ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD LEE REEVES, III, — PETITIONER,
(Your Name)

vs.

THE STATE OF CALIFORNIA, — RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONALD LEE REEVES, III, CDCR# BC-1244
(Your Name)
FACILITY D, BUILDING 3, CELL# 212
CENTINELA STATE PRISON, P.O. BOX 931
(Address)

IMPERIAL, CALIFORNIA 92251
(City, State, Zip Code)
PETITIONER IN PRO PER

(Phone Number)

QUESTIONS PRESENTED

1. Whether petitioner's due process right to a fair trial was violated when he was convicted of robbery in Count 4 based upon insufficient evidence that petitioner formed the intent to steal either before or during the commission of the act of force against the victim, David Hamilton.
2. Whether petitioner's due process right to a fair trial was violated when he was convicted of robbery felony murder in Count 3 based on insufficient evidence that the fatal assault was incidental to the robbery.
3. Whether petitioner's due process right to a fair trial was violated relative to the true finding on the robbery murder special circumstance attached to Count 3, based upon insufficient evidence that the fatal assault was incidental to the robbery.
4. Whether petitioner's due process right to a fair trial was violated when he was convicted of robbery felony murder in Count 1 based upon insufficient evidence that petitioner formed the intent to steal either before or during the commission of the act of force against the victim, Bobby Johnson.
5. Whether petitioner's due process right to a fair trial was violated relative to the true finding on the robbery murder special circumstance attached to Count 1, based upon insufficient evidence that the fatal assault was incidental to the robbery.
6. Whether petitioner's two indeterminate sentences of life in prison without parole constitutes cruel and unusual punishment under the state and

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

THE PARTIES TO THE PROCEEDINGS IN THE CALIFORNIA COURT OF APPEAL INCLUDED THE STATE OF CALIFORNIA AND PETITIONER, DONALD LEE REEVES, III. THERE ARE NO PARTIES TO THE PROCEEDINGS OTHER THAN THOSE NAMED IN THE PETITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the CALIFORNIA SUPREME court appears at Appendix "B" to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was N/A.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from state courts:

The date on which the highest state court decided my case was JUNE 27, 2018. A copy of that decision appears at Appendix "B".

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(DUE TO VOLUMINOUS FACTS PLEASE SEE ATTACHED BRIEF)

STATEMENT OF THE CASE

(DUE TO VOLUMINOUS FACTS PLEASE ATTACHED BRIEF)

REASONS FOR GRANTING THE PETITION

(DUE TO VOLUMINOUS FACTS PLEASE SEE ATTACHED BRIEF)

CONCLUSION

(DUE TO VOLUMINOUS FACTS PLEASE SEE ATTACHED BRIEF)

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Date: _____

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD LEE REEVES, III,
PETITIONER,

V.

THE STATE OF CALIFORNIA
RESPONDENT.

==========

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA, FOURTH APPELLATE DISTRICT

==========

DONALD LEE REEVES, III
CDCR# BC-1244 (D3-212)
CENTINELA STATE PRISON
P.O. BOX 931
IMPERIAL, CA 92251

PETITIONER IN PRO PER

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD LEE REEVES, III
PETITIONER,

V.

THE STATE OF CALIFORNIA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

THE PETITIONER, DONALD LEE REEVES, III, RESPECTFULLY PETITIONS THIS COURT FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT, FILED ON MARCH 28, 2018.

OPINIONS BELOW

THE UNPUBLISHED OPINION OF THE COURT OF APPEAL IS ATTACHED AS APPENDIX "A". THE CALIFORNIA SUPREME COURT'S DENIAL OF PETITIONER'S PETITION FOR DISCRETIONARY REVIEW IS ATTACHED AS APPENDIX "B".

JURISDICTION

PETITIONER PETITIONS THIS COURT PURSUANT TO **28 U.S.C. §1257(a)**[1]. A JUDGMENT OF THE COURT OF APPEAL OF THE CALIFORNIA, AFFIRMING PETITIONER'S CONVICTION ON 03/28/18. THE CALIFORNIA SUPREME COURT DENIED DISCRETIONARY REVIEW OF THAT DECISION ON 06/27/18. THIS PETITION IS BEING FILED WITHIN THE 90 DAYS OF THE DUE DATE. (RULE 13.1)

PETITIONER INVOKES THE JURISDICTION OF THIS COURT UNDER **28 U.S.C. §1257** ON THE GROUND THAT HIS RIGHTS UNDER THE 5TH, 8TH AND 14TH AMENDMENT TO THE U.S. CONSTITUTION WERE VIOLATED.

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[1] ALL FURTHER STATUTORY REFERENCES ARE TO THE PENAL CODE UNLESS OTHERWISE SPECIFIED.

INTRODUCTION

In the early morning hours of October 31, 2014, three homeless men were robbed and assaulted in separate incidents in downtown San Diego. One of the victims sustained relatively minor injuries, another victim died a month and half after the assault, and the third victim died three months after he was assaulted.

Appellant, who was in the area of the assaults, matched the description of the assailant and was arrested and interviewed by law enforcement that morning. He cooperated, waived his Miranda rights, and agreed to be interviewed but did not have any memory of the incidents.

At trial, appellant did not dispute the evidence of his involvement in the assaults on the victims but argued that the assault on one of the victims was not a substantial cause of his death three months later. He also provided evidence at trial that the assaults occurred while he was in a drug and alcohol induced psychosis and he did not intend to rob or harm anyone.

Following a bench trial, appellant was convicted, *inter alia,* of two counts of first degree felony murder, based upon the theory that the killings occurred in the commission of robberies. Special circumstances (murder in the commission of a robbery and multiple murders), alleged as to both counts, were also found true. He was sentenced to consecutive terms of life in prison without the possibility of parole on both counts. Convictions on other counts were either stayed or imposed concurrently.

In this case, where the evidence points to assaults with no intent to kill and merely incidental takings of property, the prosecutor did not meet his burden of proof on the robbery / felony-murder convictions relative to both homicide victims. The evidence also fails to support the robbery conviction in count 4.

Because the theft of property of the homicide victims was incidental to the fatal assaults, the special circumstance allegations that the victims were murdered during the commission of robberies must also be vacated.

Finally, the consecutive sentences of life in prison without the possibility of parole violate the state and federal constitutional prohibitions against cruel and /or unusual punishment because those sentences are disproportionate to appellant's individual culpability.

STATEMENT OF THE CASE

On February 19, 2016, the San Diego County District Attorney filed a nine count consolidated information charging appellant DONALD LEE REEVES, III, with the following: two counts of murder [Pen. Code, sec. 187, subd. (a), counts 1 and 3]; three counts of robbery [Pen. Code, sec. 211, counts 2, 4 and 5];[2] two counts of assault by means likely to produce great bodily injury [Pen. Code, sec. 246, subd. (a), counts 6 and 7]; receiving stolen property [Pen. Code, sec. 496, subd. (a), count 8] and misdemeanor possession of a controlled substance [Health & Saf. Code, sec. 11377, subd. (a), count 9]. (APPENDIX "C") (1 CT 32-36.)

As to counts 1 and 3, the amended information alleged the special circumstance of multiple murders [Pen. Code, sec. 190.2, subd. (a)(3)] and that the murders were committed during a robbery [Pen. Code, sec. 190.2, subd. (a)(17).] (APPENDIX "C") (1 CT 33-34.) Great bodily injury enhancements were alleged as to counts 2, 5, 6, and 7 [Pen. Code, secs. 12022.7, subd. (a), 1192.7, subd. (c)(8)] and, as to count 2, only, a great bodily injury enhancement was also alleged pursuant to Penal Code section 12022.7, subdivision (b) [victim became comatose due to brain injury.] (APPENDIX "C") (1 CT 34-35.)

A court trial commenced on October 17, 2016 and on October 27th appellant was convicted on counts one through seven and count nine. (APPPENDIX"N") (11 RT

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[2] The amended information originally charged appellant in count 4 with attempted robbery but that count was amended by interlineation on October 26, 2016 to charge the offense of robbery. (10 RT 2063; 1 CT 32; 2 CT 394.) (APPENDIX "M"; APPENDIX"C"; APPDX."D")

(APPENDIX "N"; APPENDIX "D")
2117-2127; 2 CT 378, 396.) The court found appellant not guilty of the offense charged in count eight. (APPENDIX "N"; APPENDIX "D")
(11 RT 2117; 2 CT 396.) The court found both special circumstance allegations true as to counts one and three and found true all great bodily injury enhancements alleged in counts two, five, six and seven. (APPENDIX "D")
(2 CT 396.)

On January 10, 2017, appellant was sentenced on counts one and three to two indeterminate consecutive terms of life in prison without the possibility of parole. The sentences on the remaining counts were either stayed or imposed concurrently. The details of the sentence are as follows:

Indeterminate Sentences

Counts 1 and 3 – life without parole on each count; sentence on count 3 consecutive to count 1.

Determinate Sentences

Counts 2, 4, 6 & 7 -- mid term of 3 years on each substantive count, plus 3 years on counts 2, 6 & 7 for the great bodily injury enhancements; all sentences stayed;

Count 5 -- concurrent term of 3 years, plus concurrent 3 years for great bodily injury enhancement;

Count 9 -- current sentence of 180 days.

(APPENDIX "O"; APPENDIX "D")
(13 RT 2437-2440; 2 CT 400-401.)

Appellant filed a timely notice of appeal on January 10, 2017. (APPENDIX "D")
(2 CT 339-

340.)

STATEMENT OF FACTS

Prosecution's Evidence

Some time after midnight on October 31, 2014, appellant, who was twenty-two years old at the time, went to the SRO Lounge, a gay bar, located at 1807 Fifth Avenue in San Diego. (4 RT 870-871.) (APPENDIX "G") He met forty-eight year old Roberic Brooks there and purchased methamphetamine from him for twenty dollars. (4 RT 736, 748-750, 765.) (APPENDIX "G") The two men left the bar together when it closed at around 2:00 a.m. to look for more drugs. (4 RT 753-754.) (APPENDIX "G")

Shortly after leaving the bar, appellant assaulted Brooks, knocking him unconscious. (4 RT 737, 739-741, 754-756.) (APPENDIX "G") When Brooks regained consciousness, he saw appellant assault another homeless male, later identified as David Hamilton, near a church across the street. (4 RT 766-769.) (APPENDIX "G") Hamilton died three months after the assault. (6 RT 1468-1469.) (APPENDIX "I")

Later that same morning, another homeless male, Bobby Johnson, was assaulted while sleeping outside a senior center located at 1525 Fifth Avenue in San Diego. (4 RT 722-723, 725, 810, 882-883, 878.) (APPENDIX "G") Johnson died a month and a half after he was assaulted. (6 RT 1467.) (APPENDIX "I")

Events Preceeding the Assaults on David Hamilton and Bobby Johnson

Roberic Brooks testified, under a grant of immunity, about his encounter with appellant in the early morning on October 31, 2014. (4 RT 780-781.) (APPENDIX "G") Brooks

met appellant for the first time at the SRO Lounge that morning and he admitted he sold methamphetamine to appellant at the bar. (4 RT 748-750, 765, 776.) (APPENDIX "G") Appellant told Brooks he snorted the drugs Brooks sold him but Brooks didn't observe that. (4 RT 750.) (APPENDIX "G") Later, appellant said he lost the drugs and wanted his money back. (4 RT 754-755.) (APPENDIX "G")

Brooks didn't see appellant drink alcohol at the bar and did not smell alcohol on his breath. (4 RT 750-751.) (APPENDIX "G") Appellant did not appear to be under the influence of drugs or alcohol when he was at the bar. (4 RT 750-752.) (APPENDIX "G") However, Brooks admitted he was intoxicated and high that night. He said he probably drank about six beers and used methamphetamine the previous night and throughout the day preceding the assault. (4 RT 755-757, 778.) (APPENDIX "G") He last smoked about a gram of meth within 30 to 45 minutes of the assault and was high at that time. (4 RT 758, 778.) (APPENDIX "G") He used meth daily in the months preceding the assault. (4 RT 757-758.) (APPENDIX "G")

Brooks testified that he and appellant left the bar together when it closed because appellant said he lost the drugs Brooks sold him and they were "looking for the drugs" appellant lost and they were also going to get more drugs.[3] (4 RT 754.) (APPDX."G") According to Brooks, when they first left the bar, appellant argued with some people in a vehicle parked next to the bar and he was "ready to fight." (4

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[3] Brooks' testimony on this points appears inconsistent with his prior testimony that appellant told him that he snorted the drugs Brooks sold him. (4 RT 750.) (APPENDIX "G")

(APPENDIX "G")
RT 753, 776-777.) At that point Brooks thought something was wrong with appellant mentally or he was intoxicated because he was arguing with the people outside the bar for no apparent reason. (4 RT 753, 788.)

While his testimony is not entirely clear on this point, it appears from Brooks' testimony that after he and appellant left the bar, appellant told Brooks that he lost the drugs Brooks sold him and he needed his twenty dollars back. (4 RT 753, 755.) Brooks told appellant that he would get more drugs and, as they walked around the corner, south of Fifth Street, appellant assaulted him with a bar, knocking him unconscious. (4 RT 737-741, 754-756.) On the day of the incident, Brooks told an officer that he was "coldcocked or punched and rendered unconscious." (5 RT 1222, 1225.) The officer only recalled Brooks saying he was hit with a fist not a metal pipe or other weapon. (5 RT 1242-1243.)

When Brooks regained consciousness, his wallet was out of his pocket and the contents were scattered in bushes nearby. (4 RT 742.) Two EBT ("Electronic Benefit Transfer") cards[4] were missing from his wallet after the assault. (4 RT 774.) Brooks also saw two people standing and "fist-fighting each other" near a church across the street and he saw appellant hit a man on the head with something that looked like a bar. (4 RT 766-769.) Brooks told Officer Jared Thompson, on the morning of the incident, that when he regained consciousness,

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[4] Brooks explained that one card was for cash and the other was for food stamps. (4 RT 800.)

he saw "several individuals across the street in the alcove by the Presbyterian church battering an unknown person." (5 RT 1227, 1242.) (APPENDIX "H")

Brooks witnessed the fight for about two minutes and then lost consciousness again but woke up when he heard a fire truck drive by, which he flagged down. (4 RT 770, 793.) (APPENDIX "G") He was then transported to the hospital where he received stitches for an injury to his eye. (4 RT 7770, 42-743.) (APPENDIX "G")

Two surveillance videos from the SRO Lounge were played at trial and Brooks identified appellant in the videos as the individual who assaulted him on October 31st. (4 RT 760-764, 813; 5 RT 1215-1218; Court's Exhibit 2.) (APPENDIX "G"; APPENDIX "H")

Brooks admitted prior convictions for petty theft with a prior, burglary, and domestic violence, in addition to numerous arrests for being under the influence of drugs. (4 RT 782-784.) (APPENDIX "G") He also admitted he was homeless on October 31, 2014 and was abusing methamphetamine and alcohol during that time. (4 RT 786.) (APPDX."G") He voluntarily provided samples of DNA to the police and gave them his shoes and other articles of clothing he wore on the morning of the assaults. (5 RT 1229-1232.) (APPENDIX "H")

Assaults on Roberic Brooks and David Hamilton

At about 4:30 a.m. on October 31st, Officer Jason Zdunich was dispatched to a reported battery of an individual in the area of the 1700 block of Fourth Avenue in San Diego. (Preliminary Hearing Transcript ("1PHT") on May 18, 2015

(APPENDIX"E")
@ 32-33.)[5] Officer Zdunich spoke with Roberic Brooks who sustained injuries the officer considered to be consistent with a "misdemeanor battery." (APPENDIX "E") (1PHT 34, 36.) Brooks had two abrasions above his right eye and the skin under his left eye was swollen and bruised. (APPENDIX "E") (1PHT 36.) Brooks did not want to file criminal charges but only wanted to go to the hospital.[6] (APPENDIX "E") (1PHT 34, 37.) Paramedics arrived and transported Books to Scripps Mercy Hospital where he was treated for his injuries. (APPENDIX "E"; APPENDIX "H") (1PHT 34-35, 37; 5 RT 1220.)

At about 5:15 a.m. that same morning, David Hamilton approached Officer Zdunich and his partner who were standing in the same area where they contacted Roberic Brooks. (APPENDIX "E") (1PHT 37.) Hamilton's face was bleeding and severely swollen. (Preliminary Hearing Transcript on December 14, 2015 ("2PHT") (APPENDIX "F") @ 118-119.) Both of his eyes were almost swollen shut. (APPENDIX "E") (1PHT 38, 41.) Hamilton asked to go to UCSD Medical Center and told the officer he had been robbed by a black male in his 30s. (APPENDIX "E") (1PHT 38, 40.)

Hamilton's injuries consisted of fractures to his jaw, both sides of his nose,

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[5] The parties stipulated to the unavailability of Officer Zdunich at trial and that the court could consider his testimony from the preliminary hearings held on May 18, 2015 and December 14, 2015. (4 RT 715-718.) The officer's testimony from the December 14th preliminary hearing (APPENDIX "G") is consistent with his testimony from the May 18th hearing and is only cited in the statement of facts where it adds to or clarifies his prior testimony.

[6] The officer explained to Brooks that a police report is required to support a prosecution in the case of a misdemeanor offense not committed in the officer's presence but Brooks did not want a police report prepared. (1PHT 36-37.) (APPENDIX "E")

top and bottom of the maxillary sinus, the orbits or bone cavities around the eyes, the cheekbone and rib.[7] He also had two different types of brain bleeds (a small subdural hematoma and some subarachnoid hemorrhage) and dissection of the left common carotid artery. (1PHT 38; 4 RT 839, 841-842; 6 RT 1472, 1487-1489; 8 RT 1854.) His face was bruised and swollen and he had difficulty opening his eyes. (6 RT 1488.) Jaw surgery was preformed at the hospital but Hamilton did not need brain surgery and the brain bleeds resolved on their own. (6 RT 1514; 9 RT 1910-1911.)

(APPENDIX"E"; APPENDIX "G"; APPENDIX "I")

(APPENDIX "I")

(APPENDIX "I"; APPENDIX "L")

Hamilton was interviewed on four separate occasions, by different officers, while he was in the hospital. (4 RT 820, 859; 5 RT 1234-1235.) Officer Victor Calderson interviewed Hamilton in the intensive care unit of the hospital at about 6:00 a.m. on the morning of the assault. Hamilton told the officer he was sleeping on a bench on the west side of the church when he awoke to someone punching him in the face with his fists. (5 RT 1297-1299, 1305.) Hamilton was homeless at the time. (6 RT 1476.) As the assailant punched Hamilton, he said, "Give me all your money or I'll kill you." (5 RT 1298-1299.) Hamilton showed the assailant his wallet which had no money and the assailant threw it back and continued the assault. (5 RT 1298-1299.) Hamilton passed out from the assault and fell off the bench where he was sleeping. (5 RT 1297-1298.) The assault continued as

(APPENDIX "G"; APPENDIX "H")

(APPENDIX "H")

(APPENDIX "I")

(APPENDIX "H")

(APPENDIX "H")

(APPENDIX "H")

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[7] It was not determined whether the rib fracture occurred during the assault on October 31, 2014. (9 RT 1884.)

(APPENDIX "L")

Hamilton awoke a second time. (APPENDIX "H" 5 RT 1302.) He described the assailant as a tall, dark-skinned black male in his 20s or 30s, possibly older, with "kind of spiky dark or gray hair." (APPENDIX "H" 5 RT 1299, 1304, 1307.) The assailant kicked over Hamilton's black shopping cart and grabbed some clothes from the cart. (APPENDIX "H" 5 RT 1300-1301.)

Officer Jared Thompson interviewed Hamilton at about 8:50 a.m. that same morning. Hamilton was lethargic and lapsing in and out of consciousness during the interview, which was brief. (APPENDIX "H" 5 RT 1235, 1237.) Hamilton said he was attacked by a tall, thin black male who kicked and punched him and stole his shopping cart. (APPENDIX "H" 5 RT 1238-1239.) He also said an Hispanic male was present during the assault but that individual did not hurt him. (APPENDIX "H" 5 RT 1238-1239.)

Detective Jesus Sanchez interviewed Hamilton on November 1st and 4th. On November 1st, Hamilton said a shopping cart and sweatshirt were taken from him after the assault. (APPENDIX "G" 4 RT 822-823.) Hamilton repeated that the assailant was a black male in his 30s and further described him as six feet tall, with a slender build and curly hair and the assailant was not wearing a hat.[8] (APPENDIX "G" 4 RT 857.) He also repeated that the assailant was accompanied by a Hispanic male but only the black male assaulted and robbed Hamilton. (APPENDIX "G" 4 RT 837.) The assailant told Hamilton that he was sleeping in the assailant's spot. (APPENDIX "G" 4 RT 857.) He then hit

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[8] Video footage showed appellant wearing a cap at the SRO Lounge and other evidence showed he wore a cap at the time of his arrest. (APPENDIX "G" 4 RT 760-761, 891.)

Hamilton in the face ten times with both hands and Hamilton blacked out. (4 RT 857, 860.) (APPENDIX "G") When Hamilton regained consciousness, his cart was missing. (4 RT 858, 860.) (APPENDIX "G") Hamilton identified Roberic Brooks in a photographic lineup as similar in appearance to his assailant.[9] (4 RT 858.) (APPENDIX "G")

On November 4th, Hamilton said the black male who assaulted him had a scrawny beard and a mustache and the assailant said he wanted Hamilton's cart and hoodie. (4 RT 865-866.) (APPENDIX "G") Hamilton also reported that a second male who was tall and wore dark pants, walked up as the black male was beating him. (4 RT 865-866, 868.) (APPENDIX "G")

November 10, 2014, Hamilton was transferred from UCSD Medical Center to Bella Vista Health Center, a skilled nursing facility where he remained until January 22, 2015. (6 RT 1472.) (APPENDIX "I") On January 22nd, he moved to Fraternity House in Escondido, which is an independent living facility and a transitional home for people with HIV. (6 RT 1477; 9 RT 1912.) (APPENDIX "I"; APPENDIX "L") On January 26, 2015, he was admitted to Palomar Medical Center and he died there on February 3, 2015. (6 RT 1468-1469, 1482-1483.) (APPENDIX "I") He was admitted to the hospital because of shortness of breath, fever, and drop in blood pressure. (6 RT 1483.) (APPENDIX "I") He also developed bilateral pneumonia, became septic (blood infection), and contracted influenza A and M.R.S.A. (methicillin-resistant staphylococcus aureua). (6 RT 1484.) (APPENDIX "I") He also

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[9] Hamilton described his assailant as having curly hair while Brooks was bald at the time of the assault. (4 RT 859-860.) (APPENDIX "G")

became ventilator dependent, had to be intubated, and he developed multiple organ failure. (APPENDIX "I") (6 RT 1484.) He was 68 years old when he died and had been HIV positive for at least 12 years prior to his death. (APPENDIX "I") (6 RT 1511.)

Dr. Gregory Hirsch, at Palomar Medical Center, certified Hamilton's death on February 26, 2015, as multi-system organ failure due to septic shock and influenza A with HIV as a contributing factor. (APPENDIX "I"; APPENDIX "J") (6 RT 1527; 7 RT 1544.)

An autopsy was performed at UCSD Medical Center on February 6, 2015. (APPENDIX "I") (6 RT 1494-1495.) The autopsy was conducted by Dr. Phoutthasone Thirakul, a pathology resident at the time, and Dr. Mark Valasek, a supervising pathologist at the hospital. (APPENDIX "I"; APPENDIX "L") (6 RT 1495; 9 RT 1874.) Based upon his findings during the autopsy, Dr. Valasek concluded Hamilton died of natural causes. (APPENDIX "K") (8 RT 1782-1783.)

Assault on Bobby Johnson

At about 3:13 a.m. on October 31, 2014, 65-year-old Bobby Johnson, a homeless transient, was assaulted as he slept on the sidewalk near the senior center on Fifth Avenue in San Diego.[10] (APPENDIX "G"; APPENDIX "I") (4 RT 722-723, 725, 878, 880, 882-883; 6 RT 1512.) Another homeless transient, Gregory Rivers, was sleeping in the same area about ten feet away from Johnson that night and witnessed the assault. (APPENDIX "G") (4 RT 721-722, 725.) Rivers had known Johnson for ten or twelve years

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[10] The assault on Johnson occurred at 400 Beech Street. (APPENDIX"G") (4 RT 810.)

and considered him a friend. (4 RT 720.) (APPENDIX "G") Rivers woke up and saw a male kicking Johnson in the head twice, remove a couple items from Johnson's cart, and then kick Johnson again. (4 RT 725.) (APPENDIX "G") The suspect then turned to Rivers and said something to the effect of "you [sic] lucky it wasn't you because I don't play." (4 RT 725-726.) (APPENDIX "G")

Rivers described the suspect as a 25-year-old male, wearing shorts and black boots and had a black cart with clothing.[11] (4 RT 727, 732.) (APPENDIX "G") Rivers did not get a good look at the suspect's face and could not identify him. (4 RT 727.) (APPENDIX "G")

After the assailant walked away, Rivers checked on Johnson who was unconscious and badly injured. (4 RT 728; 6 RT 1368-1369.) (APPENDIX "G"; APPENDIX "I") Rivers called 911 and reported the assault. (4 RT 729, 731.) (APPENDIX "G") A recording of the 911 call, made at 3:30 a.m. on October 31st, was played at trial. (4 RT 730-731; Exhibit 1 – CD recording of 911 call; Exhibit 1A – transcript of 911 call.) (APPENDIX "G"; APPENDIX "P")

Johnson was transported to UCSD Medical Center where he was treated for his injuries which included a left orbital fracture, swelling of the face, rib fractures, and hemorrhaging surrounding the brain. (4 RT 839; 5 RT 1315; 6 RT 1457.) (APPENDIX "G"; APPDX. "H"; APPDX. "I") He underwent brain surgery two days after the assault but never regained consciousness after the assault. (6 RT 1457-1458.) (APPENDIX "I") He remained in the hospital for an extended period of time and was later transferred to a nursing facility

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[11] Photographs of appellant at the time of his arrest show he was wearing denim blue jeans and red Nike athletic shoes with blue laces. (4 RT 832-833.) (APPENDIX "G")

where he died on December 15, 2014. (APPENDIX "I") (6 RT 1461, 1667.)

A video recording of the assault on Johnson was recovered by the police from the senior center. (APPENDIX "G"; APPENDIX "H") (4 RT 812, 880; 5 RT 1211-1213; Courts Exhibit 3.) Ricardo Viramontes, a security officer at the senior center, viewed the video and described it as follows: The assault on Johnson was recorded at 3:13 a.m. on October 31, 2014 and the video shows a male suspect approaching a homeless man sleeping next to a building. The suspect kicks the homeless person multiple times in the face and body and then takes personal property from the victim, and places it in a cart. The suspect kicks the victim again and spits on him twice before he walks east on Beech Street. (APPENDIX "G") (4 RT 883, 885.)

Detective Sanchez identified appellant at trial as the individual shown in the video kicking Johnson. (APPENDIX "G") (4 RT 812-813.)

Appellant's Arrest and Interrogation

At about 3:30 a.m. on October 31, 2014, San Diego Police Officer Freddie Thornton was dispatched to a fight in the area of Fourth and Ash Streets in San Diego. (APPENDIX "G") (4 RT 888.) The suspect was described as a muscular white male pushing a cart, six feet tall, wearing a T-shirt and dark colored jeans. (APPENDIX"G") (4 RT 888-889.)

Shortly after he received the dispatch, Officer Thornton detained appellant, who matched the description of the suspect, as he was pushing a black cart in the area of Sixth Avenue and A Street. (APPENDIX "G") (4 RT 811, 889, 892.)

Officer John Denny responded to the scene where appellant was being detained and he described appellant as wearing a blue T-shirt, jeans, and brown leather Vans brand shoes with blue shoelaces. (APPENDIX "H") (5 RT 1271.)

Appellant had blood spatter on the front of his right tennis shoe and blood on his sock. (APPENDIX "G"; APPENDIX "H") (4 RT 828, 830, 890; 5 RT 1280, 1284.) His fingers were also swollen and he had bruising and small abrasions on his kunckles. (APPENDIX "G"; APPENDIX "H") (4 RT 829; 5 RT 1279-1280.) Appellant's mouth and right shoe were swabbed for DNA and his clothing, shoes and hat were collected at the time of his arrest. (APPENDIX "H") (5 RT 1281, 1289.)

At about 3:30, Officer Jason Aguilar arrested appellant for assault with a deadly weapon and robbery of Johnson and advised him of his Miranda rights. (5 RT 1325.) (APPENDIX "H") A small baggy containing .03 grams of methamphetamine was seized from appellant's wallet at the time of his arrest. (APPENDIX "H"; APPENDIX "I") (5 RT 1327; 6 RT 1364-1365.) Appellant appeared to Officers Thornton, Denny, and Aguilar to be under the influence of drugs or alcohol or both at the time of his detention and arrest. (4 RT 895-897; 5 RT 1274, 1322-1323.) (APPDX. "G"; APPENDIX "H")

EBT cards belonging to Roberic Brooks were found in appellant's possession when he was detained and a black jacket with Johnson's bible in the pocket was found in the cart appellant was pushing.[12] (APPENDIX "G"; APPENDIX "H") (4 RT 826, 831; 5 RT 1325;

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[12] The parties stipulated that Brooks' EBT cards were found in appellant's possession at the time of his arrest. (6 RT 1363-1364.) (APPENDIX "I")

(APPENDIX "I")
6 RT 1370.) A pair of lavender pants, a T-shirt, and a tan hat were also found in the cart. (APPENDIX "I") (6 RT 1374-1375.)

Detective Jesus Sanchez interviewed appellant at the police station at 7:00 a.m. on October 31st. (APPENDIX "G") (4 RT 814, 833.) In that interview, appellant told the detective that he had two beers at a bar that morning and snorted some methamphetamine he bought from a black male at the bar. (APPENDIX "K") (8 RT 1743-1744.) He did not tell the detective he consumed 17 beers and snored several lines of methamphetamine in the hours preceding the assaults or that he was hallucinating earlier that morning. (APPENDIX "K") (8 RT 1743-1745.) According to the detective, appellant did not appear to be intoxicated or under the influence of drugs during the interview.[13] (APPENDIX "K") (8 RT 1747.) Appellant cried uncontrollably but answered the detective's questions and his speech was not slurred. (APPENDIX "K") (8 RT 1747.) Sanchez was not present when appellant was detained earlier that morning. (APPENDIX "K") (8 RT 1753-1754.)

A video recording of the interview was played at trial (Exhibit 88) and a transcript of the interview was received in evidence as Exhibit 88A. (APPENDIX "L") (9 RT 1975-1976, 2036.)

DNA Evidence

DNA in apparent blood stains on appellant's jeans and in several locations

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[13] The police did not take blood and urine samples from appellant at the time of his arrest which is a common practice in homicide cases. (8 RT 1750-1751.) Sanchez admitted that appellant's blood should have been tested. (APPENDIX "K") (8 RT 1755.) (APPENDIX "K")

on his shoes matched Hamilton's DNA in some locations and in other locations, where there were multiple sources of DNA, Hamilton's DNA was the predominate DNA profile. (6 RT 1393, 1406-1410, 1413.) (APPENDIX "I") Hamilton was also included as the possible source of major DNA types in other locations on appellant's shoes and on appellant's fist. (6 RT 1409-1410, 1414.) (APPENDIX "I")

Brooks' DNA matched DNA evidence on appellant's right shoe and matched the dominate DNA profile from the left shoe. (6 RT 1407, 1414.) (APPENDIX "I") Brooks and Hamilton were also included as possible major contributors to DNA in other areas on the shoes. (6 RT 1410-1411.) (APPENDIX "I")

Hamilton's DNA was also found in blood swabs collected from various areas at the scene of the assault and from a wadded ball of tissues collected from a trash can in the same area. (6 RT 1415-1418, 1436-1438.) (APPENDIX "I") Appellant was included as a three percent contributor to the DNA on the tissues. (6 RT 1418.) (APPENDIX "I") There was also strong support for including Hamilton as the major contributor to DNA in three locations on the purple pants found in the cart appellant was pushing at the time of his arrest. (6 RT 1420-1423, 1430-1434.) (APPENDIX "I")

Medical Evidence and Opinion Testimony

Two medical experts testified for the prosecution. Dr. Othon Mena, a deputy medical examiner for the County of San Diego, performed the autopsy on Bobby Johnson and he opined about the manner and cause of Johnson's death. (6 RT 1454, 1467.) (APPENDIX "I") He also conducted a medical-legal examination (record

review) of Hamilton's death and opined about the manner and cause of his death. (6 RT 1468, 1485-1486.) (APPENDIX "I")

Dr. Phoutthasone Thirakul was the resident assistant who performed the autopsy on Hamilton, under the supervision of Dr. Mark Valasek. She also conducted "a medical-legal examination review of records" relating to Hamilton's death. (9 RT 1880.) (APPENDIX "L") She opined about the cause of Hamilton's death.

Dr. Mena

Dr. Mena opined that Johnson died of complications from blunt force head trauma he sustained in the assault on October 31, 2014 and the manner of death was homicide. (6 RT 1467.) (APPENDIX "I")

Mena opined that Hamilton died from complications of remote blunt force head trauma with the contributing condition of immunodeficiency virus or HIV. (6 RT 1485, 1490, 1494, 1508-1509.) (APPENDIX "I") Mena opined the assault on October 31, 2014, was a substantial factor contributing to Hamilton's death and he concluded the manner of death was homicide from the assault. (6 RT 1486, 1490, 1494, 1508-1509.) (APPENDIX "I")

Mena is a pathologist who specializes in medical-legal death investigations. (6 RT 1451.) (APPENDIX "I") He did not participate in Hamilton's autopsy and his opinions about the manner and cause of Hamilton's death were based upon a medical-legal investigation. (6 RT 1468.) (APPENDIX "I")

Mena explained that the office of the medical examiner waived jurisdiction

in the Hamilton case based upon information provided by Palomar Medical Center, where he died, that his death was the result of "infectious diseases or processes." (APPENDIX "I") (6 RT 1469.) Hamilton had a history of pneumonia, septic shock, HIV / AIDS, hepatitis, hypertension, atrial fibrillations, and acute renal failure (kidney failure). (APPENDIX "I") (6 RT 1469, 1519-1520, 1523.) In April, 2015, Mena's office invoked jurisdiction and investigated Hamilton's death after Mena learned about the assault on Hamilton and his death three months later. (APPENDIX "I") (6 RT 1470.)

Mena disagreed with Dr. Valasek's conclusion that the assault was not a significant cause of Hamilton's death because Hamilton sustained a brain injury in the assault and was not able to care for himself. (APPENDIX "I") (6 RT 1505.) After the assault, he never regained the level of functioning he experienced prior to the assault. (6 RT 1505.) (APPENDIX "I") In addition, Hamilton's reduced level of mobility after the assault placed him at greater risk for infection. (APPENDIX "I") (6 RT 1506.)

Dr. Thirakul

Dr. Thirakul was a resident pathologist when she preformed Hamilton's autopsy but she subsequently received additional training in forensic pathology[14] and was working as an associate medical examiner in Florida at the time of trial. (APPENDIX "L") (9 RT 1875-1877, 1880.)

At trial, Thirakul opined that Hamilton's death was a homicide, caused by

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[14] A forensic pathologist is "a doctor who specializes in investigating deaths that are known or suspected to be unnatural." (9 RT 1875.) (APPENDIX "L")

"complications of remote blunt force head trauma" from the assault on October 31, 2014. (APPENDIX "L") (9 RT 1882.) She further opined, "with a reasonable degree of medical certainty," that the assault was a substantial factor contributing to his death. (APPENDIX "L") (9 RT 1893.) She explained that the definition of "cause of death, generally accepted in the forensic medical community, is "a disease or injury that initiates an unbroken chain of morbid events leading directly to death." (APPENDIX "L") (9 RT 1894.)

Thirakul's opinion was based primarily upon evidence that Hamilton was "functioning independently" prior to the assault and, after the assault, he needed help ambulating and he never regained his previous level of functioning. (9 RT 1886-1893.) (APPENDIX "L") Thirakul confirmed that "at some point," Hamilton had "full-blown AIDS," which contributed to his death." (9 RT 1882, 1886.) (APPENDIX "L")

Thirakul explained that because Hamilton died at Palomar Medical Center, that hospital reported his death to the medical examiner (ME) and that office waived jurisdiction. (9 RT 1898.) (APPENDIX "L") Thirakul said she reported the assault to the ME and the waiver remained. (9 RT 1898.) (APPENDIX "L") The waiver indicated the ME did not believe the assault caused Hamilton's death. (9 RT 1899.) (APPENDIX "L") However, Thirakul later learned the ME's office maintained they were not aware of the assault when jurisdiction was waived. (9 RT 1900.) (APPENDIX "L")

At the time of the autopsy, Thirakul concluded Hamilton died of natural causes related to HIV. (9 RT 1899-1991.) (APPENDIX "L") However, her opinion about the manner and cause of Hamilton's death changed after she conducted a forensic

investigation of the case. (APPENDIX "L") (9 RT 1901.) She was not aware of the Bella Vista records at the time of the autopsy which she considered significant because those records indicated Hamilton never fully recovered and "was consistently institutionalized from the time of the assault to the time of his death...." (9 RT 1901-1903.) (APPENDIX "L")

Defense Evidence

Appellant's Testimony

Appellant testified at trial and explained that in the early morning of October 31, 2014, he was distraught over the breakup with his girlfriend, hours earlier, and he was highly intoxicated, after consuming drugs and alcohol, to numb the emotional pain. (APPENDIX "J") (7 RT 1641-1652.) He had no memory of the assaults or that he took anyone's property. (APPENDIX "J") (7 RT 1655, 1694, 1696.) He was 22 years old at the time. (APPENDIX "J") (7 RT 1609.) He was never in a gang, had no criminal history as a juvenile and only two misdemeanor adult convictions. (APPENDIX "J") (7 RT 1610-1611.) He grew up in Barrio Logan, a high crime neighborhood, and lived there with his mother, an older brother, and niece at the time of the assaults. (APPENDIX "J") (7 RT 1610-1611.) In October, 2014, appellant was employed at Fuller Lighting Designs, Inc., and performed a variety of duties there including working in the shipping and receiving department of the warehouse. (APPENDIX "J"; APPENDIX "K") (7 RT 1614; 8 RT 1732-1734.) He worked there for about a year before his arrest. (APPENDIX "J"; APPENDIX "K") (7 RT 1633; 8 RT 1733.)

Appellant had been dating Claudia Cruz for several months and they had

plans to see a movie on the evening of October 30, 2014. (7 RT 1634.) (APPENDIX "J") However, the two argued that night and Cruz broke off the relationship with appellant. (7 RT 1637, 1641.) (APPENDIX "J") Appellant was sad and depressed over the breakup and felt he lost everything. (7 RT 1641.) (APPENDIX "J") He was committed to the relationship and the two frequently discussed marriage. (7 RT 1641-1642.) (APPENDIX "J")

He was very emotional and didn't know how to deal with his feelings so he resorted to drugs and alcohol. (7 RT 1643-1644.) (APPENDIX "J") Shortly after the break-up, he drank a six-pack of 16-ounce I.P.A. beers and snorted about five lines of methamphetamine at his home. (7 RT 1643-1644.) (APPENDIX "J") He had also snorted a line of methamphetamine earlier that day, before he saw Cruz. (7 RT 1663.) (APPENDIX "J")

At about midnight, appellant walked to a friend's house where he drank five more beers and smoked some marijuana. (7 RT 1464, 1647, 1678-1679.) (APPENDIX "J") After he left his friend's house, he walked to the S.R.O. Lounge on Fifth Avenue. (7 RT 1648.) (APPDX."J") He estimated that he drank another six beers and five shots of hard liquor at the bar. (7 RT 1650-1652.) (APPENDIX "J") He then purchased methamphetamine from a stranger he met at the bar and he snorted the drug in the bathroom. (7 RT 1652.) (APPENDIX "J")

Appellant used methamphetamine daily during the month of October, 2014, and he had not slept for three or four days before the assaults. (7 RT 1649-1650, 1659-1660.) (APPENDIX "J")

His memory of the events after he left the bar was "fuzzy." (7 RT 1652.) (APPENDIX "J") He recalled that he started to walk back home when the bar closed at 2:00 a.m. (7

(APPENDIX "J")
RT 1652-1653, 1686.) As he walked, "things were starting to get really dark" and he saw "demonic figures" – one he estimated was about 50 feet tall, about the size of a building, with huge wings and horns." (APPENDIX "J") (7 RT 1653.) He was scared and feared for his life. (APPENDIX "J") (7 RT 1653-1654.) He ran but the demons caught up to him and choked him and laughed at him. (APPENDIX "J") (7 RT 1654.) He threw punches and kicked at them but his hands went through them. (APPENDIX "J") (7 RT 1654.) He then blacked out and his next memory was being handcuffed by an officer who told him he almost killed someone. (APPENDIX "J") (7 RT 1654-1655.)

Appellant had no memory of assaulting anyone or taking anyone's property. (APPENDIX "J") (7 RT 1655, 1694, 1696.) He had a job and lived at home with his family and had no reason to take anyone's property. (APPENDIX "J") (7 RT 1656.) He had no plan to harm anyone that night and did not have negative or hostile feelings about homeless people. (APPENDIX "J") (7 RT 1656.)

Appellant admitted on cross-examination that he told his brother in a recorded jail conversation that he was drinking on the night of the incidents and it appeared he was "going to get jumped or something by some fucking bums or some fucking tweeker – tweeker bums or something, and [he] just fucking started throwing punches and guess I kicked someone's ass good." (APPENDIX "J") (7 RT 1698.) In that conversation, appellant referred to one of the victims as "a fucking bum." (APPDX."J") (7 RT 1699.) He did not recall telling Detective Sanchez, in the post-arrest interview, about the hallucinations he experienced at the time of the assaults. (APPENDIX "J") (7 RT 1697-

1698.)

Dr. Clipson

Clark Clipson, a clinical and forensic psychologist, testified as a defense expert about appellant's mental state at the time of the assaults. (APPENDIX "L") (9 RT 1936, 1967.) He reviewed the evidence in appellant's case, administered psychological tests to appellant, and interviewed appellant on three occasions. (APPENDIX "L") (9 RT 1938-1942.) Appellant's statements to Clipson about the facts preceding the assaults were consistent from the first interview to the last, which spanned a year and a half. (APPENDIX "L") (9 RT 1967.) Clipson opined that appellant committed the assaults during a drug and alcohol-induced psychosis; he was not malingering and was not a violent person. (APPENDIX "L") (9 RT 1947, 1958-1959, 1968, 1975, 1986, 2028.)

Clipson further opined that the assaults were secondary to appellant's conflicted relationship with Claudia Cruz. (APPENDIX "L") (9 RT 1981.) Appellant struggled with his sexual orientation and had been in a closeted homosexual relationship for three years that ended a few weeks before the assaults. (APPENDIX "L") (9 RT 1981.) It was unacceptable to be gay in his family, his culture, and in his neighborhood. Clipson believed appellant's relationships with women were designed to create an appearance that he was straight. (APPENDIX "L") (9 RT 1982-1983.) The breakup with Cruz was particularly traumatic because it forced him to accept his sexual orientation. (APPENDIX "L") (9 RT 1982, 1984.) Appellant's alcohol and drug consumption preceding the assaults was an attempt to "drown his feelings." (APPENDIX "L") (9 RT 1984-1985.) Appellant

had no history of theft and/or violent, aggressive behavior. (9 RT 1985-1986.) (APPENDIX "L") Clipson opined the theft of items from the victims was irrational and the result of his intoxication. (9 RT 1986.) (APPENDIX "L")

Clipson noted appellant was "shocked, horrified, and appalled at his behavior" after the police told him he hurt someone. (9 RT 1969.) (APPENDIX "L") In the post-arrest interview, appellant was very emotional, he was suicidal, and he asked the police to shoot him, which is consistent with his inability to remember the assaults. (9 RT 1974.) (APPENDIX "L") Appellant's statements during the post-arrest interview that he had no memory of the assaults is consistent with a blackout. (9 RT 1975, 2028.) (APPENDIX "L")

A blackout occurs when someone rapidly consumes an excessive amount of alcohol. That individual may act and appear conscious but will have no memory of what happened. (9 RT 1952.) (APPENDIX "L") A person blacking out is not unconscious but that person cannot form long-term memories. (9 RT 2028.) (APPENDIX "L")

Clipson explained that psychotic behavior is "behavior rooted in a thought disorder," characterized by hallucinations, delusional beliefs, and irrational thinking. (9 RT 1948.) (APPENDIX "L") Stimulant abuse can cause psychosis and a drug-induced psychosis is clinically indistinguishable from a psychosis experienced by someone who is schizophrenic. (9 RT 1949-1950.) (APPENDIX "L") The hallucinations appellant described are consistent with a stimulant-induced psychosis. (9 RT 1951.) (APPENDIX "L") Three or four days of sleep deprivation can also cause hallucinations. (9 RT 1952.) (APPENDIX "L")

A psychotic state is different from a blackout because the psychosis causes "internal experiences" which are perceived as real while the blackout is more of a memory issue. (9 RT 1953.) (APPENDIX "L") It is also possible to experience partial blackouts. (9 RT 1953, 2028.) (APPENDIX "L") Clipson opined appellant was not in a blackout state when he experienced the delusions which he remembered because of the intensity and strong feelings they generated. (9 RT 2028.) (APPENDIX "L")

Appellant likely experienced the delusions as a result of his insomnia and chronic methamphetamine abuse, which began a month before the assaults. (9 RT 1954.) (APPENDIX "L") He experienced blackouts from the alcohol he consumed. (9 RT 1954.) (APPDX."L") Clipson found it significant that the officers who observed appellant at the time of his arrest thought he was under the influence of drugs and/or alcohol. (9 RT 1955.) (APPENDIX "L") Evidence that appellant purchased methamphetamine at the bar and possessed that drug at the time of his arrest is also consistent with his testimony that he was under the influence at the time of the assaults. (9 RT 1956.) (APPENDIX "L")

Appellant scored overall in "the low average range of intelligence" on a test Clipson administered and he scored at the fifth percentile on a vocabulary sub-test which is a gross measure of oral language skills. (9 RT 1944-1945.) (APPENDIX "L") This reflects a lack of education or undiagnosed learning disabilities. (9 RT 1946.) (APPENDIX "L") Appellant's high school grade point average was 1.9. (9 RT 1946.) (APPENDIX "L")

Clipson's psychological testing also showed no signs that appellant was malingering. (9 RT 1947.) (APPENDIX "L") He does not have antisocial personality disorder (not

having a conscience or caring about the consequences of his behavior) or borderline personality disorder (poor emotional attachments to other people). (9 RT 1956.) (APPENDIX "L") People who are particularly cruel to others in the commission of their crimes are often narcissistic but, according to Clipson, appellant is not narcissistic, he is not violent, and not predisposed to violence. (9 RT 1958-1959.) (APPENDIX "L")

Increased aggression is a symptom of methamphetamine use and significant amounts of the drug can cause anyone to become aggressive and violent. (9 RT 1963.) (APPENDIX "L") The unprovoked assaults in this case are consistent with methamphetamine intoxication. (9 RT 2025.) (APPENDIX "L")

Clipson found no evidence that appellant hated homeless people or targeted them. (9 RT 1960.) (APPENDIX "L") Instead, he opined that appellant's actions during the assaults were the result of his state of intoxication and unrelated to appellant as a person. (9 RT 1961.) (APPENDIX "L") Appellant's reference to the victims as "fucking bums" is consistent with his limited education and vocabulary and is not evidence that he targeted them. (9 RT 1969-1970, 1989-1990.) (APPENDIX "L")

There was also no motive for appellant to take personal property from the victims. He had a full-time job, lived at home and did not pay rent, and his expenses were minimal. (9 RT 1962, 2032.) (APPENDIX "L") The items he took were not things he wanted or items of significant monetary value. His actions in taking the property were irrational and inconsistent with a "logical intent to steal." (9 RT 1962.) (APPENDIX "L")

Clipson acknowledged appellant lied to Detective Sanchez about the amount of drugs and alcohol he consumed prior to the assaults and when he said that was the first time he used methamphetamine. (9 RT 1992-1994, 2001, 2003.) (APPENDIX "L") He also provided conflicting statements about the name of the friend he hung out before he went to the S.R.O. Lounge and he did not mention in the police interview or in the jail call with his brother that he saw demons and was hallucinating at the time of the assaults. (9 RT 1991-1992, 2004-2006, 2011.) (APPENDIX "L")

However, Clipson believed appellant was truthful in their interviews because appellant passed all the "malingering measures" and his expressions of shock and astonishment in the post-arrest interview appeared genuine. (9 RT 2028.) (APPDX. "L")

Dr. Valasek

Dr. Mark Valasek, the primary attending pathologist who performed the autopsy on Hamilton at U.C.S.D. Medical Center, testified as a defense witness about the cause of Hamilton's death. He opined that Hamilton died of natural causes and the primary cause of death was "sepsis secondary to pneumonia," which was secondary to his longstanding HIV. (8 RT 1783, 1794, 1800, 1860; 10 RT 2043-2045.) (APPENDIX "K"; APPENDIX "M") His opinion was based upon evidence of pneumonia as the cause of death with no evidence of trauma. (8 RT 1801; 10 RT 2044.) (APPENDIX "K"; APPENDIX "M")

Valasek opined the assault was not a substantial factor in Hamilton's death and there was no link between the assault and Hamilton catching the flu, which

was the precipitating event leading to the M.R.S.A. superinfection and sepsis that caused his death. (8 RT 1783, 1801, 1808 (APPENDIX "K"); 10 RT 2045, 2048-2050. APPENDIX "M")

Valasek noted that Hamilton had AIDS for at least 12 years prior to his death which was a significant factor in his death. (8 RT 1789-1790, 1793. (APPENDIX "K")) At the time of death, Hamilton also had three different infections in his lungs: influenza A, MRSA in a septic condition, and aspergillus, a fungal infection, common in people with HIV who are predisposed to respiratory infections. (8 RT 1791, 1793-1795, 1799. (APPENDIX "K")) The lung infection was "overwhelming" and sufficient, alone, to cause death.[15] (8 RT 1796. (APPENDIX "K")) Hamilton also had hypertension which led to chronic kidney disease, acute renal failure, early cirrhosis of the liver, and a history of recurrent pneumonia. (8 RT 11797-1799. (APPENDIX "K"))

Hamilton was predisposed to MRSA pneumonia because of the flu and unable to mount an immune response because of his HIV. He contracted pneumonia at the peak of the flu epidemic in San Diego County. (8 RT 1801-1802, 1807-1808. (APPENDIX "K")) Valasek opined the assault did not predispose Hamilton to the flu or pneumonia and there was no "direct link clinically" between the assault and the pneumonia. (8 RT 1807-1809, 1796. (APPENDIX "K")) He confirmed from medical records that Hamilton was homeless at the time of the assault and had a history of not taking his AIDS medication. (8 RT 1803-1804. (APPENDIX "K"))

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[15] Hamilton's lungs were two to three times the normal weight because they were filled with pus and fluid. (8 RT 1796. (APPENDIX "K"))

Character Witnesses

Three witnesses testified as character witnesses for the defense.

Jessury Gonzalez had known appellant for five years and the two dated for about eight months. (7 RT 1618.) (APPENDIX "J") She described appellant as a good and honest person, never violent. (7 RT 1618-1619, 1621-1623.) (APPENDIX "J") He never expressed negative opinions about homeless people and on one occasion in 2013, Gonzalez saw appellant give his leftover sandwich to a homeless person. (7 RT 1620.) (APPDX."J")

Robert Redding met appellant in high school, had known him for six or seven years, and considered him to be an honest person. (8 RT 1714, 1724.) (APPENDIX "K") He never knew appellant to be a violent person and never heard him express negative opinions about homeless people. (8 RT 1720-1724.) (APPENDIX "K") Redding never saw appellant consume alcohol or drugs with the exception of marijuana. (8 RT 1728-1729.) (APPENDIX "K") After high school, Redding and appellant had a three-year sexual relationship which they kept secret. (8 RT 1720-1721, 1724.) (APPENDIX "K") Their relationship ended in August, 2014. (8 RT 1723.) (APPENDIX "K")

Mike Fuller, appellant's employer, confirmed appellant's employment at Fuller's company, Fuller Lighting Designs. (8 RT 1732-1734.) (APPENDIX "K") Fuller considered appellant to be "extremely honest," kind, and respectful to elders on the job sites. (8 RT 1734.) (APPENDIX "K") Fuller never saw appellant act violently and never saw him under the influence of drugs. (8 RT 1736, 1738.) (APPENDIX "K") He described an incident at work

where appellant accidentally injured Fuller by dragging a heavy metal baseplate across his hand, tearing off his fingernails and the skin on his hand. Fuller was in considerable pain and was infuriated with appellant but appellant "kept his cool," apologized repeatedly, and tried to help Fuller. (8 RT 1736.) (APPENDIX "K") Fuller would re-hire appellant if he was released from custody. (8 RT 1734.) (APPENDIX "K")

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT, AS A MATTER OF LAW, TO SUPPORT THE CONVICTION FOR THE ROBBERY OF DAVID HAMILTON IN COUNT 4.

A. FACTUAL AND PROCEDURAL BACKGROUND.

Appellant was convicted in count 4 of the robbery of David Hamilton. (11 RT 2121.) (APPDX."N") That conviction was based primarily upon the testimony of Roberic Brooks, a key prosecution witness, who said he witnessed appellant assault Hamilton. There was also evidence that appellant was in possession of Hamilton's personal property at the time of his arrest. The relevant facts are essentially undisputed.

Brooks testified that after appellant assaulted him, he witnessed appellant assault another man, later identified as Hamilton, across the street near the Presbyterian church. (4 RT 766-769.) (APPENDIX "G") DNA evidence further confirmed appellant's involvement in the assault on Hamilton. (6 RT 1393, 1406-1410, 1413-1414.) (APPENDIX "I") Brooks also told an officer on the morning of the assaults that he

saw several individuals battering an unknown person, the officer believed was Hamilton. (5 RT 1227, 1242.) (APPENDIX "H")

Hamilton told several officers that he was initially assaulted by a black male (someone other than appellant) and at least one other individual, whom he described as Hispanic, was also present during the assault but that other individual did not harm him. (1 PHT 38, 40; 4 RT 857, 865-866; 5 RT 1238-1239, 1299, 1304.) The prosecutor acknowledged in closing argument that more than one person may have been involved in the assault on Hamilton. (10 RT 2070.) (APPENDIX "E"; APPENDIX "G"; APPENDIX "H"; APPENDIX "M")

Appellant was also found in possession of a black shopping cart when he was arrested which contained a pair of Hamilton's lavender pants among other items. (4 RT 889, 892; 6 RT 1374-1375, 1420-1423, 1430-1434.) It appears from the evidence the pants and shopping cart were the only items he took from Hamilton. (APPENDIX "G"; APPENDIX "I")

A jacket with Bobby Johnson's bible in the pocket, a T-shirt, and a tan hat were the only other items found in the cart. (4 RT 826; 6 RT 1370; 1374-1375.) DNA testing on the T-shirt and shopping cart was inconclusive and testing on the hat excluded appellant and all of the victims in this case. (4 RT 822-823; 5 RT 1238; 6 RT 1421, 1423-1424.) However, circumstantial evidence indicates the cart was likely Hamilton's, which he reported missing after the assault. (APPENDIX "G"; APPENDIX "I"; APPDX."H"; APPENDIX "I")

In sum, compelling evidence shows appellant did not initiate the assault on Hamilton and he was not the only participant in that assault. Apart from evidence

that he was involved, at some point in the assault, and took some property from Hamilton, no other evidence shows when appellant joined in the assault and when he took the shopping cart and pants. Thus, it cannot reasonably be inferred from the evidence that appellant formed the intent to take the cart and pants either before or during the assault, as opposed to taking these items as an after-thought when the assault was concluded. The evidence also fails to prove appellant assaulted Hamilton so he could take his property. Instead, appellant took items which were not of significant monetary value and were not items he needed or wanted, while he was highly intoxicated and emotionally distraught over the breakup with his girlfriend. Appellant submits the evidence proves, at most, that he committed a theft offense, not a robbery.

For the reasons discussed below, the evidence is insufficient, as a matter of law, to support the robbery conviction in count 4.

B. STANDARD OF REVIEW

When a defendant challenges the sufficiency of the evidence used to convict him, an appellate court reviews the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (U.S. Const., Amends. 5 & 14; Cal. Const., art. 1, sec. 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 99 S.Ct.

2781]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) If the verdict is supported by substantial evidence, the reviewing court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

"The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on isolated bits of evidence." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203, quoting *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261, internal quotations omitted.)

Evidence that only creates a speculative inference is not sufficient because "[a] reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work'." (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) In *People v. Bender* (1945) 27 Cal.2d 164, the court noted that "[m]ere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof." (*Id.* at p. 186.) This means the question of whether some set of evidence reasonably proves a fact is a matter of law. In other words, the rationality, the non-speculative nature, of an inference is a question of law to be decided by the reviewing court. (See *People v. Morris, supra*, 46 Cal.3d 1, 20-21; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1604; *People v. Cluff* (2001) 87 Cal.App.4th

991, 1002.)

C. THE EVIDENCE FAILS TO PROVE, BEYOND A REASONABLE DOUBT, THAT APPELLANT'S INTENT TO STEAL AROSE BEFORE OR DURING THE COMMISSION OF THE ACT OF FORCE.

"Robbery is 'the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 343, internal citation and quotations omitted; Pen. Code, § 211.) "A conviction of robbery requires evidence showing that the defendant conceived the intent to steal either before or during the commission of the act of force against the victim. '[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft.'" (*Ibid.*) The wrongful intent and the act of force or fear must concur in the sense that the act must be motivated by the intent. (*People v. Marshall* (1977) 15 Cal.4th 1, 34, internal citations and quotations omitted.)

The case of *People v. Marshall, supra,* 15 Cal.4th 1, is instructive. In that case, a jury convicted the defendant, *inter alia,* of first degree murder and two counts of robbery. The jury found true a special circumstance allegation that the murder was committed during the commission or attempted commission of robbery (§ 190.2, subd. (a) (17) (A)). However, the Supreme Court reversed one of the robbery convictions based on insufficient evidence to support that

conviction. (*Id.* at p. 35.) The Court also set aside the special circumstance finding that the murder was committed during a robbery. (*Id.* at pp. 40-41, 44.) The court affirmed the first degree murder conviction on the theory that the killing occurred in the course of an attempted rape but noted that because the evidence was insufficient to support the robbery conviction, it was also insufficient to support the conclusion that the murder occurred in the perpetration or attempt to perpetrate a robbery. (*Id.* at p. 37.)

The robbery conviction was based upon evidence the defendant took a letter from the murder victim. The letter was from a grocery store responding to the victim's request for a check-cashing card and was found in defendant's possession when the police detained him. The Supreme Court concluded "there is no evidence that defendant killed [the victim] for the purpose of obtaining this letter from her. Although the condition of [the victim's] body and the cause of death establish use of force against [her], they do not suggest or give rise to an inference that the force was exerted to obtain the letter. (*Id.* at p. 34.)

The Supreme Court explained:

> Defendant's possession of the letter written to Rawls [the victim] by the grocery market supports an inference that he took the letter from Rawls or her immediate presence, but is not evidence that "reasonably inspires confidence" (*People v. Morris* (1988) 46 Cal.3d 1,19) that defendant killed Rawls for the *purpose* of obtaining the letter. If a person commits a

murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money. In this case, however, the letter taken by defendant was, in the prosecutor's words, an "insignificant piece of paper." The prosecution offered no evidence tending to show that the grocery's letter responding to Rawls's request for a check-cashing card was so valuable to defendant that he would be willing to commit murder to obtain it. Accordingly, defendant's possession of the letter does not constitute evidence of sufficient "solid value" (ibid.) to support the conclusion that defendant killed Rawls so that he could obtain possession of the letter. The prosecution's argument to the contrary is based purely on speculation. As we have said before, mere speculation cannot support a conviction. [Citations.] To be legally sufficient, evidence must be reasonable, credible, and of solid value. [Citation.]

(*People v. Marshall, supra,* 15 Cal.4th at p. 35, original emphasis.)

The present case presents similar facts. Here, too, the evidence fails to establish the necessary concurrence of intent to steal and the act of force. Instead, the evidence shows appellant committed the assault for a nonlarcenous purpose. He was emotionally distraught and extremely intoxicated, having consumed drugs and alcohol after the breakup with his girlfriend. There is also

compelling evidence that someone other than appellant initiated the assault and no evidence establishes when appellant joined the assault or when he took the property. And, like the defendant in *Marshall,* there is no evidence tending to show the shopping cart and lavender pants appellant took from Hamilton were so valuable to him that he would be willing to commit murder to obtain those items. At most, the taking was an after-thought, committed after the assault was concluded.

As the defense expert explained, appellant's actions in taking property from Hamilton were irrational and inconsistent with a "logical intent to steal." (9 RT 1962.) (APPENDIX "L") The shopping cart and lavender pants were not items of significant monetary value and not items appellant wanted or needed. He had a full-time job, lived at home and did not pay rent, and had minimal expenses. The irrational act of taking these items was not the motive for the assault on Hamilton but was instead the result of appellant's extreme level of intoxication. The taking was, at most, a theft not a robbery.

For the reasons discussed, appellant's conviction for robbery in count 4 must be reversed.

II. DUE PROCESS REQUIRES THE FELONY MURDER CONVICTION IN COUNT 3 BE REVERSED BECAUSE THE PROSECUTOR'S EVIDENCE FAILED TO PROVE APPELLANT COMMITTED ROBBERY.

A. FACTUAL AND PROCEDURAL BACKGROUND.

The prosecutor charged appellant in count 3 with first degree murder in the

death of David Hamilton based upon the theory that the fatal assault constituted felony murder committed during the course of a robbery. (APPENDIX "M") (10 RT 2069.) Even if this court finds the evidence sufficient to support the robbery conviction in count 4, that finding does not necessarily require a finding that the instant homicide occurred in the perpetration of the robbery and that a first degree murder conviction is required as a matter of law under the felony-murder doctrine. (*People v. Jeter* (1964) 60 Cal.2d 671, 676.) "Where the design to commit an independent felony is conceived by an accused only after delivering the fatal blow to his victim, the [felony-murder] doctrine is not applicable. [Citation]." (*Id.* at p. 676-677.)

In the present case, the prosecutor argued in closing argument that appellant committed first degree murder based on the robbery felony-murder theory. He also argued in the alternative, that if the court had a reasonable doubt that the fatal assault was committed during a robbery, the killing amounted to second degree murder.[16] (APPENDIX "M") (10 RT 2069.)

Even though the prosecutor did not assert a theory of premeditated murder in closing argument, the court stated, relative to count 3, that appellant's

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[16] Based upon the prosecutor's alternative argument that the killing amounted to second degree murder, with no claim that it was premeditated, it appears the trial court incorrectly stated that the prosecutor was also alleging the theory of first degree murder based upon premeditation and deliberation. (11 RT 2121.) (APPENDIX "N")

intoxication at the time of the offense precluded a finding of premeditation. (11 RT 2121-2122.) (APPENDIX "N") On that theory, the court stated it would find only second-degree murder. (11 RT 2122.) (APPENDIX "N")

However, the court found the robbery felony-murder theory applicable to count 3 and explained its ruling as follows:

> I find a compelling pattern on October 31 with regard to all three of these victims. A very methodical pattern to assault them, to get their property, and a striking similarity between all three. The only difference being that the Brooks' assault was way less severe. But, again, it is – it appears that Mr. Hamilton's property was gone through just like all the other victims and that defendant ends up with pieces of Mr. Hamilton's clothing, Mr. Hamilton's cart. So that leads me – and so I do find that felony murder theory is applicable.

(11 RT 2122.) (APPENDIX "N")

The facts and circumstances surrounding the assault and "robbery" of Hamilton are discussed in Argument I (A), above, and are incorporated herein by this reference for the sake of brevity. In sum, compelling evidence shows appellant did not initiate the assault and was not the only participant in the assault. Hamilton stated repeatedly to different officers that he was initially assaulted by a tall black male and another male was present but didn't harm him. (1 PHT 38, 40; 4 RT 857, 865-866; 5 RT 1238-1239, 1299, 1304.) (APPENDIX "E"; APPENDIX "G"; APPENDIX "H") Brooks

reported that he saw several individuals assaulting an unknown male, believed to be Hamilton. (5 RT 1227, 1242.) (APPENDIX "H") The prosecutor also acknowledged that Hamilton may have been assaulted by more than one individual. (10 RT 2070.) (APPENDIX "M")

The evidence fails to establish when appellant joined in the assault and there is no evidence that he assaulted Hamilton to rob him of his shopping cart and pants. It is simply not reasonable to infer from the prosecution's evidence that appellant formed the intent to steal before or during the assault and that he assaulted Hamilton for the purpose of robbing him.

Instead, the evidence shows appellant was emotionally distraught and intoxicated when he assaulted Hamilton and took his property. As the defense expert explained, the taking was irrational and not reflective of a "logical intent to steal." (9 RT 1962.) (APPENDIX "L") The property he took was not of significant monetary value and was not property he wanted or needed.

Appellant's conviction for the felony murder of Hamilton must be reversed because the prosecutor failed to prove the facts required for a felony murder under Penal Code section 189, specifically that the fatal assault on Hamilton "was committed in the perpetration of . . . robbery." (Pen. Code § 189.) If a taking of property is incidental to a killing, if for instance the taking is an afterthought of a killing, the killing is not felony murder. To be guilty of felony murder in the commission of robbery, "the defendant must form the intent to steal before or during rather than after the application of force to the victim, and . . . *the*

defendant must apply the force for the purpose of accomplishing the taking." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1176, italics added.) In other words, the prosecutor had to prove that the taking occurred with force or fear and that appellant committed the fatal assault for the purpose of taking Hamilton's property.

Here, the prosecution's evidence was simply not able to prove the fatal assault was a "killing" in the course of a robbery because the evidence fails to show appellant formed the intent to take the property before or during the assault and that he assaulted Hamilton for the purpose of taking his property. Instead, the evidence shows, at most, that the assault was followed by an incidental theft – an afterthought of the assault. Without solid, credible evidence that Hamilton was assaulted in the perpetration of a robbery, due process requires reversal of the first degree murder conviction in count 3. (*In re Winship* (1970) 397 U.S. 358, 364 ; *Jackson v. Virginia, supra*, 443 U.S. 307, 314; *People v. Johnson, supra*, 26 Cal.3d 557, 578.)

B. STANDARD OF REVIEW

As explained in Argument I (B), *ante*, in order to be affirmed by a reviewing court, criminal convictions must be supported by solid, credible evidence capable of proving every element of a crime or enhancement beyond a reasonable doubt. (U.S. Const., Amends. 5 & 14; Cal. Const., art. 1, sec. 15; *In re Winship, supra*,

397 U.S. at p. 364 ; *Jackson v. Virginia, supra*, 443 U.S. 307, 314; *People v. Johnson, supra,* 26 Cal.3d 557, 578.) The evidence must prove the charge with reasonable inferences, not speculation, conjecture, or prejudice. (*People v. Morris, supra*, 46 Cal.3d 1, 20-21; *People v. Bender, supra*, 27 Cal.2d 164, 186.)

As the California Supreme Court has explained:

> [T]he appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt [Citations]. The prosecution's burden is a heavy one: 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." [Citation.] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires confidence and is "of solid value."

(*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755-756.)

C. A FELONY MURDER IS A KILLING THAT OCCURS DURING THE COURSE OF A FELONY; IF THE FELONY IS INCIDENTAL TO THE KILLING, THERE IS NO FELONY MURDER.

Under the felony-murder rule, a murder "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including robbery ...

is first degree murder. (§ 189; *People v. Wallace* (2008) 44 Cal.4th 1032, 1078; *People v. Andreasen* (2013) 214 Cal.App.4th 70, 80.) "[T]he felony-murder offense is established merely upon a showing that the defendant killed during the commission or attempted commission of the felony . . . ." (*People v. Andreasen, supra,* 214 Cal.App.4th at p. 80.) "The purpose of the felony-murder rule 'is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing ..., whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.' [Citation.]" (*Ibid.*) There is no requirement of intent to kill for either the felony-murder offense or the robbery felony-murder special circumstance. (*Id.* at p. 81.)

California courts have long held that when the force used against the victim results in his death, the defendant's intent to rob will not support a conviction of felony murder (§ 189) if it arose after the infliction of the fatal wound. (*People v. Gonzales* (1967) 66 Cal.2d 482, 486; *People v. Jeter* (1964) 60 Cal.2d 671, 676-677; *People v. Carnine* (1953) 41 Cal.2d 384, 388; *People v. Hardy* (1948) 33 Cal.2d 52, 59.) "[T]he evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death; evidence which establishes that the defendant formed the intent only after engaging in the fatal acts cannot support a verdict of first degree murder based on section 189." (*People v. Anderson* (1968) 70 Cal.2d 15, 34.)

In the current bench trial, the court found appellant guilty of felony murder, in count 3, concluding the fatal assault on Hamilton occurred during the commission of a robbery. (10 RT 2069.) (APPENDIX "M") The trial court's stated rationale for finding felony murder is speculative and unsupported by the evidence. First, the court found " a compelling pattern" and "striking similarity" in the crimes committed against the three victims. Yet, the evidence proves otherwise.

There are distinct differences in those crimes. Brooks, who was assaulted first, was someone appellant met in a gay bar and the two men left the bar together at 2:00 a.m when it closed. For reasons undisclosed in the record, shortly after they left the bar, appellant struck Brooks once, knocking him unconscious. Brooks' injures were not life-threatening. Appellant took two EBT cards from Brooks wallet and may have taken back the twenty dollars he paid Brooks earlier that morning for the methamphetamine Brooks sold him.

The assault on Hamilton was next and the circumstances of that assault are very different. Appellant didn't know Hamilton and the evidence shows he was not the only person involved in that assault. The court's statements that "it appears that Mr. Hamilton's property was gone through just like all the other victims" and that there was "[a] very methodical pattern to assault them, [and] to get their property . . ." is entirely speculative because there is little information in the record about the circumstances of that assault and alleged robbery. The evidence shows only that appellant was involved in the assault, at some point,

and took Hamilton's shopping cart and pants.

The evidence fails to support a reasonable inference that appellant formed the intent to take the property before or during the assault and that he participated in the assault on Hamilton so he could take his property. As the court acknowledged, appellant was intoxicated when he committed the instant crimes. Thus, the taking of property from the homeless victims was an irrational act committed when appellant was intoxicated and distraught. The property had no significant monetary value, and was not something appellant wanted or needed.

The prosecutor's version of the facts, which are accepted for purposes of a sufficiency argument, shows the assault on Hamilton and the taking of his property were part of a continuous transaction; the temporal relationship is not in dispute. But the prosecutor's evidence fails to prove the necessary causal relationship. If the killing is part of, or a consequence (intended or not) of the robbery, then the killing is felony murder under the law. But if, on the other hand, a theft of property is a consequence of a killing ('we killed this guy, we might as well take his stuff'), then the killing is not done "in the commission of" the theft as required for first degree felony murder under section 189. Again, "to be guilty of felony murder in the commission of robbery . . . the defendant must form the intent to steal before or during rather than after the application of force to the victim, and . . . the defendant must apply the force for the purpose of accomplishing the taking." (*People v. Pollock, supra*, 32 Cal.4th 1153, 1176.)

This one-way logical connection from felony to killing accords with the purpose of the felony-murder rule discussed above. (*People v. Andreasen, supra,* 214 Cal.App.4th at p. 80.) Viewed as a whole, the prosecutor's evidence did not prove beyond a reasonable doubt that Hamilton was killed in the perpetration of a robbery as required for first degree felony murder under section 189. Accordingly, due process requires reversal of the conviction in count 3. (U.S. Const., Amends. 5 & 14; Cal. Const., art. 1, sec. 15; *In re Winship, supra*, 397 U.S. 358, 364; *Jackson v. Virginia, supra,* 443 U.S. 307, 314; *People v. Johnson, supra*, 26 Cal.3d 557, 578.)

III. THE LACK OF SUBSTANTIAL EVIDENCE THAT THE FATAL ASSAULT ON DAVID HAMILTON WAS INCIDENTAL TO ROBBERY, AS OPPOSED TO THE OTHER WAY AROUND, REQUIRES REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDING UNDER PENAL CODE SECTION 190.2, SUBDIVISION (a)(17), ATTACHED TO COUNT 3.

A. INTRODUCTION

In the current bench trial, the court found true the special circumstance allegation attached to count 3; that the assault which led to David Hamilton's death occurred in the course of committing a robbery [§ 190.2, subd. (a)(17)]. (1 (APPDX."C";APPENDIX "N") CT 34; 11 RT 2122.) In Arguments I and II, *supra,* appellant demonstrates why the evidence is insufficient, as a matter of law, to support the convictions for the robbery in count 4 and the robbery felony-murder offense in count 3. If this court disagrees, appellant alternatively contends the evidence fails to prove the fatal assault on Hamilton was incidental to the robbery as opposed to the robbery

being merely part of or incidental to the assault.

Evidence deemed sufficient to support a robbery conviction is not necessarily sufficient to support a robbery-murder special circumstance finding. (*People v. Marshall, supra,* 15 Cal.4th at p. 41.) Similarly, evidence deemed sufficient to support the felony-murder offense is not enough to support the robbery/murder special circumstance finding. As this court explained in *People v. Andreasen, supra,* 214 Cal.App.4th 70: "[T]he felony-murder offense is established merely upon a showing that the defendant killed during the commission or attempted commission of the felony, whereas the felony-murder special circumstance requires an additional showing that the intent to commit the felony was independent of the killing." (*Id.* at p. 80.) "[T]he courts have fashioned the rule that the felony-murder special circumstance statute can apply only if the murderer had a *felonious purpose independent of, or concurrent with, the murder.*" (*Id.* at p. 81; original emphasis.)

Thus, the subdivision (a)(17) special circumstance requires proof beyond a reasonable doubt that a defendant intended to commit robbery independent of the killing. If the defendant only intended to commit murder and the commission of robbery was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved. (APPENDIX "D") (2 CT 268; CALCRIM No. 730; *People v. Williams* (1988) 44 Cal.3d 883, 927 ["where the defendant's intent is to kill, and the related offense is only incidental to the murder, the murder cannot be

said to have been committed in the commission of the related offense."].)

For the reasons discussed below, the prosecutor did not meet the burden of proof relative to the special circumstance that the fatal assault occurred in the course of a robbery. Accordingly, the robbery felony-murder special circumstance finding, attached to count 3, must be reversed.

B. STANDARD OF REVIEW

The standard of review for a sufficiency of the evidence claim as to a special circumstance is whether, when evidence that is reasonable, credible, and of solid value is viewed " in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt." (*People v. Dickey* (2005) 35 Cal.4th 884, 903.) The standard is the same under the state and federal due process clauses. (*People v. Gonzales* (2011) 52 Cal.4th 254, 294.) The reviewing court presumes, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.)

C. THE EVIDENCE FAILS TO SHOW APPELLANT ASSAULTED HAMILTON TO ADVANCE AN INDEPENDENT FELONIOUS PURPOSE.

Section 190, subdivision (a) provides that first degree murder "shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life," with

the penalty to be determined as provided in certain statutory provisions, including the felony-murder special circumstance statute (§ 190.2).

The robbery-murder special circumstance applies to a murder committed while the defendant was engaged in the commission of, or attempted commission of, robbery. (§ 190.2, subd. (a)(17)(A); *People v. Wallace* (2008) 44 Cal.4th 1032, 1078.) "'[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.'" (*Ibid,* citing *People v. Mendoza* (2000) 24 Cal.4th 130, 182.) As noted, appellant's convictions for felony-murder and robbery are not enough to support the felony-murder special circumstance finding. (*People v. Marshall, supra,* 15 Cal.4th at p. 41 [reversal of the robbery-murder special circumstance finding would be necessary even if the evidence supported the defendant's robbery conviction]; *People v. Andreasen, supra,* 214 Cal.App.4th at p. 80 [noting the distinction between the felony-murder offense and the felony-murder special circumstance.)

Thus, the felony murder special circumstance defined in section 190.2, subdivision (a)(17), does not apply to every killing that occurs along with a robbery. It applies only to killings that derive from an initial intent to commit the underlying felony, "'a murder in the commission of a robbery but [not] the exactopposite, a robbery in the commission of a murder.'" (*People v. D'Arcy*

(2010) 48 Cal.4th 257, 296.) "In other words, if the felony is merely incidental to achieving the murder – the murder being the defendant's primary purpose – then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present." (*People v. Navarette* (2003) 30 Cal.4th 458, 505; *People v. Marshall, supra,* 15 Cal.4th at p. 41 ["robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder"].)

The case of *People v. Marshall, supra,* 15 Cal.4th 1, is instructive. There, the Supreme Court set aside a robbery/murder special circumstance finding based upon insufficient evidence to support that finding. The Court explained:

> A robbery-murder special circumstance may only be found true if the murder was committed while the defendant was engaged in "the commission of, or the attempted commission of" a robbery. (§ 190.2, subd. (a) (17) (A).) In this case, . . . the evidence is insufficient to show that defendant killed Rawls during the commission of a robbery, thus requiring reversal of the robbery-murder special-circumstance finding.
>
> *Such a reversal would be necessary even if the evidence were sufficient to support defendant's robbery conviction.* At trial the prosecution theorized that defendant took from the person of Rawls a letter written to her by a grocery store because he wanted the letter as a token of the rape and

killing. Even if supported by the evidence, this theory would not form a proper basis for upholding the robbery-murder special circumstance, because the robbery would merely be incidental to the murder. The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder. [Citations.]

(*People v. Marshall, supra,* 15 Cal.4th at pp. 40-41, emphasis supplied.)

The present case presents similar facts. Here, the prosecutor did not have substantial evidence, capable of proof beyond a reasonable doubt, that the fatal assault on Hamilton derived from a robbery within the meaning of the special circumstance statute applicable to robbery felony-murder. The most probative evidence on the point pointed in the other direction – that the assault on Hamilton was the goal and that any taking of property was peripheral – a scenario not supporting the special circumstance allegation.

Appellant acknowledges the evidence shows he was involved in the assault and he took Hamilton's property but other compelling evidence shows at least one other person was involved in the assault and that person, not appellant, initiated the assault. The evidence fails to show when appellant joined the assault and fails to support a reasonable inference that appellant assaulted Hamilton to advance the independent purpose of robbing him.

As discussed in Arguments I and II, above, Roberic Brooks, a key

prosecution witness, told Officer Jared Thompson, on the morning of the assault, that he saw "several individuals across the street in the alcove by the Presbyterian church battering an unknown person." (5 RT 1227, 1242.) (APPENDIX "H") The officer believed the "unknown person" was David Hamilton. (5 RT 1242.) (APPENDIX "H")

On the morning of the assault, Hamilton reported to an officer that he was assaulted by a black male in his 20s or 30s, who demanded his wallet. (1PHT 38, 40.) (APPENDIX "C") Hamilton repeated that information to other officers in several different interviews – twice on the morning of the assault and in two different interviews days later. (4 RT 857, 865-866; 5 RT 1238-1239, 1299, 1304.) (APPENDIX "G"; APPENDIX "H") Hamilton also told officers that a Hispanic male approached during the assault but that individual did not harm him. (4 RT 865; 5 RT 238-1239.) (APPDX."G"; APPENDIX "H") Thus, statements made by Brooks and Hamilton provide compelling evidence that appellant did not initiate the assault and was not the only individual involved in the assault. The prosecutor also admitted in closing argument, that there may have been more than one person involved in the assault on Hamilton. (10 RT 2070.) (APPENDIX "M")

Thus, the evidence shows only that appellant was involved in the assault, at some point in time, which may have occurred when Hamilton was unconscious. Yet, that evidence, without more, does not show the requisite *independent* felonious intent to rob Hamilton before or during the assault. Evidence that appellant was in possession of Hamilton's cart and pants when he was detained and arrested likewise fails to provide the requisite intent because

the theft of that property could have occurred after the assault was concluded.

Under the standard required by due process, the prosecutor's evidence could not prove anything relative to the crucial point about whether the assault on Hamilton was committed "in the perpetration of" robbery, or whether the taking of property was merely incidental to the assault. (*People v. D'Arcy, supra*, 48 Cal.4th 257, 296.) Only by ignoring the burden of proof and relying on suspicion, conjecture, and speculation could the trier of fact conclude the felony murder special circumstance – murder in the commission of a robbery – was established in this case. Due process requires reversal of the special circumstance allegation under section 190.2, subdivision (a)(17), attached to count 3. (U.S. Const., Amends. 5 & 14; Cal. Const., art. 1, sec. 15; *In re Winship* (1970) 397 U.S. 358, 364 ; *Jackson v. Virginia, supra*, 443 U.S. 307, 314; *People v. Johnson, supra*, 26 Cal.3d 557, 578; *People v. Morris, supra*, 46 Cal.3d 1, 20-21 [conjecture, speculation, and guesswork are not rational inferences constituting proof].)

IV. DUE PROCESS REQUIRES THAT THE CONVICTION FOR THE FELONY MURDER OF BOBBY JOHNSON, IN COUNT 1, BE REVERSED BECAUSE THE EVIDENCE IS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE APPELLANT FORMED THE INTENT TO TAKE JOHNSON'S PROPERTY PRIOR TO OR DURING THE FATAL ASSAULT AND THAT HE ASSAULTED JOHNSON FOR THE PURPOSE OF ROBBING HIM.

A. PRELIMINARY INFORMATION.

In the current bench trial, the court found appellant guilty of felony murder, in count 1, finding the assault which led to the death of Bobby Johnson was committed in the perpetration of a robbery. (11 RT 2124.) (APPENDIX "N") Appellant was convicted in a separate count (count 2) of the robbery of Johnson. (11 RT 2124.) (APPENDIX "N") The robbery in count 2 consisted of appellant taking a jacket, presumably belonging to Johnson, with Johnson's bible in the pocket. But for the taking of that property, which was of no significant monetary value, the court would have found the killing of Johnson constituted second degree murder. (11 RT 2125.) (APPENDIX "N")

Relative to the robbery count, the court stated that it viewed the video of the assault on Johnson and explained, in relevant part, that it showed: "very intentional conduct [by the defendant] to go through all of Mr. Johnson's belongings and pick out certain items, certain pieces of clothing, and put them in the cart that he had stolen from Mr. Hamilton. And you clearly see him taking Mr. Johnson's property and his property was found among defendant's belongings in the cart at the time he was apprehended. So he is guilty of the robbery of Mr. Johnson." (11 RT 2124.) (APPENDIX "N")

Relative to the murder charge in count 1, the court noted that the prosecution alleged two theories: premeditation and felony-murder – murder committed in the perpetration of a robbery. (11 RT 2124.) (APPENDIX "N") The court found insufficient evidence of premeditation based upon the evidence of appellant's intoxication at the time of the offenses. (11 RT 2124-2125.) (APPENDIX "N") On that theory, the court stated it would have found second-degree murder. (11 RT 2125.) (APPENDIX "N") However, the court found appellant committed first degree murder based on the robbery felony murder theory. As to that theory, the court summarily concluded that "[t]he murder occurred in the course of a robbery of Mr. Johnson so felony murder is a degree of first degree murder as a percolate." (11 RT 2125.) (APPENDIX "N") The court provided no further details to support the implicit finding that appellant formed the intent to rob Johnson either before or during the commission of the fatal assault and that he assaulted Johnson for the purpose of robbing him. (*People v. Pollock, supra*, 32 Cal.4th at p. 1176.)

For the reasons discussed below, the evidence fails to support the first degree murder conviction in count 1, based upon the theory that the fatal assault was committed during a robbery.

B. STANDARD OF REVIEW

The applicable standard of review for the sufficiency of the evidence on counts 1 is set forth in Argument II (B), above, and is incorporated herein by this reference for the sake of brevity.

C. THE EVIDENCE SHOWS THE TAKING OF JOHNSON'S PROPERTY OCCURRED AFTER THE FATAL ATTACK AND DOES NOT CONSTITUTE FELONY-MURDER.

To be guilty of felony murder in the commission of robbery, "the defendant must form the intent to steal before or during rather than after the application of force to the victim, and . . . *the defendant must apply the force for the purpose of accomplishing the taking.*" (*People v. Pollock, supra,* 32 Cal.4th at p. 1176, italics added.) In other words, the prosecutor had to prove that the taking in this case occurred with force or fear and that appellant committed the fatal assault so he could rob Johnson. If the taking of property is incidental to a killing, for example if it is an after-thought of a killing, the killing is not felony murder. The evidence in this case shows the taking of Johnson's property occurred after the fatal attack and was not a killing in the perpetration of a robbery.

As noted in Argument II, above, appellant's conviction for robbery in count 2 does not necessarily require a finding that the instant homicide occurred in the perpetration of that robbery and that a first degree murder conviction is required as a matter of law under the felony-murder doctrine. (*People v. Jeter, supra,* 60 Cal.2d at p. 676.) "Where the design to commit an independent felony is conceived by an accused only after delivering the fatal blow to his victim, the [felony-murder] doctrine is not applicable. [Citation]." (*Id.* at p. 676-677.)

The prosecution's evidence relative the assault on Johnson and the taking of his property consisted of the eyewitness testimony of Gregory Rivers, the video

evidence showing the assault outside the senior center, and evidence that, when appellant was detained, he was in possession a jacket with Johnson's bible in the pocket. The essential facts are undisputed. Rivers saw appellant kick Johnson in the head twice, remove "a couple items of clothing" from Johnson's cart, and then kick Johnson again. (4 RT 725.) (APPENDIX "G") Another witness, Ricardo Viramontes, saw the video of the assault and testified that it showed appellant kicking Johnson, multiple times, "taking [Johnson's] stuff, throwing it into a cart, and then leaving after that." (4 RT 883, 885.) (APPENDIX "G") Viramontes added that after appellant took the property, he kicked Johnson again and spat at or on him a couple times. (4 RT 883.) (APPDX."G") In the video, Johnson appears motionless and unconscious after the multiple acts of kicking committed before appellant took the property. (Exhibit 3, "DVD: Kicking Video.") Thus, the fatal acts appear to have occurred before the taking of property and the final acts of kicking and spitting on the victim appear to be simply an after-thought -- not essential to the robbery or killing. Thus, the intent to rob Johnson appears from the evidence to have occurred after the fatal blows.

The critical issue relative to the felony murder conviction on count 1 is whether the evidence proves, beyond a reasonable doubt, that appellant formed the intent to rob Johnson either prior to or during the commission of the fatal blows which led to Johnson's death. "[T]he evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of

the acts which resulted in the victim's death; evidence which establishes that the defendant formed the intent only after engaging in the fatal acts cannot support a verdict of first degree murder based on section 189." (*People v. Anderson, supra,* 70 Cal.2d 15, 34.)

Appellant submits the evidence shows, at most, that he committed second degree implied malice murder not first degree felony murder. As the prosecutor argued in closing argument, when appellant approached Johnson "he made the decision he's going to assault one of these homeless individuals." (10 RT 2066.) (APPENDIX "M") The prosecutor added, "[t]here's no other reason for him to stop." (10 RT 2066.) (APPENDIX "M") The prosecutor did not argue appellant's primary motive was to rob Johnson or that he formed the concurrent intent to kill Johnson for the purpose of robbing him. The evidence fails to reasonably support either inference.

If appellant's primary objective was to rob Johnson, not assault him, it is doubtful he needed to use force because Johnson was asleep at the time. It is also not reasonable to infer from the evidence that appellant decided to kill Johnson so he could take his property. The evidence shows appellant took only a jacket with a bible from Johnson – not items of significant monetary value or items he wanted or needed. These items were found in the cart appellant was pushing at the time of his detention and arrest. (6 RT 1370.) (APPENDIX "I")

The assault was unplanned and fueled by the drugs and alcohol appellant consumed when he was distraught over the breakup with his girlfriend. He didn't

know Johnson, didn't have a motive to harm or rob him, and no evidence showed he hated homeless people and targeted them. There is also no evidence appellant formed a prior plan to rob and kill the victims. These unplanned crimes were also uncharacteristic of his non-violent nature. As the defense expert concluded, the taking of this property was irrational and inconsistent with a "logical intent to steal." (9 RT 1962.) (APPENDIX "L")

If the killing is part of, or a consequence (intended or not) of the robbery, then the killing is felony murder under the law. But if, on the other hand, a theft of property is a consequence of a killing ('we killed this guy, we might as well take his stuff'), then the killing is not done "in the commission of" the theft as required for first degree felony murder under section 189.

Viewed as a whole, the prosecutor's evidence did not prove beyond a reasonable doubt that the fatal assault on Johnson was committed in the perpetration of a robbery as required for first degree felony murder under section 189. Accordingly, due process requires reversal of the conviction in count 1. (U.S. Const., Amends. 5 & 14; Cal. Const., art. 1, sec. 15; *In re Winship, supra*, 397 U.S. 358, 364; *Jackson v. Virginia, supra,* 443 U.S. 307, 314; *People v. Johnson, supra*, 26 Cal.3d 557, 578.)

V. THE LACK OF SUBSTANTIAL EVIDENCE THAT THE FATAL ASSAULT ON BOBBY JOHNSON WAS INCIDENTAL TO ROBBERY, AS OPPOSED TO THE OTHER WAY AROUND, REQUIRES REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDING UNDER PENAL CODE SECTION 190.2, SUBDIVISION (a)(17), ATTACHED TO COUNT 1.

A. INTRODUCTION

In this court trial, the court found true the special circumstance allegation attached to count 1; that the killing occurred in the course of committing a felony – robbery [§ 190.2, subd. (a)(17)]. (11 RT 2125.) (APPENDIX "N") As discussed in Argument III, above, the subdivision (a)(17) special circumstance requires proof beyond a reasonable doubt that the defendant intended to commit robbery independent of the killing. If the defendant only intended to commit murder and the commission of robbery was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved. (2 CT 268 – CALCRIM No. 730; (APPENDIX "D") *People v. Williams, supra,* 44 Cal.3d at p. 927.)

For the reasons discussed below, the evidence in this case shows the robbery of Bobby Johnson was incidental to the fatal assault. The prosecutor did not meet the burden of proof relative to the special circumstance that the killing occurred in the course of a robbery. Accordingly, the special circumstance allegation under section 190.2, subdivision (a)(17), attached to count 1 must be reversed.

B. STANDARD OF REVIEW

The applicable standard of review for the sufficiency of the evidence is set

forth in Argument III (B), above, and is incorporated herein by this reference for the sake of brevity.

C. THE PROSECUTOR FAILED TO PROVE THE FATAL ASSAULT ON BOBBY JOHNSON WAS COMMITTED TO FACILITATE A ROBBERY.

As demonstrated in Argument III, above, the felony murder special circumstance defined in section 190.2, subdivision (a)(17), does not apply to every killing that occurs along with a robbery. It applies only to killings that derive from an initial intent to commit the underlying felony, "'a murder in the commission of a robbery but [not] the exact opposite, a robbery in the commission of a murder.'" (*People v. D'Arcy, supra,* 48 Cal.4th at p. 296.) If the felony is merely incidental to achieving the murder – the murder being the defendant's primary purpose – then the special circumstance is not present. (*People v. Navarette, supra,* 30 Cal.4th at p. 505; *People v. Marshall, supra,*15 Cal.4th at p. 41.) As further noted, appellant's convictions for murder and robbery are not enough; the statute also requires that he committed the murder during the commission of the robbery and that he intended to commit robbery independent of the killing. (*People v. Andreasen, supra,* 214 Cal.App.4th at p. 80; *People v. Marshall, supra,* 15 Cal.4th at p. 41.)

In *Marshall,* the Supreme Court stated that even if there is sufficient evidence to support the defendant's conviction for robbery, reversal of the robbery/murder special circumstance finding in that case would still be necessary.

(*Id.* at p. 41.) In *People v. Andreasen, supra,* this court explained the distinction between the felony-murder special circumstance and the felony-murder offense, stating, "the felony-murder offense is established merely upon a showing that the defendant killed during the commission or attempted commission of the felony, whereas the felony-murder special circumstance requires an additional showing that the intent to commit the felony was independent of the killing." (*People v. Andreasen, supra,* 214 Cal.App.4th at p. 80.)

Consistent with the foregoing authority, the trial court, as the trier of fact, relied upon CALCRIM No. 730 relative to the felony-murder special circumstance finding which states, in relevant part: "the People must prove that the defendant intended to commit robbery independent of the killing. If you find that the defendant only intended to commit murder and the commission of robbery was merely part of or incidental to the commission of that murder, then the special circumstance had not been proved." (APPENDIX "D") (2 CT 268.) In contrast, the instructions on the felony murder offense did not include a requirement that appellant's intent to rob be independent of the killing. (APPENDIX "D") (2 CT 260; CALCRIM No. 540A.)

Here, the prosecutor did not have substantial evidence, capable of proof beyond a reasonable doubt, that the fatal assault on Bobby Johnson derived from a robbery within the meaning of section 190.2, subdivision (a)(17). As demonstrated in Argument IV, the most probative evidence on the point pointed in the other direction – that the assault on Johnson was the goal and any taking

of property was peripheral – a scenario not supporting the special circumstance allegation.

The facts and circumstances of the assault on Johnson are described in Argument IV (A) and (C) above, and are incorporated herein by this reference for the sake of brevity.

Appellant acknowledges evidence that he assaulted Johnson and took a bible and presumably a jacket from him. (6 RT 1370.) (APPENDIX "I") Appellant was intoxicated and distraught over the breakup with this girlfriend when he assaulted Johnson and took his property. There is no evidence he had a prior plan to rob or harm anyone on the morning of the incidents and no evidence he hated homeless people and targeted them. Instead, as the defense expert explained, his actions in taking the property were irrational and inconsistent with a "logical intent to steal." (9 RT 1962.) The items he took were of little or no monetary value and were not things he needed or wanted.

Under the standard required by due process, the prosecutor's evidence fails to establish that appellant intended to commit robbery independent of the fatal assault. In other words, the evidence fails to show that the killing occurred in the commission of a robbery. (*People v. D'Arcy, supra*, 48 Cal.4th 257, 296.) The evidence shows only that the commission of robbery was merely part of or incidental to the fatal assault. Only by ignoring the burden of proof and relying on suspicion, conjecture, and speculation could the trier of fact conclude the felony

murder special circumstance was established in this case.

For the reasons discussed, due process requires reversal of the special circumstance allegation under section 190.2, subdivision (a)(17), attached to count 1. (U.S. Const., Amends. 5 & 14; Cal. Const., art. 1, sec. 15; *In re Winship, supra,* 397 U.S. 358, 364 ; *Jackson v. Virginia, supra*, 443 U.S. 307, 314; People v. Johnson, supra, 26 Cal.3d 557, 578; *People v. Morris, supra*, 46 Cal.3d 1, 20-21 [conjecture, speculation, and guesswork are not rational inferences constituting proof].)

VI. APPELLANT'S TWO INDETERMINATE SENTENCES OF LIFE IN PRISON WITHOUT PAROLE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A. PRELIMINARY INFORMATION

Appellant was 22 years old when he committed the instant offenses. He was convicted, *inter alia,* of two counts of first degree felony murder for committing the fatal assaults on Hamilton and Johnson during the commission of robberies. Robbery-murder special circumstance findings on each count elevated his sentence to two consecutive terms of life in prison without the possibility of parole. The trial court found he was intoxicated during the assaults and for that reason, rejected the prosecutor's theory that the killings were premeditated. But for the taking of a jacket and bible from Johnson and a shopping cart and lavender pants from Hamilton – items of no significant monetary value – the court would have found appellant guilty of second degree

murder in both cases. (11 RT 2121-2122, 2124-2125.)

As noted in the preceding arguments, there are a number of mitigating circumstances in this case. Appellant had no prior felony convictions, no gang affiliation, and no history of violence. Three character witnesses testified about his peaceful, non-violent nature and his reputation for honesty. No weapons were involved in this case and the crimes were committed while appellant was severely intoxicated, from ingesting drugs and alcohol, and emotionally distraught over the breakup with his girlfriend. There is no evidence he planned to harm or rob anyone prior to the assaults and no evidence he hated or targeted homeless people.

The robberies of the homicide victims were instead irrational and reflected appellant's significantly impaired mental state. He took items from the two homeless men that were not things he wanted or needed and that had no significant monetary value. In addition, the fragile health of the victims, which does not relieve appellant of liability, contributed to their deaths, which occurred more than a month after the assault of one victim and three months after the assault of the other victim. In his post-arrest interview with the police, shortly after the incidents, appellant explained that he had no memory of harming anyone or taking their property. His shock, disbelief and deep sense of remorse for his involvement in the instant unplanned crimes is further evidence of his impaired mental state during the assaults and is arguably evidence of a reduced

study

level of culpability relative to the homicides.

Appellant's sentences of life in prison without the possibility of parole are extraordinarily harsh given the mitigating circumstances described above. His relative youth, his lack of a prior criminal history, his distraught emotional state and intoxication at the time of the incidents, and his personal characteristics all reduce his individual culpability. His sentences of life imprisonment without parole are so grossly disproportionate as to violate the state and federal constitutional prohibitions against cruel and / or unusual punishment.

B. STANDARD OF REVIEW

This Court performs an independent review to measure the facts against the constitutional standard. "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.)

> To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty

imposed is "grossly disproportionate to the defendant's individual culpability" [citation], or, stated another way, that the punishment " ' "shocks the conscience and offends fundamental notions of human dignity" ' " [citation], the court must invalidate the sentence as unconstitutional. (*People v. Hines* (1997) 15 Cal. 4th 997, 1078.)

C. APPELLANT'S SENTENCES OF LIFE WITHOUT THE POSSIBILITY OF PAROLE VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." While it is the Legislature's role in the first instance to define crimes and prescribe punishment, the Legislature's authority is circumscribed by the constitutional prohibition against cruel and unusual punishment." (See *Solem v. Helm* (1983) 463 U.S. 277, 290.)

The Eighth Amendment applies to the states via the Fourteenth Amendment (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*) (lead opn. of O'Conner, J.); *Robinson v. California* (1962) 370 U.S. 660, 667), and contains a narrow proportionality principle that applies to noncapital sentences. (*Ewing, supra,* 538 U.S. at p. 20, *quoting Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (*Harmelin*); *Lockyer v. Andrade* (2003) 538 U.S. 63, 72 (*Andrade*).) A court's proportionality analysis under the Eighth Amendment should be guided by

objective criteria, including, among other factors "the gravity of the offense and the harshness of the penalty." (*Solem v. Helm, supra*, 463 U.S. at p. 292.)

"[T]hree factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: `(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' [Citation.]" (*Ewing v. California, supra*, 538 U.S. at p. 22 [155 L.Ed.2d 108, 123 S.Ct. 1179].)

On three occasions since 2005, the United States Supreme Court has considered the Eighth Amendment prohibition as applied to juvenile sentences. While appellant acknowledges he was not a juvenile when he committed the current crimes, he submits his relative youth, immaturity, and intellectual deficits, in addition to the unique circumstances of the unplanned offenses, are relevant mitigating circumstances.

The high Court's decisions reflect a growing recognition that the youthful brain is not as developed or sophisticated as the adult brain and that youths are, therefore, not as culpable for their crimes as adults. In *Roper v. Simmons* (2005) 543 U.S. 551, 568 [125 S.Ct. 1183, 161 L.Ed.2d 1] (*Roper*), the Supreme Court held the Eighth Amendment prohibits the death penalty for defendants under age 18 years. Citing both "scientific and sociological studies," the Court recognized that juveniles, compared to adult offenders, are more immature, impulsive,

susceptible to peer pressure, and have an "underdeveloped sense of responsibility." (*Id.* at pp. 569-570.) In the Court's view, these immutable developmental differences not only render the juvenile offender less blameworthy than his adult counterpart, but also more amenable to reform. (*Id.* at p. 570.)

In *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825], the high Court considered the constitutionality of life without parole sentences for juvenile defendants convicted of nonhomicide offenses. Following the reasoning in *Roper*, the Court held that such sentences run afoul of the Eighth Amendment. (*Id.* at pp. 67-68, 74-75, 82.) The Court explained that LWOP sentences "forswear [] altogether the rehabilitative ideal" – instead pronouncing an "irrevocable judgment" which is fundamentally at odds with the juvenile offender's capacity for change. (*Id.* at p.74.) While the Eighth Amendment does not guarantee that a juvenile offender in a nonhomicide case will eventually be granted parole, it does guarantee that one day he will be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75.)

In *Miller v. Alabama* (2012) 567 U.S. 460, 489 [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*), the Court held that mandatory life without parole sentences are unconstitutional for juvenile homicide offenders. The essential point in *Miller* is that irrespective of the underling crime, "An offender's age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants'

youthfulness into account at all would be [constitutionally] flawed." (*Miller, supra,* 567 U.S. at p. 473-474, internal quotations and citation omitted.) Applying this principle in the context of homicide, the Court struck down sentencing schemes which removed the sentencing court's discretion to impose anything other than a life without parole sentence against a minor convicted of murder. (*Miller v. Alabama, supra,* 567 U.S. at p. 479, 489.) Instead, the Court held the sentencing judge must have discretion to consider the offender's youth as a possible mitigating factor which rendered a life without parole sentence inappropriate. (*Id.* at p. 489.)

Miller recognized that the brain of a young person is not as developed or sophisticated as the brain of a mature adult. For that reason, young people are prone to rash and irresponsible actions which are the product, not of an intractable antisocial character, but of simple immaturity. (*Miller v. Alabama, supra,* 567 U.S. at pp. 471-473.) These developmental deficits do not disappear at age 18. In fact, research had found the opposite. The prefrontal cortex -- the area of the brain responsible for cognitive analysis, abstract thought, and the moderation of correct behavior in social situations – is one of the last areas of the brain to reach maturation. (M. Aarin, *et al*, "Maturation of the Adolescent Brain," Neuropsychiatric Disease and Treatment, Vol. 9, 2013, p. 449, 453, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/.) (APPENDIX "R" AND "S") Development of this area often remains incomplete until around the age of 25. (*Ibid.*) "The prefrontal

cortex offers the individual the capacity to exercise good judgment when presented with difficult life situations." (*Ibid.*)

As the foregoing cases make clear, the "mitigating qualities of youth" are a crucial sentencing factor, such that a sentencing scheme which is appropriate for a mature adult would not necessarily be appropriate for a more youthful offender. Appellant recognizes that the decisions in *Roper, Graham* and *Miller* are not directly applicable to him. However, the question in this case is whether the principles embodied in those cases cease to apply the moment a person turns 18, or whether a young person who has nonetheless reached the age of majority, is still entitled to have the sentencing court consider his youthfulness and its possible effect on his capacity for future reform.

Appellant was only 22 years old at the time of the current offenses. He had no significant prior criminal history or history of violence. He scored in the low average range of intelligence and in the fifth percentile in a test of oral language skills. (9 RT (APPENDIX "L") 1944-1945.) Moreover, studies show the part of his brain which controls reason, logic, and problem solving, among other executive functions, may not have been completely developed when he committed the current offenses. His intoxication, in response to the breakup with this girlfriend, was also a significant factor which the trial court found negated any finding that the fatal assaults were premeditated. The trial court could reasonably have concluded that the mitigating factors described above were sufficient to warrant a

future opportunity at parole but the court was precluded from considering this option because state law required mandatory sentences of life without parole. (§ 190.2, subd. (a).)

Given the unique mitigating factors in this case and the trial court's inability to consider those factors, appellant's sentences of life without the possibility of parole violate the Eighth Amendment prohibition against cruel and unusual punishment. This court should remand the matter for a new sentencing hearing.

D. APPELLANT'S SENTENCES OF LIFE WITHOUT THE POSSIBILITY OF PAROLE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE CALIFORNIA CONSTITUTION.

Whereas the federal Constitution prohibits cruel "and" unusual punishment, California affords greater protection to criminal defendants by prohibiting cruel "or" unusual punishment, that is, punishment that "shocks the conscience" and offends fundamental notions of human dignity, considering the offender's history and the seriousness of his offense. (Cal. Const., art. I, § 17; *People v. Dillon* (1983) 34 Cal.3d 441, 478, abrogated by statute on a different ground as explained in *People v. Chun* (2009) 45 Cal.4th 1172, 1186; *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).)

Under the California Constitution, a punishment is excessive if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d 410, 424.) Even a punishment which is not impermissible in the abstract,

nevertheless is constitutionally impermissible under California's constitution if it is disproportionate to the defendant's individual culpability. (*Id.* at p. 478.) Under California law, it is the imperative task of the judicial branch, as co-equal guardian of the Constitution, to condemn any violation of the prohibition against cruel and unusual punishment. (*Id.* at p. 414.)

In *People v. Mora* (1995) 39 Cal.App.4th 607, a case involving murder with robbery/burglary special circumstances, the reviewing court recognized that a punishment provided by law "may run afoul of the constitutional prohibition against cruel or unusual punishment in article I, section 17, of the California Constitution." (*Id.* at p. 615.) The *Mora* court explained:

> If the punishment mandated by law for a special circumstances murder is so grossly disproportionate to a particular defendant's individual culpability as to constitute cruel or unusual punishment under [*People v. Dillon, supra,* 34 Cal.3d 441] ... a court has authority to prevent the imposition of unconstitutional punishment. (See *People v. Webb* (1993) 6 Cal.4th 494, 536 [dictum that a death sentence could be reduced under *Dillon*, but death sentence affirmed]; *People v. Davis* (1994) 7 Cal.4th 797, 817 (conc. opn. of Kennard, J.)] [dictum that a sentence of death or even life without parole could be reduced under *Dillon*].) In such cases the punishment is reduced because the Constitution compels reduction ....
>
> (*Ibid.*)

In *Lynch*, the California Supreme Court formulated a three point analysis for determining whether a sentence is cruel and unusual: (1) the nature of the offense and the offender, with particular regard to the degree of danger which both present to society; (2) a comparison of the challenged penalty with the punishment prescribed in the same jurisdiction for other more serious offenses; and (3) a comparison of the challenged penalty with the punishment prescribed for the same offense in other jurisdictions. (Id. at pp. 425-427.)

> Although articulated slightly differently, both [state and federal] standards prohibit punishment that is `grossly disproportionate' to the crime or the individual culpability of the defendant. [Citations.] ... [Citations.] *Any one of these factors can be sufficient to demonstrate that a particular punishment is cruel and unusual.*

(*People v. Mendez* (2010) 188 Cal.App.4th 47, 64-65; emphasis supplied.)

With respect to the nature of the offense, "the courts are to consider not only the offense in the abstract -- i.e., as defined by the Legislature -- but also "`the facts of the crime in question' [citation] -- i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*People v. Dillon, supra,* 34 Cal.3d at p. 479.)

When evaluating the particular offender, the reviewing court focuses on

"individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (Ibid.)

The case of *People v. Dillon, supra*, 34 Cal.3d 441, is factually similar to the present case and is therefore instructive on this issue. In *Dillon*, the California Supreme Court concluded that under the facts of that case, the life imprisonment of a 17-year-old defendant for first degree murder based on a felony-murder theory violated California's constitutional prohibition against cruel and unusual punishment. (*People v. Dillon, supra*, 34 Cal.3d at pp. 450-452, 477, 482-483, 489.) The court in so deciding refined the first *Lynch* prong, stating trial and reviewing courts should examine "not only the offense in the abstract[,]" but also "the facts of the crime in question.' [Citation.]" (*Id.* at p. 479.)

The 17-year-old defendant in *Dillon, supra*, was convicted of first degree felony murder and attempted robbery in an incident in which the defendant and his companions entered a farm on which the victim and his brother illegally grew marijuana. (*Id.* at p. 451.) The defendant intended to take some of the marijuana if possible. (*Ibid.*) He shot the victim nine times as the victim approached him carrying a shotgun. (*Id.* at p. 452.)

The California Supreme Court held the defendant's sentence of life imprisonment as a first degree murderer violates article I section 17, of the California Constitution. (*Id.* at p. 489.) The Court modified the judgment by reducing the degree of the crime to murder in the second degree. (Ibid.) The

court noted that at the time of the shooting, the defendant was an unusually immature youth. (*Id.* at p. 488.) "He had no prior trouble with the law, and, . . . was not the prototype of a hardened criminal who poses a grave threat to society." (*Ibid.*)

The Dillon court observed that the shooting in that case was a response to a suddenly developing situation that the defendant perceived as putting his life in immediate danger. (*Ibid.*) The Court further acknowledged:

> To be sure, he largely brought the situation on himself, and with hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself panicking when that risk seemed to eventuate.
>
> (*Ibid.*)

As demonstrated, the present case is presents a number of similar and compelling mitigating factors. Appellant was relatively young and immature, he had intellectual deficits, he was intoxicated at the time of the crimes, he had no significant prior criminal history, no history of violence and, like the defendant in *Dillon*, was not the prototype of a hardened criminal who poses a grave threat to society. He also has no gang-related ties and no mental heath issues. Moreover, there is no evidence he had a prior plan to harm or rob anyone on the morning of the assaults. No weapons were involved and he showed great

remorse and disbelief, in his post-arrest interview, concerning his involvement in these crimes. He also cooperated with law enforcement, waived his Miranda rights, and agreed to an interview with law enforcement shortly after his arrest.

But for the robberies of the homicide victims, which involved property of little or no value, appellant would have been convicted of second degree murder in each case. As noted, the "robberies" were completely irrational and inconsistent with a logical intent to steal and were instead the result of appellant's intoxication and emotional turmoil.

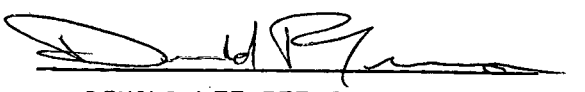
Based upon the foregoing, appellant's life without parole sentences violate both the state and federal constitutions and should be vacated.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA COURT OF APPEAL'S HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT. MOREOVER, SOME OF THE ISSUES PRESENTED HEREIN HAVE NOT BEEN PREVIOUSLY ADDRESSED BY THIS COURT IN THE CONTEXT OF THIS FACTUAL SCENARIO. FURTHERMORE, PETITIONER RESPECTFULLY REQUESTS AND PRAYS THAT THIS COURT REVERSE THE JUDGMENT OF CONVICTION. ALTERNATIVELY, THIS CASE MUST BE REMANDED FOR RESENTENCING BECAUSE THE LIFE WITHOUT PAROLE SENTENCES ON COUNTS 1 AND 3 VIOLATE THE STATE AND FEDERAL PROHIBITIONS AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT.

DATED: AUGUST 28, 2018

RESPECTFULLY SUBMITTED,



DONALD LEE REEVES, III
CDCR# BC-1244

PETITIONER IN PRO PER