted the defense itself. For the jury to have inferred consciousness of guilt for murder *from* the suppression of evidence, it would have had to have found first that appellant suppressed the evidence *because* he committed murder – a circularity that the instruction is not supposed to aim at. It is appellant's contention that CALJIC No. 2..06 is appropriate only when suppression of evidence encompasses collateral, circumstantial facts in the case, and does

not embrace coextensively *the* central fact of guilt *vel non*, as it did in this case where it was erroneously given.

Appellant is well aware that this Court has repeatedly upheld the propriety of this instruction, and similar other consciousness of guilt instructions, as consistent with constitutional protections (*People* v. *Yeoman* (2003) 31 Cal.4th 93, 131; *People* v. *Coffman* (2004) 34 Cal.4th 1, 103), as temperately formulated, adding no argumentative weight to the prosecution's case (*People* v. *Holloway* (2004) 33 Cal.4th 96, 142; *People* v. *Jackson* (1996) 13 Cal.4th 1164, 1224), and even as beneficial to the defense in limiting any undue probative value the jury might confer on the fact in question in the instruction. (*Jackson*, *ibid.*; *Holloway*, *ibid.*) Nonetheless, there is a limitation that may be generalized from the established exceptions that have been applied in the case of flight instruction (CALJIC No. 2.52)[21] and in the case of motive instruction (CALJIC No. 2.51).[22]

Flight instructions are inappropriate when the only evidence of flight in question is the perpetrator's dispatch from the scene of the crime and when the identity of the perpetrator is the factual issue to be resolved. (*People* v. *Rhodes* (1989) 209 Cal.App.3rd 1471, 1475-1476; *People* v. *Batey* (1989) 213 Cal.app.3rd 582, 587; *People* v. *Boyd* (1990) 222 Cal.App.3rd 541, 575; *People* v. *Pitts* (1990) 223 Cal.App.3rd 606, 879; see also *People* v. *Pensinger* (1991) 52 Cal.3rd 1210, 1245.) In such

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[21] "The flight of a person after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

[22] "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

circumstances, flight "shows consciousness of guilt only if the jury has resolved the issue of identity against the defendant", which, however, constitutes a resolution of the issue of guilt itself. (*People* v. *Rhodes*, *supra*, at p. 1476, fn. 3.) In other words, flight instruction is proper only when "there is substantial evidence of flight by the defendant *apart from his identification as the perpetrator*, from which the jury could reasonably infer a consciousness of guilt." (*Rhodes*, *id.*, at p. 1476, emphasis in original.)

Similarly, instruction on motive is improper where, by raising a defense of entrapment, the central issue in the case becomes whether "the commission of the alleged criminal act [] was induced by the conduct of law enforcement agents" (CALJIC No. 4.60). (*People* v. *Martinez* (1984) 157 Cal.App.3rd 660, 669; *People* v. *Lee* (1990) 219 Cal.app.3rd 829, 841.) As with flight applied to the disputed identity of the perpetrator fleeing the scene, motive instruction begs the question of guilt *vel non* through the presence of an induced or independent motive in the perpetrator. (See *Martinez*, *ibid.*)

The matter may be generalized for any instruction that attempts to outline the probative value of a specific fact in the case: an inference instruction is unnecessary when the inference can only be resolved by a resolution of the ultimate question of guilt itself. (See *United States* v. *Perkins* (9th Cir. 1991) 937 F.2nd 1397, 1403.) Beyond unnecessary, it is circular and confusing (*United States* v. *Littlefield* (1st Cir. 1988) 840 F.2nd 143, 149), and "[t]his circularity problem recurs whenever a jury can only find [the inference at issue] if it already believes other evidence directly establishing guilt." (*United States* v. *Durham* (10th Cir. 1988) 139 F.3rd 1325, 1332.)

Thus, in the instant case, appellant's defense was that of lesser culpability predicated on his commission of acts constituting the crime of

accessory after the fact. The acts in question were the very ones subject to the formulation of CALJIC No. 2.06. For the jurors to draw the inference of consciousness of guilt permitted by the instruction, the jurors would have to resolve the ultimate question itself: whether appellant committed the crimes charged. This is the circularity that is deemed disqualifying for flight instruction and motive instruction, and which must be deemed disqualifying for the suppression of evidence instruction in this case.

Before assessing the specific prejudice in this case from the instruction, it may be helpful to outline the general type of prejudice that arises from the use of these sorts of instructions when they intersect with disputed, ultimate facts in the case. The logical fallacy has been defined above, but more than the etiolated propositions of technical logic are at stake. An instruction on suppression of the evidence

> "'. . . calls upon the court to point out a particular piece of evidence and disclose to the jury its probative value, i.e., the inference of guilt. Rarely would a party against whom such an instruction is given agree with the inference. The court's instruction lends credence to the arguable inference and suggests to the jury it must be made.' . . . [E]ven if only one possible inference could logically be drawn for the evidence, there is normally no need for such an instruction. 'By argument a party can present the inferences he wishes the jury to draw and thereby obtain the full benefit of the evidence.'" (*State* v. *Wright* (Or.App. 1977) 572 P.2nd 667, 668.)

This passage arises in a case rejecting the use of a suppression instruction under *any* circumstances as an invasion of the province of the jury – a blanket position this Court does not accept. (See *People* v. *Jackson*, *supra*, 13 Cal.4th at p. 1224.) But the passage accurately describes the effect of such an instruction when the inference coincides with the

ultimate factual issue in the case. Thus, perhaps if the inference at issue in the instruction were collateral and merely corroborative, the instruction would not rise to the level of an endorsement of one side or the other. But when the inference at issue is set on the very dividing line between the prosecution and the defense, it is easily understood as a suggestion by the court that the corroborative inference in support of the prosecution's case was to be preferred to the exculpatory inference that raises a reasonable doubt in favor of the defense. In short, while accurately stating the prosecution's theory of a single, subordinate piece of evidence in its case, the instruction obscures the very crux of the defense, while it also amounts to an endorsement, or suggested endorsement, of the prosecution's case.

As to the specific prejudice in this case, the respective strengths and weaknesses of the defense and prosecution cases have been discussed. The low credibility of the testimony of Charles Sammons and Martin L'Esperance, the lack of any evidence of any clear motive on the part of appellant, the circumstantial evidence corroborating appellant's claim of consensual sex (see above at pp. 44-49) all rendered the defense in this case of accessory after the fact substantial. To have cast, through CALJIC No. 2.06, this defense as a disfavored inference rather than a defense proper is to have "misdirected or misled [the jury] upon an issue vital to the defense" in a case in which "the evidence does not point unerringly to the guilt of the person accused." (*People* v. *Rogers* (1943) 22 Cal.2nd 787, 807.) If CALJIC No. 2.06 had not been given, there is reasonable probability that the case would have resulted more favorably for appellant. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

If this Court disagrees that appellant has met the standard of review for state error, the question of federal constitutional error must be considered. The distortion of the defense that occurred through the erroneous prism of CALJIC No. 2.06 violated appellant's Sixth and

Fourteenth Amendment right to present a defense (*Crane* v. *Kentucky* (1986) 476) U.S. 683, 690), which includes the right to present a partial defense. (*People* v. *Cash* (2002) 28 Cal.4th 702, 727.) The distorting prism of the instruction also violated appellant's Eighth Amendment right to an accurate and reliable guilt determination in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638; *People* v. *Cudjo* (1993) 6 Cal.4th 585, 623.) The standard of review thus requires only a reasonable doubt as to whether the error was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) There is at least a reasonable doubt on this record, which requires the reversal of appellant's convictions.

IV.
CALJIC No. 2.03, ON THE PERMISSIBLE INFERENCE OF CONSCIOUSNESS OF GUILT FROM FALSE OR MISLEADING STATEMENTS, SHOULD NOT HAVE BEEN GIVEN FOR THE SAME REASONS CALJIC No. 2.06 WAS IMPROPER IN THIS CASE

For the same reason he objected to CALJIC No. 2.06, defense counsel also objected to CALJIC No. 2.03 (8RT 1671), which the trial court nonetheless gave to the jurors as follows:

> "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he's now being tried, you may consider that statement as a circumstance tending to prove consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide." (9RT 1916.)

The same reasoning as applied to CALJIC No. 2.06 applies to CALJIC No. 2.03. (*United States* v. *Littlefield* (1st Cir.1988) 840 F.2nd 143,

149; *United States* v. *Durham* (10th Cir. 1998) 139 F.3rd 1325, 1332.) In the instant case, while CALJIC No. 2.06 embraced the *acts* in which the defense of lesser culpability inhered, CALJIC No. 2.03 embraced the *words* describing those acts, i.e., they embraced appellant's exculpatory statement to Grate describing consensual sex and the commission of accessory after the fact. Appellant discusses this instruction separately, however, not only because the error involving CALJIC No. 2.06 was independently prejudicial, but also because the two instructions are not identically situated in terms of the issues they present.

For as the trial court pointed out to defense counsel, the instruction was not warranted by appellant's description of the acts he committed, but by his expression of surprise at the beginning of the interview that Mrs. Sammons had been killed, when, by his own later admission, he in fact knew that she had been. (8RT 1671.) This indeed is a collateral, corroborative fact, and does not create the problem of logical circularity that existed for CALJIC No. 2.06 in this case. This assumes, of course, that the jurors would confine application of the instruction to the collateral, corroborative fact, and there was nothing in the instruction that would confine the application of the instruction within its correct boundaries. The instruction was therefore ambiguous, and the question of error is determined by whether the jury was likely to have resolved the ambiguity on the side of error. (*People* v. *Kelly* (1992) 1 Cal.4th 495, 525; *Estelle* v. *McGuire* (1991) 502 U.S. 62, 72-73.)

In the instant case, the intense focus of both sides' efforts was on whether appellant's statements to Grate regarding consensual sex and accessory after the fact were true or false. The acknowledged inconsistency of appellant's initial claim of surprise to hear of the murder of Mrs. Sammons was a minor factual issue in the case. The jurors were hardly likely at all to understand the instruction as properly applying to this minor

issue, but were indeed likely to understand CALJIC No. 2.03 as aimed as the bulk of appellant's statement to Grate, which was inculpatory or exculpatory depending on whether the prosecution or defense should prevail. There was therefore error in giving CALJIC No. 2.03, and that error was prejudicial for the same reasons adduced in regard to CALJIC No. 2.06. The erroneous giving of instruction in accord with CALJIC No. 2.03 in itself requires reversal (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24); the combination of instruction in accord with CALJIC No. 2.03 and 2.06 was *a fortiori* prejudicial in its combined effect. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman*, *supra*.)

V.
CALJIC Nos. 2.03 AND 2.06 ARE ARGUMENTATIVE, PINPOINT INSTRUCTIONS THAT WERE PREJUDICIAL IN THIS CASE

If this Court rejects the previous two arguments, appellant must fall back on a third argument: CALJIC Nos. 2.03 and 2.06 are argumentative, pinpoint instructions that suggest to the jury an endorsement of the prosecution's version of the case, whether or not the factual issues in these instructions coincide with the ultimate factual determination in the case. (*State* v. *Wright* (Or.App. 1977) 52 P.2nd 667, 668; see also *State* v. *Hall* (Mont.1999) 297 P.2nd 929, 937, and cases cited.) This, of course, is the very contention that this Court has repeatedly rejected generally in regard to consciousness of guilt instructions, and specifically in reference to these two instructions. (*People* v. *San Nicolas* (2004) 34 Cal.4th 614, 667; *People* v. *Crandell* (1988) 46 Cal.3rd 833, 871.) Appellant has nothing new to add apart from Sisyphean persistence in recapitulating what appears to him to be the truth of the matter.

The instructions do not identify a theory of the case, but pronounce on the probative value of specific facts. That they are cast in the form of a *legal* instruction confers on them the more inexorable appearance of a proposition of law as opposed to a judicial comment on the specific facts of the case. The idea that these instructions are beneficial in protecting the defendant from the undue strength of subordinate evidence (see *People* v. *Holloway* (2004) 33 Cal.4th 96, 142) is, with rare exceptions (see *People* v. *Seaton* (2001) 26 Cal.4th 598, 673), not accepted by the class of supposed beneficiaries, and trial counsel's objections in the instant case (8RT 1671-1672) are hardly eccentric or unusual. The idea that these instructions were beneficial in this case is belied by the intersection of these instructions with the ultimate exculpatory fact in the case, whether or not this particular circumstance governs the *general* propriety of giving these instructions. Appellant would submit that these instructions are improper, and that, for the very reasons adduced in the previous two arguments, they were prejudicial, requiring reversal both on the standard of review for state error (*People* v. *Watson* (1956) 46 Cal.2nd 818, 837-838), and *a fortiori* on the standard of review for federal constitutional error. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

VI.
THE TRIAL COURT'S SPECIAL INSTRUCTION ON THE RELATIONSHIP BETWEEN COUNTS 1 AND 4, COMBINED WITH THE USE OF VERDICT FORMS AKIN TO SPECIAL INTERROGATORIES, WERE PREJUDICIALLY AMBIGUOUS, APPEARING TO CONFINE THE ORDER OF SUBSTANTIVE DELIBERATIONS, WHICH IN TURN OBSCURED PROPER CONSIDERATION OF APPELLANT'S AFFIRMATIVE DEFENSE

Count 4 of the information alleged a violation of Section 32 predicated on appellant's having been an accessory to the crime of murder. The count was added to the information as an alternative charge to the crime of murder alleged in count 1. (RT Vol. Q, pp. 6-7.) In order to inform the jury of the significance of alternative charges, the trial court gave the following special instruction:

> "The defendant is accused in Count 1 of having committed the crime of murder and in Count 4 of having committed the crime of accessory after the fact of murder. The defendant cannot be convicted as both a principal and as an accessory to the same crime.
>
> "In order to find the defendant guilty of the crime charged in Count 4, accessory after the fact to murder, you must first unanimously find the defendant not guilty of the crime charged in Count 1, murder of the first degree, and not guilty of the lesser offense of murder of the second degree.
>
> If you unanimously find the defendant guilty of murder of the first degree or the lesser offense of murder in the second degree, you should not render a verdict on Count 4, accessory after the fact of murder." (9RT 1936.)

The instruction was clearly intended to track the so-called acquittal-first instruction as formulated in CALJIC No. 8.75, which was designed for lesser-included offenses, and which was given here in regard to first- and second-degree murder. (9RT 1934-1936.) Accessory to murder was, and is, not a lesser-included offense to murder (*People* v. *Majors* (1998) 18 Cal.4th 386, 408); and it is doubtful that the "acquittal-first" principle even applies to alternative charges, which are presented to the jurors as an equilibrium in which the conviction on one charge requires the automatic and simultaneous acquittal on the other. (See *People* v. *Crowell* (1988) 198 Cal.App.3rd 1053, 1060, fn. 8; *People* v. *Black* (1990) 222 Cal.App.3rd 523, 525; *People* v. *Lewis* (1993) 21 Cal.App.4th 243, 251, fn. 6; and *People* v. *Jamarillo* (1976) 16 Cal.3rd 752.) The appropriate instruction would have been in accord with CALJIC No. 17.03, informing the jurors, "In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find him not guilty of the other as well as any lesser crime included therein." But the concern here is not the administrative difference between a lesser-included offense and an alternative charge, but something that substantively affected the outcome of this case: the reasonable likelihood that this instruction misled the jurors to believe that they were not free to order their substantive deliberations as they saw useful or proper. (See *People* v. *Kurtzman* (1988) 46 Cal.3rd 322, 333-335.)

Placing aside, then, the difference between lesser-included offenses and alternative charges, the basic legal structure for appellant's claim is well settled. For the sake of a clear and orderly procedure that leaves no ambiguities as to the findings of the jury, a court may direct the order in which verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be rendered on a lesser-included offense. (*People* v. *Fields* (1996) 13 Cal.4th 289, 303-304; *Stone* v. *Superior Court*

(1982) 31 Cal.3rd 503, 519.) A court may not, however, go farther and dictate the order of deliberations, requiring that the jurors *consider* first the greater offense and acquit thereof before even considering the lesser offense. (*People* v. *Kurtzman*, *supra*, 46 Cal.3rd 322, 333-335; *People* v. *Hernandez* (1988) 47 Cal.3rd 315, 353; *People* v. *Dennis* (1998) 17 Cal.4th 468, 536.)

In the special instruction at issue here, the jurors were told that before they could "find" appellant guilty of accessory to murder, they had to unanimously "find" appellant not guilty of the crime of first and second degree murder. Further, they were told that if they were to "find" appellant guilty of murder, they were not to "render a verdict" on the accessory charge. The phrases, "find defendant guilty", "find defendant not guilty", and "render a verdict" are all sufficiently compact to refer to either 1) the mental and deliberative process of coming to a substantive legal conclusion; or 2) the substantive conclusion itself; or 3) the administrative recordation of that conclusion in a verdict form; or 4) all of the above three at once. (See *People* v. *Kurtzman*, *supra*, 47 Cal.3rd at p. 336.) Meanings 1, 2, and 4 will tend to confine the order of substantive deliberation and render the instruction improper and misleading. (*Ibid.*) Only 3 is correct law, and the question of error hinges, as it does for any ambiguous instruction in which one meaning represents an incorrect principle of law, on whether or not there was a reasonable likelihood that the jurors understood the instruction by its improper meaning. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 72; *People* v. *Clair* (1992) 2 Cal.4th 629, 663; *People* v. *Berryman* (1993) 6Cal.4th 1048, 1077.)

On the one hand, the jurors, as noted above, were instructed in accord with CALJIC No. 8.75 for first- and second-degree murder. CALJIC No. 8.75 has been approved as an unambiguous formulation of the proper acquittal-first principle. (*People* v. *Nakahara* (2003) 30 Cal.4th 705,

715.) The jurors, in accord with 8.75, were told that "the court cannot accept a verdict of second degree murder as to count 1 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same count." (9RT 1935.) The clear emphasis of this formulation is on the administrative aspect of returning a verdict. Any latent ambiguity in this would be completely dispelled by the further admonition in CALJIC No. 8.75, "[Y]ou have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it to be productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdicts." (9RT 1935.)[23]

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[23] The full charge given the jurors in accord with CALJIC No. 8.75 was as follows: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in Count 1, and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime. [¶] You'll be provided with guilty and not guilty verdict forms as to Count 1 for the crime of murder in the first degree and lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree. Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or any lesser crime thereto. [¶] In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it to be productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdicts. [¶] Before you return any final or formal verdicts, you must be guided by the following: [¶] Number one, if you unanimously find a defendant guilty of first degree murder as to count 1, your foreperson should sign and date the corresponding guilty verdict form; [¶] Number two, if you are unable to reach a unanimous verdict as to the charge in Count 1 of first degree murder, do not sign any verdict forms as to that count and report your disagreement to the court; [¶] Number three, the court cannot accept a verdict of guilty of second degree murder as to Count 1 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same count; [¶] If you find the defendant – number 4, if you find the defendant not guilty of murder in the first degree as to Count 1, but cannot reach a unanimous agreement as to murder of the second degree, your foreperson should sign and date the not guilty of murder in the first degree form and should report your disagreement to the court; [¶] If – number five, if you unanimously find a defendant not guilty of first degree murder, but

The language of the special instruction was much more lax than this, but the question is whether CALJIC No. 8.75 would color the understanding of the special instruction. There is strong reason to doubt it. As noted above, the instruction in accord with CALJIC No. 8.75, by its own terms, applied to first and second-degree murder. The special instruction, by its own terms, applied specifically to counts 1 and 4. Secondly, although the jurors were not expressly told that second degree murder was lesser *included* offense of first degree murder, nor that accessory to murder was an alternative charge to murder, it would be apparent to lay understanding that second degree murder was defined by the absence of the single element of premeditation and deliberation (see 9RT 1924-1925), while the transition from murder to accessory to murder would appear obviously more complex and different in quality, requiring a set of elements collateral to those required for murder. (9RT 1931-1932.) If this is not enough in itself to lead the jurors to conclude that the formulation in CALJIC No. 8.75 was separate and distinct from the special instruction, and that the special instruction therefore had its own scope and meaning, there is the further problem of the verdict forms, which not only strengthened the tendency of misinterpretation of the special instruction, but also re-injected ambiguities into CALJIC No. 8.75 itself.

The court explained the verdict forms to the jurors as follows:

> "Okay. Before we swear the bailiff to take charge of the jury, I do want to go over a couple of things with you.
>
> "First of all, the verdict form, and the one that needs to be returned to me is the one that's stamped 'Original.' This is

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guilty of second degree murder, your foreperson should sign and date the corresponding verdict forms." (9RT 1934-1936.)

the only one that's going to be sent into the jury room with you, but this is the form on which your verdicts should be rendered.

"It starts with Count 1, obviously, and you have two options with respect to the charge in Count 1. That is not guilty of murder in the first degree or guilty of murder in the first degree. Whatever your verdict is, the foreperson should check off the appropriate box, date it and sign it.

"Then in bold print at the top of the second page, there is some instructions for you. It says, 'Answer the following only if you found the defendant guilty of murder in the first degree of Deborah Sammons in Count 1.'

"And that then has you address the issue of the special circumstance that's alleged of murder while lying in wait. And you have two options. You can find that allegation is true or that the allegation is not true. Whatever your verdict is, if you answer that question, the appropriate word as indicated under the line where you are going to write that word should be written in there and again signed and dated by the foreperson. As instructed in the bold print, you would only answer that question if you found the defendant guilty of murder in the first degree.

"Then you have another set of instructions in bold print which tells you to, 'Answer the following only if you found the defendant not guilty of murder in the first degree.' And then you have the option of a lesser offense of second degree murder, the same two options, not guilty or guilty. If you reach that question, you are to answer that question, and render a verdict according to the verdict of the jury.

"At the top of page 3, then you have some more instructions in bold print. It says, 'Answer the following only if you found the defendant not guilty of both murder in the first and murder in the second degree in Count 1.' So if, and only if, you found the defendant not guilty of murder in the first degree and murder of the second degree, do you consider Count 4, which I've moved up under Count 1 because it's an alternative charge to that in Count 1. And that's the charge of being an accessory after the fact to the commission of a

> murder. And, again, you have the same two options, not guilty or guilty, and a place to sign and date by the foreperson." (RT 2046-2047; see 4CT 1145-1148.)

Thus, the instruction on the use of the verdict forms contains the compact language of "finding" and "rendering" a verdict. Indeed, in the instruction and in the verdict form itself, a new compact term, "answer" is used when the jurors were instructed that the progression of verdicts was an "answer" to a set a questions. The form used is similar to special interrogatories, which are generally recognized as "bringing judicial pressure to bear on juries in reaching their verdicts." (*Commonweatlth* v. *Durham* (Ky. 2001) 57 S.W.3rd 829, 835-836; see also *United States* v. *Sababu* (7th Cir. 1989) 891 F.2nd 1308, 1325.) Although the verdict forms in the instant case do not at all pressure the jury toward a guilty verdict for any crime charged, thereby constituting an impropriety for that reason (see *United States* v. *Spock* (1st Cir. 1969) 416 F.2nd 165, 182), the question-by-question approach has the overall effect of a logical roadmap to substantive deliberations. This in turn has a clearly coercive effect on the *order* in which the process of deliberation is to occur. When one considers, then, the reinforcement of the instruction on the verdict forms and the verdict forms themselves, the balance of likelihoods falls strongly on the side of the improper understanding that the order of substantive deliberations were confined and prescribed by law. The question then becomes the prejudice arising from this instructional error.

This Court has observed that error of this type, -- *Kurtzman* error as it is denominated, -- seems to be prejudicial only in theory, since the benefits and debilities arising from the error tend to be evenly distributed between the prosecution and the defense:

"In the abstract, an acquittal-first instruction appears capable of *either* helping *or* harming *either* the People *or* the defendant.

"Such an instruction 'has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree. But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant if the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.' [Citation.]

"As stated, in the abstract, an acquittal first instruction appears capable of either helping or harming either the People or the defendant. In any given case, however, it will likely be a matter of pure conjecture whether the instruction had any effect, whom it affected, and what the effect was. Certainly, even if we could conclude that there is a reasonable likelihood that the jury in this case construed or applied the challenged instructions as imposing an acquittal-first rule, on this record we could not conclude that defendant suffered prejudice." (*People* v. *Berryman*, *supra*, 6 Cal.4th 1048, 1077, fn. 7, italics in original.)

This paradigm set forth in *Berryman* contemplates a jury deliberating on greater and lesser-included offenses, wherein the prosecution's failure of proof on a single element of the greater crime

dispatches the jury down the ladder, as it were, to the lesser offense. It does not contemplate the conceptual situation presented here, wherein the jurors switch ladders altogether to get from the greater to the lesser offense. Thus, for the instructions to assure that the jurors will not move "too quickly" from the adequate consideration of the greater offense, the prosecution obtained in this case not merely a theoretical benefit, but a concrete one in the impression that an adequate consideration of the crime of murder did not require an assessment of the defense claim that appellant did not murder but was only an accessory to murder. In short, the instruction prejudiced the defense by allowing the jury to come to a verdict of guilt for murder before there was any adequate consideration of the substantial evidence that appellant was only an accessory. The possibility that the special instruction might result in a hung jury with no verdict on either offense was hardly a practical benefit for appellant who would face a *capital* retrial, while a verdict of guilt for accessory would represent the success of his defense. Thus, here, one is not at the mercy of conjecture in concluding that the erroneous confinement of deliberations presented real benefits only to the prosecution and real drawbacks only to the defense.

The case in favor of the defense claim has been recounted in the previous arguments. The weak credibility of Charlie Sammons was sheltered by the friendly shade of an instruction that confined deliberations to the prima facie elements of murder; the weak credibility of Martin L'Esperance thrived in this same dark spot; however, appellant's statement to Grate and all the circumstantial considerations that at least raised a reasonable doubt as to whether appellant committed the crime of murder or accessory to murder remained outside the prosecution's prima facie case and thus outside the order of deliberations set by the erroneous special instruction. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

Finally, one may also note that this case also falls outside *Berryman*'s estimation that *Kurtzman* error can only be a state-law violation. (*People* v. *Berryman*, *supra*, 6 Cal.3rd 1048, 1077, fn. 7.) Here, the instructions also had the effect of a federal constitutional violation for the same reason that distinguishes this case from all others in which *Kurtzman* error has been found harmless: the treatment, in this case, of an alternative charge inextricably involved in the defense as though it were a lesser included offense. In other words, appellant's defense was that he committed only the crime of accessory to murder. The erroneous acquittal-first instruction, to the extent that it induced the jurors to bypass consideration of appellant's claim, deprived him unconstitutionally of his Sixth and Fourteenth Amendment right to a meaningful opportunity to present this defense. (*Crane* v. *Kentucky* (1986) 476) U.S. 683, 690.) In addition, the error, by allowing the prosecution to establish its case for murder merely on its prima facie proof, without regard to factual issues injected by the defense, crossed federal constitutional lines by lightening the prosecution's burden to prove guilt beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.) Finally, the dilution of the burden of proof violated the Eighth Amendment's mandate of heightened reliability in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638.) The error here thus rises to the level of a federal constitutional violation, and there is certainly a reasonable doubt whether the error was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

VII.
THE REQUESTED CAUTIONARY INSTRUCTION ON ACCOMPLICE TESTIMONY, IN ACCORD WITH JUSTICE KENNARD'S FORMULATION IN *PEOPLE* V. *GUIUAN* WAS APPROPRIATE AND NECESSARY UNDER THE CIRCUMSTANCES OF THIS CASE, IN WHICH A "VOLUNTEERING ACCOMPLICE" WOULD EVENTUALLY OBTAIN SUBSTANTIAL CONSIDERATION FROM THE PROSECUTOR, WHO IMPLIED TO THE JURORS AT TRIAL THAT NO CONSIDERATION WOULD BE FORTHCOMING

Introduction

It will be recalled from the statement of facts that Charles Sammons testified that he had come forth voluntarily without any express or implied promise of consideration from the prosecution in exchange for his testimony. (7RT 1484-1485.) Mr. Pedersen, the prosecutor, based on this evidence went on to argue that Sammons testified with "absolutely no promises, not even a tacit, Don't worry, we'll take care of you later. Nothing. No deals at all were made with Charles Sammons." (9RT 1944.) Yet, on October 21, 1999, approximately five months after judgment of death was imposed in this case, the prosecution dismissed the special circumstance alleged against Sammons, who then pled no contest to the charge of first degree murder. (RT, *People* v. *Sammons*, 10/21/99, pp. 23-31; SCT 2nd, pp. 32-36.)[24] At the sentencing hearing on January 24, 2000, where Sammons would be punished by the sentence of life with possibility

[24] The reporter's transcripts from the separate proceedings in Charlie Sammons' case (Solano No. FC41041) is part of the certified record on appeal in the instant case. The second supplemental clerk's transcript in this case is effectively the clerk's transcript from the Sammons' case.

of parole after twenty-five years, the prosecutor remarked that although Sammons' testimony at the Bacon trial "was probably self-serving and not completely forthcoming", nonetheless, "I think he did voluntarily testify without promise of leniency from the People, and in all candor, that is a major reason why the People agree to strike . . . [the] special circumstances, which we did in taking his plea." (RT, *People* v. *Sammons*, 1/24/00, p. 35.)

There are indeed various permutations on the inducement of an accomplice/witness to testify. He or she may testify in exchange for leniency already granted; he or she may testify in exchange for leniency promised; or he or she may testify without any leniency granted or promised. The first two situations are impeachable; the latter is not, except in regard to the accomplice/witness's subjective expectation formed without any inducement. The latter was the situation presented here, which, for terminological convenience, one may denominate by borrowing from Mr. Pedersen the concept of the "volunteering accomplice."[25] It is appellant's contention that in the case of the volunteering accomplice, it is both appropriate and necessary to give a strong admonitory advisement that "'[b]ecause an accomplice is also subject to prosecution for the same offense, an accomplice's testimony may be *strongly* influenced by the *hope* or expectation that the prosecution *will reward* testimony that supports the prosecution's case by granting the accomplice immunity or leniency.'" (*People* v. *Guiuan* (1998) 18 Cal.4th 558, 576, Kennard, J., concurring, emphasis added.)

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[25] "Accomplice" in this phrase is a compact reference to "accomplice-witness," since, by definition, an "accomplice," *qua* criminal actor, acts voluntarily. Further, "voluntary" carries the wrong connotations, since accomplice-witnesses induced by a promise of leniency voluntarily testify. "Volunteer" and "volunteering" is meant to connote self-motivation in the absence of any apparent inducement to testify.

As seen from the citation, this is the formulation from Justice Kennard's concurring opinion in *Guiuan*, and it was requested in full by defense counsel in this case, but rejected by the trial court as argumentative. (8RT 1763-1764; 9RT 1771-1774, 1894; SCT 3rd, p. 9.) The instruction given by the trial court consisted in a modification of CALJIC No. 3.18, as reformulated in the majority opinion in *Guiuan*. (9RT 1918; 4CT 1100; see below.) In the following, appellant will demonstrate that the instruction given by the trial court was inadequate to offset the jurors' misimpressions or enlighten their inexperience regarding the pressures operating to produce Charlie Sammons' "voluntary" testimony in this case, and that it was therefore error to refuse Justice Kennard's instruction as requested by the defense.

A.

The procedural events from which the issue here arises is interwoven with the legal exposition in *People* v. *Guiuan*, *supra*, 18 Cal.4th 558 of the appropriate wording for CALJIC No. 3.18, the standard cautionary instruction on accomplice testimony. Before *Guiuan*, CALJIC No. 3.18 provided: "'The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled after examining it with care and caution in the light of all the evidence in the case.'" (*Id.*, at p. 561.) This instruction, however, did not account for the limitation this Court accepted in *People* v. *Williams* (1988) 45 Cal.3rd 1268 that the caution necessary for the assessment of accomplice testimony was appropriately applicable only to the extent that that testimony incriminated the defendant. (*Guiuan*, *supra*, at pp. 560-561.) Although the trial court in *Guiuan* did not err in giving the accepted form of the standard instruction (*id.*, at p. 570), henceforth CALJIC No. 3.18 would

be "pretailored" to read: "'*To the extent an accomplice gives testimony that tends to incriminate the defendant*, it should be viewed with *caution*. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining with care and caution in light of all the evidence in the case.'" (*Id.*, at p. 569, emphasis added.) The change of the original "distrust" to "caution" was also designed to support the qualifying principle from *Williams*: "The word 'caution' . . . signals the need for the jury to pay special heed to *incriminating* testimony because it may be biased, but avoids the suggestion that *all* of the accomplice's testimony, including favorable testimony, is untrustworthy." (*Guiuan*, *id.*, at p. 569, fn. 4.)

The trial court in the instant case gave a modification of the *Guiuan* instruction as follows:

> "To the extent that Charles Sammons gives testimony that tends to incriminate the defendant, it should be viewed with caution. You should consider the extent to which his testimony may have been influenced by the receipt or expectation of any benefits in return for his testimony.
>
> "You should also consider anything that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to any interest he may have in the outcome of the defendant's trial. This does not mean, however, that you may arbitrarily disregard that testimony. You should give the testimony the weight you think it deserves after examining it with care and caution and in light of all the evidence in this case." (9RT 1918; 4CT 1100.)

The trial court crafted this instruction as the appropriate, non-argumentative alternative to the defense request for Justice Kennard's formulation in *Guiuan*. (8RT 1766; 9RT 1771-1774.)

In Justice Kennard's concurring opinion in that case, she disagreed with the majority formulation on two points: first, she believed that "distrust" rather than "caution" represented the appropriate level of skepticism to apply to accomplice testimony (*People* v. *Guiuan*, *supra*, at p. 573, Kennard, J., concurring); secondly, an effective cautionary instruction had to explain the reasons why accomplice testimony warranted extraordinary caution. (*Id.* at p. 571; Kennard J., concurring.) In this regard she pointed to the example of the cautionary instruction on in-custody informants, which does adduce an explanation for the heightened caution by advising the jurors that "'[i]n evaluating [the testimony of such informants], *you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. . . .*'" (*Ibid.*, italics in opinion; see also § 1127a, subd. (b); and CALJIC No. 3.20.)[26]

The trial court, in modifying the post-*Guiuan* version of CALJIC No. 3.18, obviously compromised in the direction of Justice Kennard's position, but rejected Justice Kennard's actual formulation as more appropriate for argument. Justice Kennard's full admonition, requested by defense counsel again even after the trial court offered its compromise formulation (9RT 1771-1772, 1894), is as follows:

> "'In deciding whether to believe testimony given by an accomplice, you should use greater care and caution than you do when deciding whether to believe testimony given by an

[26] The jury was instructed in accord with CALJIC No. 3.20 in regard to Martin L"Esperance's testimony. (9RT 1916-1917.)

ordinary witness. Because an accomplice is also subject to prosecution for the same offense, an accomplice's testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting the accomplice immunity or leniency. For this reason, you should view with distrust accomplice testimony that supports the prosecution's case. Whether or not the accomplice testimony supports the prosecution's case, you should bear in mind the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission, the fact that the accomplice's participation in the crime may show the accomplice to be an untrustworthy person, and an accomplice's particular ability, because of inside knowledge about the details of the crime, to construct plausible falsehoods about it. In giving you this warning about accomplice testimony, I do not mean to suggest that you must or should disbelieve the accomplice testimony that you heard at this trial. Rather, you should give the accomplice testimony whatever weight you decide it deserves after considering all the evidence in the case.'" (*People* v. *Guiuan*, *supra*, 18 Cal.4th 558, 576, Kennard, J., conc.; see SCT 3rd, p. 9.)[27]

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[27] The request modified the formulation to elide the word "accomplice" and replace it with Sammons' name or with an appropriate pronominal reference to him, so that, for example, the opening sentence would read: "In deciding whether to believe the testimony given by *Mr. Sammons*, etc. (SCT 3rd, p. 9.) The accomplice instructions actually given were all modified in this manner. For example, CALJIC No. 3.16 was modified to read: "Because Charles Sammons is subject to prosecution for the identical offense charged in Count 1 against the defendant, his testimony is to be evaluated in accordance with the following rules" (9RT 1917), in lieu of the standard: "If the crime of murder was committed by anyone, the witness, Charles Sammons, was an accomplice as matter of law and his testimony is subject to the rule requiring corroboration." These modifications were designed to avoid the suggestion, in the instructions at least, that Sammons was an auxillary perpetrator in a crime *committed* by appellant, while, at the same time, Sammons would retain his testimonial status of an accomplice witness whose testimony was subject to the corroboration rule of Section 1111 and to the cautionary advisement of CALJIC No. 3.18. These modifications were not disputed, but represented rather the trial court's solution to the problem, acceptable to all parties. (8RT 1736-1739.)

The instruction is based on the four characteristics of accomplice testimony that has rendered apparent to judicial experience the inherent risks of such testimony. First, the accomplice has "a powerful built-in motive to aid the prosecution in convicting a defendant, regardless of guilt or level of culpability, in the hope or expectation that the prosecution will reward the accomplices' assistance with immunity or leniency." (*Id.*, at p. 572.) Secondly, the accomplice's own admission to involvement in the crime charged in itself impeaches his credibility with evidence of bad moral character. (*Id.*, at p. 574.) Thirdly, "[q]uite apart from any hope that the prosecution will grant the accomplice immunity or leniency as a reward for testimony that results in the defendant's conviction, it is in the accomplice's interest to persuade the prosecution that the offense is less serious than the charge indicates or that the accomplice's own role in its commission is relatively insignificant." (*Id.*, at p. 575.) Fourthly, and finally, "special caution is warranted because an accomplice's firsthand knowledge of the details of the criminal conduct allows for the construction of plausible falsehoods not easily disproved." (*Ibid.*)

Although the majority in *Guiuan* did not feel the need for Justice Kennard's formulation as the standard CALJIC instruction for the usual accomplice/witness situation, Justice Kennard's formulation was not precluded as a *requested* instruction, and is not precluded since the law does not foreclose the possibility that otherwise correct statements of law may require amplification or explanation in uncommon situations. (See *People* v. *Cavitt* (2004) 33 Cal.4th 187, 204; see also *People* v. *James* (1969) 274 Cal.App.2nd 608, 611.) The question becomes whether, in the circumstances of this case, or even generally for the situation of the volunteering accomplice, the trial court's modification of the *Guiuan* instruction was inadequate, and whether Justice Kennard's more lucidly specific advisement was necessary. To determine this, a more detailed

examination of the circumstances of this case and of the inherent debilities under which the defense operates in addressing the problem of the "volunteering accomplice" is appropriate to provide the context in which to measure the relative efficacy of the competing cautionary instructions.

B.

In his opening statement to the jury, the prosecutor announced:

> "Now Mr. Sammons is going to testify in this case, even though his own murder trial is still pending. The District Attorney's Office has made no offers to him. There has been no plea deals, no promise of leniency, passive or express. While those – that's the case, it may well be that Mr. Sammons is hopeful of getting some sort of deal, and that may be part of the reason why he decides to testify. Because his own case has not yet concluded, it is also likely that he will attempt to minimize his own involvement in the death of his wife." (RT 1098-1099.)

With this the prosecutor did invoke the possibility that Charlie Sammons was hoping for a deal and had a motive to minimize his involvement. However, in disparaging Charlie Sammons' credibility, the prosecution was displaying, as it were, its own clean hands, and implying, whether intentionally or not, that Charlie Sammons' expectations were purely subjective and unreasonable. In this regard, one should note that the prosecutor here neither states nor implies that some consideration might be possible later.

The next stage was for the prosecution to redeem the promise made in the opening statement, and this was done early in the direct examination of Charlie Sammons, who stated that he came forward to "to set the record straight." (7RT 1484-1485.) While the prosecution, as evidenced by the

opening statement, was not committed to Charlie Sammons' notion of a "straight record", it was committed to emphasizing the absence of any promise or deal from the prosecution:

> "Q. Did the District Attorney's office or law enforcement approach you asking for your testimony, or did you through your attorney approach them?
>
> "A. I'm not quite sure.
>
> "Q. Did we come and ask you to testify or did your attorney ask us if we could work something out?
>
> "A. I believe the attorney did.
>
> "Q. And as you sit there, are there any deals or have there been any agreements made between yourself and the District Attorney's Office or any other law enforcement agency in exchange for your testimony?
>
> "A. No.
>
> "Q. Are you hopeful that at the end of this case that there will be consideration given to you?
>
> "A. I hope.
>
> "Q. Has there been any unspoken wink, wink sort of agreement made between law enforcement, prosecution and yourself?
>
> "A. No.
>
> "Q. Were any privileges, either in jail or any – of any other sort given to you in exchange for your testimony here today?
>
> "A. No." (7RT 1485.)

The prosecutor here was apparently attempting to enhance Charlie Sammons' credibility and the credibility of the prosecution generally by this mutual eschewal of any *quid pro quo*. Sammons' testimony thus continued the implication that Charlie Sammons' hopes and expectations were completely unilateral, which was true only in the sense that they were unreciprocated by a present promise, but untrue in the sense that the satisfaction of his hopes and expectations were not in fact foreclosed by the same District Attorney who so adamantly and ostentatiously withheld any present promise.

The cross-examination by defense counsel on this point brought to fruition the full extent of the problem:

> "Q. Now, in response to one of the District Attorney's questions here, you said that nothing has been promised you, but you're hopeful?
>
> "A. Yes.
>
> "Q. What do you mean you're hopeful, Mr. Sammons?
>
> "A. I'm hoping that they'll find the truth out.
>
> "Q. And let you go?
>
> "A. Yes." (7RT 1512.)

In other words, Charlie Sammons' hope was the absurd one that he would exonerate himself completely. Thus, his mendacity could be relegated to the irrational margins of his testimony that he had no criminal involvement in this case whatsoever, while his veracity could still be preserved for the

details of the crime in relation to appellant's actions. This veracity was in turn vouchsafed by the fact that he was given no promises of leniency.

This indeed is what the prosecutor effectively argued in closing argument:

> "And I'm not submitting to you that you should believe him in much of the particulars in which he testified. Charles Sammons is in this as deeply as Robert Bacon. But I submit to you there are two reasons why his testimony was significant and why it was presented to you.
>
> "As you know the District Attorney's Office made absolutely no promises, not even a tacit, Don't worry, we'll take care of you later. Nothing. No deals at all were made with Charles Sammons. He wanted to testify, I think he said, because he wanted to set the record straight. Well, I submit to you he didn't set the record straight, but there was no offer from the District Attorney's Office at all.
>
> "He testified because he was in [*sic*] and he told the District Attorney's Office he was willing to testify. You as jurors should hear that. You should be the people who evaluate the value of that testimony, not the D.A., not the defense, not the police. It should be the jurors. So when a person involved in the crime says I'm willing to testify, no strings attached, I'll put him on the stand and let you evaluate his testimony. That should be your job. That's appropriate for you to hear.
>
> "And the second reason why it's important that you heard Mr. Sammons is to establish the lying in wait special circumstance. We know based solely on Mr. Bacon's statement, that he was asked to kill Mrs. Sammons. The defendant himself admitted that. But we didn't know exactly some of the circumstances surrounding that until you talked or heard Mr. Bacon – Mr. Sammons testify. And he told you a little bit of a background about how they, Mr. Bacon and Mr. Sammons, had been together and how he suggested, Gee,

it would be nice if my wife was out of the picture." (RT 1944-1945.)

The tone and thrust of this argument varies drastically from the favor eventually accorded to Charlie Sammons by the very prosecutor who made this argument. Yet the argument was within the evidence and virtually immune from impeachment. First, no deal as yet existed; secondly, there was no discovery to obtain on any deal; thirdly, Mr. Pedersen could not be called as witness or cross-examined on his true state of mind toward a future deal with Charlie Sammons (see *People* v. *Donaldson* (2001) 93 Cal.App.4th 916, 928-929; see also *People* v. *Von Villas* (1992) 10 Cal.App.4th 201, 249-250); and finally, the defense in this case would have no access to Charlie Sammons' defense counsel in order to obtain evidence regarding Charlie Sammons' true state of mind. (See Evid. Code, § 954.) In short, the volunteering accomplice, as appellant is using that term, is significantly fortified against impeachment in ways the accomplice/witness with a deal or promise in hand is not.

The use of accomplices and informants as an appropriate and effective prosecutorial tool is well settled and well established. The dangers are deemed to be adequately checked by "(1) the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system [citations]; (2) trial judges and stringent discovery rules to subject the process to close scrutiny [citation]; (3) defense counsel to test such evidence with vigorous cross examination [citations]; and (4) the wisdom of a properly instructed jury whose duty it is to assess each witness's credibility and not to convict unless persuaded beyond a reasonable doubt of the accused's guilt." (*United States* v. *Bernal-Obeso* (9th Cir. 1993) 989 F.2nd 331, 335.) As seen from the above analysis, in the

case of the "volunteering accomplice," a gross misimpression remains despite the integrity of the prosecutor, and indeed the integrity of the prosecutor in this instance was implicitly invoked as an assurance that there was in fact no deal with the witness. There was no "evidence" as such to discover. There was no witness to cross examine except for the dubious accomplice/witness himself. One was left then with "the wisdom of a *properly* instructed jury . . . ." What then was the proper instruction to give?

C.

The instruction given by trial court specified to the jurors that they "should consider the extent to which" Charles Sammons' "testimony may have been influenced by the receipt or expectation of any benefits in return for his testimony." (9RT 1918.) The corresponding point in Justice Kennard's formulation is that "[b]ecause Mr. Sammons is also subject to prosecution for the same offense, his testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting immunity or leniency." (SCT 3rd, p. 9.)

The tense of the trial court's version, signaled by "may have been influenced by the receipt or expectation of any benefits" refers to the idea of past promise in "may have been" and only ambiguously to the idea of futurity in the word "expectation," since the expectation can still depend on a past promise. By contrast, Justice Kennard's formulation clearly embraces the future prospect of unpromised benefits in the words, "*hope* or expectation that the prosecution *will reward* testimony that supports the prosecution's case." If this is a strong form of expression, it was necessary to offset the strong implication that a "volunteering accomplice," like Charles Sammons, had no reasonable, and therefore strongly motivating

hope that he would obtain a future reward. By the same token, the phrase "strongly influenced" was necessary to indicate the strength such a hope can, and often does, achieve when nourished only by the possibilities inherent in the system itself quite apart from any express or implied promises from the prosecution. By contrast, the trial court's "may have been influenced" was not only ambiguous in evoking the proper tense, but weaker than the situation warranted.

Before addressing other points of comparison, one might pause here to consider perhaps a more fundamental point regarding the necessity for greater clarity in the cautionary instructions. Would a jury, regardless of the degree of obscurity or clarity that informs the cautionary instruction, nonetheless understand as a matter of common experience that a volunteering accomplice can indeed still retain a strong hope or expectation of leniency even in the absence of any promises? The answer is surely no, especially when the prosecutor himself, as here, has given implied assurances that no future deal would be forthcoming. A lay juror, with no day-in-day-out experience of the criminal justice system, has no way of realizing the lengths to which the system itself fosters pressure to reward such witnesses even when express or implied promises are affirmatively withheld. This is quite apart from the consideration that lay jurors would not be aware of how prosecutors less scrupulous than Mr. Pedersen might abuse the use of volunteering accomplices for purposes of tactical manipulation. (See *Jackson* v. *State* (Del. Supr. 2001) 770 A.2nd 506, 514 [State admitted at post-trial hearing that "for tactical reasons they did not offer Johnson leniency because that would undermine his credibility."].)

Thus Justice Kennard's defense of her formulation for use in all accomplice/witness situations, at least applies in full and compelling force when, as here, there is a volunteering accomplice, such as Charlie

Sammons, who purports to come forward only to obtain the consideration he legally deserves or not. As Justice Kennard stated in *Guiuan*:

> "Like Justice Brown, I have a high opinion of jurors' abilities, and I agree that, in the words of Presiding Justice Gardner, '[a] juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box.' (*People* v. *Long* (1974) 38 Cal.App.3rd 680, 689 . . . .) Still, most jurors have only limited experience with the actual workings of the criminal justice system and the pressures that operate on testifying accomplices. Few jurors have ever been formally accused of a crime or put in a situation where their liberty may depend upon assisting the prosecution to obtain another's conviction. When their duties as jurors require them to confront situations and concepts with which they have only limited familiarity, most jurors, I think, would welcome instructions that explain not only the rules they are to follow in reaching their verdicts but also the reasoning that underlies those rules." (*People* v. *Guiuan*, *supra*, 18 Cal.4th 558, 576, Kennard, J., conc.)

Thus, it is not merely linguistic precision that is at issue; there is also a need to redress the imbalance caused by the jurors' lack of experience with the system itself. Justice Kennard's formulation redresses this imbalance, at least in the type of situation presented in this case. The trial court's version only perpetuates misimpressions and ambiguities that the jurors might well not penetrate. The use of instructions to remedy gaps in common experience that cannot be remedied by evidence or argument cannot, for that very reason, be argumentative, i.e., appropriate for argument by the parties rather than purveyed through legal instructions. (See *People* v. *Wharton* (1991) 53 Cal.3rd 522, 570.)[28] One may now turn

[28] Perhaps the most prominent examples of curative instructions of this type are the instructions that reflect judicial experience in sexual assault cases. (See

to the other points of comparison between the instruction given and the instruction requested.

The trial court's instruction also cautioned the jurors that they "should also consider anything that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to any interest he may have in the outcome of the defendant's trial." (9RT 1918.) This was designed to be a generalized statement devoid of any argumentative specificity, except for a nod toward a sort of pale specification in "any interest he may have in the outcome of the defendant's trial." By contrast, Justice Kennard's formulation is sharp and clear: "Whether or not" the accomplice's "testimony supports the prosecution's case," the jury "should bear in mind the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission, the fact that the accomplice's participation in the crime may show the accomplice to be an untrustworthy person and an accomplice's particular ability because of inside knowledge about the details of the crime, to construct plausible falsehoods about it." (SCT 3rd, p. 9.)

It will be recalled how in the direct examination of Charlie Sammons, the prosecutor established that he was testifying without any express or implied promise of leniency; it will also be recalled that on cross examination Charlie Sammons declared his motive to be exoneration. (7RT 1484-1485, 1512.) Appellant noted the wide gulf separating the two and the differences between the absurdity of exoneration and the hope for leniency even in the absence of any promises. (See above pp. 111-114.) Further, appellant showed how the prosecutor confounded the more realistic expectation of leniency with Charlie Sammons' professed hope for

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People v. *Putnam* (1942) 20 Cal.2nd 885, 891-892; see also *People* v. *Gammage* (1992) 2 Cal.4th 693, 701-702.)

exoneration. The trial court's instruction was too vague and general to cure this confusion between separate and distinct factors. However, Justice Kennard's formulation defines the situation here precisely: while the jury was to consider any hope of future reward in assessing that portion of the accomplice testimony that supported the prosecution's case, they should also consider "the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission" "[*w*]*hether or not the testimony supports the prosecution's case* . . . ." Not only does this formulation make distinctions in exact accord with the evidence and cure the confounding of pertinent factors, it also suggests in a *non*-argumentative and more balanced fashion that Charlie Sammons' "minimization" of his role in the crime in which he may have been the sole perpetrator was an independent motive to fabricate.

The specification of the accomplice's self-impeachment through admissions of his own bad acts was appropriate in the instant case simply to balance the mirror-image self-impeachment by appellant, who, like Charles Sammons admitted to being an accessory to murder, while not the murderer himself. This was important not only to balance this aspect that was specific to this case, but also to offset the force of the prosecutor's virtual vouching for Charlie Sammons' limited credibility. The trial court's mere catchall formulation provided little help, especially when there were instructions on appellant's incriminatory admissions (9RT 1916) on his suppression of evidence as consciousness of guilt (9RT 1916), and on his false and misleading statements as consciousness of guilt. (9RT 1916.) The defense had no recourse to a parallel set of instructions although such instructions described factual situations applicable to Charlie Sammons.[29]

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[29] The instructions given in accord with CALJIC Nos. 2.06, 2.03, and 2.71 were as follows: "If you find the defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence,

Regarding the verisimilitude an accomplice/witness can muster in the aid of persuading a jury, although this factor touches generally on all accomplice/witness situations (*People* v. *Tewksbury* (1975) 15 Cal.3rd 953, 967), it touches here in a pointed manner for the same reason as the factor of self-impeachment. Appellant's statement to Grate and Charlie Sammons' testimony before the jury presented mirror-image versions of events. Appellant's position as defendant rendered the jury thoroughly aware that his plausible knowledge of detail was not self-ratifying or corroborating. Charlie Sammons' position, however, which was not properly elucidated by the trial court's instruction, was not crystal clear to the jurors, and there was thus a specific warrant for specifying the misleading plausibility of Charlie Sammons' "inside knowledge." (See 9RT 1945.)

Finally, one should comment on the retention of the word "distrust" over the word "caution." Again, the rationale adduced by the majority in *Guiuan* was that "distrust" suggested too thoroughgoing a skepticism that would broadly embrace not only the testimony given by the accomplice in support of the prosecution's case, but also the accomplice testimony that could be characterized as favorable to the defense. (*People* v. *Guiuan*, *supra*, 18 Cal.4th 558, 569, fn. 4.) Here, there was effectively *no* testimony

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this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide. [¶] If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he's now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide. [¶] An admission is a statement made by a defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. You're the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." (9RT 1916.)

from Charlie Sammons that favored the defense. The defense case and Charlie Sammons' testimony were mirrored opposites, mutually exclusive of each other, and if the jurors found something useful in Charlie Sammons' testimony to support the defense, no juror on this record would be misled by the word "distrust" over the word "caution." If on the other hand, the use of the word "caution" was intended to soften the debility under which the prosecution operates when employing accomplice testimony, one should note that the prosecutor, in his first closing statement, declared to the jurors, "Now, before I go on, I think I need to make perfectly clear you don't need the testimony of Charles Sammons to convict Robert Allen Bacon of murder" (9RT 1943), and then again in his final closing, he argued:

> "Most of Mr. McKenna's argument was spent trying to convince you that Charles Sammons is a bad guy and spent trying to convince you that the People's case rests on Charles Sammons. It does not. And this is not a situation in which I stood up in my opening argument – opening statement weeks ago and told you Charles Sammons is going to be the star witness for the People, and he's going to make this case. No, I stood up and I told you he's going to minimize his own involvement, he's going to lie to you because he wants a deal. But I presented him to you, as I told you in my first argument, because he was there and you should decide." (9RT 2023.)

In short, the prosecutor conceded that "distrust" was the proper orientation with which to approach Charlie Sammons' testimony. Thus, whether the word "caution" protects the prosecution or whether it protects the defense, in this case, where the contest between defendant and accomplice-witness was over mutually exclusive versions of same event on an all-or-virtually-nothing basis, the word "distrust" was appropriate.

In sum, the rejection of the defense request that the cautionary instruction follow Justice Kennard's formulation in her concurring opinion in *Guiuan* was error. The situation of the "volunteering accomplice" places defense counsel in a dilemma: the accomplice/witness may have substantial expectations of a benefit or consideration for his testimony, but counsel has no evidence to establish this or any means to assert this in argument. The dilemma of the defense is a significant advantage to the prosecution. The only manner of redressing the balance, short of forbidding altogether the use of volunteering accomplices, is, and was in this case, to allow a cautionary instruction in the formulation set forth by Justice Kennard.

D.

In regard to prejudice, the structure of the problem presented by the volunteering accomplice points in the direction of the standard of review. Again, the problems presented by such a witness cannot be met by relying on the integrity of government prosecutors, the ability of defense counsel to obtain relevant information, the ability of defense counsel to confront and cross-examine adverse witnesses, or on the ability of defense counsel to dispose of the issue through meaningful argument. If the first consideration, the integrity of government prosecutors, is not impugned at least at the level of federal due process without a showing of a *knowing* use of false evidence or misleading argument (*People* v. *Morrison* (2004) 34 Cal.4th 698, 717), the complete frustration of the defense's ability to obtain pertinent information in regard to accomplice credibility certainly implicates the Sixth and Fourteenth Amendment right to a meaningful opportunity to present a defense. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 689-690.) Further, the insulation of the accomplice witness from realistic impeachment due to the prosecutor's plenary control over the timing of

such impeachment evidence violates the Sixth Amendment right to confrontation. (*Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 680; see also *People* v. *Gaines* (1997) 54 Cal.App.4th 821, 825.) Finally, the impossibility of meeting the dilemma of the volunteering accomplice interferes with the Sixth Amendment right to assistance of counsel. (See *Herring* v. *New York* (1975) 422 U.S. 853, 865.) All this is quite beside the unreliability injected into these capital proceedings by the absence of an adequate advisory to the jury of the dangers of the volunteering accomplice witness, which unreliability is in derogation of the Eighth Amendment. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638.) The standard of review then for improper denial of appellant's requested instruction is whether respondent can show the error harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

Whether or not the prosecutor believed that his case could dispose with Charlie Sammons and still lead to a conviction of appellant, the objective situation, based on the strength of the defense case, in fact made Charlie Sammons, if not indispensable, at least highly important to the prosecution. The prosecution position was that appellant was the direct perpetrator of the murder. Without Charlie Sammons, the only speaking witness was effectively appellant himself through the statement to Detective Grate. Thus, without Charlie Sammons, the prosecution case was completely circumstantial and put the prosecution in the position in which defense counsel often find themselves: having a jury who wants to hear from the main protagonist in the case. The absence of Charlie Sammons could only benefit the defense, and his presence was very helpful to the prosecution in buttressing the persuasiveness of its case. However, Charlie Sammons' misleading appearance as a "volunteer" gave him an undue persuasiveness, and there is surely a reasonable doubt that the error in not giving the requested cautionary instruction on his credibility did not affect

the outcome of the case. (*Chapman* v. *California*, *supra*, 386 U.S. 18. 23-24.)

But even under the more exacting standard of review of state error, there was prejudice here. The defense presented was certainly substantial enough to raise a reasonable doubt as to whether appellant was a murderer or only an accessory to murder. The prosecution case was correspondingly weak to the extent that Charlie Sammons was clearly liable for murder even if he were not the direct perpetrator of murder. He nonetheless retained too much of his limited credibility because of the misleading status of "volunteer." If the properly worded cautionary instruction had been given in this case, there is a reasonable probability that the defense would have prevailed. (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837.)

VIII.
THE GIVING OF CALJIC No. 2.01 WHERE THE CASE HINGES ON THE ASSESSMENT OF DIRECT EVIDENCE WAS PREJUDICIAL TO THE DEFENSE IN THE INSTANT CASE

In accord with CALJIC No. 2.01, the jury in the instant case was instructed that a finding of guilt cannot be based on circumstantial evidence unless "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.". (9RT 1911.) The instruction amplifies the principle by asserting: "[I]f the circumstantial evidence as to any particular count permits of two reasonable interpretations, one of which points to the defendant's guilt and the other to the defendant's innocence, you must adopt that interpretation that points to the defendant's innocence and reject

that interpretation that points to the defendant's guilt." (9RT 1911.)[30] The instruction, as appellant contends, was improperly given where the case hinged on the assessment, *not* of circumstantial evidence, but on the assessment of direct evidence, and, as will be seen, the instructional error redounded to the prejudice, not to the prosecution, but to the defense, whose substance depended on the *believability* of appellant's statement to Detective Grate and not on its *reasonableness*.[31]

The existence of error requires little argument or explanation. It is virtually black letter law that instruction in accord with CALJIC No. 2.01 is appropriate only "in those cases where circumstantial evidence is 'substantially relied on for proof of guilt.'" (*People* v. *Anderson* (2001) 25

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[30] The full instruction given to the jury in accord with CALJIC No. 2.01 was as follows: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but 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 upon which such inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt. [¶] If on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation appears to you to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (RT 1910-1911.)

[31]. At the outset of discussions regarding the "standard packet" of guilt phase instructions, the court announced, "If you don't object when I say I'm going to give something or not give something, then the record will assume by your silence that you are in agreement with what I'm saying." (8RT 1659.) Then, when the Court read off a list of instructions, which included CALJIC No. 2.01, counsel entered no objection. (8RT 1660.) The failure to object does not of course waive the issue of instructional error (§ 1259); furthermore, defense counsel's silence, in the absence of any expression of tactical purpose, does not raise an estoppel through the doctrine of invited error. (*People* v. *Valdez* (2004) 32 Cal.4th 73, 115; *People* v. *Lara* (2001) 86 Cal.App.4th 139, 164-165.)

Cal.4th 543, 582; *People* v. *Wright* (1990) 52 Cal.3rd 367, 406; *People* v. *Wiley* (1976) 18 Cal.3rd 162, 174; *People* v. *Yrigoyen* (1955) 45 Cal.2nd 46, 49.) Thus, when direct evidence constitutes the predominant portion of the prosecution's case, the instruction should not be given (*People* v. *Williams* (1984) 162 Cal.App.3rd 869, 875), and for purposes of this rule, the extrajudicial statements of a hearsay declarant are deemed to be direct evidence. (*People* v. *Gould* (1960) 54 Cal.2nd 621, 628-630.) As noted in the previous argument, the prosecution case rested on Charlie Sammons' percipient testimony, on Martin L'Esperance's version of appellant's confession, and on appellant's extrajudicial admissions to Detective Grate. None of this constituted circumstantial evidence for purposes of CALJIC No. 2.01, and it is clear that the instruction was given without its proper foundation.[32]

The question of prejudice is less straightforward. It is generally thought that an error in giving CALJIC No. 2.01 benefits the defense. (See *People* v. *Magana* (1990) 218 Cal.App.3rd 951, 955.) It is thought beneficial to the defense to the extent that the instruction, improperly given, wrongly burdens the prosecution: "The reason for the general rule in this behalf is to be found in the danger of misleading and confusing the jury, where the inculpatory evidence consists wholly or largely of direct evidence of the crime. In such cases, as courts have repeatedly pointed out, it would be most mischievous to intimate to the jury that the prosecution was relying for a conviction upon circumstantial evidence." (*People* v. *Lapara* (1919) 181 Cal. 66, 70; see also *People* v. *Jerman* (1946) 29 Cal.2nd 189, 196; and *People* v. *Wright* (1990) 52 Cal.3rd 367, 406.) But what if the *defense* is relying on direct evidence to raise a reasonable doubt as to the

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[32] These assertions apply not only to the prosecution's case for murder, but also for the charged rape and sodomy.

prosecution's case, and this direct evidence was presented through the prosecution's own case to which CALJIC No. 2.01 applies?

Appellant is referring of course to his extrajudicial statements to Detective Grate. Although presented by the prosecution for their alleged falsehood, they were urged by the defense for their truth, and they were the *only* express evidence presented of lesser culpability based on accessory after the fact. Having these statement evaluated by whether or not they constituted a reasonable explanation of the prosecution's inculpatory case embraces the very "mischief" thought to accrue to the prosecution from the improper giving of CALJIC No. 2.01. In other words, under CALJIC No. 2.01, the outcome of the guilt case depended on whether the jury found appellant's version of events in his statement to Grate to be reasonable, when in fact it was legally sufficient for these statements only to be *believable*.

The distinction is important, especially in this case. There was at least one unusual portion of appellant's statement to Grate, and that was his claim to have had consensual sexual relations with Mrs. Sammons within only minutes of meeting her for the first time. A rational juror could indeed find this claim to be credible, yet feel himself forced to reject it on the basis of CALJIC No. 2.01 as unreasonable, and thereby to reject the entire defense as unreasonable. This was not a case in which the confusion between direct and circumstantial evidence was a detriment to the prosecution; this was a case in which it was a detriment to the defense.

Respondent will point to this Court's decision in *People* v. *Wilson* (1992) 3 Cal.4th 926, in which this Court appears to have rejected the identical argument. In *Wilson*, the defendant complained that CALJIC No. 2.01 "allows the jury to convict merely by finding the prosecution's theory of the case 'reasonable' and the defense theory of the case 'unreasonable,' thus compelling the jury to reject a defense theory which is unreasonable

but also true." (*Id.*, at p. 943.) This Court rejected the argument because, when CALJIC No. 2.01 was conjoined with CALJIC No. 2.90, the primary instruction on proof beyond a reasonable doubt, the jurors would understand that the distinction in CALJIC No. 2.01 between the "reasonable" and the "unreasonable" referred to the reasonable-doubt standard. (*Ibid.*):

> " . . . . The paragraph criticized by defendant therefore 'does not tell the jury to reject interpretations of circumstantial evidence favorable to the defense simply because they are unusual or bizarre, [but] merely tells them to reject interpretations of circumstantial evidence that are so incredible or so devoid of logic that they can beyond a reasonable doubt, be rejected.' (*People* v. *Magana* [(1990)] 218 Cal.App.3rd [951,] 956 . . . .)" (*Wilson, ibid.*)

The argument rejected, however, is not identical. In *Wilson*, the defendant referred to "theories," and the Court accordingly responded in terms of "interpretations" of circumstantial evidence, which indeed is within the purview of CALJIC No. 2.01. But CALJIC No. 2.01 refers not only to "interpretations" of circumstantial evidence but also to "*each fact* which is essential to complete a set of circumstances necessary to establish guilt beyond a reasonable doubt." The informing paradigm inheres in the image of the chain whose strength is no greater than its weakest link (*State* v. *May* (N.C. 1977) 235 S.E.2nd 178, 185; *State* v *Johnson* (N.D. 1905) 103 N.W. 565, 566), and the most elemental link will be the "fact" out of which "interpretations" arise. Thus, if the assessment of an "interpretation" as "reasonable" or "unreasonable" would likely be assimilated, through CALJIC No. 2.90, to the standard of reasonable doubt, the assessment of a "fact" as reasonable or unreasonable would indeed be likely to be

assimilated to the natural categories of "normal" or "bizarre" despite CALJIC No. 2.90. The argument rejected in *Wilson* was therefore *not* identical to the argument presented here, which focuses not on "interpretation," but on the "fact" that appellant had consensual relations with Mrs. Sammons after only a brief introduction.

There is a related distinction between this case and that of *Wilson*. In *Wilson*, the prosecution case was heavily, if not completely, circumstantial. (*People* v. *Wilson*, *supra*, 3 Cal.4th 926, 931-935.) There was therefore no initial error in the giving of CALIC No. 2.01, and the defendant's claim in *Wilson* was based solely on the alleged ambiguity in the instruction. There was thus in *Wilson* a circumstantial case on which to focus, which rendered the misunderstanding of CALJIC No. 2.01 less likely. In the instant case, there was not a circumstantial case to draw the focus of the instruction and to fend off that "most mischievous" danger of "intimat[ing] to the jury that" the case in fact hinged "upon circumstantial evidence." (*People* v. *Lapara*, *supra*, 181 Cal. 66, 70.) Thus, in *Wilson*, the predominantly circumstantial nature of the case rendered the resolution more a matter of assessing "interpretations" of circumstantial evidence than that of assessing the credibility of witnesses or declarants who witnessed elemental facts relevant to the case.

Finally, one might also observe that the defense theory in *Wilson* presented no unusual or bizarre aspect. Indeed, in *Wilson*, the defense presented no evidence, and "[i]n closing argument, defense counsel argued that the circumstantial evidence was not inconsistent with a finding that defendant was not the perpetrator of the crimes. (*Wilson*, *id.*, at p. 935.) There was nothing here to give force or life to the prejudicial misunderstanding of CALJIC No. 2.01 or to draw its focus in a misleading way. Here by contrast, the defense case depended on consensual sex between appellant and Mrs. Sammons – an event, which was

"unreasonable" by the rules of probability governing normal social intercourse. But as "unreasonable" as the event was in this sense, there were substantial grounds on which to find it "believable," at least enough so to raise a reasonable doubt. It was believable because of the absence of physical evidence to corroborate forcible sexual assault; it was believable because of the lack of motive appellant had to murder Mrs. Sammons; it was believable based on the odd configuration of Mrs. Sammons clothing on her dead body; and it would have been more believable if the trial court had admitted the note in appellant's possession with Mrs. Sammons' name, work address, and work phone number. (See above at pp. 44-48.)

In *Wilson*, this Court appropriated the argument from *People* v. *Magana*, *supra*, 218 Cal.App.3rd 951, and nothing in *Magana* undermines any of the distinctions appellant has made in relation to *Wilson*. In *Magana*, the defendant was charged with possession of heroin for sale, possession of cocaine for sale, and with simple possession of cocaine and heroin. (*Magana*, *supra*, 218 Cal.App.3rd at p. 953.) The evidence showed that defendant in *Magana* was standing on a street corner when approached by an officer. The officer noticed a white bindle on the ground about 8 to 10 inches from defendant's feet. Two clear plastic baggies containing cocaine and a bindle of heroin were seized from defendant's pocket, and there was more cocaine in another pocket. Defendant had three $20 bills in his possession. An expert on the sale of drugs concluded from the manner of the packaging of the drugs, the quantity of the drugs, and the absence of use paraphernalia, that the contraband found on or near defendant was being held for sale. Defendant testified, denying that the heroin on the ground was his, and that the drugs he possessed he had purchased that day for personal use. The three twenties he carried were part of his change. (*Id.*, at pp. 953-954.)

Magana rejected the claim that CALJIC No. 2.01 was faulty "since it allows the jury to convict merely by finding the defense theory of the case to be unreasonable" (*id.*, at p. 956), and in doing so, it provided the reasoning and language that this Court adopted in *Wilson*. But in *Magana*, as in *Wilson*, the issue focused on "interpretations" of circumstantial evidence rather than on the underlying facts arising from direct evidence. Further, *Magana*, even more than *Wilson*, was a circumstantial case. Finally, like *Wilson*, there was nothing unusual or bizarre to increase the likelihood of misapplication. Neither *Wilson* nor *Magana* dispose of the problem of CALJIC No. 2.01 in this case.

Finally, if the distinctions outlined above are not enough to subvert the application here of *Wilson* and *Magana*, one may here invoke the prosecutor's closing argument in which he rendered the categories of reasonable-doubt and reasonable-occurrence interchangeable. After reading to the jurors the definition of proof beyond a reasonable doubt as defined by CALJIC No. 2.90 (9RT 1938-1939), the prosecutor elaborated:

> "And I submit to you, ladies and gentlemen, that the People clearly have carried their burden of establishing and proving this case to you beyond a reasonable doubt. You may have noticed as you listened to these instructions, and as a practical matter, having listened to these instructions a number of times, I still get confused, so I can imagine for you hearing it for the first time and not having a set of instructions to follow along, it might have been a little bit difficult to understand.
>
> "How many times did you hear the words 'reasonable' and 'rational' as read to you by Judge Smith? There's a reason for that. Even though these instructions seem to be at first blush a bunch of legal gobbledygook, in essence, and in reality what they are is guides to help you do exactly that, reach a reasonable conclusion, a rational conclusion based on the evidence.

"And so during my remarks, some of the time I'll be referring to some of these instructions and hope that they make a little more sense after we talk a little bit about them.

"During the process of selecting the jurors, during the voir dire process, Judge Smith told those jurors who were here on a particular day something about one of the tasks of the juror is, and he said something to the effect of one of the jobs that a juror has is to sort out what is credible and what's not. And if something doesn't make sense, you are to look at it carefully. That's exactly what this case is all about. Looking at the evidence, looking at the submissions to you from the prosecution and from the defense and sorting out what makes sense and what does not." (RT 1939-1940.)

In other words, credibility is equated with reasonableness, which is the vice inherent in the formulation of CALJIC No. 2.01, inviting the jurors to reject as untrue that which is nonetheless believable.

This misunderstanding would be what the jurors would hear when the prosecutor closed out the thought in reference to CALJIC No. 2.01 specifically:

"If the circumstantial evidence is susceptible of two reasonable interpretations, two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt. If, on the other hand, *and I submit to you that the other hand is what applies in this case, one interpretation of such evidence appears to you to be reasonable and the other unreasonable, you must accept the reasonable interpretation and reject the unreasonable.*" (9RT 1942, emphasis added.)

This case then is distinguishable from *Wilson* and *Magana* at the very least because there was, in *Wilson* and *Magana*, no prosecutorial argument that abetted the incorrect understanding of CALJIC No. 2.01. Under the circumstances of this case, there was a reasonable likelihood that the jurors were misled to believe that the defense could be rejected merely as unreasonable without regard to whether it was believable to the point that it raised a reasonable doubt. (*Estelle* v. *McGuire* (1991) 502 U.S. 62, 72; *People* v. *Clair* (1992) 2 Cal.4th 629, 663.)

The error here represents a distortion of the proper application of the constitutional standard of proof beyond a reasonable doubt, the application of which is mandated by the Fourteenth Amendment of the United States Constitution (*In re Winship* (1970) 397 U.S 358), and is a necessary concomitant of the Eighth Amendment right to a determination of heightened reliability in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638.) As discussed throughout this brief, the defense case was substantial while the prosecution case had glaring weaknesses. On this record there is at least a reasonable doubt that the error in giving CALJIC No. 2.01 was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

IX.
COMBINED PREJUDICE FROM GUILT PHASE ERRORS

If this Court believes that the errors discussed in arguments **I** through **VIII** were not prejudicial individually in the guilt phase of trial, then their combined prejudice requires reversal of the guilt verdict. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

X.
THIS COURT MUST ORDER AN ACQUITTAL ENTERED FOR THE CHARGE OF ACCESSORY TO MURDER

In argument **VI**, appellant addressed the relationship between counts 1 and 4 as alternative charges. This was done in reference to the "acquittal-first" instruction, and in the course of that argument the nature of alternative charges was defined: alternative charges requires that conviction on one charge entail, as a matter of law, acquittal on the other. (See CALJIC No. 17.03; see above, pp. 95-96.) In the instant case, however, the jurors returned a verdict of guilt for murder but, pursuant to their instructions, returned no verdict at all on count 4 charging accessory to murder. (4CT 1146-1147; 9RT 2074-2075.) Thus, in the instant case, if the murder conviction in count 1 is affirmed, and if accessory to murder is a true alternative offense, then appellant is entitled to an express acquittal on count 4. The first condition is of course pending with this appeal; the second is satisfied insofar as accessory to murder *is* a true alternative offense to the crime of murder.

Section 32 defines an accessory after the fact as a "person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony, or convicted thereof . . . ." It is fairly certain that the statute does not contemplate a violation in which the accessory is aiding *himself* as principal in the felony; the crime is committed only when the defendant acts to aid "*another of the principals.*" (*People* v. *Mouton* (1993) 15 Cal.Ap.4th 1313, 1323, emphasis in original, disapproved on o.g. in *People* v. *Prettyman* (1996) 14 Cal.4th 248.) On the evidence in the instant case, appellant either committed the

homicide and acted to cover up this participation or he acted only as an accessory to a homicide committed by Charles Sammons. Even if the evidence could be construed as showing appellant to be a principal through aiding and abetting Charlie Sammons (see § 31), the cover-up cannot then be deemed the crime of accessory because it incidentally benefited Charlie Sammons as well as appellant. (See *People* v. *Francis* (1982) 129 Cal.App.3rd 241, 245-248.) It follows that an acquittal must be entered for the crime of accessory in this case, if, *arguendo*, the murder conviction is upheld.

XI.
THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH APPELLANT'S PRIOR SECOND-DEGREE MURDER CONVICTION IN ARIZONA AS A SPECIAL CIRCUMSTANCE

As recounted in the statement of facts, the special circumstance predicated on appellant's prior conviction for second-degree murder in Arizona was determined in a bifurcated court trial. The special circumstance for prior conviction of murder does not apply to foreign convictions, unless the murder in question, "if committed in California, would be punishable as first or second degree murder . . . ." (§ 190.2(a)(2).) Thus, it had to be proved beyond a reasonable doubt (§ 190.4(a)) that the homicide committed by the defendant embraced the prima facie elements of first or second-degree murder in California. (*People* v. *Martinez* (2003) 31 Cal.4th 673, 684; *People* v. *Andrews* (1989) 49 Cal.3rd 200, 222-223.) In the instant case, the evidence presented at the bifurcated portion of the guilt phase of trial was insufficient to establish this, and the special circumstance for prior conviction of murder must be reversed. Before discussing the specific evidence adduced, it is first necessary to analyze the divergence between Arizona's second-degree murder and California's.

A.

In California, murder is the killing of a human being with malice aforethought. (§ 187.) The killing of a human being with malice aforethought and premeditation is first-degree murder (apart from felony-murder), while the same act without premeditation is second-degree murder. (§ 189.) Malice is defined as "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."

(§ 188.) Malice "is implied, when no considerable provocation appears or when the circumstances attending the killing shows an abandoned or malignant heart." (§ 188.) Implied malice has been glossed in more prosaic terms as a killing which "results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People* v. *Dellinger* (1989) 49 Cal.3rd 1212, 1217; *People* v. *Martinez*, *supra*, 31 Cal.4th at p. 684.) These are the prima facie elements of second-degree murder by which a foreign conviction must be measured for purposes of the special circumstance for prior murder conviction. (*Ibid.*)

In Arizona, Arizona Revised Statutes, section 13-1104 provides for three forms of second-degree murder as follows:

> "A. A person commits second degree murder if without premeditation:
>
> "1. Such person intentionally causes the death of another person; or
>
> "2. Knowing that his conduct will cause the death or serious physical injury, such person causes the death of another person; or
>
> "3. Under circumstances manifesting extreme indifference to human life, such person recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person."

In form 1, intentionally causing the death of another, "'[i]ntentionally' . . . means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct." (A.R.S., § 13-105(9)(a).)

Hence, form 1 appears to be the equivalent of a homicide with intent to kill, i.e., the equivalent of California's express malice murder. (See *State* v. *Ontiveros* (Ariz.App. 2003) 81 P.3rd 330, 331-333; cf. *People* v. *Martinez*, *supra*, 31 Cal.4th at pp. 686-687.)

Form 3 of Arizona's second-degree murder seems to be the equivalent of California's implied malice murder. In Arizona, "'[r]ecklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." (A.R.S., § 13-105(9)(c).) Although, in Arizona, this same definition of recklessness characterizes manslaughter (*State* v. *Valenzuela* (Ariz. 1999) 984 P.2nd 12, 14-15), the addition of "extreme indifference to human life" adds some "greater degree of criminality" to the act. (*State* v. *Walton* (Ariz.App. 1982) 650 P.2nd 1264, 1272-1273.) Perhaps this defines a more serious crime than California's implied malice murder, but in any event this third form of Arizona second-degree murder seems to be at least equal to or within the definition of California's implied-malice murder, which requires an intentional act committed with conscious disregard for its danger to human life. The divergence between California and Arizona comes in the second form of Arizona's second-degree murder, the knowing causation of another's death.

Strictly speaking this second form subdivides into two subforms: either the defendant causes death knowing that his conduct will cause death or he causes death knowing that his conduct will cause "serious physical injury." The first subform, knowing that one's conduct will cause death, is the equivalent of California's implied malice murder. (See *People* v. *Martinez* (1991) 230 Cal.App.3rd 197, 205-206.) But what if the death results from a knowing causation of "serious physical injury"? This is

certainly not intent to kill (*State* v. *Ontiveros*, *supra*, 81 P.3rd, at pp. 331-332); but is it still the equivalent of implied malice?

Arizona Revised Statutes, section 13-105(34) provides the definition necessary to resolve the question:

> "'Serious physical injury' includes physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."[33]

If one assumes that "a reasonable risk of death" is the equivalent of California's "danger to human life", one is still in the realm of implied malice. However, the other forms of "serious physical injury" are clearly not within the orbit of California's implied malice. Disfigurement or an assault resulting in broken bones, a severe beating, or other serious injuries can indeed be "serious" without being a danger to human life. Indeed, a knowing causation of these forms of injury, which result in death, would constitute a sort of felony-murder predicated on aggravated assault, or on mayhem without the specific intent to inflict disfigurement – forms of murder that do not exist in California. (*People* v. *Robertson* (2004) 34 Cal.4th 156, 169; *People* v. *Ireland* (1969) 70 Cal.2nd 522, 539 [assault]; *People* v. *Sears* (1965) 62 Cal.2nd 737, 745; *People* v. *Anderson* (1965) 63 Cal.2nd 351, 359; *People* v. *Jones* (2000) 82 Cal.App.4th 663, 668 [mayhem].) An Arizona second-degree murder predicated on a knowing causation of serious physical injury resulting in death would not necessarily be punishable as murder in California.

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[33] At the time of appellant's conviction for second-degree murder, the numbering of this subdivision was different, but the wording was the same. (*State* v. *Greene* (Ariz. 1995) 898 P.2nd 954, 957, fn. 3.)

Thus, to establish the special circumstance for prior murder conviction, the possibility that the conduct resulting in the Arizona conviction does not qualify as a special circumstance had to have been precluded beyond a reasonable doubt by the evidence presented. This did not occur.

B.

Exhibit 30, introduced by the prosecution, consisted of a certified copy of appellant's Arizona conviction. (9RT 2064-2065; SCT 1st, pp. 73-78.) These documents reveal nothing except that appellant was convicted in Arizona in 1983 for second-degree murder and for robbery.

The prosecutor also obtained judicial notice of Exhibits 3 and 12 attached to appellant's motion to strike the prior convictions. (9RT 2068-2069.) Exhibit 3 is a series of documents, which includes a minute entry showing appellant's entry of a plea on June 17, 1983. It shows only that he pled guilty to second degree murder and robbery. (2CT 446-447.) There was also included in these documents of minute entry of August 17, 1983 showing imposition of sentence. (2CT 438-439.) Again, in this exhibit there was nothing that revealed the underlying nature of the crime. The case then would have to rest on Exhibit 12 of the pretrial motion, which was a transcript of appellant's entry of a plea.

The transcript reveals a routine proceeding of this nature, with advisements and voir dire, and also the entry of the pleas. (2CT 633-646.) Before accepting the plea, however, the court was required to ascertain the factual basis for the plea. Defense counsel and the prosecutor agreed that the grand jury transcript provided this basis. The court then had the prosecutor summarize the contents of that transcript:

"MR. LANGE: I think in a nutshell, it would show that Mr. Rush and Mr. Noble met on October 26th; that they went to the Circle K and some liquor was purchased; that they were over under a tree by I-10 and Ina, and that there was some discussion.

"Mr. Noble said he was going to a job and gave information about what sort of job he was going to Mr. Rush; that Mr. Noble went to sleep.

"The statement from Mr. Rush – part of the statement indicates that he then decided to take the wallet of Mr. Noble, hoping to get the information on the job and maybe going to get the job. And as this happened, a struggle ensued; and that as a result of the struggle, Mr. Noble was beaten severely, and in the process his throat was cut with a sharp instrument, possibly a broken bottle, at the scene.

"And then Mr. Rush left the scene, and Mr. Noble bled to death under the tree and died.

"And Mr. Rush was found hitchhiking up the road and he had blood on him. And he had a dog with him, and the dog had blood on it also.

"During one of the statements that he was giving, he produced the wallet of Mr. Noble that was in Mr. Rush's possession.

"That would be basically a nutshell of the evidence." (2CT 647-648.)

At the invitation of the court, defense counsel added facts:

"MR. LINGEMAN: That the two of them were drinking. The deceased had a 0.18 blood-alcohol content. I don't know what Mr. Rush's condition was, because he never had that done, but he was clearly intoxicated.

"Mr. Rush indicates, and did indicate in the statement, that this other fellow hit his dog. The dog was pregnant at the time. He's very protective of his dog. And that caused a fight between the two of them, and they went at each other for some period of time.

"Mr. Rush told the other fellow that he was a judo expert or karate expert and could beat the other fellow up.

"THE COURT: Mr. Rush –

"MR. LINGEMAN: Mr. Rush told this to the other fellow.

"THE COURT: The other fellow told him that he was –

"MR. LINGEMAN: That he was dangerous and could beat the other fellow up, and did beat the other fellow up, kicked him. He hit him. And there are a number of witnesses to that.

"THE COURT: Eyewitnesses?

"MR. LINGEMAN: Eyewitnesses to the assault. There are no eyewitnesses, although there's about a dozen people who saw Mr. Rush – Mr. Rush didn't have anything in his hands.

"THE COURT: Who are the eyewitnesses?

"MR. LINGEMAN: You mean you want the names.

"THE COURT: Who?

"MR. LINGEMAN: People that were passing by.

"This happened 75 feet off of Ina Road. Clearly visible in broad daylight, and a lot of people saw this going on.

"THE COURT; And their names are included.

"MR. LINGEMAN: Yes, all in the disclosure material. And they all have conflicting statements, and some consistencies run through them; and that there was a fight going on, and nobody saw anything in Mr. Rush's hand.

"But it's clear to me Mr. Rush never admitted, although he gave a complete lengthy statement, that he never cut the man intentionally with the bottle. We don't know if – I don't know if Mr. Rush knows, but either possibility is there.

"THE COURT: But the cause of death was having been cut in the throat and bleeding to death?

"MR. LINGEMAN: Yes. And he was beaten severely, and Mr. Rush did that.

"THE COURT: Is the cause of death as a result of the cut.

"MR. LINGEMAN: Yes.

"THE COURT: Was the wallet found on Mr. Rush?

"MR. LINGEMAN: Yes. No money, but a phone or address or something that referred to this other job in the other city.

"THE COURT: Let me take a moment to read the Grand Jury Transcript." (2CT 649-651.)

When the court returned, and based on what was in the Grand Jury Transcript, in conjunction with the representations of counsel, the court accepted the plea. (2CT 651.)

The grand jury transcript was not in evidence at the bifurcated proceeding in the instant case. Based on the representations made at the plea hearing in Exhibit 12, one can conclude at most that appellant severely beat Mr. Noble; in the course of the struggle resulting in that beating, Mr.

Noble's throat was cut on a broken beer bottle; and that Mr. Noble died as a result of this cut. Quite apart from whether this was competent evidence had a proper hearsay objection been lodged, is this sufficient evidence?

The prosecutor himself formulated his statement of facts in the passive: " . . . [A]s a result of the struggle, Mr. Noble was beaten severely, and in the process his throat was cut with a sharp instrument, possibly a broken bottle at the scene." (2CT 647.) Did appellant intentionally cut Mr. Noble's throat with a broken bottle? Did he do it unintentionally but with knowledge that the broken bottle would inflict disfigurement or serious impairment short of death? Or did Mr. Noble fall on broken glass due to some blow inflicted by appellant which appellant knew would cause a serious physical injury? In the latter two cases, appellant committed that form of second-degree murder that does not conform to the requirements of either express-malice or implied-malice murder in California. There was insufficient evidence to establish appellant's Arizona murder conviction as punishable in California as second-degree murder.

But what of first-degree murder? In California, a homicide of any sort committed in the course of a robbery is a first-degree murder under the felony murder rule. (§ 189.) However, Arizona has the same form of first degree murder (A.R.S., § 13-1105(A)(2))[34], and its definition of robbery seems to be equivalent to California's. (A.R.S., § 13-1902(A).)[35] Thus, the

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[34] "A person commits first degree murder if: . . . . 2. Acting alone or with one or more other persons the person commits or attempts to commit . . . robbery . . . and in the course of an in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person."

[35] In California, robbery is a taking of any personal property from the person of another with the intent to permanently deprive that person of that property. (See CALJIC No. 9.40.) In Arizona, robbery is defined as follows: "A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to

evidence of the conviction itself for second-degree murder is significant evidence that the conduct was *not* felony-murder/robbery in this case, and in the description of the underlying conduct by the prosecutor and defense counsel at the plea hearing, the relation of the robbery to the homicide was described in a way as to render the homicide unrelated or co-incidental to the robbery, which, in California, negates a finding of felony-murder. (*People* v. *Monterroso* (2004) 34 Cal.4th 743, 766-767; *People* v. *Green* (1980) 27 Cal.3rd 1, 59-62.) Furthermore, the same rule regarding an incidental or co-incidental relation between the underlying felony and the homicide is within the Arizona concept of the felony murder rule insofar as Arizona felony murder requires that "the death resulted from an action taken to facilitate accomplishment of the felony." (*State* v. *Jones* (Ariz.1997) 937 P.2nd 310, 319; *State* v. *Hallman* (Ariz.1983) 668 P.2nd 874, 881.) When one considers on this record that appellant was allowed to plead to second-degree murder when he could have been charged with a crime punishable either by death or life imprisonment (A.R.S. § 13-1105(C)) simply strengthens the doubt that the homicide underlying appellant's second-degree murder conviction could be characterized as a felony-murder.

Thus, whether one considers the elements of California's second-degree murder or California's first-degree murder, no trier of fact, whether a judge or jury, could have concluded beyond a reasonable doubt that

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prevent resistance to such person taking or retaining property." The Arizona courts understand this definition to include an intent to deprive the victim of his property (*State* v. *Celaya* (Ariz.1983) 660 P.2nd 849, 852-853), while "deprivation" is understood to mean the withholding of property "'either permanently or for so long a period that a substantial portion of its economic value or usefulness or enjoyment is lost . . . .'" (*Matter of Appeal in Maricopa County Juvenile Action* (Ariz.App. 1984) 687 P.2nd 412, 413-414.) This, however, is consistent with California's concept of permanent deprivation of property for purposes of theft crimes and robbery. (*People* v *Avery* (2002) 27 Cal.4th 49, 57-58; see also *People* v. *Montoya* (2004) 33 Cal.4th 1031, 1037.)

appellant's conviction for second-degree murder in Arizona established in California a special circumstance for prior murder conviction under Section 190.2(a)(3).

C.

This argument has been confined to the evidence presented at the bifurcated proceeding on the special circumstance, which is part of the guilt phase of trial. In *People* v. *Martinez*, *supra*, 31 Cal.4th 673, this Court left it an open question whether evidence from the penalty phase can establish the requisite conduct to bring a foreign murder conviction within the elements required by the California definition of murder. (*Id.*, at p. 688.) Assuming, *arguendo*, that a reviewing court may resort to evidence presented at the penalty phase to fill any gaps in the guilt phase evidence, such a procedure would not avail here.

The testimonial evidence presented at the penalty phase regarding the underlying crime did not diverge in any crucial manner from the representations of the prosecutor and defense counsel at the plea hearing in Arizona in 1983. If anything, they rendered the matter even more equivocal or doubtful.

In regard to second-degree murder, one learns from the penalty phase that appellant, although seen by several witnesses beating John Nobel in broad daylight, was not seen with any weapon in his hands in doing so. (10RT 2142-2145, 2154.) Further, the area was strewn with litter and the broken beer bottle could well have already been on the ground, cutting John Nobel when he fell, beaten down by appellant's assault. (10RT 2138, 2145.) Appellant himself had no cuts on his hands. (10RT 2154.) There were no usable latent prints found on the remains of the bottle. (10RT 2150-2151.) Finally, in regard at least to express-malice, there was little

doubt from the testimonial evidence that appellant and Nobel were drinking heavily that morning. (10RT 2151-2154, 2174-2177.)

In regard to felony-murder/robbery, appellant's claim to have removed the wallet only to retrieve the job information was strongly corroborated by the fact that Nobel himself, shortly before the homicide when both men were stopped for a field investigation by a deputy, told the deputy that he was headed to Phoenix to possibly get a job at the Turf Paradise Race Track. (10RT 2151-2152.) As to the kicking of the dog, the dog actually existed and was seen by deputies both before and after the homicide. (10RT 2151.)

The testimonial evidence from the penalty phase thus adds more detail but little that fills the necessary gaps in the evidence already presented at the guilt phase. Even with the addition of this evidence, no rational trier of fact could conclude beyond a reasonable doubt that appellant here was convicted of a form of murder equivalent to the crime of murder as defined by California statutes. Rather, the form of murder committed by appellant very much resembles that form of murder defined in Arizona as resulting from the knowing infliction of disfigurement or serious bodily impairment, which would not, in California, constitute the crime of murder.

D.

In any event, whether or not the evidence from the penalty phase of trial provides the necessary factual predicate to qualify the special circumstance, this evidence is not available to this Court to redeem what should have been adjudicated properly at the guilt phase. The determination of whether or not a foreign conviction qualifies for a sentencing enhancement under California law, "the trier of fact may look to the entire record of conviction *but no further*." (*People* v. *Woodell* (1998)

17 Cal.4th 448, 450-451, emphasis added; *People* v. *Myers* (1993) 5 Cal.4th 1193, 1195; *People* v. *Guerrero* (1988) 44 Cal.3rd 343, 355.) The testimony of witnesses at the current trial is clearly outside the record of conviction for the prior convictions, and, under this rule of evidence, the penalty phase testimony is simply incompetent to establish the special circumstance for a prior murder conviction. But the bar against consideration of the penalty phase evidence arises from still other statutory and constitutional sources, and not just from a rule of evidence regarding the proof of prior convictions.

As stated above, California statutory law at least requires that any special circumstance be proved beyond a reasonable doubt. (§ 190.4(a).) As demonstrated, based on the evidence presented at the bifurcated proceeding in the instant case, the trial court could not rationally conclude beyond a reasonable doubt that the special circumstance predicated on the Arizona murder conviction was established. At the penalty phase of this case, the jurors were re-presented with the Arizona murder conviction as an aggravating factor. There was also testimony outlining the underlying facts of the case. The jurors were also instructed on the elements of second-degree murder, but in accord with Arizona Revised Statute 13-1104. (11RT 2353-2354.) There was no instruction in accord with California's definition of murder. Thus, the jurors made no finding, whether express or implied, that appellant's Arizona conduct came within California's definition of the crime of murder. In short, for this Court to review facts supporting a finding, there must first be a finding, and, in fact, there was none. (See *Sullivan* v. *Louisiana* (1993) 508 U.S. 275, 280-281.) Stated in other terms, the instruction in accord with the Arizona definition represents the incorrect theory for purposes of this issue, and from the general verdict of death one cannot discern the basis on which the jurors considered appellant's prior Arizona conviction, i.e., as a crime consistent or not with

California's definition of murder. (See *People* v. *Guitton* (1993) 4 Cal.4th 1116, 1125-1127.)[36]

In addition, appellant submits that the failure of proof at the time a finding is rendered constitutes a double-jeopardy bar to any further consideration of evidence under the Fifth Amendment of the United States Constitution. (*Burks* v. *United States* (1978) 477 U.S. 1, 12-18.) The claim is rooted in the premise that there is a Sixth Amendment right to a jury determination on proof beyond a reasonable doubt of any fact that renders a defendant in a capital case death-eligible. (*Ring* v. *Arizona* (2002) 536 U.S. 584, 603-609.) If Sixth Amendment protections apply to this type of fact, then there is no principled basis on which to preclude the application of Fifth Amendment protections. (*Sattazahn* v. *Pennsylvania* (2003) 537 U.S. 101, 111-112; see also *People* v. *Seel* (2004) 34 Cal.4th 535, 541.) Thus, the insufficiency of the evidence to establish the special circumstance at the guilt phase of trial vested a violation of the Fourteenth Amendment right to proof beyond a reasonable doubt (see *In re Winship* (1970) 397 U.S. 358) that cannot therefore be retried through penalty phase evidence readjudicated either by the penalty jury or by the reviewing court. (*Burks* v. *United States*, *supra*, 477 U.S. at pp. 12-18; *Sullivan* v. *Louisiana*, *supra*, 508 U.S. at pp. 280-281.)

Appellant understands that the rule in *Ring* is itself predicated on the more general principle that proof beyond a reasonable doubt is required for

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[36] There are other problems with the use of the penalty determination as a substitute for the guilt determination. Although the jurors had to find the Arizona conduct and conviction to be true beyond a reasonable doubt before either could be considered as a factor in aggravation (*People* v. *Milwee* (1998) 18 Cal.4th 96, 161, fn. 30), the jury was not required to find any one aggravating fact unanimously. (*People* v. *Brown* (2004) 33 Cal.4th 382, 402.) Further, in this case, there was, in regard to the Arizona murder and robbery, serious instructional errors, including the trial court's failure to instruct that proof beyond a reasonable doubt was required before the Arizona conduct could be considered in aggravation. All of this is discussed in the following argument.

any fact, whether or not in a capital case, required to increase the sentence beyond the statutory maximum imposed pursuant to a finding of guilt for the underlying crime, and that this constitutional rule has been held *not* to apply when the fact in question is that of a prior conviction. (*Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 489-490; *Blakely* v. *Washington* (2004) 542 U.S. 296, 301-302; *United States* v. *Booker* (2005) 543 U.S. 220, 244; see also *Monge* v. *California* (1998) 524 U.S. 721; and *Almendariz-Torres* v. *United States* (1998) 523 U.S. 224.) There are two considerations, however, that render the exception for prior convictions inapplicable here.

First, the rationale for the exception is that the fact of a conviction betokens that the conduct supporting that conviction had already been established with all the attendments of due process and fundamental fairness. (*Jones* v. *Unites States* (1999) 526 U.S. 227, 249; *Apprendi* v. *New Jersey*, *supra*, 530 U.S. at pp. 488, 496.) This rationale does not apply when the fact of conviction, to qualify as a sentencing consequence, requires a determination of the underlying conduct. When that is the case, as it is with appellant's Arizona prior, then the exception in the *Ring/Apprendi* rule for prior convictions simply does not apply. The full panoply of federal constitutional protection is required.[37]

The second reason relates to capital cases alone. In *Ring* v. *Arizona*, *supra*, 536 U.S. 584, the case in which the Court applied the *Apprendi* principle to facts that render a defendant death-eligible in a capital case, the Court noted specifically that it was not presented with the question of a

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[37] Recently, in *Shepard* v. *United States* (2005) 544 U.S. 13, 125 S.Ct. 1254, 1262-1263, the Court interpreted a federal enhancement statute as barring any extensive factual inquiry by a sentencing court into the facts underlying a prior conviction from a guilty plea. The Court noted any other reading of the statute risked violations of the Sixth and Fourteenth Amendment right to have a jury determine any fact raising a sentence beyond the statutory maximum. (*Id.*, at p. 1262-1263.) This is all but an endorsement of appellant's position, which this Court at least has recognized to be an open question (*People* v. *Epps* (2001) 25 Cal.4th 19, 29), and which is being considered in *People* v. *McGee*, S123474.

prior conviction as a death-aggravator. (*Id.* at 536 U.S. 584, 597, fn. 3.) Prior to the appearance of *Apprendi*, it was the rule that sentencing determinations were not subject to Fifth Amendment protection. (*North Carolina* v. *Pearce* (1969) 395 U.S. 711, 729.) An exception to this rule was carved out for capital sentencing determinations, which were accorded double-jeopardy protection unlike non-capital sentencing determinations. (*Bullington* v. *Missouri* (1981) 451 U.S. 430, 446; *Arizona* v. *Rumsey* (1984) 467 U.S. 203, 209-210; *Monge* v. *California*, *supra*, 524 U.S. at pp. 730-731.) Thus, prior to *Apprendi*, double jeopardy foreclosed the relitigation of any death-eligibility fact in a capital case either found untrue or found to be based on insufficient evidence, whether that fact was a prior conviction for murder or something else. It is not rational, with the appearance of *Apprendi*, that the constitutional protections surrounding capital litigation are to be diminished. When one adds the Supreme Court's refusal, in *Ring*, to sanction the exception for prior convictions, and to emphasize that this sub-issue was not before it, then the conclusion is even stronger that prior convictions, as a death-eligibility fact in a capital case, is subject to the federal constitutional protections provided by the Fifth, Sixth, and Fourteenth Amendments.

These then are two reasons why the prior conviction exception to the *Apprendi* rule does not apply here. There is yet a third reason, but it presents an institutional conundrum insofar as the United States Supreme Court has rejected it, albeit by slimmer and slimmer margins. It is that, in terms of constitutional protections, there is no principled or historical difference between a prior conviction and any other fact with sentencing consequences beyond the maximum allowed by statute. Thus, the federal constitutional requirements of proof beyond a reasonable doubt, jury trial, and double-jeopardy do apply to prior convictions that raise a sentence above the statutory maximum. The exception for prior convictions is not

tenable and ought to be rejected. (*Shepard* v. *United States*, *supra*, 125 S.Ct. 1254, 1263-1264, Thomas, J., concurring; *Apprendi* v. *New Jersey*, *supra*, 530 U.S. 466, 521, Thomas, J., concurring; *Almendarez-Torres* v. *United States*, *supra*, 523 U.S. 224, 251, Scalia, J., dissenting.)

PENALTY PHASE ISSUES

XII.
MISSTATEMENT OF THE FOUNDATIONAL REQUIREMENT FOR THE FACTOR (b) ASPECT OF THE ARIZONA MURDER AND ROBBERY, AS WELL AS FAILURE TO RELATE THE REASONABLE DOUBT STANDARD TO THIS ASPECT OF THOSE CRIMES, CONSTITUTED PREJUDICIAL ERROR AT THE PENALTY PHASE OF TRIAL

A.

If the insufficiency of the evidence of the prior murder special circumstance should have removed it from penalty consideration under Section 190.3(a), which allows the jurors to consider in aggravation the existence of any of the special circumstances, it did not remove it from consideration at the penalty phase under section 190.3(c) as simply a prior felony conviction, and under section 190.3(b) for criminal activity involving the use, or threat of use, of force or violence. For the Arizona murder and robbery were presented at the penalty phase as aggravating evidence consisting both in the fact of the prior conviction for a felony and in the facts of underlying conduct exhibiting violence.[38]

When as here the same crime falls within the purview of factor (c), as a prior felony conviction, and factor (b), as violent criminal activity, the crime has separate and distinct relevance under each factor. The factor (b)

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[38] Section 190.3 provides in relevant part: "In determining the penalty, the trier of fact shall take into account any of the following factors: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true pursuant to Section 190.1. [¶] (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence; [¶] (c) The presence or absence of any prior felony conviction."

aspect of the crime is relevant to the defendant's character and propensity for violence; the factor (c) aspect tends to show the defendant's habitual criminality and the failure to deter or rehabilitate him despite previous sanctions. (*People* v. *Melton* (1988) 44 Cal.3rd 713, 764; *People* v. *Balderas* (1985) 41 Cal.3rd 144, 201-202.) "These entirely distinct and equally relevant considerations *coexist* in a prior felony conviction which also involved a violent crime . . . [, and t]he jury is therefore entitled to evaluate such an incident for its relevance under both subdivision (b) and subdivision (c)." (*People* v. *Melton*, *supra*, p. 764, italics in original; *People* v. *Yeoman* (2003) 31 Cal.4th 93, 156-157; *People* v. *Daniels* (1991) 52 Cal.3rd 815, 880.)

The procedural protections governing the use of other crimes in aggravation at the penalty phase of a capital case is relatively well settled. Because this type of evidence can easily have an inordinate impact on the capital penalty determination, other-crimes must be proved beyond a reasonable doubt before they may be considered as evidence in aggravation of sentence; furthermore, the court must instruct the jurors *sua sponte* on this foundational rule. (*People* v. *Robertson* (1983) 33 Cal.3rd 21, 53-54; *People* v. *Yeoman*, *supra*, 31 Cal.4th 93, 132; *People* v. *McClellan* (9169) 71 Cal.2nd 793, 804-805; *People* v. *Polk* (1965) 63 Cal.2nd 443, 450-451.) More specifically, the foundation for factor (c) evidence, i.e., a prior felony conviction, is proof beyond a reasonable doubt of the fact of a prior conviction; the foundation for factor (b) evidence, i.e., violent conduct or conduct threatening violence, is proof beyond a reasonable doubt of the conduct. (*People* v. *Milwee* (1998) 18 Cal.4th 96, 161, fn. 30.) When, as here, other-crimes come within the purview factor (b) and factor (c), then the court must instruct correctly on *both* the foundational requirements appropriate to each aspect of this evidence. (*People* v. *Kaurish* (1990) 52 Cal.3rd 648, 707-708.)

This is the principle the trial court violated in the instant case. For not only did the court fail to instruct on the foundational requirement for the factor (b) aspect of the murder and robbery, the court, in a special instruction, affirmatively conveyed to the jurors the understanding that the proof of the fact of the Arizona conviction was the only requirement for consideration of the underlying conduct as evidence in aggravation. In other words, the court confounded the factor (c) foundational requirement with the factor (b) requirement.

B.

The instructions on other-crimes began appropriately enough with a description of the factor (c) foundational requirement in accord with CALJIC No. 8.86:

> "Evidence has been introduced for the purpose of showing that the defendant, Robert Allen Bacon, has been convicted of the crime of murder in the second degree and robbery prior to the offense of murder in the first degree of which he's been found guilty in this case.
>
> "Before you may consider any of the alleged crimes as aggravating circumstances in this case, you must first be satisfied beyond a reasonable doubt that the defendant Robert Allen Bacon, was in fact convicted of the prior crimes." (11RT 2553.)

However, instruction in accord with CALJIC No. 8.87, which describes the factor (b) foundational requirement, was confined by the court to the evidence of appellant's conduct in possessing a firearm when he was on parole:

> "Evidence has been introduced for the purpose of showing that the defendant, Robert A. Bacon, has committed the following criminal act, possession of a firearm, which involved the threat of force or violence. Before a juror may consider any criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Robert A. Bacon, did in fact commit the criminal act. A juror may not consider any evidence of any other criminal act as an aggravating circumstance.
>
> "It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal act occurred, that juror may consider that act as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." (11RT 2356-2357.)

This represents the first leg of the claim of error in this case. The confinement of this instruction to the conduct of possession of a firearm constituted an erroneous failure to instruct on the foundation for the factor (b) aspect of the murder and robbery. (*People* v. *Robertson*, *supra*, 33 Cal.3rd 21, 53-54; *People* v. *Kaurish*, *supra*, 52 Cal.3rd 648, 707-708.)

If it is objected that the second sentence of this instruction is sufficiently generalized to embrace the conduct underlying the convictions for murder and robbery, and that the jurors were reasonably likely to have understood the proper application of this instruction, the second leg of this claim resolves the matter conclusively against this improbable conclusion in any event. The second leg of the claim is that the jurors were told in a special instruction that the factor (c) foundation for the murder and robbery provided the warrant to consider the underlying conduct as evidence in aggravation.

This came in the form of a limiting instruction given by the Court *sua sponte* to offset, in its view, the unnecessary focus on the definitional elements of the Arizona murder and robbery, on which defense counsel

wanted the jurors instructed. (10RT 2305-2309; 11RT 2333.) The court itself was skeptical as to the relevance of the elements of the crime to any underlying conduct (10RT 2309), and even in regard to the second-degree murder and robbery, the court would not instruct on the elements without making sure that the jurors understood that their job was *not* to determine the underlying facts of those crimes. (10RT 2306; 11RT 2333.) Consequently, after instructing in accord with CALJIC No. 8.86 on the factor (c) foundational requirement as quoted above, and on the elements of Arizona murder and robbery, with some concomitant statutory definitions (11RT 2353-2356), the Court gave its own admonition as follows:

> "You have been instructed on the elements of the crime of second degree murder and robbery under Arizona law. The sole purpose of these instructions is to provide you with a better understanding of the conduct which constitutes those crimes in Arizona.
>
> "While you must first be satisfied beyond a reasonable doubt that the defendant was, in fact, convicted of those prior crimes before you may consider them as an aggravating circumstance, the People need only prove in these proceedings that the defendant was convicted of those crimes. However, to the extent evidence was introduced concerning the commission of those crimes, you may consider that evidence in determining the weigh to which you believe such circumstance is entitled." (11RT 2356.)

The Court could not have more expressly stated that the foundational requirement for factor (b) consideration is factor (c) proof. As noted, this is exactly wrong. (*People* v. *Milwee*, *supra*, 18 Cal.4th 96, 161, fn. 30.) It not only constitutes a misstatement of the law, it makes it virtually certain that the jurors did not understand that the next instruction on the factor (b) foundational requirement in accord with CALJIC No. 8.87 applied in any

manner to the Arizona murder and robbery. (See *People* v. *Young* (2005) 34 Cal.4th 1149, 1202 ["If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction."].)

One final comment may be in order before turning to the question of prejudice. The discussions regarding the appropriate instruction on other-crimes in this case renders it apparent that both the trial court and prosecutor were under the misimpression that the Arizona crimes had no independent factor (b) relevance. This was not to say that the prosecutor or the judge did not expect the jurors to use the underlying facts and circumstances of the Arizona crimes as evidence in aggravation. The prosecution, as everyone knew and expected, presented extensive testimonial evidence regarding the conduct underlying the murder and robbery, and it would have been paradoxical if not grotesque to think that this evidence was deemed irrelevant. Rather, the conception, as reflected also in the erroneous instructions, was that the facts and circumstances underlying the Arizona murder and robbery convictions were simply part and parcel of the factor (c) evidence, that the factor (c) foundation was all that was required for the jurors to consider the underlying facts as evidence in aggravation, and that this evidence had no separate or distinct factor (b) relevance.[39]

C.

In analyzing the prejudice from these instructional errors, it will be helpful to outline the opposing frames formed by the case in aggravation and that in mitigation. The case in aggravation consisted of the familiar

[39] The prosecutor's closing argument also reflected this erroneous understanding of the law, arguing that he needed only to prove the *fact* of the convictions beyond a reasonable doubt (11RT 2367-2368), but nonetheless arguing the facts underlying those convictions as evidence in aggravation. (11RT 2376-2380.)

triad of the facts and circumstances surrounding the capital murder itself (factor (a)); the factor (b) and (c) aspects of the Arizona murder and robbery, even if (b) was conceptually subsumed under (c); and the factor (b) crime of possession of a firearm. Even respondent might agree that the aggravating impact of the possession of a firearm, at least taken in itself, was negligible in this case, and that the salient points in aggravation were the capital crime, the prior conviction for murder, and the facts underlying this prior conviction for murder. In this regard, the beating suffered by Deborah Sammons in the course of the homicide was brutally inflicted. The prior conviction for murder and robbery showed the failure of deterrence and the rejection of an opportunity to rehabilitate. The facts underlying the convictions, if they showed an intent to kill, established a propensity and readiness to commit homicide; if they showed a culpable mental state other than intent to kill, such as knowledge or extreme indifference to human life, then they still established a propensity to extreme violence.

The defense case in mitigation, on the other hand, was inherently compelling. Its factual underpinnings were uncontested by the prosecutor, who granted that the defense witnesses did not lie, and who conceded that appellant's childhood was "disgusting" and "horrible." (11RT 2374.) Julie Waldrop, who received the six-month-old child into her foster care, observed an abnormally unresponsive, phlegmatic, unsmiling, and uncrying baby. (10RT 2225.) Neglect and lack of the tenderness naturally extended to new-borns in the first experiences of life was sufficient to explain this observation; further, the harshness of this introduction to the world was the expectable result of adulterous paternity (10RT 2206-2207) and of the incompetence of a young mother degraded to earning a living by means of prostitution. (10RT 2209, 2213-2214.) If the baby was not irredeemable and made progress under a warmer tutelage in Mrs. Waldrop's house

(10RT 2225-2226), this lasted only six months and at the age of one, appellant was returned to his mother Kathy Bacon. Waldrop, who was related to Kathy Bacon and who knew her, had grown attached to the baby. She made no attempt to follow his progress, "Because," as she attested, "I knew what was happening in my heart. I didn't know it for a fact, but I knew it my heart, and I couldn't stand it." (10RT 2230.)

One wonders if Mrs. Waldrop's foreboding comprehended a Bill Garlinghouse. When appellant was four-years-old, another three years of his mother's meretricious neglect gave way to Garlinghouse's violent abuse. Garlinghouse was ever keen to administer his special brand of sadistic discipline on the young boy. The supposed misbehavior of the boy was the thin patina of pretext for beatings, cigarette burns on the body, the killing of pets. Undoubtedly appellant represented to Garlinghouse just one more of life's unfair and frustrating burdens, forcing poor, struggling Bill to extend the generosity of his hearth and home to his wife's bastard. But no patina or pretext existed at all for sodomizing the boy – an act appellant revealed only once to his mother, who did nothing to protect the child. (10RT 2215-2216.)

Evidence of such monstrous abuse and emotional deprivation in the first six years of life, when the child is completely at the mercy of his caretakers, who are in a position either to guide or twist the young child's character, carries powerful mitigating force in assessing a penalty. (See *Wiggens* v. *Smith* (2003) 539 U.S. 510, 534-535.) It was a compelling counterweight to the circumstances of the capital crime, and one would have to see the prior Arizona crime as decisive in this case. It was therefore important for the defense to extenuate and mitigate these crimes as fully as possible. How would correct instruction on the factor (b) foundational requirement have aided in this endeavor?

The prosecution of course propounded appellant's underlying conduct in its worst light: "But Mr. Bacon is unable to see the world through anyone's eyes other than Mr. Bacon's and so he felt justified in beating and taking a broken beer bottle to a throat of some man because, 'He hit my dog.'" (11RT 2376.) Indeed, a juror might be forgiven for accepting this at face value when, as the instructions directed, and the prosecutor himself asserted (11RT 2367-2368), "[T]he People need only prove in these proceedings that defendant was convicted" of second-degree murder (11RT 2356), and in fact there was no reasonable doubt, or even lingering doubt of this fact.

But if the jurors were required first to check each element of the crime of Arizona murder against the facts actually proved beyond a reasonable doubt, there was indeed substantial ground to conclude that appellant had not, in fact, taken a bottle to Mr. Noble's throat, as the prosecutor put it. None of the several eyewitnesses to this daylight assault had seen any weapon in appellant's hand during this altercation. The area itself was littered with roadside debris, and a broken beer bottle was hardly out of place. A rational trier of fact could certainly conclude, or at least form a reasonable doubt, that Noble died when he fell on broken glass as a result of appellant's attack. Can the crime be seen as morally mitigated in the absence of an intent to kill? Most certainly it could.

If the jurors were required to apply proof beyond a reasonable doubt to any conduct interpretable as the knowing causation of death or serious physical injury, there were substantial grounds for relative mitigation here too. An assault with fists alone only arguably manifests a knowledge that death or even serious physical injury will ensue. Indeed, when the mitigation evidence from the defense case itself is thrown into the scale, a reasonable juror might well conclude that appellant's subjective view of what constituted serious physical injury was colored by a high tolerance

acquired at the tender age of four at the hands and feet (literally) of Bill Garlinghouse.

Finally, in regard to reckless murder, which requires proof beyond a reasonable doubt of the element of "extreme indifference to human life", any one of the jurors might well conceive a reasonable doubt. Some or all might conclude that an attack with fists simply does not manifest this extremity of indifference. Some or all might conclude that appellant, with his childhood experience, was acting with indeed more restraint than one would expect from a character warped by the abuse of Bill Garlinghouse.

In sum, under each and every form of second-degree murder set forth in the definitional elements of the Arizona statute, there was wide room to view the evidence at different levels of moral, if not legal, culpability. Where on this scale the evidence was placed was important for resolving a case in which the mitigating evidence was strong. If the prosecution was required to *prove* the most aggravated form of the commission of the crime beyond a reasonable doubt, and not just have to establish it by proving the mere fact of the conviction, then there was a reasonable possibility of a different outcome to the penalty trial, which requires reversal therefor. (*People* v. *Brown* (1988) 46 Cal.3rd 923, 965.)

One final note: although the "reasonable possibility" standard for state penalty-phase error is effectively the equivalent of the standard of review under *Chapman* v. *California* (1967) 386 U.S. 18 (*People* v. *Ashmus* (1991) 54 Cal.3rd 932, 965), it may nonetheless still be worthwhile to formulate the federal constitutional aspect of the instructional errors set forth in this argument. As noted above, the reasonable-doubt rule for other-crimes evidence was developed because of the overwhelming effect other-crimes evidence tends to have on the capital penalty determination. (*People* v. *McClellan*, *supra*, 71 Cal.2nd 793, 804-805; *People* v. *Polk*, *supra*, 63 Cal.2nd 443, 45-451.) Needless to say, evidence of prior criminal

conduct that truly rises to the level of the crime of murder has the potential for the most serious adverse impact on whether or not a not a capital defendant should die or obtain life without possibility of parole. "The requirement that each juror be convinced beyond a reasonable doubt before considering [other-crimes evidence] enhances the reliability of the sentence." (*People* v. *Yeoman*, *supra*, 31 Cal.4th 93, 134.) It follows from this, the failure to instruct on this foundational requirement, and to affirmatively misdescribe the foundational requirement as only the necessity to prove the fact of a conviction, undermines the reliability of the sentence. This, in turn, constitutes a violation of the Eighth Amendment's requirement of *heightened* reliability in a capital case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638; see also *Woodson* v. *North Carolina* (1976) 428 U.S 280, 305; *Lockett* v *Ohio* (1978) 438 U.S. 586, 604; *Zant* v. *Stevens* (1983) 462 U.S. 862,874; and *Spain* v. *Florida* (1984) 468 U.S. 447, 468, Stevens, J. concurring and dissenting.) On this record, there is at least a reasonable doubt that the instructional errors at issue here were harmless. (*Chapman* v. *California*, *supra*, 386 U.S. 18, 23-24.)

XIII.
THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURORS ON THE ELEMENTS OF ARIZONA'S VOLUNTARY MANSLAUGHTER WAS PREJUDICIAL ERROR

In addition to requesting instruction on the elements of Arizona's second-degree murder and robbery, defense counsel also wanted the court to instruction on Arizona's definition of voluntary manslaughter. (10RT 2090-2093, 2300-2302.) This was refused outright by the trial court as completely irrelevant. (10RT 2308-2309.) If the claim raised in the previous argument was not sufficient to require reversal of the penalty

determination, one must proceed to the instant claim that the trial court erred in refusing to instruct on the elements of voluntary manslaughter.

The general rule is that, on request, the trial court is obligated to instruct on the specific elements of the factor (b) and (c) crimes. (*People* v. *Davenport* (1985) 41 Cal.3rd 247, 281-282; *People* v. *Adcox* (1988) 47 Cal.3rd 207, 256.) The question presented here is does this extend to instruction on a lesser offense supported by the evidence, but not identical with the crime of conviction?

In *People* v. *Adcox*, *id.*, the prosecution requested, for a factor (c) conviction, instruction on the elements of the crime of conviction, which was shooting at an inhabited dwelling in violation of section 246. (*Adcox*, *id.*, at pp. 254-255.) The parties knew, however, that defendant had not been found guilty as the direct perpetrator, but as an aider and abettor who had driven the vehicle from which the shot was fired, but who did not himself fire the shot. (*Id.* at pp. 255-256.) This Court held that instruction only in accord with the prima facie elements of the crime, without any clarification of the lesser moral culpability involved in the actual commission, was misleading and erroneous. (*Id.*, at p. 256.) This Court formulated a rule that

> " . . . where – as here – the parties are apprised of facts concerning defendant's role in, or commission of, the prior offense, which are inconsistent with the standard instruction on the elements of such offense, an appropriate clarifying instruction should be sought, or stipulation obtained, to accurately characterize the nature of the aggravating prior felony conviction being placed before the jury." (*Ibid.*)

Although in *Adcox* there was no dispute that the defendant's liability was vicarious rather than direct, there is no cogent reason not to apply the rule

to disputed factual issues regarding at least the factor (b) aspect of other-crimes evidence. (See *People* v. *Price* (1991) 1 Cal.4th 324, 489 [suggesting that factor (b) instruction on the lesser-included offense of voluntary manslaughter should be given on request].)

In any event, the general rule governing *all* criminal determinations is that. on an appropriate request, the trial court is obligated to instruct on specific points of evidence or special theories that might be applicable to the particular case. (*People* v. *Flannel* (1979) 25 Cal.3rd 668, 680-681; *People* v. *Wade* (1959) 53 Cal.2nd 322, 334; *People* v. *Atkins* (1975) 53 Cal.App.3rd 348, 360.) *Adcox* simply clarifies that in the penalty phase of a capital case, the defendant, on request, may be entitled to instruction on legal points pertinent to a factor (b) or (c) crime that betoken or manifest some lesser degree of moral culpability for that crime. The question then becomes whether or not appellant, on the evidence, was entitled to an instruction on the elements of voluntary manslaughter.[40]

The instruction proffered by the defense set forth the pertinent definition in Arizona of voluntary manslaughter:

> "In the State of Arizona, manslaughter is a lesser crime to second degree murder. Pursuant to Arizona Revised Statutes Section 13-1103(a), a person commits manslaughter by:
>
> "(1) Recklessly causing the death of another person; or
>
> "(2) Committing second-degree murder as defined in Section 13-1104, subsection A, upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

[40] Of course, if this were a guilt trial, there would be a *sua sponte* right to instruction on the lesser-included offense of voluntary manslaughter. (*People* v. *Barton* (1995) 12 Cal.4th 186, 199-203.) The same rule applies in Arizona. (*State* v. *Valenzuela* (Ariz.1999) 984 P.2nd 12, 14-15.)

"Adequate provocation is defined in Arizona Revised States Section 13-1104 (4) as follows:

"'Adequate provocation' means conduct or circumstances sufficient to deprive a reasonable person of self-control." (SCT 1st, p. 221.)

The crime, as defined, was connected to second-degree murder in one of two ways. As a reckless homicide, it had to be committed in conscious disregard for the danger to human life (A.R.S., § 13-105(9)(c); see also 11RT 2355.) Second-degree murder requires the additional element of "extreme indifference to human life." (*State* v. *Valenzuela* (Ariz. 1999) 984 P.2nd 12, 14-15; *State* v. *Walton* (Ariz.App. 1982) 650 P.2nd 1264, 1272-1273.) As a second-degree murder committed in the heat of passion on provocation, the crime tracks the more traditional form of voluntary manslaughter, such as California's, which defines voluntary manslaughter as "the unlawful killing of a human being without malice . . . upon a sudden quarrel or heat of passion." (§ 192.) Either form could be connected to the facts of the case.

In regard to sudden-quarrel manslaughter, a trier of fact could have concluded that appellant had no intention even of pummeling John Noble until Nobel kicked appellant's pregnant dog. Whether this was sufficient to deprive a reasonable person of self-control might depend on where on the reasonableness-scale one places attachment to "man's best friend," but the matter was arguable. (See *Childs* v. *State* (Ga.App.1984) 319 S.E.2nd 459, 550-551 [whether shooting the defendant's dog was sufficient provocation to reduce murder to manslaughter was a question for the jury.].) In regard to reckless manslaughter, a trier of fact could have concluded that appellant, acting recklessly did not act with extreme indifference to life. The evidence

supported the conclusion that the cut to Noble's neck was an accident; that appellant intended only to pummel him; and that appellant, who at the tender ages of four to twelve had been the object of severe pummeling by Bill Garlinghouse, did not fully comprehend the true seriousness of Noble's injuries. Thus, the factual basis for an instruction on the Arizona elements of voluntary manslaughter was present. But was the instruction necessary?

The answer to this is yes, and it arises from the special nature of the relationship between voluntary manslaughter and murder. Voluntary manslaughter is deemed to be not so much an independent crime from murder as, for example, theft is distinct from robbery. Voluntary manslaughter is deemed to be a *mitigation* of murder, requiring the jury to make not so much a factual distinction but a *normative* distinction. (See *People* v. *Czahara* (1988) 203 Cal.App.3rd 1468, 1478 [Whether provocation is sufficient to reduce murder to manslaughter is a determination dependent on "community norms."].) This of course fits sudden-quarrel manslaughter in California (see § 192) as well as sudden-quarrel manslaughter in Arizona. It applies also to Arizona's reckless manslaughter, which requires the jurors to determine whether or not the circumstances of the homicide were attended by "extreme indifference to human life," which will be the watershed between murder and manslaughter. These indeed are the kinds of normative and moral decisions that suffuse the jury's task in the face of penalty phase evidence (see *People* v. *Cole* (2004) 33 Cal.4th 1158, 1234; *see also People* v. *Brown* (2004) 33 Cal.4th 382, 396), and the mitigation of a murder to voluntary manslaughter represents as much a reduction in moral culpability as, and more a reduction in legal culpability than, the vicarious accomplice liability in *Adcox*.

In addition, with evidence susceptible of mitigating the crime of murder to manslaughter, the jurors could not completely understand or

comprehend the elements of second-degree murder, which were given to them. In order to place "extreme indifference to human life" in a workable context, the jurors needed to know that merely reckless homicide was only the crime of manslaughter. This set a sort of parameter and would belie any tendency to interpret any and every conscious disregard for human life – the Arizona definition of recklessness in this context – as an *extreme* indifference to human life. Secondly, in sudden-quarrel manslaughter, an element of that crime *is* the commission of second-degree murder, which is then reduced to voluntary manslaughter by the affirmative presence of sudden-quarrel and heat of passion. This is similar to the structure of the relationship between murder and manslaughter in California, and in whatever state the crime of sudden-quarrel manslaughter exists, the prosecution cannot establish the crime of murder without proof beyond a reasonable doubt of the absence of manslaughter provocation. (*Mullaney* v. *Wilbur* (1975) 421 U.S. 684, 704 see also *People* v. *Breverman* (1998) 19 Cal.4th 142, 190; and CALJIC No. 8.50.) When the evidence supports a finding of sudden-quarrel and heat of passion, the jurors cannot conceptually comprehend the crime of murder without instruction on the elements constituting manslaughter.

Thus, in declining to instruct on voluntary manslaughter, the trial court abused any discretion it had in the matter. More properly, it failed to exercise *any* discretion since it found that voluntary manslaughter was simply irrelevant to this case. In either case, the failure to accede to a proper request was at least state error.

It was also federal constitutional error not only for the reasons asserted in the previous argument regarding the Eighth Amendment requirement of heightened reliability, but also for a further Eighth Amendment reason. The jury's inability to properly assess the true moral weight of the appellant's Arizona murder effectively cut appellant off from

a source of mitigating evidence and effectively precluded the jury from giving mitigating effect to relevant evidence surrounding the Arizona murder. This preclusion of mitigating evidence constituted in itself an Eighth Amendment violation. (*Buchanan* v. *Angelone* (1998) 522 U.S 269, 276; *Johnson* v. *Texas* (1993) 509 U.S. 350, 362.)

The arguments advanced in regard to prejudice in the previous argument are the same here. A strong and compelling case in mitigation from the defense based on appellant's concededly horrible childhood experiences, supported further by a significant case for lingering doubt of guilt for the capital crime, was defeated by the decisive difference of the evidence of appellant's Arizona murder. The mitigated character of that crime was obscured by mis-instruction or incomplete instruction, and there is a reasonable doubt that the instructional error was harmless. (*People* v. *Brown* (1988) 46 Cal.3rd 432, 447-448; *Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

Indeed, the instructional error here, failure to instruct on the elements of voluntary manslaughter, was even more potently prejudicial to the defense since elements of voluntary manslaughter pointed distinctly to the possibility that appellant was not merely at the lower end of moral culpability within the crime of second-degree murder, but that appellant may indeed have been outside the purview of murder altogether. The instructional error here was independently prejudicial, but in conjunction with the misrepresentation of the reasonable doubt standard and the factor (b) foundational requirement there is even less doubt that the combined errors affected the outcome of the penalty trial. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California*, *supra*, 386 U.S. at pp. 23-34.)

XIV.
APPELLANT'S PAROLE VIOLATION FOR POSSESSION OF A HANDGUN DID NOT CONSTITUTE A FACTOR (b) CRIME, AND WAS IMPROPERLY ADMITTED INTO EVIDENCE

The summary of the prosecution's case in aggravation included a rendition of the testimony of Ann Cleary, appellant's Arizona parole officer, who, on February 24, 1995, in the course of a parole search, discovered under the pillow of appellant's bed a loaded, .25 caliber Raven. (See above at pp. 23-24; see also 10RT 2186-2190.) The defense had objected to this evidence *in limine* of the penalty trial because it did not establish a factor (b) crime, i.e., a criminal act that "involved the use of force or violence or the express or implied threat to use force or violence." (§ 190.3(b).) The trial court overruled the objection: the cases established that possession of a deadly or dangerous weapon while in custody did qualify as a criminal act that impliedly threatened force or violence; parole-status was a form of custody; and the handgun, loaded and under the pillow, was at hand and ready for use. (10RT 2084-2090, 2112-2113.) The trial court erred.

This Court has recognized that possession of a weapon, even by one previously convicted of a felony, is not necessarily a factor (b) crime. (*People* v. *Jackson* (1996) 13 Cal.4th 1164, 1235; see, e.g., *People* v .*Dyer* (1988) 45 Cal.3rd 26, 76.) However, it also seems to be the rule that actual incarceration, invariably, is a circumstance that renders the knowing possession of any dangerous or deadly weapon a factor (b) crime. (*People* v. *Prieto* (2003) 30 Cal.4th 226, 268; *People* v. *Smithey* (1999) 20 Cal.4th 936, 1002; *People* v. *Tuilaepa* (1992) 4 Cal.4th 569, 588-589; *People* v. *Ramirez* (1990) 50 Cal.3rd 1158, 1186-1187; *People* v. *Grant* (1988) 45 Cal.3rd 829, 849-851.)

When the crime is committed outside of actual custody, there must be some circumstance that betokens the implied threat of violence. In *People* v. *Quartermain* (1997) 16 Cal.4th 600, the defendant had in his house several sawed-off rifles, silencers, and material and instructions for making silencers (*id.*, at p. 631); in *People* v. *Jackson*, *supra*, 13 Cal.4th 1164, the defendant obtained possession of a gun after he escaped from custody for a pending murder charge (*id.*, at p. 1235-1236); and in *People* v. *Garceau* (1993) 6 Cal.4th 140, the defendant, outside of custody, possessed illegally a machine gun, a silencer, and multiple concealable handguns. (*Id.* at p. 203.) The excess of the possession, or the character of the items, such as machine guns, sawed-off rifles, or silencers, or the desperate circumstances of the defendant himself (as in escape from custody) might turn possession into a factor (b) crime apart from actual custody; but the mere possession of a concealable firearm by a convicted felon will not. (See *People* v. *Dyer*, *supra*, 45 Cal.3rd 26, 76.)

Here appellant did not possess an arsenal. The character of the weapon itself, a simple handgun, did not suggest implied violence. Appellant was free of actual custody on a lawful basis, and was not an escapee. There was no evidence that the gun was possessed to facilitate a violent crime or any criminal act apart from the status-crime inhering in the mere possession of the gun. At most, the location of the gun under the pillow suggested night-time self-defense, when sleep renders a person particularly vulnerable to attack. The only question then is whether parole status itself was the functional equivalent of actual custody in this context.

There is no doubt that parole is constructive custody. (*People* v. *Ott* (1978) 84 Cal.App.3rd 118, 124-125.) However, it is not identical with actual custody, and it is not treated as actual custody for all purposes. (See *People* v. *Holloway* (2004) 33 Cal.4th 96, 120-121.) The reason that factor (b) embraces the possession in actual custody of even ambiguously

dangerous objects (see *People* v. *Tuilaepa*, *supra* 4 Cal.4th at p. 589 [razor blades and battery pack]) is because of security concerns, -- patent and obvious to every inmate, -- that exist in this situation. Parole is only constructive custody, in which the law *loosens* to the point that within relatively broad conditions, the parolee is like any other free citizen. The possession of a weapon by a parolee is no different in *any* regard than the possession of a weapon by a convicted felon who has successfully completed parole. The latter type of possession is not, as seen from above, in itself a factor (b) crime. It follows that without some other extraordinary circumstance, the possession by a parolee is also not a factor (b) crime. Here, there was no extraordinary circumstance, and the trial court erred in allowing this evidence.

In addition to the state law error, the use of a nonviolent crime under factor (b) constituted also a federal constitutional violation. California has determined in its capital statutory scheme that non-adjudicated conduct is relevant to the capital sentencing decision *only* when that conduct was violent or threatened violence. (*People* v. *Boyd* (1985) 38 Cal.3rd 762, 774.) In determining that criminal conduct, as a factor militating toward a verdict of death, should be limited in this way, the State has established a liberty interest, the violation of which is prohibited by the Due Process Clause of the Fourteenth Amendment. (*Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346.)

But even apart from this, there is directly an Eighth Amendment violation arising from the concomitant error in the trial court's complementary instruction to the jury that "[e]vidence has been introduced for the purpose of showing that the defendant, Robert A. Bacon, has committed the following criminal act: possession of a firearm, which involved the threat of force or violence." (11RT 2356.) The purpose of factor (b) is to establish the defendant's propensity for violence as a

consideration relevant to the selection of a sentence. (*People* v. *Yeoman* (2003) 31 Cal.4th 93, 156; *People* v. *Malone* (1988) 47 Cal.3rd 1, 46.) To tell the jurors that a nonviolent felony in fact is violent as a matter of law effectively injects an element of bias and caprice into the sentencing decision. (*Tuilaepa* v. *California* (1994) 512 U.S. 967, 973.) This erroneous inversion would seem plausible to sensibilities likely to be prejudiced against the possession of handguns by parolees or convicted felons, but it would be legally and constitutionally incorrect. Hence, the evidentiary error debouches into a violation of the Eighth Amendment.

Appellant had observed above that the evidence of possession of a firearm, taken in itself, was negligible as a factor in aggravation when compared with the prior murder and robbery. (See above, at p. 159.) But as a seamless element in the synthesized case in aggravation, it was magnified beyond its true weight by the prior murder and robbery. Appellant was not just *any* parolee or convicted felon with a loaded semiautomatic handgun under his pillow, he was on parole from a *murder* conviction. The inevitable fear was that he possessed a weapon capable of murder for purposes of murder. Given that the balance of aggravating factors, based on appellant's history of adult violence, and mitigating factors, based on the appalling abuse of his first and tender years, were in some equilibrium (see above at pp. 158-160), an additional factor on one side or the other could have possibly been decisive. This possibility is sufficient to require reversal for state error (*People* v. *Brown* (1988) 46 Cal.3rd 432, 447-448), and creates the reasonable doubt necessary for reversal for federal constitutional error. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.) Finally, this error, in combination with the other penalty phase errors argued above, created at least a combined prejudice that necessitates reversal. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman* v. *California*, *supra*, 386 U.S. at pp. 23-34.)

XV.
THE ERRONEIOUS FAILURE TO PARTIALLY SUPPRESS APPELLANT'S STATEMENT TO DETECTIVE GRATE WAS PREJUDICIAL AT THE PENALTY TRIAL

In argument II of this brief, appellant claimed that his statement to Detective Grate should have been partially suppressed due to a *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436) violation consisting either in a failure to honor appellant's invocation of his right to counsel or in actively dissuading appellant from invoking this right. If this Court agrees that the error was established, but that the prejudice was insufficient for reversal of the guilt verdict, there remains the question of prejudice to the penalty determination. The Fifth Amendment protections, including the *Miranda* rules, apply to the penalty phase of trial as well as the guilt phase. (*Estelle* v. *Smith* (1981) 451 U.S. 454, 462-463.)

As discussed above, the defense case in mitigation focused on the monstrous abuse appellant suffered in the first decade of life, first at the hands of a negligent and incompetent mother, and then at the hands of a violent, sadistic, and sexually perverted stepfather. This compelling case was indeed a strong counterweight to the case in aggravation, itself strong in the existence of a prior murder committed by appellant, and in the violence of the capital crime itself. But, as the prosecutor urged in his closing at the penalty trial, one of the more egregious aspects of the capital crime was the attitude appellant betrayed to Detective Grate during the interrogation:

> "And what was his attitude toward the murder of Deborah Sammons. It was even worse. To Detective Grate, he did not say, 'I'm sorry for what I did.' And perhaps even

> worse is that in his story to Detective Grate, his ultimate story, he indicated to Detective Grate that he hadn't actually killed this woman, but he had had this marvelously great relationship, very brief period of time, though it was, with her. He liked her. He had this attraction to her.
>
> "Even when he is lying to Detective Grate, he is still unable to project any feeling of compassion towards Deborah Sammons. He doesn't say, 'I didn't do it. But when Charlie Sammons brought me back in there, I felt so sorry for that poor woman. This is the woman that I had some feeling for, I felt bad for her, it was horrible what happened to her.'
>
> "No. What did he say? What did he say to Detective Grate? 'What did she look like?' 'I didn't want to screw her.' He was unable to show any compassion, even in his lies, he's unable to show any compassion for anyone else." (11RT 2376-2377; see also SCT 1st, p. 57.)

This argument might possibly have been made without appellant's post-request statements to Grate, but its force would be severely diminished. Moreover, the specific quote, or rather euphemized quote, "I didn't want to screw her," would not be possible at all if the statement had been properly suppressed. Thus, the statement to Grate was highly important in buttressing the aggravating force of the prosecution's penalty case. That case was weaker without the statement to Grate, and with this diminution, there is certainly a reasonable doubt on this record that appellant would have received a death verdict instead of life. The failure to suppress the statement requires at least reversal of the penalty judgment. (*Chapman* v. *California* (1967) 386 U.S. 18. 23-24.)

XVI.
ERROR IN EXCLUDING EVIDENCE CORROBORATING APPELLANT'S CLAIM OF CONSENSUAL SEX WITH MRS. SAMMONS PREJUDICED APPELLANT'S CASE FOR RESIDUAL DOUBT AT THE PENALTY TRIAL

In argument I of this brief, appellant contended that the erroneous exclusion of the note containing the name, address, and phone number for Mrs. Sammons was prejudicial error in the guilt trial. (See above, pp. 32 to 49.) But if this error is deemed insufficient for reversal of the guilt verdict, it was at least sufficient for reversal of the penalty verdict, prejudicing appellant's ability at the second phase of trial to present the mitigating defense of lingering or residual doubt.

Under California law, the jury may consider any lingering or residual doubts as to guilt as a factor in mitigation of penalty. (§ 190.3(k); *People* v. *Gray* (2005) 37 Cal.4th 168, 232; *People* v. *Hines* (1997) 15 Cal.4th 997, 1068.) As the jurors were instructed in the instant case, "Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt." (11RT 2357.) And lingering or residual doubt as to appellant's role as the perpetrator of the homicide was a live issue at the penalty trial, with the prosecutor claming that there was no lingering doubt (11RT 2379), and the defense maintaining that lingering doubt arose at least from the evidence that impeached Charles Sammons' credibility. (11RT 2395-2396.)

The note, as explained in argument I, provided significant corroboration of the otherwise problematical claim by appellant that he had had consensual sexual relations with Mrs. Sammons. The truth of such consensual relations raised a doubt about appellant's commission of the homicide, rendering more plausible the defense claim that Charles

Sammons – the man with the most compelling motive – was the perpetrator. If the error in excluding this evidence did not create a reasonable probability that of an acquittal for murder (*People* v. *Watson* (1956) 46 Cal.2nd 818, 836-837), there was at least a possibility that the augmented case in mitigation with the addition of this evidence would have induced a rejection of death. (*People* v. *Brown* (1988) 46 Cal.3rd 432, 447-448.)

XVII.
FAILURE TO GIVE JUSTICE KENNARD'S CAUTIONARY INSTRUCTION ON ACCOMPLICE TESTIMONY WAS PREJUDICIAL TO THE PENALTY DETERMINATION

In argument VII, appellant contended that the trial court erred in failing to give the requested cautionary instruction on accomplice testimony in accord with Justice Kennard's formulation in her concurring opinion in *People* v. *Guiuan* (1998) 18 Cal.4th 558. As appellant argued there, that instruction was the only one adequate to the situation presented in this case: the accomplice who purports to testify without any promise of legal benefit from the prosecution, but whose expectations are nonetheless so well-founded by the inherent demands of administering a criminal justice system as to be virtually certain of fulfillment. If this Court believes that the refusal of the requested instruction was not prejudicial at the guilt trial, it was nonetheless prejudicial at the penalty trial on the issue of lingering or residual doubt. As noted above, trial counsel invoked Sammons' lack of credibility as grounds for this form of mitigation. (11RT 2395-2396.) Placing Sammons' testimony in its proper context in a way that could not be done merely by evidence or even argument would have increased the force of doubt about appellant's guilt at least to the point of affecting the

penalty verdict, which must therefore be reversed. (*People* v. *Brown* (1988) 46 Cal.3rd 432, 447-448.)

XVIII.
CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL FOR FAILURE TO PROVIDE A MEANINGFUL DISTINCTION BETWEEN CAPITAL AND NON-CAPITAL MURDERS

In order to avoid the Eighth Amendment's proscription against cruel and unusual punishment, the death penalty law must distinguish meaningfully between "the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman* v. *Georgia* (1972) 408 U.S. 238, 313 (White, J., conc.); *accord*, *Godfrey* v. *Georgia* (1980) 446 U.S. 420, 427; *People* v. *Edlbacher* (1989) 47 Cal.3rd 983, 1023.) In California, this narrowing function is served by the "special circumstances" set forth in Section 190.2. (*People* v. *Bacigalupo* (1993) 6 Cal.4th 457, 468.) However, the number and sweep of the special circumstances listed in Section 190.2 undermine this very function and render the death penalty law in violation of the Eighth Amendment.

The category of felony-murder for a special circumstance (§ 190.2(a)(17)) includes all first degree felony-murders (§ 189), which in turn includes accidental and unforeseeable deaths, as well as acts committed in panic, under the dominion of mental breakdown, or acts committed by an accomplice. (*People* v. *Dillon* (1984) 34 Cal.3rd 441, 477.) Further, the reach of capital murder has been extended by this Court's construction of the lying-in-wait special circumstance (§ 190.2(a)(15)), which encompasses virtually all intentional murder. (See *People* v. *Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People* v. *Morales* (1989) 48 Cal.3rd 527, 557-558, 575.) When these two broad categories are conjoined to the numerous

other special circumstances listed, the statute virtually renders every murderer death-eligibile. It follows that the death penalty statute in California fails to avoid the Eighth Amendment proscription by providing a basis for narrowing the class of death-eligible murders, and is unconstitutional. (But see *People* v. *Frye* (1998) 18 Cal.4th 894, 1028-1029; *People* v. *Bacigalupo*, *supra*, 6 Cal.4th at 465-468.)

XIX.
CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL IN FAILING TO REQUIRE A FINDING THAT DEATH IS APPROPRIATE BEYOND A REASONABLE DOUBT

As repeated throughout this brief, the Eighth Amendment requires a heightened standard of reliability at both guilt and penalty phases. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) Proof beyond a reasonable doubt is of course required for the guilt determination (*In re Winship* (1970) 397 U.S. 358); proof beyond a reasonable doubt is constitutionally required to establish a special circumstance (see *Ring* v. *Arizona* (2002) 536 U.S. 584, 609; see also *Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 489); and proof beyond a reasonable doubt should be required for the determination of death as the penalty under California law for special circumstance murder. Without this standard of certainty, it cannot be said that the law has minimized the risk of a "wholly arbitrary and capricious" imposition of the death penalty. (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 189.)

The argument against this is, of course, that the penalty decision is inherently normative and moral, and thus not susceptible to the test of proof beyond a reasonable doubt. (*People* v. *Rodriguez* (1986) 42 Cal.3rd 730, 779; *People* v. *Sanchez* (1995) 12 Cal.4th 1, 81.) However, guilt determinations too sometime rest on the jury's applying normative and

moral categories, such as when it must be determined whether murder may be mitigated to voluntary manslaughter. (See *People* v. *Czahara* (1988) 203 Cal.App.3rd 1468, 1478 [Whether provocation is sufficient to reduce murder to manslaughter is a determination dependent on "community norms."].) "Beyond a reasonable doubt" represents not only a level of proof but also a level of certainty, which applies to decisions of various natures. Requiring the jurors to be certain, beyond a reasonable doubt that death is appropriate is necessary to ensure the reliability mandated by the Eighth Amendment. Failure to provide such an instruction invalidates the current death penalty statute and requires reversal of the death judgment in this case. (*Sullivan* v. *Louisiana* (1993) 508 U.S. 275, 281-282; .)

XX.
THE FEDERAL CONSTITUTION REQUIRES JURY UNANIMITY AS TO AGGRAVATING FACTORS

It has been held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown* v. *Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge* v. *California* (1998) 524 U.S. 721, 732; see also *Johnson* v. *Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments require, *a fortiori*, jury unanimity on those factors warranting the death penalty. (But see *People* v. *Taylor* (1990) 52 Cal.3rd 719, 749; *People* v. *Bolin* (1998) 18 Cal. 4th 297, 335-336.) In the instant case, the jurors were specifically instructed that "[t]here is no requirement that all jurors unanimously agree on any matter offered in aggravation or mitigation." (RT 6871-6872.) This instruction requires reversal of the death verdict. (*Sullivan* v. *Louisiana* (1993) 508 U.S. at 278-281.) In any event, given the closeness of the penalty case here, it cannot be shown beyond a reasonable doubt that the error in admonishing

against unanimity was harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23-24.)

XXI.
THE LACK OF INTERCASE PROPORTIONALITY REVIEW RENDERS THE CALIFORNIA DEATH PENALTY LAW UNCONSTITUTIONAL

The lack of proportionality review in California's death penalty scheme violates the Eighth Amendment in allowing the imposition of the death penalty in an arbitrary and capricious manner. (*Gregg* v. *Georgia*, (1976) 428 U.S. 153.) In civil cases, uniformity and reliability of monetary awards by juries are subject to modification by the judge in light of experience with compensatory awards in general. (*Consorti* v. *Armstrong World Industries, Inc.* (2nd Cir. 1995) 72 F.3rd 1003, 1009, vacated o.g. (1996) 518 U.S. 1031.) The same considerations of uniformity and fairness should apply even more strongly in his context where much more than monetary compensation is at stake, and where the Sixth, Eighth and Fourteenth Amendments bar any arbitrariness or unreliability in the determination. (But see *People* v. *Clark* (1993) 5 Cal.4th 950, 1039.) The failure of the California law to require such a review vitiates the death judgment in this case.

XXII.
COMBINED PREJUDICE OF PENALTY PHASE ERORS

If this Court concludes that the individual penalty phase errors discussed above did not generate sufficient prejudice to require reversal of the death judgment, appellant contends that the combined prejudice from the various errors did. (*People* v. *Hill* (1998) 17 Cal.4th 800, 844; *Chapman*

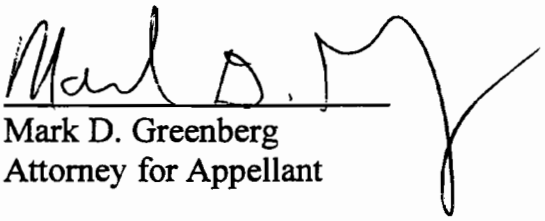
v. *California* (1967) 386 U.S. 18, 23-24; *People* v. *Brown* (1988) 46 Cal.3rd 432, 447-448.)

CONCLUSION

For any or for all the reasons set forth above, appellant's convictions must be reversed. At the very least, the judgment of sentence of death must be reversed.

Dated: April 10, 2006

Respectfully submitted,



Mark D. Greenberg
Attorney for Appellant

CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 55,617 words.

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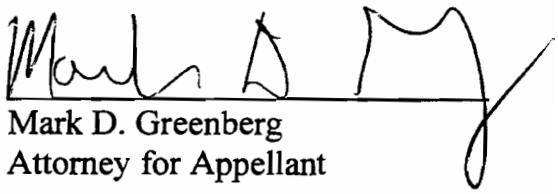

Mark D. Greenberg
Attorney for Appellant

[CCP Sec. 1013A(2)]

The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S OPENING BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on April 12, 2006, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 12, 2006 at Oakland, California.

Mark D. Greenberg
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