

Koontes v California

Index To Appendices

Appendix A: Order OF 4/15/2026 from Calif Supreme Court

Appendix B: Order OF Orange County Superior Court Dated 7/29/13

Appendix C: Order OF United States Dist. Court, Central Dist. OF Calif. Dated 11/20/12

Appendix D: Declaration OF Mark Werksman, Attorney
Dated 2/14/14

Appendix E: Secretly Recorded Meeting Between Bill Price
And Amy Nguyen On 2/11/13

SUPREME COURT
FILED

APR 15 2026

Jorge Navarrete Clerk

S293234

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re LONNIE LOREN KOCONTES on Habeas Corpus.

The petition for writ of habeas corpus is denied.

GUERRERO

Chief Justice

Appendix A

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUL 29 2013

ALAN CARLSON, Clerk of the Court

BY: T. EBBERT, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

LONNIE KOCONTES,
Defendant.

CASE NO. 13ZF0163
(13CF0463 & 13CF1773)

ORDER OVERRULING
DEMURRER, DENYING
MOTION TO STRIKE,
AND DENYING MOTION
TO DISMISS INDICTMENT

TO THE PEOPLE OF THE STATE OF CALIFORNIA AND TO DEFENDANT AND HIS
COUNSEL OF RECORD:

BACKGROUND

Defendant is charged by indictment in case number 13ZF0163 with the 5/26/06 murder of Micki Kanesaki. It is also alleged that he committed the murder intentionally for financial gain. (Pen. Code §§ 187(a); 190.2(a)(1)) In addition, the indictment alleges that this court has jurisdiction pursuant to Penal Code section 778a, subdivision(a), in that defendant, with the intent to commit a crime, did an act in Orange County, California, which culminated in the commission of a crime outside California.

In the present motion, defendant demurs to the indictment, moves to strike it, and moves to dismiss the charges, all on the same grounds. He contends that the victim's death occurred outside the United States, and therefore, this court - and any state court in California - lacks subject matter and territorial jurisdiction over the charged offense. (For convenience, subject matter and territorial jurisdiction are referred to collectively herein as "territorial jurisdiction".)

Appendix B

PROCEDURAL HISTORY

Because there have been three separate prosecutions brought based on the same alleged conduct, their procedural history is summarized below.

The First Case

On 2/13/13, defendant was charged by complaint with Ms. Kanesaki's 5/26/06 murder plus the special circumstance of intentional murder for financial gain. (Case number 13CF0463, hereinafter, "the first case".) The First Amended Complaint added the jurisdictional allegation, pursuant to Penal Code section 778a(a), that defendant, with the intent to commit a crime, performed an act in Orange County, California, which culminated in the commission of a crime outside California.

In a single motion filed 3/13/13, defendant demurred to and moved to dismiss the complaint on the ground that this court lacked territorial jurisdiction over the charged offense.¹ Both motions were based on counsel's declaration which contained facts extrinsic to the pleadings. On 4/22/13, the date set for the hearing on the demurrer and motion to dismiss, the magistrate (Judge Kazuharu Makino) overruled the demurrer, but refused defendant's request for a separate evidentiary hearing, prior to the preliminary examination, to determine whether this court had territorial jurisdiction. On 5/16/13, the date set for the preliminary hearing, defendant entered a not guilty plea before a different magistrate, Judge William Evans.

Judge Evans also entertained defendant's motion to dismiss the first case, which raised the following issues:

- 1) Whether, as a matter of law, Penal Code section 778a(a) prohibits California from prosecuting a person who commits a crime outside the United States.
- 2) Assuming section 778a (a) permits California to prosecute a crime committed outside the United States, whether the People have submitted sufficient evidence to establish jurisdiction under this statute.

On 5/29/13, Judge Evans initially ruled that section 778a(a) permits California to exercise jurisdiction over crimes committed outside the United States. Therefore, he commenced an evidentiary hearing to determine if the People could satisfy the elements of section 778a(a).

¹ Between the filing of the original motion and the court's ruling, defense counsel filed supplemental documents were filed in support of the demurrer and motion to dismiss.

However, following the close of the evidence, Judge Evans reconsidered his initial ruling and held that section 778a(a) prohibits California from exercising jurisdiction over a crime completed outside the United States. Therefore, on 5/31/13, he dismissed the first case and discharged the defendant.

Defendant remained in custody because the People immediately filed a new complaint (case # 13CF1773, hereinafter, "the second case"). Defendant objected to the new complaint on the ground that a dismissal for lack of territorial jurisdiction prohibited the People from re-filing the case. However, Judge Evans rejected this contention and allowed the second case to be filed. Subsequently, defendant demurred, moved to strike and moved to dismiss the second case on this and other grounds; these motions were set for 6/17/13.

But before the 6/17/13 motions could be heard, the grand jury returned an indictment which contained the identical charges alleged in the first two cases. (Case # 13ZF0163 - hereinafter, "the indictment" or "the third case"). When the indictment was filed, the second case was dismissed on the People's motion, pursuant to Penal Code section 1387(c).

The third case – the indictment – is identical in substance to the two prior cases. It alleges that on or about 5/26/06, defendant murdered Micki Kanesaki, and that he did so intentionally for financial gain. (P.C. § 187(a); 190.2(a)(1)) The indictment also alleges that defendant, who had the intent to commit a crime, did an act within Orange County, California, in execution and part execution of that intent, which culminated in the commission of a crime outside the State of California.

At his 6/17/13 arraignment on the indictment, defendant waived the right to be arraigned that day and the arraignment was continued to 6/26/13. Also on 6/17/13, the court agreed to incorporate into the third case, the demurrer and motion to dismiss which had been filed in the second case. Nevertheless, on 6/21/13, defendant filed a new Demurrer, Motion to Strike and Motion to Dismiss in the third case. (Case # 13ZF0163).

On 6/26/13, the court heard argument on all three motions and continued the matter to 7/29/13.

DEMURRER; MOTION TO STRIKE INDICTMENT; AND MOTION TO DISMISS

The demurrer, motion to strike and motion to dismiss are combined into a single motion, in which defendant contends as follows:

- 1) When a case has been dismissed for lack of territorial jurisdiction, the People may not re-file it.

- 2) Assuming this case may be re-filed, the doctrines of res judicata and collateral estoppel require its immediate dismissal.
- 3) The demurrer to the indictment must be sustained because the face of the complaint establishes that the offense occurred outside the United States, and therefore, this court lacks territorial jurisdiction.
- 4) California lacks territorial jurisdiction over the offense, as a matter of law, because Penal Code sections 778a(a) and 27 prohibit California from exercising jurisdiction over a crime which culminates outside the United States, and on the additional ground that international law prohibits this court from exercising jurisdiction over this offense.²

DISCUSSION

ISSUE 1

The Magistrate's Dismissal for Lack of Territorial Jurisdiction Does Not Prohibit the People from Re-Filing the Charges

(a)

Relying on Penal Code section 1387, defendant contends a second filing in a felony case is permitted only when a case has been dismissed "pursuant to this chapter, or Section 859b, 861, 871, or 995". (Citing Pen. Code §. 1387(a)) He emphasizes that the dismissals "pursuant to this chapter" are limited to *statutory* speedy trial violations (i.e., §§ 1381, 1381.5, and 1382) and interest-of-justice dismissals under section 1385. The only other permissible dismissals pursuant to section 1387 are for failing to provide a speedy or continuous preliminary hearing (§§ 859b & 861.); when a magistrate finds no probable cause (§ 871); and when an indictment or information is set aside (§ 995). Because the first case was dismissed on none of these statutorily-enumerated grounds, defendant contends that section 1387 prohibited the re-filing of his case.

He asserts that the nature of a dismissal for lack of territorial jurisdiction is so different from the dismissals enumerated in section 1387 that this justifies the prohibition against the re-filing of his case. In support of this contention, he relies on *Casey v Superior Court* (1989) 207 Cal.App.3rd 837, which provides as follows:

"A dismissal for lack of territorial jurisdiction is qualitatively different from those situations in which dismissals in the furtherance of justice have been approved. In the former situation, the court is not empowered to hear the case; in the latter it chooses to dismiss the case because other factors outweigh its authority to act.

² This ground was raised in defendant's supplemental brief, filed 6/26/13. The People have responded to this argument in their supplemental opposition, filed 7/10/13.

This conclusion finds further support in the fact a number of methods exist to challenge a court's power to hear a case, all of which are outside the scope of section 1387." (*Casey v. Superior Court* (1989) 207 Cal.App.3d 837, 844.)

In *Casey*, the People twice filed conspiracy and drug charges in San Joaquin County which were twice dismissed. The minutes of the first case indicated it had been dismissed in the interests of justice. In the second case, the minutes also indicated it had been dismissed in the interests of justice; but the reporter's transcript of the preliminary hearing established the second dismissal was for lack of jurisdiction because the offense had been committed in Calaveras County. When a third prosecution was initiated in Calaveras County, the defendant moved to dismiss under section 1387, but the trial court denied the motion. In upholding the trial court's ruling, the Court of Appeal held that the second dismissal - for lack of territorial jurisdiction - - was not a dismissal in the interests of justice and did not "count" as a dismissal for the purposes of section 1387. Therefore, it held the charges had not been twice dismissed pursuant to section 1387, and a third prosecution was not barred.

Consequently, *Casey* does not hold, as defendant contends, that a prosecution dismissed for lack of territorial jurisdiction may not be re-filed. *Casey* also observed that nothing in the record indicated the multiple filings resulted from the type of conduct Penal Code section 1387 was designed to prevent - forum shopping and/or prosecutorial harassment of the defendant. (*Casey, supra*, at 845)

This court makes the same finding with respect to the present case. Despite the circumstances surrounding victim's death, defendant was not charged with any offense for more than six years after the crime occurred. And after being charged, there has been no indication that the District Attorney's Office has engaged in any judge-shopping or harassment of defendant.

(b)

Next, defendant contends that a defendant whose case is dismissed for lack of territorial jurisdiction should be treated like a defendant whose case was dismissed for a denial of due process, in that the case may not be re-filed. The authorities on which he relies include *People v Pinedo* (2005) 128 Cal.App.4th 968, 974-975, which held that the People could not re-file a case which had been previously dismissed for prejudicial pre-accusation delay; *US v Marion* (1971) 404 US 307, 310-312, which held that when a case is dismissed for undue delay prior to indictment, re-indictment is impermissible; and *Strunk v US* (1973) 412 US 434, 439-440, which held that a dismissal [with prejudice] is the only adequate remedy for a prejudicial violation of a defendant's speedy trial rights.

Defendant emphasizes that in the above-cited cases, the error which resulted in the dismissal could not be corrected, and for this reason, a subsequent prosecution was

prohibited. Because he claims the jurisdictional defect which resulted in the dismissal in his case also cannot be cured, he asserts it is analogous to a due process defect which bars a subsequent prosecution.

However, the dismissal herein is not the equivalent of a due process dismissal. A dismissal on a due process grounds due to pre-accusation delay occurs only when the defendant has shown actual prejudice resulting from the delay. (See *US v Marion* (1971) 404 US 307, 325-326) That prejudice often consists of lost defense witnesses or exculpatory evidence which is significant enough to outweigh the People's justification for the delay. (See *People v Nelson* (2008) 43 Cal.4th 1242, 1250-1251)

In that context, the ultimate question the court must decide is whether "the defendant will be denied his right to a fair trial as a result of governmental conduct." (*People v Nelson*, *supra*, at 1255) If the answer is yes, it is apparent why a subsequent prosecution is prohibited: If a case has been dismissed due to prejudicial loss of defense evidence, re-filing the charges will inevitably result in another due process violation. If the government's conduct has resulted in conditions which would deprive a defendant of a fair trial in the first prosecution, the prospects of a fair trial in a second prosecution are equally improbable.

Defendant submits nothing to show he suffered any prejudice from the government's conduct which would adversely affect his right to a fair trial in the current prosecution. Instead, the Judge Evans' dismissal herein was based exclusively on his interpretation of the territorial jurisdiction statute.³ The issue of prejudice was not before the court. Consequently, the dismissal herein is not comparable to a dismissal based on a violation of due process.

But even assuming the two dismissals are similar, defendant fails to show the purported lack of territorial jurisdiction has prejudiced his right to a fair trial. Based on this lack of prejudice and the lack of any applicable legal authority, the court rejects the contention that the first dismissal bars a subsequent prosecution.

ISSUE 2

The Indictment is Not Barred by Collateral Estoppel or Res Judicata

Defendant contends that the magistrate's dismissal based on lack of territorial jurisdiction is binding on this court, requiring the immediate dismissal of the indictment. In support of this contention, he relies on authorities which establish that a defendant in a criminal case may assert collateral estoppel against the prosecution. Defendant relies on *People v: Quarterman* (2012) 202 Cal.App. 4th 1280, in which collateral estoppel prohibited the People from charging a defendant with a second probation violation after he had previously been

³ Although Judge Evans heard evidence, he did not consider any of that evidence in making his ruling. Nor did he make any factual findings or determinations of credibility.

In the criminal context, *some* cases have held that res judicata and collateral estoppel apply only where jeopardy has attached in the previous proceeding (*People v. Methey* (1991) 227 Cal.App.3d 349, 354- 355, disapproved on other grounds in *Schlick v. Superior Court* (1992) 4 Cal.4th 310; *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1556.) "Jeopardy does not attach when felony charges are dismissed prior to trial and since the People's ability to refile charges is generally limited to one additional filing, res judicata and collateral estoppel principles are not needed to prevent harassment of a defendant. (*Methey, supra*, 227 Cal.App.3d at p. 358; 1 Witkin, *supra*, §§ 277, 278, pp. 320-321.)" (*People v. Gallegos* (1997) 54 Cal.App.4th 252, 267)

Assuming jeopardy in the prior proceeding is an element of collateral estoppel, it did not attach in the first case.

(b)

Similar Magistrate Orders Lack Collateral Estoppel Effect

"[T]he doctrines of res judicata or collateral estoppel are inapplicable to orders dismissing criminal proceedings following preliminary hearings." (*People v. Wallace* (2004) 33 Cal.4th 738, 749, citing *People v. Uhlemann, supra*, 9 Cal.3d at pp. 667-668; *People v. Backus* (1979) 23 Cal.3d 360, 396-397)⁴

While the dismissal herein did not occur after a preliminary hearing, it was similar in that it resulted from a magistrate's ruling. Because the defendant, who has the burden of establishing the validity of his claim, has failed to present authority that collateral estoppel effect may be given to the present ruling, he has failed to satisfy that burden.

(c)

Limited Application to Issues of Law

According to the United States Supreme Court, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe v. Swenson, supra*, 397 U.S. 436, 443, 446, 90 S.Ct. 1189, 1194-1195, emphasis added.)

Although the doctrine is sometimes applied to issues of law in civil cases. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 622), almost all criminal cases applying collateral estoppel have involved prior determinations of fact. (See, *Ashe v. Swenson, supra*, 397 U.S. 436, 443, 446; *People v. Santamaria* (1994) 8 Cal.4th 903, 912)

⁴ The same is true of an order granting a motion to suppress evidence under P.C. § 1538.5.

An exception is *People v. Howie* (1995) 41 Cal.App.4th 729, 736, in which the defendant was convicted by a jury of robbery, burglary, assault with a deadly weapon and simple assault. The jury also found three prior serious felony convictions true. However, years before, in an unrelated proceeding, a different court had found one of the prior convictions unconstitutional, and the People had not appealed from that ruling. Therefore, it was a final determination on the merits to which the People and the defendant had been parties. Consequently, the People were bound by it in all subsequent proceedings.

Howie is inapplicable to the present case because the order under consideration here is not final. In addition, the difference in the procedural posture of the two cases makes *Howie's* application to the present case questionable.

(d)

Injustice and the Public Interest May Preclude Collateral Estoppel

When collateral estoppel is applied to "a question of law rather than of fact, the prior determination is not conclusive if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations]." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 622, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64; *In re Bush* (2008) 161 Cal.App.4th 133, 147-148)

Assuming all the elements of collateral estoppel exist, this court finds that foreclosing the People from relitigating the issue of territorial jurisdiction would be against the public interest. The court's determination is based on the following factors:

- (1) The prior decision involved an issue of law on which no controlling authority exists.
- (2) Based on the record available to the court, including documents of which defendant has requested judicial notice, the charges, if proved true, indicate the offense was committed outside the United States for the purposes of avoiding California's territorial jurisdiction, a fact not considered in the prior ruling.
- (3) The seriousness of the charges.
- (4) No prejudice to defendant would result from a re-determination of the issue.
- (5) The People of the State of California would be prejudiced if the prior ruling were given collateral estoppel effect.
- (6) The public interest in litigating criminal cases, particularly serious cases, on their merits.

ISSUE (3)

Demurrer to Indictment

Defendant observes that (1) an accusatory pleading must show that the charged offense is "triable in the court in which it is filed", and (2) a demurrer will be sustained where it appears on the face of the pleading that "the court has no jurisdiction" over the charged offense. (Citing P.C. § 959(5) and § 1004(1))

In support of his demurrer, defendant refers to a stipulation the parties entered into on 5/29/13, which provided as follows:

"For the purposes of the evidentiary hearing regarding the issue of territorial jurisdiction only, the parties stipulate as follows:

Lonnie Koontes and Micki Kanesaki boarded the Bahamian Cruise Ship, "Island Escape" in May 23, 2006. On May 26, 2006, Micki Kanesaki was reported missing on the ship. On May 27, 2006 her body was found floating in the water off the coast of Italy. She was deceased." (5/29/13 minutes, seq 11)

Defendant contends that, due to the stipulation, the above facts are on the face of the pleading, which now shows that the offense occurred outside the United States. These facts, combined with Judge Evans' ruling that Penal Code section 778a(a) applies only to crimes committed within the United States, means that this court lacks jurisdiction over the offense.

The People's Response to the Demurrer

The People assert that they need not plead any evidentiary facts because the indictment is sufficient to provide defendant with sufficient notice concerning the nature of the charge and sufficient information concerning the date of the crime and the name of the victim. (Citing *People v Savercool* (1889) 89 Cal. 650, 651) They also assert that the alleged defect is not on the face of the pleading as required by Penal Code section 1004.

DISCUSSION

In the first case (#13CF0463), defendant demurred to the First Amended Complaint, which was identical in substance to the current pleading - the indictment. Both pleadings allege that defendant, with the intent to commit a crime, did an act within Orange County, California, in execution and part execution of that intent, which culminated in the commission of a crime *outside the State of California*. However, neither pleading alleged that the culmination of the crime occurred outside the United States.

In his demurrer to the First Amended Complaint, defendant argued that it was undisputed that the offense had occurred outside the United States, but the magistrate (Judge Makino) refused to consider the allegedly undisputed facts and overruled the demurrer because the alleged defect was not on the face of the challenged pleading.

The demurrer to the indictment suffers from the same defect. The 5/29/13 stipulation, by its express terms, was entered into "[f]or the purposes of the evidentiary hearing regarding the issue of territorial jurisdiction only...." Moreover, the context of the stipulation illustrates why it should not be considered here. Just before the parties entered into the stipulation, Judge Evans had ruled that section 778a(a) permits California to exercise jurisdiction over crimes committed outside the United States, and the parties were about to begin a hearing on whether the People's evidence was sufficient to establish the elements of section 778a(a).

As the stipulation was not entered into for the purposes of a demurrer, allowing the defense to use it for that purpose would be inconsistent with the terms of the stipulation and unfair to the People. In addition, at the 6/26/13 hearing on the current motion, the People declined to extend that stipulation beyond its stated purpose.

Further, a defendant may not "strengthen his demurrer by bringing in evidentiary material which discloses a defect in the (pleading) . . .") [citation] The sole question raised by demurrer is whether the pleading is facially-not factually-deficient." (See *People v Jiminez* (1993) 19 Cal.App.4th 1175, 1177, at fn 3.)

Defendant also argues that the People are bound by the facts in the stipulation, because they have incorporated them into one or more of their briefs. This contention is incorrect. In their opposition, filed 6/20/13, the People presented a "Statement of *Anticipated* Facts" (emphasis added), in which they represented to the court that they *expected* to establish certain facts at trial. (People's Opposition to Defendant's demurrer, motion to strike and motion to dismiss, at pages 2-4)⁵ While the anticipated facts include those stated in the 5/29/13 stipulation, the People did not agree such facts could be used in a demurrer, and for this reason, the court will not consider them.

Consequently, the demurrer is overruled because the face of the indictment shows no jurisdictional defect.

⁵ The People's anticipated facts include the following: That the victim was strangled before being thrown overboard; that a few months before the cruise, the victim had updated her will, making defendant her sole heir; that before taking the cruise, defendant had told a girlfriend that he wanted to end his relationship with the victim; that he was going to "take care of" the victim while they were on the cruise ship and would "make it look like an accident". None of these facts are properly before this court for the purposes of the demurrer.

ISSUE (4)

Do Sections 778a(a) and 27(a)(1) Apply to Crimes Culminated Outside the US?

Here, the parties address the same issue before Judge Evans: Whether section 778a(a), and to a lesser extent, section 27(a)(1), permit a California court to exercise jurisdiction over a crime which was completed outside the United States.

In addressing this issue, the court is not limited to the face of the accusatory pleading. Therefore, it considers the facts stated in the 5/29/13 stipulation. Additionally, after this motion was initially filed, the grand jury transcript was provided to the parties and has become public. Therefore, although the court has not yet had access to that transcript, it is informed and believes that the transcript supports the facts stated in the stipulation. In addition, the court assumes, for the purposes of this portion of the motion, that the pathologist who performed the autopsy of the victim concluded she had been strangled.

(a)

The Plain Meaning of the Statutes

Penal Code section 778a(a)

A court must follow the plain meaning of a statute unless doing so would lead to absurd results not intended by the Legislature. If the statute's meaning is doubtful, the court may examine its background and history, as well as other evidence of legislative intent. (*People v. Birkett* (1999) 21 Cal.4th 226, 231-232)

Section 778a, subdivision (a) provides:

"(a) Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state." (P.C. § 778a, subd. (a), emphasis added.)

Each party contends the language of section 778a(a) is unambiguous and that it supports that party's position.

Defendant contends that because the statute authorizes jurisdiction over an offense culminating "either within or without this state", the ordinary meaning of "state" is a state within the United States. Since the Legislature failed to expressly provide that California may assert jurisdiction over an offense completed in another country or nation, its out-of-state jurisdiction is necessarily limited to those offenses completed within the United States. He observes that

a presumption against extra-territorial jurisdiction exists absent clear legislative intent to the contrary.

Defendant also observes that when section 778a was enacted in 1905, the Code Commissioner's note provided as follows: "The section is designed to provide for the punishment of persons who in this state do an act culminating in the commission of a crime in another state." He also points out that reports of legislative committees and commissions are part of a statute's legislative history and may be considered when the meaning of a statute is uncertain. (*People v. Cruz* (1996) 13 Cal.4th 764, 774, fn. 5)⁶

The People respond that the term "state" has been commonly construed to apply to other nations as well as other states within the United States, particularly in international law, where "state" almost always means "nation". And in a domestic context, it can mean "nation", as well.

For example, former Probate Code section 26 provided that a will made outside of California is valid if it is "executed according to the laws of the state in which it was executed." (Former Probate Code § 26) In *Estate of Hudson* (1982) 137 Cal.App.3rd 984, 986, the reviewing court construed "state" as used in Probate Code section 26, to include foreign nations as well as other states within the United States. (*Hudson, supra*, at 987)

The People also observe that based on California's history, including its proximity to Mexico and the Pacific Ocean, it is reasonable to assume that in enacting section 778a, the Legislature intended to extend California's jurisdiction to crimes committed in these nearby extra-territorial areas, as well as to sister states.

This court observes that another statute of approximately the same vintage as Penal Code section 778a(a) which used the term "without this state" is former CCP § 1793 which permitted a court to appoint a guardian for an insane or incompetent person "who resides without the state". In a 1923 case, the California Supreme Court construed "without the state" in former section 1793 to include a foreign county: it held that a person residing in Germany resided "without the state of California" for the purposes of the statute. (*Grinbaum v. Superior Court* (1923) 192 Cal. 528, 537)

The language of section 778a(a) makes it clear that the location where the crime culminates does not determine whether California has jurisdiction. Instead, the determining factor is whether California's connection – as determined by what occurred within California – is sufficient. That is why the statute is general about the crime's ultimate location but specific

⁶ Although the comments of the Code Commission are not part of the statute and may not be considered in assessing its "plain language", the court has placed the information in this section for convenience, only.

about what must occur within California - the co-existence of the intent and an act in furtherance of that intent -

This court finds that section 778a(a)'s use of the term "without this state" is not limited to the other states within the United States. Had the Legislature intended to limit it in that respect, it would have used the phrase "without this state but within the United States". That is what the Legislature did when it enacted Civil Code section 1182, which provides that the proof or acknowledgment of an instrument may be made "without this state, *but within the United States*". (Civil Code § 1182, emphasis added.) At the time of its 1872 enactment, Civil Code section 1182 included this language and therefore, the Legislature was aware of the distinction when it added Penal Code section 778a in 1905.

This court further finds that "without this state" is not limited to foreign nations because the statute places no outer limit on California's criminal jurisdiction; it therefore includes areas beyond the scope of any governmental authority, including international waters (hereinafter, "the high seas").⁷

Penal Code Section 27(a)(1)

The same analysis applies to Penal Code § 27(a)(1), which provides that "[a]ll persons who commit, in whole or in part, any crime within this state" are punishable under California law.⁸ Like section 778a(a), this provision contains no limitation on where the remaining parts of the crime may occur, as long as a part of it is committed in California.

Consequently, based on their plain language, neither section 778a(a) nor 27(a)(2) limit California's jurisdiction to crimes committed within the United States or in other countries. Both statutes are broad enough to apply to crimes committed in areas not claimed by any sovereign, such as the high seas, Antarctica, international waters, or even in international air space.

However, assuming the statutory language is ambiguous, the following additional factors support the conclusion that both statutes apply to crimes committed outside the United States.

⁷ The high seas are "international waters not subject to the dominion of any single nation." (*U.S. v. Louisiana* (1969) 394 U.S. 11, 22-23)

⁸ (Penal Code § 27(a)(1) provides: "(a) The following persons are liable to punishment under the laws of this state: (1) All persons who commit, in whole or in part, any crime within this state. . . ." (emphasis added.)

(b)
The Legitimacy of the State's Interest

The determining factor in territorial jurisdiction is whether the connection between the crime and the prosecuting state is strong enough so that prosecuting an offense committed outside its borders is reasonable. This concept was best expressed in a 2008 Court of Appeal case:

"Territorial jurisdiction as discussed in *Betts* and *Morante*, is, however, ultimately a question of whether a state has a legitimate interest in a criminal act such that it is reasonable to convict a defendant of its commission in this state. This question necessarily can only be answered by a review of all the particular facts and circumstances of a case and is not solely dependent on concepts like attempt or preparation, concepts that may in some circumstances do more to cloud rather than illuminate the relevant interest analysis. The ultimate question is whether given the crime charged there is a sufficient connection between that crime and the interests of the State of California such that it is reasonable and appropriate for California to prosecute the offense." (*People v. Renteria* (2008) 165 Cal.App.4th 1108, 1118, emphasis added.)

This rationale is not unique to California: Federal cases have also focused on the extent of the connection between the prosecuting sovereign and the crime, rather than where it is completed.

For example, in *U.S. v. Layton* (1981) 509 F.Supp. 212, the defendant was charged by federal indictment of conspiring to murder a California congressmen and aiding and abetting that murder. He was also charged with conspiring to murder, and aiding and abetting the attempted murder of another American official. All acts on which the charges were based occurred in 1978, in the country of Guyana.

At that time, no federal statute provided for extraterritorial jurisdiction of the charged offenses (although one was enacted a few years later.) Nevertheless, despite the absence of any extra-territorial legislation, the district court held that, based on common law principles, the United States had jurisdiction over the offenses. (*U.S. v. Layton* (1981) 509 F.Supp. 212, 215-216 [affirmed in *U.S. v. Layton* 855 F.2d 1388, 1394 1410-11 (9th Cir.1988), overruled on other grounds in *Guam v. Ignacio*, 10 F.3d 608, 612 fn. 2 (9th Cir.1993)].

Layton recognized five common law principles on which the exercise of extraterritorial jurisdiction is based. (*Layton, supra*, 509 F.Supp. 212, 216) These principles are also recognized in international law as theories under which a country may exercise extraterritorial criminal jurisdiction. (*U.S. v. Roberts* (1998) 1 F.Supp.2d 601, 606 -607) Each principle is based on a connection between the prosecuting jurisdiction and the offense:

(1) Territorial (objective) jurisdiction: This concept is based on the location where the crime was committed, but it is not limited to that location. It also includes "objective" territorial jurisdiction, in which acts committed outside the territorial limits produce detrimental effects within the prosecuting jurisdiction. *Layton* found this factor to exist due to the detrimental effects within the United States, of the murder of a congressman, outside its territorial limits.

(2) Nationality jurisdiction: If the offender is a citizen of the prosecuting entity, this is a valid basis for its exercise of extra-territorial jurisdiction. Because the defendant in *Layton* was a citizen of the United States, it was permitted to exercise authority over him based on the allegiance he owes to its laws.

(3) Protective jurisdiction: This factor is based on maintaining the integrity of the prosecuting sovereign and its right to protect its interests. *Layton* held that because the crimes had a potentially adverse effect on the security of governmental functions of the United States, it was permitted to assume jurisdiction over the offense.

(4) Universality jurisdiction exists with respect to certain crimes where custody of the offender is sufficient. This factor did not exist in *Layton*.

(5) Passive personality jurisdiction: If the victim is a citizen of the prosecuting sovereign, this may also support jurisdiction. In *Layton*, both victims were American. (*Layton*, *supra*, 509 F.Supp. 212, 216)

In the present case, four of the above-referenced extraterritorial jurisdictional principles exists:

Objective territorial jurisdiction exists: The acts committed outside California produced detrimental effects within the state because the victim was a California resident who owned real and personal property within the state. The special circumstance alleged (murder committed intentionally for financial gain) is based on defendant's acquisition of all the victim's property after her death.

Nationality jurisdiction exists because, at the time of the offense, defendant was a California resident.

Passive personality jurisdiction exists because the victim was also a resident of California.

Protective jurisdiction exists: If this state declines to prosecute murders commenced in California but completed outside the United States, it may increase the danger to California residents and visitors, which would diminish the integrity of the state itself.

While not binding on this court, *Layton's* reasoning is persuasive. The crimes in *Layton* were more factually remote than those in the present case because no part of them - - neither the intent nor any act - - occurred within US territory. Nor did any statute permit extraterritorial jurisdiction over such an offense. If the United States, without an enabling statute, may rely exclusively on common law to assert extraterritorial jurisdiction over a crime committed 100% outside its borders, and within the jurisdiction of another country, it is not unreasonable to conclude that California should be permitted to assert jurisdiction in the present case. The offense herein was conceived in California, and acts taken toward its commission occurred here. California has two extraterritorial jurisdiction statutes and has satisfied four of the five common law principles of extraterritorial jurisdiction. These factors provide a strong showing which supports the conclusion that California may exercise jurisdiction over an offense committed outside the United States.

Although the court concludes that Penal Code sections 778a(a) and/or section 27(a)(1) do not prohibit California from exercising jurisdiction over a murder committed outside the United States, whether the People have presented sufficient evidence before the grand jury to satisfy the elements of either statute is not before the court in this motion.⁹

(c)

Some California Cases Have Presumed the Existence of Extra-Territorial Jurisdiction under Sections 778a(a) and 27(a)(1)

No California case has expressly addressed whether section 27(a)(1) or 778a(a) permits this state to prosecute a crime completed outside the United States. Nevertheless, in certain cases involving crimes committed outside the country, the reviewing court has presumed it is permissible.

In *People v Brown* (2001) 91 Cal.App.4th 256, the defendant was a physician whose California medical license had been revoked. While in California, he made preliminary arrangements to perform a surgery in Mexico. Not only was the surgery completely unnecessary, it was prohibited in California.¹⁰ In addition, the patient was over 70 years old, in poor health, and the defendant gave him virtually no post-operative care. After performing the surgery in Mexico, the defendant immediately brought the victim back to California where he died the following day. According to the reviewing court, the victim was under the doctor's care after the operation, but only nominally. After being convicted, the defendant challenged California's territorial jurisdiction, but the court rejected that challenge:

⁹ The only barrier to applying these statutes to offenses outside the United States would be if they conflicted with federal law (See *Skiriotes v. Florida* (1941) 313 U.S. 69, 77). However, as indicated, *infra*, no conflicting federal legislation exists.

¹⁰ The patient had a disorder known as apotemnophilia, an intense and longstanding desire to have a specific limb amputated - usually a leg. Previously thought to be entirely psychiatric in origin, it is now thought to also have a neurological basis.

"Appellant met Bondy [the victim] in California and the two went from here to Mexico for the procedure. Having removed Bondy's leg, appellant brought him back to this state for postoperative treatment. Bondy died in this state while still, at least nominally, in appellant's care. With the state of mind required for a conviction of implied malice murder, appellant carried out in this state non de minimis acts of preparation and direct involvement such that California had a clear interest in and legitimate basis to prosecute him for murder. (*People v. Brown, supra*, 91 Cal.App.4th 256, 266- 267.)

In *Brown*, the facts connecting the defendant and the offense to California were stronger than in the present case because the defendant died in California. But it was undisputed that the criminal act which caused the death had occurred in Mexico. And because the reviewing court decided the case pursuant to section 778a(a), it implicitly found the statute applicable to a crime committed outside the United States.

In *People v Utter* (1972) 24 Cal.App.3rd 535, the defendant was purportedly managing the real property investments of a wealthy and naïve, older woman, when, in reality, he was stealing them from her. On the pretext of meeting with foreign investors who would provide her with cash, defendant lured her into accompanying him on a trip to Europe. Before the trip, while still in California, he purchased the airline tickets for himself and the victim and he acquired a gun which he apparently used to commit the murder.

A friend of the defendant who joined them on the trip testified that, after they arrived in Europe, defendant revealed he intended to kill the victim because her accountant and attorney had learned he had been stealing from her. The friend pretended to go along with the plan, but then returned home early while defendant remained abroad with the victim. Later, after the friend returned home, defendant phoned him and reported that everything had been "taken care of". When defendant returned to California without the victim, he was in possession of her distinctive jewelry and her passport, both of which he asked the friend to dispose of. In response to inquiries about the victim's whereabouts from her husband and other interested parties, defendant denied any specific knowledge. Her body was never found.

However, photos seized from defendant's car showed him and the victim together in Europe. Evidence was presented at trial that she was last seen alive in Switzerland when she showed her passport upon checking into a Locarno hotel. There was evidence she had been murdered in Switzerland because her blood-soaked clothing and purse were found in a locker in the Geneva rail station. According to the criminalist, the blood on the clothing matched the victim's blood type and had resulted from two head wounds. The gun was recovered from defendant's father-in-law who lived in another state and to whom defendant had given the gun after his return from Europe.

Defendant was convicted by a jury of murder, robbery, and grand theft. On appeal, he challenged California's territorial jurisdiction over the offenses.

The reviewing court observed that although the murder was committed outside California, a literal reading of (former) sections 778a and 27(1) appeared to support California's jurisdiction over the murder count. (*Utter*, *supra*, 24 Cal.App.3d, at 549-550).¹¹ However, at that time, (former) sections 27(1) and 778a were construed to require an act committed in this state which was equivalent to an attempt before jurisdiction could attach. (*Ibid.*, citing *People v Buffum* (1953) 40 Cal.2nd 709) (This requirement was subsequently abrogated.)¹² Because the evidence in *Utter* was insufficient to establish an attempt in California, the murder conviction was reversed.

However, the robbery and theft convictions were affirmed. California had jurisdiction over the robbery and theft counts based on former section 27(2) [now 27(a)(2)] which gives California jurisdiction over robbery and theft committed "without this state" if the defendant brings the stolen property into this state. Nothing in the language of section 27(a)(2) specifies that a robbery and theft committed in a foreign country or outside this country may be prosecuted in California; the only reference is to such offenses committed "without this state".¹³ However, in the face of a jurisdictional challenge, *Utter* held California had jurisdiction because the defendant had brought the stolen property into this state. (*Utter*, at 549) Therefore, while *Utter* did not directly address whether crimes committed in foreign countries could be tried in California under section 27, its holding implies that an offense committed in a foreign county is "without this state" for the purposes of extraterritorial jurisdiction.

Defendant relies on *People v. Cavanaugh* (1955) 44 Cal.2d 252 for the proposition that where the offense is murder, either the fatal injury or the death must have occurred in the county where the case is being prosecuted. However, *Cavanaugh* was decided under the *Buffum* rule, when jurisdiction could not attach unless an attempt had been committed within this state. As indicated previously, this is no longer the law. (*People v. Morante* (1999) 20 Cal.4th 403, 436) But even if *Cavanaugh* were controlling, it would not prevent this court from exercising jurisdiction, because *Cavanaugh* was decided pursuant to what is now Penal Code section 27(a)(1), and it did not address section 778a(a) at all.

¹¹ This statement in the opinion supports the conclusion that the plain language of section 778a(a) and section 27(a)(1) supports extraterritorial jurisdiction.

¹² The requirement of an attempt no longer exists; any non-de minimis act committed within the state will suffice. (*People v. Morante* (1999) 20 Cal.4th 403)

¹³ Penal Code section 27(a)(2) provides:

"(a) The following persons are liable to punishment under the laws of this state:

¶
(2) All who commit any offense without this state which, if committed within this state, would be larceny, carjacking, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state." (emphasis added)

Moreover, section 27(a)(1), which gives California jurisdiction if a part of a crime is committed within this state, is narrower than section 778a(a). It requires more of the crime to have been committed in California and less outside the state. According to the California Supreme Court, "the latter cited statute [§ 778a(a)] is by its terms broader in scope than the former [27(a)(1)]" and "confers jurisdiction over a wider range of conduct". (*People v. Morante* (1999) 20 Cal.4th 403, 436.) Consequently, even if *Cavanaugh* applied, it would not prevent this court from exercising jurisdiction under the statute invoked by the People in the present case - section 778a(a).

Defendant also relies on *Chromy v. Lawrance* (1991) 233 Cal.App.3d 1521 for the proposition that California lacks jurisdiction over a wrongful death on the high seas. However, *Chromy* is distinguishable; it was a civil case in which the death resulted from a boating accident. Further, the lawsuit was brought under a federal law which allowed the action to be tried in a state court only if the state's wrongful death statute applied to death on the high seas, and the California statute did not. Consequently *Chromy* is irrelevant.

(d)

The 1991 Amendment to section 778a Does Not Reflect Legislative Intent

Penal Code section 778a provides:

(a) Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state.

(b) Whenever a person who, within this state, kidnaps another person within the meaning of Sections 207 and 209, and thereafter carries the person into another state or country and commits any crime of violence or theft against that person in the other state or country, the person is punishable for that crime of violence or theft in this state in the same manner as if the crime had been committed within this state.

This statute was originally enacted in 1905 and consisted of a single paragraph (which is now designated subdivision (a)). Defendant points out that in 1991, the Legislature amended section 778a to add subdivision (b), which provides that when a person is kidnapped in California and taken to another state or country, the perpetrator is punishable in California for crimes of violence or theft committed against the kidnap victim in the other state or country to the same extent as though these crimes had been committed in California. But because subdivision (a) was not amended at the same time to provide for jurisdiction over crimes committed in another country, defendant contends it should be inferred that the Legislature intended to continue limiting subdivision (a) to crimes committed within the United States.

However, this inference has already been rejected by the California Supreme Court in *People v. Morante* (1999) 20 Cal.4th 403. *Morante* overruled *People v. Buffum* (1953) 40 Cal.2d 709 which had held that (in conspiracy cases) former sections 778a and 27(1) must be construed more narrowly than their plain language would indicate. *Buffum* required that under both sections, California may exercise jurisdiction over a conspiracy committed outside the state only if the conduct in California qualified as an attempt to commit a crime. (*Morante*, *supra*, 20 Cal.4th at 419.) *Morante* overruled *Buffum* and held an attempt within California was no longer required and that lesser conduct would suffice. (*Ibid.*, at 422-424)

However, the defendant in *Morante* urged the court not to overrule *Buffum* because the Legislature, in declining to amend subdivision (a) when it added subdivision (b), was implicitly approving *Buffum*'s longstanding interpretation of section 778a(a). But *Morante* flatly rejected that contention. In the following excerpt, it explained that because subdivisions (a) and (b) address different crimes and subjects, an amendment to subdivision (b) is not indicative of legislative intent concerning subdivision (a):

"The Legislature's addition of section 778a, subdivision (b), in 1991 did not affect the portion of the statute directing that a person who commits any act within this state, in partial execution of an intent to commit a crime, that culminates in the commission of a crime outside the state, may be punished for that crime in this state in the same manner as if the crime had been committed entirely within this state. In fact, the statutory amendment focuses upon the situation in which a defendant commences one offense (kidnapping) within this state and then, in addition to continuing that offense out of state, commences and completes new offenses against the victim (crimes of violence or theft) entirely outside the state, the statute expressly conferring jurisdiction over those additional offenses. Our decision in *Buffum*, concerning the extent to which a conspiracy must progress within this state in order to be prosecutable when its criminal objective is accomplished outside the state, is not implicated by the addition of a subdivision intended to address jurisdiction over new out-of-state offenses that are committed in the course of a kidnapping that is commenced within the state.[footnote 14 omitted]" (*People v. Morante* (1999) 20 Cal.4th 403, 429-429, emphasis added.

Applying the above reasoning to the current context, it follows that the amendment which added subdivision (b) creates no inference of legislative intent with respect to subdivision (a).

GROUND (5)

Does California's Exercise of Jurisdiction Violate International Law?

The "Flag State" Does Not Have Exclusive Jurisdiction to Prosecute this Offense

For the purposes of this order, the "flag state" is the country represented by the flag flown on a ship or other seagoing vessel.

In supplemental briefs filed 6/26/13 and 7/17/13, defendant raised a new jurisdictional objection: That under international law, the flag state has exclusive jurisdiction over any the conduct occurring on a vessel while it is on the high seas or in foreign waters. In support of this contention, defendant relies on The Geneva Convention on the High Seas Act of April 15, 1958, Art 6, § 1, and The United Nations Convention of the Law of the High Seas. (These documents are referred to hereinafter as "the treaties".) According to defendant, since the "Island Escape" is a "Bahamian Cruise Ship", the exclusive jurisdiction to prosecute this crime lies with its flag state. He contends a California prosecution is barred by the treaties unless the laws of Congress and/or California clearly express the affirmative intent to have the law of the United States and/or California apply to a foreign-flagged vessel. Since neither Penal Code section 778a(a) nor 27(a)(1) express such an intent, he contends California is barred by international law from exercising jurisdiction over a foreign vessel on the high seas or in foreign waters.

Whether defendant has standing to raise this issue and invoke rights under an international treaty is questionable, at best. Unless a treaty expressly creates privately enforceable rights, an individual lacks standing to invoke the treaty or allege that one of the parties to the treaty has violated its terms. (*Skiriotes v. State of Florida* (1941) 313 U.S. 69, 74, 76; *U.S. v. Bent-Santana* (1985) 774 F.2d 1545, 1550 (11th Cir.); *Florida v. Stepansky* (2000) 761 So.2d 1027, 1032)

But assuming defendant is entitled to invoke the treaties, his authorities fail to support the claim that the flag state has exclusive jurisdiction over this offense. Because the treaties he invokes are not self-executing, their provisions (to the extent they would restrict that jurisdiction) are inoperative without legislation implementing them. (*U.S. v. Postal* (1979) 589 F.2d 862, 875-876; *US v Roberts* (1998) 1 F Supp 2d 601, 607) Since defendant cites no federal legislation which prohibits the United States and/or California from prosecuting a crime committed on a foreign-flag vessel, either on the high seas or in the territorial waters of another state, the treaties do not bar either sovereign from prosecuting this offense.

Moreover, the U.S. Constitution has granted Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations". (U.S. Const. Art. I § 8, cl. 10, entitled "Piracies and Felonies on the High Seas; Offenses Against the Law of Nations.") Congress has enacted several statutes authorizing the United States to prosecute crimes committed outside its borders and its territorial waters. (See Title 18 of the United States Code (entitled "CRIMES AND CRIMINAL PROCEDURE").

Section 1111 of Title 18 permits the United States to punish murder committed "[w]ithin the special maritime and territorial jurisdiction of the United States . . ." (18 USC 1111(b))

The scope of this special maritime and territorial jurisdiction is defined in 18 USC § 7, which provides, in pertinent part:

"18 USC § 7. Special maritime and territorial jurisdiction of the United States defined

The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes:

... ¶ ¶

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

¶ ¶ ¶

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

¶ ¶ (18 USC § 7, emphasis added.)

Based on 18 USC § 1111 and 18 USC § 7, Congress has affirmatively expressed its intent to permit the United States to prosecute murders committed on foreign vessels, on the high seas, and anywhere outside the jurisdiction of any nation, if the perpetrator or the victim is a US national. Consequently, defendant's contention that the flag state herein has the exclusive jurisdiction to prosecute all crimes on a foreign-flagged ship is without merit.

Additionally, the following cases decided pursuant to 18 USC § 7 support the exercise of federal jurisdiction over offenses committed on the high seas, in the waters of a foreign state, and/or on foreign-flagged ships.

In *Nixon v. U.S.* (1965) 352 F.2d 601, the Fifth Circuit held that a murder committed in international waters off the Mexican coast fell within the provisions of 18 USC, § 7, subdivision (1) because the record supported the finding that the offense had been committed on "the high

seas". Secondly, *Nixon v. U.S.* also observed that if the offense had been committed in Mexican waters, the district court would still have had jurisdiction under subdivision (1) because the ship was US owned and registered (another aspect of special maritime and territorial jurisdiction). And in *US v Tanner* (1972) 471 F.2d 128, 141, the same circuit found federal jurisdiction lacking under 18 USC 7(1), because the Government had not shown that the crime had occurred on the high seas or under any other provision of 18 USC 7(1).

In *U.S. v. Roberts* (1998) 1 F. Supp. 2nd 601, 605, a minor was sexually assaulted on a cruise ship in international waters off the Mexican coast. The defendant, a national of St. Vincent & the Grenadines, was employed on the cruise ship, which began and ended its cruise in the United States. The ship was registered in Liberia, and flew the Liberian Flag. It was part of the Carnival Cruise line, which was incorporated under the laws of Panama and which had its corporate headquarters in Florida. When the defendant moved to dismiss for lack of territorial jurisdiction on the ground that jurisdiction belonged exclusively to the flag state, the district court denied the motion. It held that because the treaties on which the defendant relied were not self-executing, the defendant lacked standing "to rely upon an alleged violation of the treaty as a defense to this Court's jurisdiction." (*Roberts, supra*, at 606.) *Roberts* also held that the federal court had jurisdiction pursuant to 18 USC § 7(8), which permits federal jurisdiction if a foreign vessel has scheduled departure from or arrival in the US with respect to an offense committed against a US national.¹⁴

Roberts also observed that United States jurisdiction was appropriate based on passive personality and objective jurisdiction. Passive personality jurisdiction existed because the victim was a national of the state asserting jurisdiction; objective jurisdiction existed because the offense caused an effect within the state asserting jurisdiction. (*Roberts, supra*, at 605-607) Neither the flag state (Liberia), nor the place of incorporation (Panama) had commenced prosecution of the offense and neither had any reason to do so because neither the victim nor the defendant were nationals of either state. Further, the vessel did not operate near Liberia, giving the flag state even less incentive to prosecute. And although Carnival was a Panama corporation, that state had less incentive to prosecute because Carnival's corporate headquarters were in Miami. Consequently, the failure of those states to prosecute supported the assumption of jurisdiction by the United States.

Based on the foregoing authorities, whether the offense herein was committed on the high seas or within the territorial waters of another state, defendant has failed to establish that the flag state has exclusive jurisdiction to prosecute Ms. Kanesaki's murder. There is no

¹⁴ Because it found jurisdiction under § 7(8), *Roberts* raised, but did not resolve whether the court had jurisdiction under § 7(1) because the offense was committed on the high seas. It observed that there was a split of authority in the Fifth Circuit on whether being on the high seas was sufficient, by itself, to establish jurisdiction under § 7(1). While *Nixon, supra*, holds that it is, other Fifth Circuit cases have held it is not. (*Roberts, supra*, 604-605)

indication before this court that the flag state or any other foreign entity is attempting to exercise its jurisdiction over the offense.

The United States could exercise jurisdiction over this offense pursuant to 18 USC § 7(1) and 7(7). In the event that these provisions do not apply, federal jurisdiction may exist under common law principles. (See, *supra*, *United States v. Layton* (1981) 509 F.Supp. 212) However, according to the defendant, the United States has investigated the offense, but declined to prosecute.

The U.S. and California have Concurrent Jurisdiction over the Charged Offense

"[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." (*Abbate v. U.S.* (1959) 359 U.S. 187, 194; *Florida v. Stepansky* (2000) 761 So.2d 1027, 1031) When Congress has not given exclusive jurisdiction to the federal courts over an offense historically punished by the states, it does not restrict the states' authority to continue to punish it. (*Cross v. State of North Carolina* (1889) 132 U.S. 131, 139, 10 S.Ct. 47, 49-50)

Congress has granted the federal courts jurisdiction over murders committed "[w]ithin the special maritime and territorial jurisdiction of the United States . . ." (18 USC § 1111(b)) This section does not, on its face, provide for exclusive federal jurisdiction, nor has defendant submitted any authority which construes it in that manner. State and federal courts have concurrent jurisdiction over murders committed under 18 USC § 7(3). (See, *U.S. v. Fields* (2008) 516 F.3d 923, 928-929 (10th Cir.), certiorari denied 129 S.Ct. 1905.) Therefore, it is not unreasonable to assume concurrent state and federal jurisdiction exists under 18 USC § 7(1) and 7(7).

Further, a state within the United States is not prohibited from prosecuting a crime committed on the high seas. According to the United States Supreme Court:

"If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State ... may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress."(*Skiriotes v. Florida* (1941) 313 U.S. 69, 77, 61 S.Ct. 924, 85 L.Ed. 1193, emphasis added.)

In other words, assuming a legitimate state interest and the absence of conflicting federal legislation, if the United States has jurisdiction over the charged offense, California has jurisdiction over it, as well.

Having determined that California has a significant interest in prosecuting the present offense, and having discerned no federal legislation which conflicts with its exercise of jurisdiction, this court finds, based on Penal Code sections 778a(a), 27(a)(1), and common law principles of extraterritorial jurisdiction, that California is not prohibited from exercising jurisdiction over the charged offense.

As previously indicated, the court does not address, in the present motion, whether the evidence submitted by the People is sufficient to satisfy their burden of proof pursuant to Penal Code section 778a(a).

DISPOSITION

For all the reasons expressed in this order, defendant's demurrer is overruled, his motion to strike and his motion to dismiss the indictment are denied.

DATED: 7.29.13



GREGG L. PRICKETT
JUDGE OF THE SUPERIOR COURT

**Additional material
from this filing is
available in the
Clerk's Office.**