Tracy Renee Lum, SBN 256703
Law Office of Tracy Renee Lum
1045 Sperry Avenue, Suite F, #254
Patterson, CA 95363
(209) 894-7794 (T)
(209) 894-7239 (F)
trlum@hotmail.com

Counsel for Petitioner
Joseph Hunt

SUPERIOR COURT STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOSEPH HUNT, Petitioner, vs. ROBERT BURTON, Respondent, On Habeas Corpus.	Case No.: _____ Fmr. Crim. No.: A090435 **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS – VOL. 1**

Table of Exhibits

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,	B029402
Plaintiff and Respondent,	(Super. Ct. No. A090435)
v.	
JOE HUNT,	
Defendant and Appellant.	

COURT OF APPEAL - SECOND DIST.
FILED
NOV 23 1993
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Laurence J. Rittenband, Judge. Affirmed.

Daniel A. Dobrin, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Acting Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General and Elaine F. Tumonis, Deputy Attorney General, for Plaintiff and Respondent.

PEOPLE v. HUNT
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I. INTRODUCTION

Defendant, Joe Hunt, was convicted by a jury of murder in the first degree of Ronald George Levin in violation of Penal Code section 187.1/ Defendant also was found guilty of robbery in violation of section 211 and that Levin was murdered while defendant was engaged in the commission of robbery within the meaning of section 190.2(a)(17). The jury fixed the penalty as life imprisonment without the possibility of parole. The court sentenced defendant to state prison for life without the possibility of parole for the murder. No sentence was imposed for the robbery.

On appeal, defendant alleges his trial was unfair because: (1) the trial court imposed unconstitutional limitations on one of his attorneys; (2) his lead attorney had a conflict of interest and was ineffective; (3) a juror committed misconduct; (4) numerous evidentiary rulings were erroneous and prejudicial; (5) evidence of the corpus delicti of robbery and murder was insufficient to support the judgment; (6) the prosecutor committed misconduct during final argument; (7) the court denied the defense access to key evidence; (8)

1/ All statutory references are to the Penal Code unless indicated otherwise.

the jury was not properly instructed; (9) the court improperly limited voir dire; (10) defendant was not present during significant chambers and bench conferences; (11) his law clerk was banished from the courtroom; (12) the court violated court rules governing electronic media coverage of his trial; and (13) the trial judge was pro-prosecution and hostile to the defense.

Defendant does not claim the evidence was insufficient to support the jury's verdict. He does, however, present his arguments based upon a premise that this is a weak case based solely on circumstantial evidence without body or bullets. However, we conclude that the prosecution presented overwhelming evidence that the defendant murdered Levin on the night of June 6, 1984, even though Levin's body was never found and notwithstanding defendant's evidence showing that Levin was facing criminal prosecution and civil lawsuits and may have hidden away a large sum of money giving him both a motive and the financial ability to disappear.

During the three-month guilt phase of the trial, in which 60 witnesses testified for the People, the prosecution proved that defendant developed a written plan to rob and murder Levin and that defendant had the motive, the opportunity, the enterprise, the philosophy, a henchman, and the weapons to carry out his plan, all of which was corroborated by defendant's multiple admissions that he killed

Levin. It is within this framework of strong and convincing evidence that we conclude that most of defendant's claims of error are without merit and where error occurred none were of a type which necessitate a reversal of defendant's conviction under federal or state constitutional principles.

We therefore set forth a lengthy statement of the facts, and where defendant's arguments are premised upon the same set of facts, have consolidated his arguments for purpose of appellate review and presentation of the court's decision.

II. FACTS

The plot to kill Ron Levin was testified to by Dean Karny who received immunity for his testimony. Defendant first became acquainted with Dean Karny and Ben Dosti in junior high school and became reacquainted with them in 1980 while Karny was a student at UCLA. Defendant impressed them as remarkably intelligent and well-established for a young man of their age. He told them how he had completed college by challenging exams at the University of Southern California, had become the youngest person to ever pass the CPA exam and about his employment with Peat, Marwick & Mitchell as a commodities trader. Eventually, over the next few months, defendant, Karny, Dosti, and another friend of Karny's named Ronald Pardovich became best friends.

Defendant told his friends that someday he wanted to form a group of intelligent, capable, motivated people who could succeed in business, personal and social ventures without the type of constraints and intrigues usually associated with corporate structures.

In November 1980, defendant moved to Chicago in order to trade commodities on the floor of the Mercantile Exchange to raise money so that he could start the group. Karny, his parents, and others provided defendant with over $400,000 to invest in Chicago. While in Chicago, defendant maintained his close friendship with Karny, Dosti and Pardovich, and a new friend, Evan Dicker, whom he met through Karny and Dosti. At first it appeared that defendant was very successful at trading. However, by 1982 defendant had lost all the money. He returned to Los Angeles with only $4 in his pocket and moved in with Karny.

The idea of forming a social group of people who shared a common philosophical belief which would grow into a business venture remained alive. To get the group started, Karny, Dosti and Pardovich socialized, met people and brought their friends around to meet defendant and expose them to his ideas. By early 1983 about 10 people were involved. Defendant, Dosti and Karny were the leaders but defendant was the final arbiter and decision-maker. The members called themselves the "Boys" and considered themselves a mini-mafia. They held their

first formal meeting, and named themselves the Bombay Bicycle Club or "BBC."[2/]

The BBC's purpose was to make money through investing in commodities, cyclotron technology and arbitrage. A philosophy developed by defendant which he called the paradox philosophy bound the group together.[3/] The paradox philosophy called for the group not to be bound by society's rules of law and religion. Members of the group would not blindly follow any rule but would do what was "necessary under the circumstances."

Survival of the individual was the sole end. However, disloyalty to defendant or the BBC led to expulsion. A belief in the paradox philosophy enabled a person to lie and to commit crimes; even murder would be justified by the paradox philosophy if it was convenient.

2/ The group chose the name "Bombay Bicycle Club", after a bar and nightclub defendant frequented when he was in Chicago. The name "Billionaire Boys Club" was coined by the media.

3/ A number of BBC members in addition to Karny, including Evan Dicker, Tom May, Jeff Raymond and attorney Jerome Eisenberg, testified to the BBC's philosophy, goals, investments and defendant's eventual financial dealings with Ron Levin, its consequences and aftermath.

By June 1983, money was raised, offices were rented and business appeared to be prospering through defendant's commodity trading. Over the next year, a number of people were persuaded to invest hundreds of thousands of dollars in various BBC business enterprises and commodities accounts over which defendant had trading authority based upon defendant's promise that they would receive high rates of return with little risk.4/ One investor, Steve Weiss, brought in his closest friends and relatives and they, alone, invested over $1.5 million.5/ On the surface the BBC looked highly profitable. Defendant personally began spending a great deal of money and he sent out financial statements and personal checks to investors indicating that they also were making huge profits on their investments.

Ronald George Levin came to defendant's attention early in 1983. Defendant was told that Levin was a "scammer" and couldn't be trusted but defendant wanted to find out for

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4/ Not surprisingly, defendant's philosophy of trading in the market was to capitalize on people's greed.

5/ Apparently up to 75 people became investors, including David May, $80,000; Tom May, $80,000; Steve Lopez, $90,000; Alan Gore, $10,000; and Dr. Julius Paskan, $180,000. The Steven Weiss Family Trust invested $502,500 in 1983 and $1,075,730.52 in 1984.

himself. When defendant eventually met Levin that summer, he formed the opinion that Levin was wealthy and he succeeded in getting Levin to place $5 million in a commodities trading account.6/ The account was in Levin's name and defendant was given the authority to trade the account on Levin's behalf. They would split the profits.

Shortly thereafter, defendant announced to the BBC that in one day he had lost all the investors' money in the commodities market with the exception of the Levin account. Defendant told the BBC they need not worry. Defendant showed them a statement indicating that he had made a $7 million profit on the Levin account. Since defendant was entitled to one-half of the Levin profits, or $3.5 million dollars, he would reimburse the other investors for their losses and the BBC was still going to have enough money to do all the other things they wanted to do.

By this time, the BBC's overhead expenses were approximately $70,000 per month, the other businesses were not

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6/ According to Levin's friends, Dean Factor and Len Marmor, Levin had the outward appearance of extreme wealth. He displayed bankbooks and checks with large amounts of money on them, including a $1 million check mounted on his wall. In fact, he had no money. Levin typed up the bank books himself. He was a "con man" who actually bragged about "ripping people off."

making much money, and defendant was personally spending large sums of money, thus the profit from the Levin account was "a very big event." Everyone at BBC expected to get money from the Levin account.

Defendant tried to get the money from Levin, but Levin told defendant he could not pay defendant his percentage immediately because he had invested the money in a shopping center. However, according to Levin, the shopping center investment had increased defendant's $3.5 million investment to $13 million. Later, Levin told defendant that a Japanese company had offered to buy the shopping center bringing defendant's profit to $30 million.

Optimism over the money which would be forthcoming from the shopping center was high in October 1983. Defendant called a BBC meeting and announced how the profits from the sale of the shopping center would be divided. The largest portion was to go to defendant. Karny and Dosti would get $1 million each. BBC members, Tom May and Dave May, each would receive $700,000. But the money never materialized. Defendant finally learned that Levin was a conniver and a manipulator and that he had been the victim of an incredible hoax.

Levin, posing as a representative of Network News, had contacted Jack Friedman, a broker with Clayton Brokerage Company, in June 1983 and convinced Friedman that he was making a documentary movie, entitled "The Traders," in which various

commodities' trading practices would be compared. Friedman's role was to set up a simulated trading account in which defendant's results as an outside trading advisor would be compared over a four to eight week span with the results of an in-house broker, a computer, and with merely throwing darts.7/ Levin told Friedman to make sure that defendant did not know the account was simulated, explaining that the emotional trading decisions would not be the same if the trader knew it was not real. Defendant was not to be told he was trading in a simulated account until the story was done.

When defendant called the brokerage house to begin trading, he was informed by Friedman that the equity in the Levin account was over $5 million. By the time Levin closed the simulated account on August 17, 1983, defendant believed he had increased the account to $13,997.448.46, reflecting a net profit of $8,320,649 and that the account was being closed so that the money could be used for a real estate transaction. Sometime in October or November 1983, Friedman told defendant the money was not real. Defendant gave Friedman the impression

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7/ Levin led Friedman to believe that the movie would be shown as a five-part series on independent television stations throughout the country. Friedman would appear as the moderator, explaining how the trades were accomplished, thereby getting free publicity.

that he knew all along that it was just a movie, but within five hours after Friedman discussed with defendant the true nature of the account, Friedman received a phone call from Levin in which Levin screamed, yelled, and threatened Friedman for violating his confidentiality. Friedman never heard from Levin again.

At about the same time that defendant learned of Levin's scam, Jim Pittman, known to the BBC members as Jim Graham, came into the picture. At first Pittman was to provide karate lessons to BBC members. As time went on, Pittman and defendant grew very close. Pittman became a BBC member, was placed in charge of security and became defendant's bodyguard.8/

Defendant confronted Levin about the scam which Levin at first denied. Finally, Levin admitted to defendant that there was no shopping center and no money. However, Levin said he had used the statements from the phony trading account to con about $1.5 out of other brokerage houses and he would give

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8/ Pittman was known to be armed with a derringer strapped to his ankle, a pen gun, and a small black automatic pistol. BBC member Jeff Raymond and attorney Jerome Eisenberg had seen a silencer attached to the automatic pistol when Pittman test fired the gun at the BBC office in April 1984.

defendant and the BBC $300,000 of that sum. However, Levin kept delaying in giving defendant the money which made defendant extremely angry. Defendant told Tom May he was going to get the money from Levin, "no matter what it took."

In the meantime, the real trading accounts of the other investors continued to lose huge amounts of money and the brokers were demanding additional funds from the investors to cover the accounts. By February 1984, $300,000 was no longer a large enough sum to solve the needs of the BBC and defendant no longer believed Levin was going to give him any money. However, it was apparent that defendant still believed Levin was wealthy and had really gotten $1.5 million from his scam. Defendant had seen stacks of bank passbooks reflecting large deposits at Levin's house. Defendant told Karny that he was going to find a way of getting that money from Levin. Defendant also told Karny that Levin was going to die one day.

Defendant continued to socialize with Levin. As he explained to Karny, defendant was going to maintain a relationship with Levin so that he could find a good opportunity to kill him. By the end of April or the beginning of May 1984, defendant told Karny he had developed a plan to get the money from Levin and to kill Levin.

Defendant's plan called for defendant to go to Levin's house for dinner. Defendant would secretly arrange to have Pittman arrive at 9:45 p.m. Pittman was to pretend he was a

mafia gunman.9/ Upon Pittman's arrival, defendant would tell Levin that he, defendant, owed a lot of money to the underworld as a result of his Chicago trading losses and that he had been putting them off by telling them he was expecting a lot of money from Levin. Defendant wanted Levin to believe that he, defendant, also would be in trouble if he did not get the money from Levin. Defendant believed that the appearance of Pittman, an enormous black man holding a gun who was unknown to Levin, would make the scenario work.

The date of June 6th was chosen because Levin was due to leave for New York the next morning. Defendant wanted to make it look like Levin had left on his trip, so that his disappearance would take longer to discover.

Defendant's plan first called for preparing the BBC in advance to believe that defendant and Levin were going to get involved in a business venture so that the BBC would not be surprised when it received money from Levin. Defendant drafted letters to leave in a file he planned to create at Levin's apartment to make it look like he and Levin were involved in a

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9/ When Pittman was arrested on October 22, 1984, he was carrying a gym bag full of books with titles like, "The Hitman, A Technical Manual for Independent Contractors" and "The Black Bag Owner's Manual, Part 2, The Hit Parade," and "Survival in the Slammer."

business transaction. According to Karny, defendant believed such letters would deflect suspicion from defendant, and in the event of a trial, that such letters would create a "reasonable doubt." Defendant also drafted an options contract between Levin and Microgenisis, one of the BBC companies, purporting to be the basis for the money defendant would receive from Levin. The amount of the option was left blank. Defendant would decide the amount of the option after he got to Levin's house when he determined how much money Levin had to transfer.

Defendant set forth his plan to kill Levin in a seven page outline of lists of things to do and reviewed the lists with Karny.10/ Defendant explained some of the more cryptic items on the lists to Karny, such as one item that read, "Levin his situation." That meant defendant was going to explain to Levin his situation in such a way as to cause Levin to believe he was going to survive the ordeal on the theory that Levin would cooperate in signing the documents if Levin thought he was not going to be killed. An item reading, "kill dog (emphasis)," was in the event Levin would not cooperate.

10/ Defendant's management style was to give his people lists of things to do. Everything was organized in list format.

Anyone who knew Levin knew that he really loved his dog. If Levin failed to cooperate, defendant planned to kill Levin's dog in such a grotesque way that Levin would be shaken up and more inclined to cooperate.

Another item on the list was "Jim digs pit." Defendant told Karny that Pittman was up in Soledad Canyon digging a pit to take Levin to after he was killed. Defendant had been helping Pittman dig the pit the day before and complained the ground was really hard.11/

Items such as "get alarm code," "pack a suitcase," and "keys" were to make it look like Levin had left for his New York trip. Defendant was going to keep the keys in case he needed to return. Pittman was to go to New York and leave some of Levin's identification in a bar or an alley so that if anyone ever suspected that Levin had met with foul play, it would appear that it happened in New York rather than in Los Angeles.

Defendant's list reminded him to "create a file" so that people would draw the conclusion that there had been an

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11/ Defendant had grown up around the Soledad Canyon area and knew it well. He had once taken Tom May there for some target shooting and had told May you could hide anything up there and no one would ever find it.

actual business transaction between him and Levin. Also on the list was a page entitled "at Levin's to do" with notes to "'close blinds, . . .' [¶] [t]ape mouth, handcuff, put gloves on, . . . have Levin sign agreements and fill in blanks, Zerox everything so he has copies, initialed copies.'"[12/]

Defendant arranged his alibi in advance by telling Karny to take defendant's girlfriend, Brooke Roberts, and Jeff Raymond to the movies on the night of June 6th so that later they could say defendant was with them.[13/]

12/ Defendant even thought to make a note to "take holes with you" reminding him to take the paper caused by punching holes in documents. Karny thought that was a "nifty touch." The list was found by Levin's father in Levin's apartment and turned over to the police. The lists were in defendant's handwriting and contained both defendant's and Karny's fingerprints.

13/ Roberts, testifying on behalf of defendant, confirmed that on June 6, she had gone to the movies with Karny, Raymond and Raymond's girlfriend, Renee. Defendant was having dinner with Levin to discuss a business deal and was supposed to get some money from him. However, defendant was already home, in his robe, and brushing his teeth when she got home from the movies at about 10 p.m. (It takes about one and one-quarter to one and one-half hour to travel from Beverly Hills to Soledad Canyon.) Defendant was excited about the check he had gotten from Levin and they called Roberts' mother to tell her about it Mrs. Roberts remembered receiving such a call about that time but could not remember the date of the call.

At 7 a.m. on the morning on June 7, 1984, defendant awakened Karny and told Karny he had done it, that Levin was dead. He showed him a check for $1.5 million and the contract signed by Levin. Defendant was so excited about the check and contract he also woke up Jeff Raymond to show them to him. Defendant told Raymond that Levin was leaving for New York that very morning to see some Arab investors who wanted to buy the option. Then he went by Tom May's and showed him the check and contract and when he arrived at the office, he made copies of the check which he distributed to the BBC members.

Three days later, defendant met with Gene Browning, the inventor of a cyclotron, which was the subject of the option agreement defendant forced Levin to sign on June 6. Browning expressed concern about the capacity of the cyclotron to perform some of the processes called for in the contract. Defendant told Browning that was no particular problem because "Levin was missing and probably dead."

A few days later and in subsequent conversations, defendant described Levin's murder in detail to Karny. Defendant had picked up some take-out food from a restaurant and took it to Levin's house. Pittman arrived just as planned, pulled a gun on Levin, and Levin immediately said, "'I will do anything you want.'" Defendant told Karny he did not have to kill the dog because Levin cooperated so quickly. Defendant told Levin his mafia story and asked Levin how much money he

could be sure would clear his account. Levin said about "a million seven." Defendant decided to have Levin sign a check for "a million five," just to make sure the check would clear.

Defendant described how he was trying to get some other assets from Levin as well, but Pittman messed up his role of mafia enforcer. After getting the check signed, Defendant turned to Pittman and said, "'Is that enough?'" Pittman was supposed to say, "'No. What else have you got?'" But instead, Pittman said, "'Yeah, that's fine.'" Defendant got upset that Pittman had blown it and Levin started to whimper because he had given up the possibility that he was going to survive. When defendant tried to get Levin to tell him the alarm code Levin was so scared and nervous he could not remember the sequence and it turned out to be wrong.

They took Levin into the bedroom, put him face down on his bed and, with a silencer attached to a .25 caliber pistol, Pittman shot Levin in the back of the head. Defendant described to Karny the sounds of Levin's last breath leaving his body. It was kind of like an explosive gasp. The blood started seeping out, so they quickly wrapped Levin in the bedspread. By accident they also wrapped the television remote control in the bedspread and took it with them. They carried Levin's body out to the car and put him in the trunk. Levin's body was heavy, they were exhausted and, in their haste to get

the trunk closed, they closed part of the lid on his body and dented the trunk lid.

Levin's body was taken to the pit in Soledad Canyon. When they put Levin's body in the pit, defendant disfigured it by shooting the body so many times with a shotgun that it would not be recognizable even if it was found. Defendant told this tale to Karny in a matter-of-fact manner without any emotion other than laughing when he told Karny how, at one point, Levin's brain jumped out of his skull and landed on defendant's chest.

Defendant thought that was "kind of neat in a weird way."[14/] Levin's distinctive watch was thrown down a storm drain because it could be traced to Levin through his special jeweler.

Levin was discovered missing early in the morning on June 7, 1984. Blanche Sturkey, Levin's housekeeper and "girl Friday" was to pick Levin up at 7 a.m. that morning to drive him to the airport. She called Levin at 6 a.m. to make sure he was up. Levin did not answer the phone. Dean Factor and

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14/ In mid-July 1984, defendant left a heavy cotton topcoat at Dicker's house. Defendant told Dicker it had Ron Levin's brains smeared on it. Dicker did not see any bloodstains on the coat, but when he reacted in disgust, defendant assured him it had been dry cleaned.

Michael Broder, who were travelling to New York with Levin, arrived at Levin's house at approximately 7 a.m. and were worried because Levin was not there. Levin's blinds were closed, his alarm was not on which was very unusual, and his dog was acting peculiarly. When Sturkey arrived, she let them in with her key.

Sturkey, Factor and Broder searched the empty house and were puzzled by what they found. They thought it would have been very unusual for Levin to make plans and not show up. Levin's airline tickets and his new Luis Vuitton luggage were still in the house. A black toiletries case with which he always travelled was still in the linen closet. One of the pillows, a sheet, and the bedspread from Levin's bed were missing. His bed had been remade with a guest-room comforter Levin never used on his own bed. The television remote control was missing, the dog was acting queer and had urinated in the house, take-out food cartons with only a few bites missing were left out, the jogging suit and robe Levin had been wearing the day before was missing but none of his other clothes were missing. His wallet, house and car keys were gone, but his car

was still in the carport. Perhaps most peculiar, Levin had not called his answering service for messages.15/

Levin's mother was called to the house and Factor and Broder went to the Beverly Hills Police Station and told a detective that they suspected Levin had been murdered. They were told that unless there was blood on the walls, there was no reason to suspect murder and there was really nothing they could do.16/

Nevertheless, things were no longer going according to plan. Pittman left for New York as planned and checked into the Plaza Hotel on June 7th in Levin's name. But when he tried to pay his bill with Levin's credit cards, they were rejected.

15/ According to Tere Tereba who had known Levin since 1971 or 1972, Levin was constantly calling in for messages. Levin carried a beeper and would even run out of movies or leave the table at a restaurant to get his phone messages. Jerry Stone ran Levin's answering service and testified that Levin's messages began accumulating at 9 p.m. on June 6, 1984. Among the accumulated messages were four from defendant to Levin. Defendant told May he was calling Levin's answering service on a daily basis to keep up appearances.

16/ The coroner explained that bloodstains would be minimal if a person was placed face down and shot in the back of the head with a small caliber pistol such as a .25 caliber. A small caliber bullet would remain inside the head and a silencer causes the gun to create a smaller entry wound. A pillow placed between the head and gun also decreases the size of the wound and soaks up blood.

Pittman tried to sneak out of the hotel without paying the bill but was caught and arrested.

Defendant flew to New York and walked up to a criminal defense lawyer, Robert Ferraro, on the "stoop of the courthouse." Defendant told Ferraro he had a friend named Ron Levin whom he wanted to get out of jail. Defendant handed Ferraro a fee of $700, plus $2000 for "Levin" when he was released and $2000 for the Plaza Hotel, all in cash.[17/] Defendant then flew on to London to stall making a payment to some investors.[18/] When he returned, defendant learned Levin's check for $1.5 million was no good and he was hysterical.[19/]

[17/] Pittman was released and ordered back for trial on August 14th. He failed to appear and a bench warrant was issued.

[18/] Telephone records, travelling receipts and defendant's passport seized from the BBC office verified a call from the New York Police Station and defendant's and Pittman's trips.

[19/] Defendant had opened an account at the World Trade Bank in an effort to expedite the cashing of Levin's check which was drawn on a Swiss bank account. Nabil Abifadel, the operations manager of the World Trade Bank, submitted the check to Credit Suisse in Zurich on June 8. On June 15, he received a telex from Credit Suisse stating the check was dishonored due to insufficient funds and a missing signature. Pittman arranged to have Levin's Swiss bank send new checks to Levin's post office box and defendant, Karny and Dosti practiced forging Levin's name. They took turns checking the mail box with the key taken from Levin but no checks were obtained. Defendant also gave Pittman $30,000 and sent him to Washington D.C. to see if Pittman could get the check cashed through his "underworld connections."

Roberts found defendant laying face down on his bed crying. Defendant told her he was upset because all of the BBC boys were going to laugh at him and he did not know what to do. He told Roberts he had called Levin on the phone and driven by Levin's house and could not get a hold of him.

The pressure was increasing for money in the group. BBC members kept asking defendant, Karny and Dosti why the projects they were working on were not being funded and the reason for other cutbacks. Karny thought the organization and cohesiveness of the BBC was starting to fall apart and felt uncomfortable about deceiving his friends in the BBC. Karny told defendant that if the members really understood what they were trying to accomplish and the principles of the paradox philosophy, that they also would be able to understand the killing of Levin. It was agreed that a special meeting of the BBC would be called and only those members with a sufficient orientation in the paradox philosophy would be invited to attend.

Prior to the meeting, May asked defendant what was going on. Defendant replied: "'Look, Tom, you are going to find out sooner or later. I killed Ron Levin.'" Defendant told May he had committed the "perfect crime," and that he had killed Levin in New York. May thought this was just another

one of defendant's lies until he attended the secret meeting of the BBC and heard defendant tell everyone he had killed Levin.

The meeting was held on June 24. Evan Dicker, Tom May, Steve Taglianetti, Dean Karny and Brooke Roberts were present and described the meeting. Defendant explained to the group, which also included Pittman, Dosti, and John Allen, that none of the BBC companies was doing well financially and there was no money left. He discussed great wealth and the need to acquire it and to protect it, and that to achieve greatness in the world, you must sometimes transgress the law. The BBC was going to take bold steps. Those who were unwilling to take the steps could remain with the BBC in some position of mediocrity, but they would never be able to achieve greatness. Defendant was going to discuss some sensitive things. Anyone could leave at that point in the meeting, but if they remained they would have to be responsible and "disciplined" about what they heard. No one left.

Defendant, Karny, Dosti and Pittman exited the room and were gone for a few minutes. According to Karny, during that time they discussed whether they should actually tell the others about the Levin killing. Defendant, Karny and Dosti were committed to sharing it with the others, but Pittman had reservations. Pittman believed that no one could be trusted

with that information and that someone would always talk. Eventually, Pittman came around. Karny and Dosti returned to the meeting and were joined by defendant and Pittman a couple of minutes later.

Defendant told the group, "'Jim and I knocked off Ron Levin.'" 20/ Defendant explained that all of their money had been lost and that in order for the BBC to survive, he had to do away with Levin. Defendant assured the group that "it was a perfect crime" and "'there is no way in which we would be caught.'" Defendant still held out some possibility that they were going to be able to get Levin's check cashed, 21/ they

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20/ Roberts testified she had overheard defendant and Karny making plans for the June 24 meeting. She heard Karny suggest that they tell the BBC that one of them had killed Levin. They finally settled on saying that defendant and Pittman had done the killing and to make it sound believable they would make up details. Roberts said she told defendant not to make up something like that, but defendant told her not to worry. Defendant had learned that the Mays or Raymond were going to steal the cyclotron machines, he did not want to lose the business, he could pay the money back through another deal, and so he was just going to say it for effect.

21/ Dicker knew Levin's business practices and wondered how defendant got Levin to give the BBC a check for $1.5 million. About a week after the meeting Dicker questioned defendant about the check. Defendant said the check was signed under a great deal of duress. Dicker asked defendant what he had done with Levin's body. Defendant replied that he had disposed of it with acid. Raymond also questioned defendant about his worries. Defendant told Raymond, "'Well, don't worry because it was a perfect crime . . . [¶] they will never find the body.'"

still had some money and resources and a lot of good projects, and they would get back on their feet if everyone stayed together and worked hard. Before the meeting broke up, defendant threatened that if anybody talked to the police they would end up in the East River and become "fish bait." 22/

Notwithstanding that threat, Pittman had been right when he said someone would talk. The next day, Taglianetti resigned from the BBC and called his father and told him what he had learned. Then he called David and Tom May and learned they also had told their father. Raymond moved out of the BBC apartment house. He also called David May and told him defendant had said he killed Levin and arranged a meeting with the Mays. Tom May collected copies of the Levin check and

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22/ Roberts heard defendant tell the group that he and Pittman had "knocked off Levin." She thought all the boys, with the exception of Pittman, were enthusiastic. After the meeting, Pittman said to Roberts, "'You know, we didn't do that.'" Roberts assured Pittman she knew they had not done it and he replied, "'I don't think they believed us anyway'" and Roberts agreed. When Roberts was asked by Detective Leslie Zoeller if there had been a meeting where defendant had said he killed Levin, Roberts had lied to him and said no, because she was scared to death of the police. When she was questioned, about 20 policemen had arrived at her house, awakened her, refused to allow her any phone calls, and threatened to arrest her.

contract and other documents to turn over to the police. It was agreed that the Mays would report the matter to the police through their attorney.23/

Defendant became suspicious that someone was talking to the police. He confirmed it by breaking into David May's apartment where he heard a message from Detective Zoeller on the answering machine.24/ Defendant confronted the Mays and Raymond with this information and demanded that they call the

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23/ Dicker did not go to the police because of his loyalty to defendant and his belief in the paradox philosophy. Later he lied to the police and told them defendant had never told him about the Levin murder because he was afraid he might be considered an accessory after the fact. Finally, in November and December 1984, Dicker contacted an attorney and the police. Steve Lopez, who was not at the meeting, heard that defendant had told the BBC members he had killed Levin. Defendant admitted to Lopez he had said as much, but only to provoke a response to see how they would react and to make himself look like a tough guy. Lopez discontinued his involvement with the BBC.

24/ Defendant decided to blame the murder on David May or Jeff Raymond and discussed different schemes with Karny and Dicker. One scheme called for saying that David May had borrowed the BMW which had been used to transport Levin's body and had returned it late with the smell of vomit and the remote control in the back. They also discussed framing Raymond by planting the remote control on him, killing Raymond's girlfriend in a sexually gruesome way, telling people Raymond had disgusting sexual habits and getting defendant's girlfriend, Brooke Roberts to lie and say Raymond had sexually attacked her. But no one wanted to have anything to do with that plan.

police and say they had lied. Defendant also told them he had the pink slips to their cars and would exchange them for the documents they had given to the police. When they explained that was impossible, defendant threatened "to declare war" on them.25/ Nevertheless, Tom May continued working with the police by removing documents from the BBC office and turning them over to the police.

Detective Zoeller of the Beverly Hills Police Department arrested defendant on September 28, 1984.26/ Defendant waived his constitutional rights and responded to a number of the detective's questions about his financial dealings with Levin. Defendant appeared very confident and very sure of himself until Detective Zoeller confronted him with the seven pages of "things to do" which had been found at Levin's house. Defendant immediately stopped talking and went

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25/ Defendant also told the Mays they were no longer BBC members, "much to [Tom May's] chagrin." To Raymond, defendant said that Levin was a very dear friend of his (defendant's) and he was really upset that he was missing. Defendant expressed the wish that Levin would be found and Raymond was not to say anything about defendant's "dear friend Levin." Defendant warned Raymond that "the D.A. doesn't make very much money and it would be very easy to persuade him to make it look like you (Raymond) might have something to do with Ron Levin's being missing."

26/ Defendant's briefcase was in his possession at the time of his arrest. When it was opened pursuant to a warrant, it revealed that, although over three months had passed since anyone had heard from Levin, defendant was still carrying around an original of the Levin option contract dated June 6, 1984.

through the lists over and over, page by page, forwards and backwards, for seven to ten minutes without speaking. Detective Zoeller then asked defendant for the second time what he knew about the lists. Defendant stated, "I don't know anything about these," and the interview ended.

Defendant called Karny from the Beverly Hills jail and reminded him of the significance of the alibi they had arranged about going to the movies on June 6. After defendant was released from jail, defendant admitted to Karny how very surprised and shocked he was to see the lists, but he believed he had managed to mask his reaction. Thereafter, defendant and Karny had frequent discussions about the fake trail they had laid with regard to the crime, how brilliantly conceived and detailed their crime plan was and that if even a few of the BBC stuck to the story, a reasonable doubt would be created in the minds of the jury.[27/] Defendant expressed the belief that, because he had been released from jail, even the lists did not constitute sufficient evidence to prove the case against him.[28/]

27/ Defendant particularly enjoyed telling Detective Zoeller that he had not done very good police work.

28/ Defendant was rearrested on October 22, 1984, and once again called Karny from the jail, this time to remind Karny that whether Karny liked it or not he was going to be involved with the testimony. Karny was warned to remember there was no meeting on June 24.

The lists contained a rough but inaccurate map of what appeared to be the Indian Canyon area of Soledad Canyon. Photographs of that area containing defendant's picture had also been seized from Pittman's residence. On October 19, 1984, Detective Zoeller drove up to Indian Canyon with Taglianetti and Tom May to look for Levin's body. Later, Zoeller made three or four more trips to the area in an unsuccessful effort to locate Levin's remains.

Defendant told Karny around the end of June that he had gone back to Soledad Canyon to see if the coyotes had dug up the body. Defendant found no trace of it.

The Department of Justice Missing Persons Unit did an investigation which included comparing Levin's "unique" dental records with unidentified deceased persons. They searched his Department of Motor Vehicles record and his criminal record. They found no trace of Levin either. At the time he disappeared, Levin left thousands of dollars in various bank accounts. Levin had purchased $25,000 in traveler's checks before he disappeared. He had paid off debts with some of the checks and deposited $10,000 of them in a Bank of America account. Thirty of those checks totalling $3,000 were never cashed. Other than earning interest, there was no activity on any of Levin's accounts after June 6, 1984.

Levin's mother never heard from him again after June 6 even though Levin loved her dearly and had never let a day go by without talking to her. Levin's body was never found and Levin was never heard from again.[29/]

29/ In September 1986, two people believed they saw Levin at a gas station in Tucson, Arizona. Carmen Canchola and Jesus Lopez pulled into the gas station and noticed a tall, attractive, older man pumping gas. The man was about six foot one, slender, with silver hair. His eyes were blue-gray and he had either a scar or a deep wrinkle on one side of one of his eyes. The man had a "mean" or "piercing" stare. He was wearing very nice, expensive looking clothes. He was with a man who was 15 to 20 years younger. The men appeared to be homosexuals. They drove off in a late '50's, early '60's silverish or pinkish-beige classic automobile On November 20, 1986, Canchola saw a sketch of Levin in an Esquire magazine article about the "Billionaire Boys Club." She thought he looked familiar and after reading a description of Levin in the article, she came to believe it was Levin she saw in the gas station and went to the police.

Canchola was shown a photographic line-up and selected Levin's picture but was somewhat uncertain. When shown another line-up containing a photograph of Levin without a beard, she was 99 percent sure it was the person she had seen in the gas station. Lopez also selected a picture of Levin from the photographic lineup and was 65 percent sure it was the person he had seen in the gas station. When shown a second photograph of Levin by defense counsel he was 95 percent certain it was the man he had seen at the gas station.

III. DISCUSSION

A. COURT IMPOSED LIMITATIONS ON COCOUNSEL

The defendant's privately retained attorneys were both appointed to represent him at his trial when he was unable to pay their fee. Defendant claims that the court interfered with the sanctity of the attorney-client relationship when, as a condition of appointing and paying at government expense his lead attorney, the court simultaneously imposed limitations on his cocounsel's role and compensation. These limitations, he claims, deprived him of his constitutional right to counsel.

We set forth the factual circumstances leading to the appointment of defendant's lawyers as they are necessary to a full understanding of why we find that defendant's contentions are without merit.

Defendant had retained attorney Arthur Barens in March 1985 to represent him at trial for an agreed-upon fee of $50,000 plus expenses. Barens brought in attorney Richard Chier to assist him and paid for his assistance out of this fee. By October 1985, defendant had paid only $35,000 of the fee and, when no further funds were forthcoming, Barens filed

a motion pursuant to section 987, subdivision (d) for the appointment of Chier as associate counsel.30/

In support of his motion, Barens submitted a declaration in which he explained that he bore the primary responsibility for preparing the defense and in that regard had reviewed a tremendous number of reports and other documentation pertaining to the case, consulted with the defendant, interviewed witnesses, researched points of law and spoken with other attorneys experienced in the defense of capital cases. Barens needed the assistance of Chier, a criminal law specialist who had been practicing for eighteen years in the following areas: the analyses of numerous complex factual and legal issues, assistance in preparing defenses to other crimes evidence which the People intended to offer pursuant to

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30/ Section 987(d) provides: "In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for denial of the request."

Evidence Code section 1101; evaluation of reports of statements of prosecution witnesses and follow-up interviews; interviewing defense witnesses, and organizing their prospective testimony; reviewing and organizing the testimony from the Pittman trial;[31/] evaluating the complex evidentiary issues including corpus delicti issues and financial records of defendant's business dealings which provided the alleged motive for murder; preparation of pretrial motions; assistance in evaluating the need for expert testimony; and drafting interlocutory appellate motions in the event of adverse trial rulings.

This motion was granted and Chier was appointed second counsel effective March 1, 1986. Thereafter, the court authorized payments to Chier at a rate of approximately $50 per hour.[32/]

31/ Pittman also was tried for Levin's murder in a separate proceeding. His trial began on May 8, 1985, and a mistrial was declared as a result of a deadlocked jury on June 24, 1985. Pittman's retrial was then continued until after defendant's trial. Pittman subsequently pleaded guilty on November 10, 1987, to accessory after the fact in violation of section 32.

32/ Mr. Barens did not request payment of a specific hourly fee for Mr. Chier nor did the court's order set forth a specific hourly fee. Rather, the order stated that "payment to second counsel be and hereby is authorized as provided by the provisions of Section 987(d) of the Penal Code." However, subdivision (d) of section 987 does not provide for the payment of court appointed counsel. The payment provisions are found in section 987.2 which state that court appointed counsel ". . . shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county."

Jury selection began on November 5, 1986, with both counsel conducting the defense voir dire. Six weeks later, Barens filed a motion pursuant to section 987(d) to have himself appointed as additional counsel effective December 16, 1986. In support of his motion, Barens submitted a declaration in which he explained that the trial of the case was taking far longer than was originally anticipated and the defendant's inability to pay the balance of his fees or expenses was beginning to erode his effectiveness. Barens further declared that a court appointment would tend to ensure his continuing and regular presence throughout the trial and would minimize the number of other court appearances he would have to make during the course of the trial "in order to keep the economic ship of state afloat." 33/

33/ On December 17, 1986, Barens filed another motion requesting that he be appointed as additional counsel, this time pursuant to the provisions of section 987.2. In his declaration in support of this motion, Barens indicated his willingness to accept appointment at whatever rate the court deemed appropriate in accordance with the criteria contained in section 987.3.

Section 987.3 sets forth the following factors the court must consider in determining reasonable compensation for court appointed attorneys, no one of which alone is controlling: "(a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client. [¶] (b) The time and labor required to be spent by the attorney. [¶] (c) The difficulty of the defense. (d) The novelty or uncertainty of the law upon which the decision depended. [¶] (e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services. [¶] (f) The professional character, qualification, and standing of the attorney."

A declaration by Chier was submitted in support of Baren's motion in which he reiterated the need for Barens's appointment and stated that Barens was a well respected member of the bar; was intimately familiar with every aspect of the prosecution; was experienced in defending persons accused of homicide; and had a good working relationship with the district attorney's office.

On January 15, 1987, the court appointed Barens to represent the defendant. Barens' compensation was set at $75 per hour and Chier's compensation was set at $35 per hour. 34/ In appointing Barens, the court stated it would continue the appointment of Chier but only on one condition. Chier could assist Barens in any way that Barens wanted, with the exception that Chier could not participate actively in the trial of the case by questioning witnesses.

On January 29, 1987, a hearing was held to clarify Chier's role in the proceedings. Barens acknowledged that in seeking his own appointment, he had told the court that he

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34/ Initially on December 30, 1986, the court had denied Baren's request for court appointment. The subsequent order appointing Barens was ordered entered as of December 16, 1986, nunc pro tunc.

needed a lawyer to help him in connection with the motions and preparation and that he had agreed to the court's limitations on Chier's participation. However, Barens requested reconsideration because the defendant was uncomfortable and had misgivings about not having two lawyers participating in his defense. Barens explained that he and Chier had prepared for trial on the basis of dividing the witnesses each would handle and, in addition, it was Chier who had the majority of contact with the defendant and had prepared the defendant to testify at trial. 35/

The court found that the presumption in a death penalty case that second counsel was required had been overcome by Barens' experience and capability. The court further found

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35/ In his written motion for clarification of the nature and extent of the participation the court intended to permit Chier during the trial, Barens informed the court that he, Chier and the defendant had been working together in harmony, with efficiency, and with specific divisions of labor. It had been agreed between them that Chier would handle all legal motions, legal objections, and other matters of law as well as examination and cross-examination of certain witnesses. Barens expressed apprehension that the court had circumscribed Chier's participation in the trial and thus defendant was being denied the effective assistance of both trial counsel.

that Chier was not needed; that Barens was fully competent to handle all examinations of witnesses himself; and that Chier's questioning of prospective jurors had antagonized and alienated the jurors and was a disservice to the defendant. Accordingly, the court ruled that Chier could fully assist Barens in all areas including arguing legal issues before the court but he must refrain from questioning witnesses and arguing in the jury's presence. If counsel was not willing to accept such limitations upon Chier, he could try the case without compensation from the county or state. Barens declined that alternative. 36/

If a criminal defendant is unable to employ private counsel, the court must appoint an attorney to represent him. (Gideon v. Wainwright (1963) 372 U.S. 335; Keenan v. Superior Court (1982) 31 Cal.3d 424, 428.) In a capital case, the right to counsel may include the appointment of an additional attorney as cocounsel when the court "is convinced...that the appointment is necessary to provide the defendant with

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36/ A petition for an emergency stay and writ of mandate to direct the court to permit Chier to fully participate as cocounsel was denied by the Court of Appeal on February 2, 1987. On that same date the jury was impaneled and the prosecution's first witness was called. Counsel's petition for review to the Supreme Court was denied on February 19, 1987.

effective representation." (§ 987, subd. (d).) The appointment of two attorneys is not an absolute right, however, and the decision as to whether an additional attorney should be appointed remains within the sound discretion of the trial court. (Keenan v. Superior Court, supra, 31 Cal.3d at p. 430; Seaman v. Superior Court (1987) 193 Cal.App.3d 1279, 1286.)

Once a trial court has found the requested services are not reasonably necessary, an appellate court will not second-guess that determination unless "'the circumstances shown compelled the [trial] court to exercise its discretion only in one way, namely, to grant the motion.'" (Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 323; Puett v. Superior Court (1979) 96 Cal.App.3d 96 Cal.App.3d 936, 938-939.)

As will be shown, it can not be said as a matter of law that the only decision open to the trial court was to permit cocounsel to question witnesses and argue the case before the jury in the guilt phase of the trial.[37/] Rather, the law clearly provides that "[t]he court shall appoint a second attorney [only] when it is convinced by the reasons stated in the affidavit that the appointment is necessary to

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37/ The court placed no limitation upon Chier with respect to the examination of witnesses at the penalty phase. Yet, Chier cross-examined only 5 of the 25 prosecution witnesses and presented the direct testimony of only 3 of the 11 defense witnesses.

provide the defendant with effective representation." (§ 987, subd. (d), emphasis added.) The court appointed cocounsel to provide, and Chier subsequently provided, exactly the assistance requested by Barens in his affidavit. Barens neither requested nor indicated in his affidavit that he needed Chier to assist him in examining witnesses or to argue the case.

Contrary to defendant's assertion and, whether or not on "the eve of trial," a court is not required to expand the duties of cocounsel beyond that set forth in lead counsel's[38/] affidavit because counsel have taken it upon themselves, without court authorization, to privately add to or divide their respective duties in a manner inconsistent with the affidavit upon which the court relied in appointing second counsel. Nor is the fact that defendant is "uncomfortable or has misgivings" a sufficient ground for expanding counsel's

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38/ Counsel on appeal points to the order appointing Barens which is denominated "Order Appointing Second Counsel" as an indication Barens was not the lead attorney. Clearly, Barens was the lead counsel in this case. He was the attorney originally retained by defendant in March 1985. He was the attorney who represented defendant at his preliminary hearing. He was the attorney who paid for the services of Chier until the money ran out. He was the attorney who requested the court appoint Chier as his assistant in February 1986. That he also sought appointment from the court as a result of defendant's continued indigency some 10 months after Chier was appointed did not change his status to second counsel.

duties. (§ 987, subd. (d); see e.g. Seaman v. Superior Court, supra, 193 Cal.App.3d at p. 1289, [no abuse of discretion in refusing to appoint cocounsel where attorney fails to accompany written request with an affidavit setting forth in detail why cocounsel should be appointed].)

Another area not included in Barens' application for the appointment of cocounsel was a request for the assistance of cocounsel in questioning prospective jurors. However, Chier actively participated in Hovey[39/] voir dire and it was during that phase of the proceedings that the trial court formed the conclusion that Chier's assistance in open court before the jurors was unnecessary and possibly harmful to the defense. For example, the court found fault with Chier's repetitive questioning of a prospective juror as to how he would consider age in determining penalty.

A trial judge has a duty to control the trial proceedings and may intervene if it appears that defense counsel is making serious mistakes or exceeding reasonable limits in conducting voir dire. (§ 1044; People v. Williams (1981) 29 Cal.3d 392, 408; People v. Garcia (1986) 183

39/ That portion of the examination of prospective jurors which seeks to uncover their attitudes toward the death penalty is commonly called Hovey voir dire. (Hovey v. Superior Court (1980) 28 Cal.3d 1)

Cal.App.3d 335, 344-345; People v. Blackburn (1982) 139 Cal.App.3d 761, 764-765; Smith v. Superior Court, supra, at p. 560.)

In People v. Stroble (1951) 36 Cal.2d 615 the trial judge believed that one of the defendant's two lawyers acted improperly during jury voir dire and also believed that certain conduct in preparing the defense and in releasing information about it was improper. The court ordered a third public defender who was familiar with the case to handle the remainder of the trial even though the relieved public defender was the only one who had interviewed the defendant. (Id. at p. 628) The Stroble court rejected defendant's contention that his right to counsel of his choice was violated because the only public defender whom defendant had come to know personally and in whom defendant had confidence had been relieved. The court held that defendant's right to counsel does not include the right to be represented by a particular deputy public defender and the record did not sustain his charge that thereafter he was not properly and adequately represented. (Id. at p. 629) As in Stroble, no abuse of discretion occurred herein. It is clear that the court acted upon its observations of Chier and

not arbitrarily or capriciously in refusing to expand Chier's role to include handling matters before the jury.

Nor did the court abuse its discretion in allocating the fee to be paid each attorney based upon their respective duties. When subdivision (d) of section 987 was added to the Penal Code in 1984 granting the court the discretion to appoint an additional attorney in a capital case, the Legislature indicated its recognition that "the rising costs of trials necessitate the implementation of guidelines which assure the defendant's right to adequate and effective representation, but do not place an unreasonable burden on the county treasury. Therefore, it is the intent of the Legislature in amending Section 987 of the Penal Code to provide additional counsel when the need for that counsel is appropriately documented to the court." (Stats. 1984, ch. 1109, § 4, p. 3736.)

Neither counsel requested or specified that a specific minimum hourly fee was required in order to keep the "economic ship of state afloat." Nor did either object to the fee schedule as such in their arguments to the trial court or to the appellate courts until the conclusion of the case. Altogether, the defense team received well over $100,000 in fees for the guilt phase of the trial which was more than

double Barons' original retainer agreement with defendant.[40] We find no abuse of discretion under these circumstances.

Defendant's argument that the court's limitations on Chier also denied him his statutory right under section 1095 to have both attorneys argue his case to the jury is not the law. Section 1095 provides: "If the offense charged is punishable with death, two counsel on each side may argue the cause. In any other case, the court may, in its discretion, restrict the argument to one counsel on each side." Notably, section 1095 "'. . . does not give the defendant in a capital case the right to have more than one counsel appointed to represent him, but merely allows a defendant who has retained multiple counsel the right to have at least two of them argue the case.'" (People v. Jackson (1980) 28 Cal.3d 264, 286, emphasis added; People v. Natale (1962) 199 Cal.App.2d 153, 157; see also Keenan v. Superior Court, supra, 31 Cal.3d at p. 429.)

40/ The record reveals that at the conclusion of the case, Chier sought and was granted an augmentation of the payments he had been receiving. Thus, he received a total of $39,505 from the county for services he rendered between November 4, 1986 and March 31, 1987. In addition, the county paid him $7800 for services prior to that time. Barens received $35,000 from defendant, an unknown amount of which he shared with Chier. The county paid Barens another $22,000 in fees pursuant to his court appointment for the guilt phase only.

In People v. Bonin (1988) 46 Cal.3d 659, the court found no constitutional or prejudicial error when one of the defendant's attorneys, who had assumed the "primary defense responsibilities" was erroneously precluded from participating in final argument. According to the court, "the federal and state Constitutions impliedly grant the criminal defendant the right to have defense counsel present closing argument, not each member of the defense team." (Id. at p. 694, emphasis in original.) Thus, this contention is also without merit.

B. CONFLICT OF INTEREST

Defendant also asserts that Barens' fee arrangement was negotiated without his knowledge or the knowledge or agreement of Chier and that it caused a conflict of interest between his two attorneys and himself which, in turn, led to a denial of his right to the effective assistance of counsel.

The Supreme Court recently restated the general principles applicable to a claim of conflict of interest in two cases, People v. Hardy (1992) 2 Cal.4th 86, 135 and People v. Jones (1991) 53 Cal.3d 1115, 1133-1134 as follows:

"'Under the federal and state Constitutions, a criminal defendant has the right to the assistance of counsel. (U.S.

Const., 6th Amend.; Cal. Const., art. I, § 15.) These constitutional guarantees entitle a defendant "not to some bare assistance but rather to effective assistance." [Citation, italics in original.] That entitlement includes the right to representation that is free from conflicts of interest. [Citations.] It applies to a defendant who retains his own counsel as well as to a defendant who is represented by appointed counsel. [Citations.] [¶] '[W]hen counsel is burdened by an actual conflict of interest, prejudice is presumed; the presumption arises, however, "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" [Citations.] [¶] 'Conflicts of interest may arise in various factual settings. Broadly, they "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." [Citations.]" (People v. Hardy, supra, 2 Cal.4th at p. 135; original italics.)

A threat to an attorney's personal interests may arise when the trial judge appoints an attorney to represent a criminal defendant as the judge possesses a potential power to exert strong pressures against the independent judgment of the lawyer. (Wood v. Georgia (1980) 450 U.S. 261, 270 fn. 17.) This occurred in Walberg v. Israel (7th Cir. 1985) 766 F.2d

1071, where the trial judge threatened not to pay the defendant's court-appointed attorney and implied that counsel's future appointments would be jeopardized if he was not on his best behavior which meant not just avoiding unethical conduct but also not pressing too hard during trial. (Id. at p. 1074.) The judge's threats appreciably reduced the likelihood that the attorney would conduct a vigorous defense. Thus, the attorney had a conflict of interest, not between two clients but between his client and himself. (Id. at p. 1076.)

Defendant compares his case to that in Walberg. However, unlike the Walberg case, the judge in this case did not threaten or pressure defense counsel into not presenting a vigorous defense. Rather, the judge believed that Barens was highly competent and able to examine all witnesses without the assistance of Chier. Thus, the court implicitly found no need for Barens to change the stratagem he had originally declared was necessary to effectively represent the defendant when he sought Chier's appointment.

Nevertheless, when, 10 months later, counsel had changed their strategy and prepared their case based upon the assumption that Chier would be allowed to examine certain witnesses, including the defendant, and then learned such was not to be the case if they wished to retain their court appointments and concomitant compensation, counsel were faced with a potential conflict between their personal interests and

that of their client. Should they forego compensation and proceed to trial based upon Chier's having prepared to examine certain witnesses? Or would that choice lead to the risk that in order to earn money counsel would have to take other cases and consequently spend less time on the defendant's case? Would the defendant then be faced with the risk that he would "'get what he paid for.'" 41/ (People v. Ortiz (1990) 51 Cal.3d 975, 985; People v. Castillo, supra, 233 Cal.App.3d at p. 63.)

This is not a case where it can be said as a matter of law that by accepting the court appointment Barens had an actual conflict. (See e.g. People v. Easley (1988) 46 Cal.3d 712, 724-725.) "It is a relatively common practice to appoint a retained attorney to represent a client when the client has become indigent and, for that reason, unable to pay the attorney's fees, and the public defender is not available." (People v. Castillo, supra, 233 Cal.App.3d at p. 57, citing

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41/ This was no longer a situation where counsel could make a motion to withdraw as counsel of record. Usually,"[w]here, in a litigation matter, a retainer agreement calls for an attorney to be paid particular amounts at specified times, and there is a failure to pay when due, the attorney has a remedy; it is to ask to be relieved from the duty of further representation of the client. (Code Civ. Proc., § 284, subd. 1.)" (People v. Castillo (1991) 233 Cal.App.3d 36, 63-55, fn. omitted; Smith v. Superior Court, supra, 68 Cal.2d at p. 558.) However, a motion to withdraw as counsel must be "timely made before the case is set for trial" and will be denied where withdrawal would prejudice the defendant, the prosecution or the smooth course of the administration of justice." (People v. Murphy (1973) 35 Cal.App.3d 905, 921.)

People v. Ortiz, supra, 51 Cal.3d at p. 989; Cal. Criminal Defense Practice (1991) Criminal Justice System, § 1.12[3], p. 1-30.) If counsel believed his ability to competently represent defendant was going to be jeopardized because of the conditions set by the court, his remedy was to seek interim appellate review of the appointment order. (People v. Castillo, supra, 233 Cal.App.3d at pp. 55-57.)

One of the duties for which Chier was appointed was to draft interlocutory appellate motions in the event of adverse trial rulings. Chier fulfilled that duty by filing an emergency petition for a peremptory writ and/or writ of mandate in this court complaining that his role had been limited. When his petition was denied, he sought a petition for review of our decision denying his request for a writ. The Supreme Court having denied review and defendant having preserved his point for appeal, his attorneys properly proceeded to trial as ordered by the court.[42/] (See e.g. In re Jackson (1985) 170

42/ The Supreme Court asked for and received a "letter response" from the district attorney's office which provided the court with the full record of the hearing as opposed to the selective portions of the hearing provided by Chier. Defendant's argument that Chier's presentation of his claims was"disingenuous" and would have been more effective if Barens had signed the petition is totally lacking in merit. The court was made aware of all the circumstances involving Barens' appointment and if it had found error, the remedy would have been to "annul" the limitations upon Chier by writ of mandate as requested by Chier, not to "annul" the appointment of and payment to Barens.

Cal.App.3d 773, 778; People v. Castillo, supra, 233 Cal.App.3d at p. 55-56.)

Even assuming that Barens' acceptance of the court appointment was an actual conflict of interest, which we do not, such an assumption does not lead inexorably to a reversal. The defendant still bears the burden of demonstrating that such "'conflict of interest adversely affected his lawyer's performance.'" (People v. Hardy, supra, 2 Cal.4th at p. 135; People v. Jones, supra, 53 Cal.3d at p. 1134; People v. Bonin, supra, 47 Cal.3d at p. 837-838; Strickland v. Washington, (1984) 466 U.S. 668, 692; Cuyler v. Sullivan (1980) 446 U.S. 335, 348.)

Thus, defendant "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." (People v. Thomas (1992) 2 Cal.4th 489, 530.) Accordingly, we first scrutinize the record to determine if Barens was prepared to examine certain witnesses, i.e. those that Chier would have examined. Secondly, we focus on whether Barens' actual

examination of witnesses was adversely affected by a conflict of interest.43/

The record reflects no lack of preparation. The time in trial before the jury was only four and one-half hours each day, leaving at least three and one-half hours of time before, during, and after the trial day to prepare. According to Barens' own statements, from the time he was appointed on January 15, 1987, until the prosecution rested on March 24, 1987, he worked every Friday, Saturday and Sunday in preparing his cross-examination. When, on the morning of the second day of trial, Barens was faced with a witness he had not originally

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43/ On appeal, defendant has set forth a list of areas in which he argues counsel's performance was adversely affected by Barens' fear that he would lose his court appointment. Most of his arguments are a challenge to the effectiveness of his attorney's representation which bear no relationship to his attorney's fee arrangement with the court. Only defendant's claims that the examination of certain witnesses and arguments to the jury were adversely affected by the fee arrangement are tested under the conflict of interest standard. Defendant's other challenges to the effectiveness of his counsel's representation must be tested under the traditional standard which requires defendant to "affirmatively prove prejudice." (Strickland v. Washington, supra, 466 U.S. at p. 693.)

planned on cross-examining, the court agreed to delay calling that witness until the following afternoon so that counsel could confer with Chier and review the witness' testimony from the Pittman transcripts. In addition, to make sure Barens was prepared, the prosecution thereafter gave counsel 24 hours notice of each witness it planned to call and Chier was present for consultation in and out of the courtroom. Finally, when the prosecution rested on a Tuesday afternoon, Barens asked for only two working days to prepare the defense witnesses. He made it clear that while Chier had interviewed out-of-state defense witnesses, he did not want to rely on Chier's interviews but wanted to interview each witness himself. Instead of two days, the court granted him the rest of the week off to prepare; trial did not reconvene until the following Monday morning.

Given the foregoing factors, it is clear that Barens fulfilled his duty to his client by working diligently to be prepared. (cf. People v. McKenzie (1983) 34 Cal.3d 616, 631-632.) Defendant has failed to show that Barens was unprepared to examine any witnesses in this case.

Secondly, defendant's claim that Barens failed to impeach witnesses Karny[44/] and Browning[45/] in significant areas with their testimony at the Pittman preliminary hearing also is without merit. Karny's trial testimony was substantially similar to the testimony he gave at the Pittman

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44/ According to defendant, at the Pittman preliminary hearing "Karny testified to watching [defendant] prepare the 'seven pages' during June 1984, only a few days before Levin's disappearance;" that he had only "vaguely" discussed a plan to kill Levin with defendant prior to that time; and that defendant had prepared the phony letters to Levin only days before June 6, and that his own participation with respect to these letters was limited to preventing one of them from going out in the mail. Karny also testified that when Pittman returned from New York, Pittman told him he had gone to New York to make it look as if Levin was murdered there. He contrasts this with the trial in which Karny testified he "actively assisted [defendant] in April and May 1984 in preparing phony letters to Levin and seeing to it that the letters were never actually mailed to him;" they discussed the "nuances of the letters and ...some of the other aspects of the plan to kill Ron Levin;" and Pittman did not know that Karny knew about the "whole plan" until later in time when the defendant told Pittman.

45/ Defendant claims that during the direct examination of Browning at trial "Browning testified that in late June, 1984, [defendant] told him . . . 'Mr. Levin was missing and probably dead. . . .' Actually, this testimony occurred during Barens' cross-examination, and Barens immediately followed up with a number of questions causing Browning to admit he had never in all of his prior depositions or testimony made such a statement. At Pittman's preliminary hearing, Browning was asked if defendant told him Levin was dead and he answered, "No."

preliminary hearing. The type of inconsistencies referred to by defendant have more to do with the difference in the way questions were asked and the context in which they were asked at each hearing. An exhaustive evaluation of Barens' actual cross-examination of all of the witnesses, but especially Karny's and Browning's, does not reveal any instance in which Barens was inept or pulled his punches because he feared that his appointment would be jeopardized by an aggressive examination.46/

Defendant next argues that another example of Barens' conflict of interest is Barens' failure to renew his request to have Chier present defendant's testimony. Defendant's theory is that Barens was afraid to ask for Chier because that would

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46/ Defendant also claims that the "most pernicious and pervasive effect of the 'arrangement'" was he lost the "aggressive, perhaps abrasive advocacy" of Chier. We recognize that a conflict of interest can lead to a reluctance to engage in "abrasive advocacy." (People v. Rhodes (1974) 12 Cal.3d 180, 184; People v. Jackson (1985) 167 Cal.App.3d 829, 833.) However, it is doubtful that the "win-loss ratio" of abrasive lawyers exceeds that of the "skilled, capable, intelligent lawyer who handle[s] his [or her] case in a manner consistent with the highest traditions of the legal profession." Sadly, "aggressive and abrasive" lawyers may make a fine show for their clients," but, like "nitpickers," their "win-loss ratio usually leaves much to be desired." (See e.g., People v. Eckstrom (1974) 43 Cal.App.3d 996, 1002; People v. Kelley (1990) 220 Cal.App.3d 1358, 1374.) We note that attorney Barens while not abrasive was persistent and assertive in his representation.

have threatened his fee arrangement. Defendant suggests that he would have testified had Chier been able to present his testimony. The record clearly belies this suggestion.

Defendant was informed of and waived his right to testify at the guilt phase of his trial. As pointed out above, Barens had plenty of time to prepare defendant's testimony for trial. The reason defendant waived his right to testify is that both counsel strongly indicated to him that he should not take the stand because he was subject to serious impeachment.

Normally, it is up to the trial attorney to determine whether a defendant should testify. But if a defendant "insists" that he or she wants to testify against the advice of the attorney, the defendant cannot be deprived of that opportunity. (People v. Harris (1987) 191 Cal.App.3d 819, 825; People v. Frierson (1985) 39 Cal.3d 803, 813.) If defendant truly wanted to testify, he had an obligation to express that desire to the court as he did just prior to the penalty phase.

The jury found defendant guilty on April 22, 1987, and on May 8, 1987, defendant for the first time informed the court that he and his attorneys were in disagreement as to whether he should be called to testify in the penalty phase of the trial. Defendant stated he was in favor of being called as a witness and both of his attorneys disagreed. Defendant requested a continuance to retain a new attorney, which would be paid for by some friends. The court denied the motion but, at Barens'

request, permitted Chier to participate in the penalty phase. Even with Chier's ability to present his testimony, defendant never again expressed a desire to, and did not, testify.47/

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's further contentions of incompetency of counsel are based upon (1) Barens' opening statement; (2) his elicitation of defendant's request for counsel; (3) his failure to object to the judge's gestures and other alleged judicial misconduct; (4) his failure to request limiting instructions; (5) his failure to renew his request for a hearing regarding alleged jury misconduct; and (6) his failure to make evidentiary objections. Each of these criticized actions relate to counsel's strategy and judgment which ordinarily is insulated from scrutiny based upon "the distorting effects of hindsight." (Strickland v. Washington, supra, 466 U.S. at p. 689.) Because of the difficulties inherent in making an evaluation of counsel's strategic decisions, "a court must

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47/ When Chier was given free rein to examine witnesses during the penalty phase, he only cross-examined 5 of the prosecution's 25 witnesses, and 3 of the defense's 11 witnesses. Thus, defendant's claim that the jury's verdict of life was based upon Chier's participation is unsubstantiated.

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (Ibid; People v. Williams (1988) 44 Cal.3d 883, 943.) With these principles in mind, we review each contention seriatim.

1. Defense Opening Statement

Defendant points to 10 promises made by Barens during his opening statement which he claims were never fulfilled in the course of the trial. These statements consist of a promise that defendant would testify, that a witness saw Levin sign the Microgenesis agreement at defendant's office the day before Levin's alleged murder, that Levin's neighbors would testify that they did not see or hear anything happen to Levin, that Levin was "a wizard at bankruptcy fraud . . . who was so dangerous" and illusive that a full-time detective, Paul Edholm, had been monitoring him for years, that Levin was facing a high probability of conviction for stealing over $1 million worth of equipment from a photographic facility, that Levin had filed bankruptcy involving hundreds and hundreds of people he had defrauded out of close to $1 million, that Levin had no exit from the Progressive Savings lawsuit because he had

already bankrupted, that any money Levin left behind would go to his mother, and that the BBC boys ridiculed and made fun of defendant in high school.

"The sole purpose of an opening statement is to outline facts upon which an acquittal will be sought." (People v. Hayes (1971) 19 Cal.App.3d 459, 472.) And while it is the duty of counsel to refrain from referring to facts which cannot be proved (see e.g. People v. Corona (1978) 80 Cal.App.3d 684, 719), the failure to produce proffered evidence, either on account of the rules of evidence or for any other reason, does not necessarily indicate prejudice. (People v. Cooley (1962) 211 Cal.App.2d 173, 215 [disapproved on other grounds in People v. Lew (1968) 68 Cal.2d 774, 778.)

In this case, counsel's decision to make an opening statement falls well within the range of reasonable professional assistance even though counsel did not present 100 percent of the evidence promised. The trial was estimated to take three months. The decision to include in the opening statement a promise that defendant would testify to certain facts was clearly premised on a belief that defendant intended to testify. It was not until nearly the end of the trial that his attorneys decided that it would no longer be in defendant's

best interest to testify. This decision was made with full knowledge of the representations made in the opening statement. Defendant personally concurred in the decision not to testify and waived his right to testify on the record.

Defendant has not shown that he was prejudiced by his change of mind or by an other promises made in his opening statement. The explanations he would have given and counsel's other promises were presented by other witnesses and by the closing argument of counsel. Counsel pointed out in his closing argument that none of the events set forth in the "seven pages" were proved to have occurred, that defendant had an alibi for the night of the crime, and that witnesses who testified to the unsoundness of the Microgenesis option agreement were biased and had reasons to lie. Counsel referred to evidence provided by the People's witnesses which substantiated the promises made in his opening statement, the thrust of which was that Levin was not murdered but voluntarily disappeared. He argued that Levin was facing an 8-year prison term based upon 10 felony charges giving Levin an incentive to disappear; the reduction Levin arranged in his $75,000 bail was totally unnecessary unless he was going to "jump bail" -- a reduction which resulted in a forfeiture of $7,500 but also protected his parents' property from being forfeited in the event of his disappearance; Levin's sudden and inexplicable return of hundreds of thousands of dollars in stolen photo equipment in order to get the lien removed from his parents'

property on June 5th and his cancellation of his appointment with his attorney on June 6th. There was also proof of Levin's knowledge that his felony case was not going well, his fear of going back to jail, and his frantic efforts to close out his accounts and martial his assets the very week preceding his disappearance which included Levin's yelling, harassing and berating bank officials to release his money because he was taking an international trip.

Evidence also was adduced that a week prior to Levin's disappearance, Fidelity Investments was intensifying its efforts to seek a criminal complaint against him for financial manipulations which had resulted in a $75,000 loss to that institution; it was undisputed that Levin had taken $153,000 from Progressive Savings and Loan and owed $50,000 to Bank of America. Further, none of that money had been traced to any bank accounts. Therefore, a reasonable inference was "[f]ind the money. Find Levin." This last argument, that Levin had absconded with all the money, explains counsel's change in tactics in not trying to prove the money would be left to Levin's mother.

With respect to the signing of the Microgenesis contract on June 5, counsel pointed out in his closing argument that based upon evidence produced by the People, the Microgenesis contract contained the figure of $1.5 million when drafted prior to June 6, that the contract was dated June 5, and that both Taglianetti and Karny saw Levin at the BBC

offices on June 5.

Counsel's tactical decision in not calling all witnesses was explained to the jurors in his closing argument when he stated: "I didn't call any of the witnesses about Ron Levin and the world is full of them. I am trying to be real with you and we have already seen a picture, as much as we are going to see, of Ron Levin. [¶] The issue is whether he is dead and the issue is whether Joe Hunt killed him that night. That is it. End of story. That is what the witnesses are about. That is what my witnesses are about and I gave you direct witnesses, witnesses with direct sensory experiences that they can come here and talk about. Not speculation. [¶] Witnesses who talked about hearing Joe's [sic] voice on the telephone on the night of June 6th. Two witnesses seeing a man they identify in the police photographs as Ron Levin."

Furthermore, no one is bound by the recitals in an opening statement and the judge admonished the jury that an opening statement is not evidence. It is because of this limitation upon the effect of an opening statement, that "one who asserts it as misconduct must prove more than the mere failure to adduce the testimony described in it." (People v. Cooley, supra, 211 Cal.App.2d at p. 215.)

Not only was the jury instructed not to consider the opening statement as evidence, the jury was properly instructed by the court, pursuant to CALJIC Nos. 2.11, 2.60, and 2.61 that neither side is required to call as witnesses all persons who

may appear to have some knowledge of the events; that it must not draw any inference from the fact that the defendant did not testify and it must neither discuss that matter nor permit it to enter into their deliberations in any way; and defendant's right to rely on the failure of the People to prove beyond a reasonable doubt every essential element of the charge against him and that his lack of testimony could not supply a failure of proof by the People.

"It is ordinarily presumed that jurors are intelligent persons capable of understanding and correlating all jury instructions that are given." (People v. Phillips (1985) 41 Cal.3d 29, 58.) "In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." (Strickland v. Washington, supra, 466 U.S. at p. 694.) Accordingly, counsel's opening statement does not afford a basis for reversal.

2. Elicitation of Defendant's Request for Counsel

Defense counsel successfully objected on constitutional grounds to any testimony on direct examination by Detective Zoeller that defendant had invoked his right to a lawyer when confronted with the seven-page list of things to do which had been found at Levin's home after his disappearance. Then, on

cross-examination, counsel twice asked Detective Zoeller to explain that defendant stopped speaking when confronted with the "seven pages" because he wanted to confer with his attorney. Counsel refused the prosecutor's demand to state on the record that this questioning was a specific, tactical decision on his part, stating: "I don't want to oblige him. The record speaks for itself."

Defendant now complains there can be no legitimate tactical reason for such questions. However, the record supports the strong presumption required under law that, in eliciting this information, counsel made a strategic choice based upon his reasonable professional judgment that such information would dispel the inference that defendant's silence was an admission of guilt. (Strickland v. Washington, supra, 466 U.S. at p. 690; People v. Thomas, supra, 2 Cal.4th at p. 530-531.) Counsel did not ask questions out of ignorance of the constitutional principles involved, nor was the information elicited as a result of inept questioning, nor was it blurted out. Nor was counsel required to disclose his strategy on the record to the court and prosecutor. As long as the record reflects a tactical decision as opposed to an ignorant blunder, our ignorance as to why counsel acted as he did cannot be a basis for inferring that he was wrong. (People v. Bess (1984) 153 Cal.App.3d 1053, 1059.) Where the record shows that counsel's actions resulted from an informed tactical choice within the range of reasonable competence, the conviction must

be affirmed. (People v. Pope (1979) 23 Cal.3d 412, 425; People v. Fosselman (1983) 33 Cal.3d 572, 582.)

3. Failure to Object to Gestures and Other Alleged Judicial Misconduct

Defendant cites incidents in which he states the court made derisive facial expressions and gestures and asked questions which reflected a judicial bias against the defense. The court's alleged bias and the attorney's alleged failure to object to the court's actions and demeanor are claimed to have prejudiced the defense. We have reviewed each of the complained of incidents and the circumstances wherein each incident is said to have occurred, and we find they fall into the following categories, (1) questions to clarify witnesses' testimony; (2) interruptions cutting off repetitious questioning; (3) humorous interjections; and (4) injudicious comments.

Contrary to defendant's contention, based upon our review of the record, we do not agree that defendant's trial was unfair and/or that counsel's alleged lack of objections or failure to describe the judge's expressions and gestures for the record are indicative of his attorney's incompetence. In reaching this conclusion with respect to categories (1) and (2), we found the analysis set forth in People v. Alfaro (1976) 61 Cal.App.3d 414, 425 particularly persuasive. There it was

stated: "It is the duty of the trial judge to keep the trial within bounds of the issues and not permit the questioning to wander off on collateral matters. The idea that trial courts should 'lean over backwards' or 'err on the side of caution' in favor of defendants in criminal cases is often advanced but is not required by case law or statute." In addition to keeping the trial within the bounds of the issues, "[t]he court may ask questions of its own and may enlarge or limit on other questions to seek the truth." (Id. at pp. 425-426.) We also do not agree that the court's humorous remarks were outrageous or prejudicial because they did not reflect a bias for or against either side.

We do agree with defendant that the court's remarks consisting of stereotypical characterizations of women and homosexuals were injudicious. But no matter how unwise, they were unlikely to have affected the verdict. "In a case where the evidence is close, one such remark could be prejudicial." (People v. Alfaro, supra, 61 Cal.App.3d at pp. 425-426.) But this case, like Alfaro, was not a close case; the evidence of guilt was overwhelming. Defendant had a motive to kill Levin; he planned Levin's killing and outlined the steps to carry it out; he told Karny of his plans and reviewed his outline with Karny; his written outline was found at Levin's home; and he told a number of BBC members that he had killed Levin. Thus, while the court's remarks were error, they did not refer to defendant. Consequently, we do not believe in this case they

were of a type which expressly or impliedly usurped the jury's ultimate factfinding power. (People v. Rodriguez (1986) 42 Cal.3d 730, 766; People v. Hefner (1981) 127 Cal.App.3d 88, 95.) Further, the jury was instructed at length that they were the "final and sole judges of the facts and the guilt or innocence of the defendant."48/

Nor does the record reveal that counsel sat quietly and failed to object or respond when he deemed it appropriate. There were objections or exceptions to the court's questioning of witnesses, to the court's demeanor during Roberts' testimony, and a motion for mistrial, and a motion for new

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48/ The full instruction read to the jury was a modified version of CALJIC No. 17.30 which stated: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion. [¶] You are to disregard any verbal exchanges between counsel and the court or any differences among us on rulings made by the court. The decision as to the guilt or innocence of the defendant is to be decided solely by you on the evidence received and on the court's instructions. I express no opinion as to the guilt or innocence of the defendant. The participation by the court in the questioning of witnesses is encouraged by our Supreme Court which has stated that there should be placed in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases instead of being in the position of a mere referee or automaton as to the ascertainment of the facts. Although I am vested with the power to comment on the facts in the case and to express my opinion on the merits of the case, I have nonetheless refrained and do refrain from doing so letting you be the final and sole judges of the facts and the guilt or innocence of the defendant."

trial were filed, each containing descriptions of the court's demeanor. The fact that on other occasions counsel did not object or take exception to the court's questioning of witnesses or remarks may be attributed to their being unobjectionable or because such objection would neither have aided the defendant nor the cause of justice. Consequently, counsel took appropriate steps to preserve objections when necessary and where no objections were made, we presume those decisions were based upon tactical considerations. The face of the record does not demonstrate that counsel was incompetent. (People v. Thomas, supra, 2 Cal.4th at p. 530-531; People v. Ghent (1987) 43 Cal.3d 739, 772-773; People v. Jackson, supra, 28 Cal.3d at pp. 291-292; People v. Frierson (1979) 25 Cal.3d 142, 158.)

4. Failure to Request Limiting Instructions

Defendant asserts that counsel also was incompetent for failing to request limiting instructions with respect to erroneously admitted "bad character evidence," alleged *Doyle* error and Pittman's statements.

a. Bad Character Evidence

Defendant contends the testimony about his paradox philosophy, his analysis of a "Rambo" movie, his bragging about

killing cats and Mexicans, and that a fortune teller thought he was "evil" was evidence of his bad character which should have been limited.[49] He argues that only counsel's ignorance of the authority set forth in People v. Enos (1973) 34 Cal.App.3d 25, 42 permitting modification of CALJIC No. 2.50 by substituting the phrase "bad acts" for the word crimes"[50] can

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[49] The admission of this evidence and other evidentiary rulings made by the trial court are discussed hereafter in Section D.

[50] If the word "act" was substituted for the word "crime" as approved in People v. Enos, supra, 34 Cal.App.3d at p. 42, CALJIC No. 2.50 would read as follows: "Evidence has been introduced for the purpose of showing that the defendant committed [an act] [acts] other than that for which [he] [she] is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] [The existence of the intent which is a necessary element of the crime charged;] [¶] [The identity of the person who committed the crime; if any, of which the defendant is accused;] [¶] [A motive for the commission of the crime charged;] [¶] [The defendant had knowledge of the nature of things found in [his] [her] possession;] [¶] [The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;]
"....
"[The crime charged is a part of a larger continuing plan, scheme or conspiracy]."
"....
"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose."

explain such a tactical error. However, once again the record does not support this contention.

Counsel repeatedly objected to the admissibility of the foregoing evidence and at the time it was admitted requested limiting instructions. At the conclusion of the case counsel proposed that the court strike such evidence and instruct the jury "that you must not consider such evidence for any purpose and must strike such testimony from your minds as though you never heard it."51/ The prosecutor countered with a request that the court give CALJIC No. 2.50 which the defense originally agreed to but upon further contemplation flatly refused, regarding it as "the kiss of death to the record."

Counsel also requested and was refused the following instruction: "You have heard evidence about the character and

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51/ The full text of instruction No. 5 requested by the defense and refused by the court was a modification of CALJIC No. 2.09 which read: "Certain evidence was admitted in error. [¶] For example evidence concerning an alleged critique by defendant of the film Rambo was admitted by the Court in error and should not be considered by you for any purpose. [¶] In addition you are not to consider for any purpose the following described evidence which should not have been received: [¶] 1. All references to the Chicago Mercantile Exchange; [¶] 2. All references to the manner in which investors were treated by Hunt; [¶] 3. All references to any statements by gypsy fortune tellers to Hunt or his parents; [¶] 4. All references to paradox philosophy; [¶] 5. All references to the defendant's alleged involvement in a Northern California criminal prosecution. [¶] You are again instructed that you must not consider such evidence for any purpose and must strike such testimony from your minds as though you never heard it."

reputation of Joe Hunt, the defendant. The defendant did not place his character in issue. The court should not have allowed the introduction of evidence concerning the defendant's character. You are not to consider any evidence concerning the defendant's character for any purpose whatsoever and you should strike such evidence [from] your minds as if you had never heard it."

Since counsel believed such evidence could not be considered for any legitimate purpose, it seems reasonable to presume that if counsel proposed or acquiesced to a "limiting" instruction the defense would be giving away one of their strongest appellate issues in the event of defendant's conviction. (People v. Phillips (1966) 64 Cal.2d 574, 580, fn. 4.) Neither counsel's failure to request nor the court's failure to give, sua sponte a limiting instruction was error. (People v. Bunyard (1988) 45 Cal.3d 1189, 1225-1226.)

b. Doyle Error

Defendant asserts that Doyle error occurred when the court also questioned Detective Zoeller about defendant's assertion of his right to an attorney. (Doyle v. Ohio (1976) 426 U.S. 610.) Counsel requested that the court immediately instruct the jury that it "cannot draw a negative inference of

guilt or consciousness of guilt from the exercise of the right to counsel." The court denied counsel's request but indicated it would reconsider his request at the conclusion of the case.

Defendant contends his attorney failed to renew his request for a Doyle instruction and that he was prejudiced thereby. This contention is totally without merit. At the conclusion of the case, counsel requested a detailed instruction with respect to this issue.[52/] While this instruction also was refused, counsel fulfilled his professional obligations by renewing his request for appropriate instructions.

52/ Defendant's request instruction No. 50 reads:
"After taking a defendant into custody, arresting officers sometimes make accusatory statements to him or in his presence, with a view to prompting some admission of guilt. [¶] An accusatory statement, as the term suggests, is a statement which in substance or effect accuses a person of guilt. [¶] The law does not require a defendant in custody to make any reply whatever to any accusatory statement made to him, or in his presence, either orally or in writing. So neither the accusatory statement, nor any failure to make reply thereto, is evidence of any kind against the accused. [¶] That is to say, neither the accusatory statement, nor any failure to reply thereto, can create any presumption or permit any inference of guilt. [¶] The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."

c. Pittman's Statements

Defendant next contends that Pittman's statements comprised a substantial part of the People's case and therefore his counsel was incompetent for failing to request that the jury be instructed pursuant to CALJIC No. 6.24.[53/] This instruction would have precluded the jury from considering any statements made by Pittman unless the jury found the existence of a conspiracy and that such statements were made in the course of the conspiracy. On this basis, the jury also would not have been allowed to consider any of Pittman's statements occurring after June 6, 1984, if they found a conspiracy but

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53/ CALJIC No. 6.24 states: "Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine: [¶] 1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed; [¶] 2. That the statement was made while the person making the statement was participating in the conspiracy and that the person against whom it was offered was participating in the conspiracy before and during that time; and [¶] 3. That such statement was made in furtherance of the objective of the conspiracy. [¶] The word 'statement' as used in this instruction includes any oral or written verbal expression or the nonverbal conduct of a person intended by that person as a substitute for oral or written verbal expression."

that the conspiracy had ended on June 6.[54/] In a related contention, he argues that, even without a request, the court had a duty to give CALJIC No. 6.24 along with an instruction defining conspiracy.

CALJIC No. 6.24 should have been given,[55/] (Evid. Code, § 1223; People v. Smith (1986) 187 Cal.App.3d 666,

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54/ In briefing this issue, defendant did not point out any statements made by Pittman before June 6, 1984, that were used against him. Thus, we will consider alleged error only as to those statements occurring after June 6, 1984. (See Rossiter v. Benoit (1979) 88 Cal.App.3d 706, 710-711.) These statements include Pittman's written and oral statements in New York by which he impersonated Levin, his silence or "adoptive admission" during the June 24, 1984 BBC meeting when defendant announced that he had "knocked off" Levin, statements about getting information from his underworld connections in Washington D.C. as to how to get the money from Levin's Swiss bank account including obtaining additional checks from the account so new ones could be written, and his statement that he had seen a receipt for an overseas package in Levin's mailbox which he tried to claim but was refused because he had no identification in Levin's name.

55/ Defendant's argument that CALJIC No. 2.71.5 also should have been given because Pittman's silence during the June 24 meeting when defendant told the BBC that he and Pittman had killed Levin was an adoptive admission which was used against defendant is without merit. An adoptive admission is a statement "offered against a party" in which "the party" manifests a "belief in its truth" (Evid. Code § 1221) and CALJIC No. 2.71.5 relates to evaluating a defendant's silence in the face of an accusatory statement. Defendant manifested his belief that he and Pittman had killed Levin by stating it for all to hear. CALJIC No. 2.71.5 does not apply to this situation.

679-680, disapproved on other grounds in People v. Bacigalupo (1991) 1 Cal.4th 103, 126, fn. 4) but the failure to do so was harmless error. We conclude that there was independent proof of a conspiracy in which defendant and Pittman were continuous participants.

Our analysis begins with the inescapable conclusion that this case did not involve a "murder conspiracy" which ended with the death of Levin. While revenge for the commodities trading hoax perpetrated upon defendant by Levin may have been inextricably entwined with the scheme, the primary goal of the conspiracy was to obtain from Levin by force and fear the $1.5 million which defendant believed Levin had acquired as a result of that hoax. Levin's death was necessary to facilitate the acquisition of the $1.5 million but the conspiracy did not end until the conspirators received the money or their efforts to do so were totally frustrated. (See e.g. People v. Hardy, supra, 2 Cal.4th at pp. 143-145.)

Independent proof of that conspiracy and Pittman's participation therein was received through the testimony of Karny which was corroborated by defendant's seven page plan which listed "Jim digs Pit," and "Joe Arrives 9:00 . . . Let's Jim In . . . 9:45," plus the testimony of witnesses who saw Pittman with a gun and silencer before Levin's murder. Pittman's arrival at the Plaza Hotel in New York and use of Levin's identification and credit cards, his arrest and

defendant's efforts to bail him out on June 11th are further indications that the conspiracy continued after June 6.

Records from the travel agency corroborate Karny's testimony that Pittman flew to Washington D.C. on June 19 and returned on June 21, 1984, the purpose of which was to seek assistance in cashing the $1.5 million check drawn on his Swiss bank account which Levin had been forced to sign. After Pittman's return, on June 24, defendant told the BBC members that there was still a possibility of getting the check cashed. After that meeting defendant told Tom May that Pittman was checking Levin's apartment to see who collected the mail and May saw defendant and Karny's efforts to forge Levin's signature. Thereafter, defendant, Karny, Dosti and Pittman checked Levin's post office box regularly to try to intercept additional checks ordered on the Swiss account. Karny got the key to the mail box on at least one occasion from Pittman. Finally, Dosti travelled to Switzerland in late August or early September 1984 to try to cash the check.

From the foregoing evidence, it is clear Pittman was participating in, and his declarations were in furtherance of, that ongoing conspiracy to cash the $1.5 million check at the time of his declarations. Thus, neither counsel's failure to request, nor the court's failure to give CALJIC No. 6.24 requires a reversal as it is not reasonably probable that a different result would have occurred had it been given.

(People v. Hardy, supra, 2 Cal.4th at p. 147; People v. Sully (1991) 53 Cal.3d 1195, 1231; People v. Smith, supra, 187 Cal.App.3d at p. 680; People v. Earnest (1975) 53 Cal.App.3d 734, 744; People v. Watson (1956) 46 Cal.2d 818, 836.)

5. Juror Misconduct

Defendant adds a claim of ineffective assistance of counsel with respect to a "Recipe of the Week"[56/] which was drafted and distributed by one of the jurors during the guilt phase of the trial. He contends his counsel was not diligent and conscientious because counsel did not renew a request for a hearing into its impact on the jury.

In resolving this particular claim of ineffective assistance of counsel, we find that counsel raised the issue of

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56/ Juror Linda Mickell's "Recipe of the Week" is for "Stir Fried Inverted Butterflies (Also known as Mu Shu Porkbellies or Commodity Chop Suey)" and is prepared as follows: [¶] 1. Invert a butterfly in frying pan. [¶] 2. Add some diced porkbellies and Swiss frankfurters. [¶] 3. Simmer over low heat for 10 minutes. [¶] 4. A little margin may be called for to prevent shrinkage. [¶] 5. Add 1 can Hunt's tomato sauce and generous amounts of spice. [¶] 6. Simmer over low heat for an additional hour. This dish may be served over rice, over noodles, or over the counter. It is best prepared ahead of time - it is a futures dish. Serves 4-6 financially secure people who wish to gain. (Low in calories and nutritional value - it is not advised for people with a faint heart condition). (Emphasis in original)

juror misconduct three separate times. First, counsel requested that the juror be questioned. Upon the court's refusal, counsel moved for a mistrial which was denied. Counsel raised it for a third time in his motion for a new trial. We conclude that these three efforts were well within the range of acceptable representation. The absence of a renewed request for a hearing did not cause counsel's representation to fall "below an objective standard of reasonableness under prevailing professional norms." (People v. Thomas, supra, 2 Cal.4th at p. 530; People v. Ledesma, supra, 43 Cal.3d at pp. 216-218.)

Moreover, the court was not required to conduct an inquiry and question the juror. Not every allegation of jury misconduct requires a hearing. Both California and federal law grant the trial court wide discretion to conduct an evidentiary hearing regarding allegations of jury misconduct. (People v. Hardy, supra, 2 Cal.4th at p. 174; United States v. Hendrix (9th Cir. 1977) 549 F.2d 1225, 1227-1228; United States v. Bradshaw (10th Cir. 1986) 787 F.2d 1385, 1389.) A hearing "'should be only held when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be

resolved at such a hearing.'" (People v. Hardy, supra, at p. 174 [quoting People v. Hedgecock (1990) 51 Cal.3d 395, 419].)

Here, the record indicates that the court accepted counsel's averments that the recipe had been distributed among the jury well before the case was submitted to the jury for their deliberations. The court also was aware that defense counsel was fully familiar with the reactions of the jury because the defense investigator had interviewed the juror who had disclosed the recipe.[57/] The investigator had the opportunity to ask that juror about the reactions of all of the jurors and their impressions about the recipe. Thus, there were no material issues of fact in dispute which required a hearing to resolve.

The court ruled that the recipe was a "clever piece of writing" which did not "show any bias." The court refused to question the juror until the case was concluded finding there was no basis for any kind of a motion for mistrial or for disqualification of jurors.

We agree with the trial court's analysis of the recipe. While it satirized some of the evidence in the case, it did not

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57/ The recipe was brought to the attention of defense counsel by Juror Becking who had previously been discharged from the jury.

reflect a bias against the defendant. Not all types of misconduct carry the same risk of prejudice or compel an imputation of actual bias. The recipe was not the type of matter which is inherently prejudicial and its circulation among the jurors did not expose them to information that was not part of the trial record. (See e.g. People v. Martinez (1978) 82 Cal.App.3d 1, 21-22.)

Defendant's additional contention that the juror committed prejudicial misconduct in that the recipe was a violation of the juror's oath not to discuss the case or to form or express any opinion about the case until it was submitted for jury deliberation must also be rejected. We follow the analysis set forth in the American Bar Association Standards for Criminal Justice: "A verdict of guilty must be reversed or vacated 'whenever . . . the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury.' (2 ABA Standards for Criminal Justice, std. 8-3.7 (2d ed. 1980) p. 8.57.)" (People v. Holloway (1990) 50 Cal.3d 1098, 1109; People v. Marshall (1990) 50 Cal.3d 907, 950-951.) Based upon our examination of the record herein and with the foregoing American Bar Association standards in mind, we cannot find there was a "strong possibility" that the misconduct was

prejudicial or that defendant suffered "actual harm." (People v. Hardy, supra, at p. 174, People v. Holloway, supra, at 1108-1110.)

6. Failure to Make Evidentiary Objections

Defendant also claims he was "poorly served" by counsel's inartfully stated objections and by failure to elicit potentially helpful testimony.[58/] The contention is counsel should have: (1) prevented the prosecutor from attacking Roberts for not volunteering exculpatory information to the police; (2) moved to strike evidence of a $1.6 million judgment against defendant; (3) added an Evidence Code section 352 objection to his relevancy objection to Tom May's testimony regarding the times defendant told lies about his boyhood; (4) objected to testimony regarding Pittman's "toys", i.e. surveillance and tape recording equipment and guns; (5) elicited further testimony about Tom May's movie deal; (6)

58/ Defendant has failed to state with any particularity what "potentially helpful testimony" was lacking from the trial. "'Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.' [Citations]." (People v. Callegri (1984) 154 Cal.App.3d 856, 865.)

moved to strike BBC attorney Eisenberg's opinion testimony; (7) made quicker or more effectual objections to the fluttering hand gestures used by the judge when asking the Arizona witnesses why they believed the person they saw in the gas station was a homosexual; and (8) posed a quicker objection to an argumentative question posed to Roberts. The foregoing list of contentions points out why "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (Strickland v. Washington, supra, 466 U.S. at p. 689.)

Defendant has singled out for our review 8 areas in a trial, the guilt phase of which alone, consumed 35 volumes of testimony consisting of perhaps as many as 30,000 questions and answers.

We can only conclude from the foregoing specifications of error that defendant wants us to establish a requirement of perfection as the standard for judging the competency of his attorney. We decline to do so. Each of counsel's alleged shortcomings, whether viewed singularly or collectively, was, if error at all, only of minor consequence. We conclude that, overall, counsel's representation was not only not unreasonable

but was well within the standards of reasonable professional conduct and none of defendant's claims of error convince us otherwise. Certainly, none of the acts or omissions referred to by defendant leads to a conclusion that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (Strickland v. Washington, supra, at p. 686.) Moreover, our conclusion that the court did not abuse its discretion in its evidentiary rulings including those raised here (see part D, post) further undermines these claims.

D. EVIDENTIARY ISSUES

Defendant contends a number of evidentiary errors occurred in his trial. He claims that defense witnesses were subjected to improper cross-examination and his ability to present rebuttal evidence was restricted. He also claims that character, opinion, reputation and "other crimes" evidence was improperly admitted. He further alleges that negative character evidence about Pittman was improperly admitted, hearsay evidence should have been excluded and the best evidence rule was violated. We conclude that few of defendant's contentions have merit and, where errors did occur, they were harmless.

1. Failure of Alibi Witness to Volunteer Exculpatory Information

Defendant argues that if the prosecutor had been required to lay the foundation required under People v. Ratliff (1987) 189 Cal.App.3d 696, Roberts could not have been cross-examined about her failure to come forward until trial with her information that when defendant told the BBC members that he had killed Levin it was merely a hoax.

The Ratliff rule requires the prosecutor to lay a foundation "'by first establishing that the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, that the witness had reason to make the information available, that he was familiar with the means of reporting it to the proper authorities, and that the defendant or his lawyer, or both, did not ask the witness to refrain from doing so.'" (People v. Ratliff, supra, at p. 701.) Defendant claims error with respect to the last prong of the Ratliff rule because his attorney told Roberts not to speak to the police.

We, like the court in People v. Santos (1990) 222 Cal.App.3d 723, 737, "do not necessarily agree that in every instance the People must expressly establish each factor suggested in Ratliff." Nevertheless, as in Santos, we conclude that the elements listed in Ratliff were also present in this case.

Roberts was living with defendant at the time of his arrest for murder and was in love with him. She allegedly knew of the exculpatory information prior to the June 24 meeting which was three months before defendant's arrest. She herself had been questioned by the police shortly after defendant's arrest and thus had the opportunity to provide that information to the police. Instead, she had lied to them and said the June 24 meeting never took place. Finally, it was attorney Barens who told her not to talk to the police and he was not involved in the case for at least six or seven months after defendant's arrest. Thus, all the elements of the Ratliff foundation for the impeachment of Roberts was present and no error occurred.

2. Browning's Testimony Regarding A Judgment Against Defendant

Browning, the inventor of the cyclotron, testified that a Mr. Morton had told Browning that he had obtained a $1.6 million judgment against defendant in Arizona and was seeking the assistance of the marshal's office in California to levy on the cyclotrons in satisfaction of the judgment. Defendant contends the admission of the foregoing testimony violated both the hearsay rule and the best evidence rule.

We conclude that neither rule was violated. The testimony was not offered for the truth of the matter stated, thus it was not inadmissible under Evidence Code section 1200.

The prosecutor's theory was that the Microgenesis contract signed by Levin was a phony contract whose only purpose was to explain how defendant came into possession of a check from Levin for $1.5 million. Browning's testimony that the cyclotron could not grind silica as required by the terms of the contract was offered to prove the contract was phony. On the other hand, the defense sought to prove that the contract was legitimate and of substantial value. To impeach Browning's credibility, the defense tried to show that Browning, the May brothers and Raymond were making their own deal with respect to the cyclotron which did not include defendant and that was the reason why Browning terminated his business dealings with defendant. Further, the defense tried to show that Browning was angry at defendant because defendant had inserted a clause in the contract that if the conditions of the contract could not be fulfilled, Levin would get 40 percent of the business that Browning had spent 18 years developing. In rebuttal to these implications, Browning testified that he had terminated his relationship with defendant because of his belief that litigation was threatened and he did not want to be a part of it.

Since the testimony was offered by the prosecution to rebut the inference raised by the defense during cross-examination that Browning was biased and had a motive to

fabricate his testimony, it was admissible. (People v. Nichols (1970) 3 Cal.3d 150, 157.)

3. The Best Evidence Rule

The best evidence rule prevents a party from proving the contents of a writing by oral testimony, or by a copy, if the original writing itself is available. (Evid.Code § 1500.) Where the content of the writing is not in issue, the best evidence rule does not apply. (Jefferson, Synopsis of California Evidence Law, § 31.1, p. 485.) Here, the contents of the judgment were not in issue. The issue was Browning's belief that there was a judgment, thus the best evidence rule does not apply.

For the same reason, the best evidence rule also did not preclude admission of a copy of corporate minutes prepared by Dicker as defendant contends. Dicker testified that at defendant's request he prepared minutes purporting to reflect a June 7, 1984 BBC board meeting in which Dosti was authorized to go to Europe to cash the $1.5 million check. No such board meeting occurred and Dicker destroyed the original minutes in October or November 1984 because he was afraid he was going to be arrested.

In this instance, the issue was not what was contained in the minutes. The issue was whether Dicker prepared phony

minutes at defendant's request. "A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production." (Evid. Code, § 1504.)

Furthermore, "[a] copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." (Evid. Code, § 1501.) The original was destroyed by Dicker, a non-party witness in the action. The proponent of the evidence was the prosecution who was not a party to its destruction. For all the foregoing reasons, neither oral testimony about the judgment nor the admission of a copy of the minutes was a violation of the best evidence rule.

4. Defendant's History of Telling Lies

Defendant contends the court improperly permitted Tom May to testify over defendant's relevancy and Evidence Code section 352 objections to testimony about defendant's character, specifically that defendant had a history of telling lies.

Tom May testified that a week before the June 24 BBC meeting, defendant told him that he killed Levin. It would be reasonable for the jury to assume that no one would make such a

statement if it was not true and that a person hearing such a statement would promptly report it to the police. May did not report this information to the police which tended to cast doubt on May's credibility and the truth of the statement.59/

May explained his reason for not going to the police was because he believed defendant's statement was a lie and gave specific examples of other unbelievable childhood "stories" that defendant had told him in the past such as the fortune teller who had told defendant he was evil, that he used to torture and kill cats in his neighborhood, and that he killed a couple of Mexicans who attacked him one day when he was walking home from school.

May's testimony did not violate the prohibition contained in Evidence Code section 1101, subdivision (a), inasmuch as it was not offered to show defendant's character trait or propensity to commit criminal offenses to prove that he robbed and murdered Levin. Rather, it was offered to explain why May did not believe that defendant had committed such crimes.

Nor was the probative value of May's testimony substantially outweighed by the probability that its admission

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59/ The defense also inferred that Tom May embellished his testimony because he was selling movie rights to the story.

would create a substantial danger of undue prejudice to the defendant. (Evid. Code, § 352.) The evidence buttressed rather than prejudiced the defense assertion that defendant's multiple confessions to Levin's murder was a hoax or just another one of defendant's "stories."

Nor was the trial court required to instruct on the limited purpose for which the evidence was received in the absence of such a request. This was not an extraordinary case in which "highly prejudicial" past offenses were a "dominant" part of the evidence against defendant. (People v. Lang (1989) 49 Cal.3d 991, 1020; People v. Collie (1981) 30 Cal.3d 43, 63-64.)

5. Defendant's Reputation as an Excellent Debater and Speaker

Defendant also complains that his Harvard High School reputation as "an excellent debater and speaker" was character evidence designed to show that he had the wherewithal to bring off the con schemes attributed to him. We agree with defendant's assessment, but not that it was improper character evidence whose admission was error.

While the evidence was offered on the issue of how Tom May came to know defendant in high school, it also was probative on the issue of how a young man in his early twenties

could convince so many people to part with tens of thousands of their dollars and to continue parting with their money even after being informed that defendant had lost all their money in just one day in the commodities market. Evidence of reputation or specific instances of a person's conduct is admissible to prove a person's character or a trait of his character when it has a tendency to prove any disputed fact that is of consequence to the determination of the action. (Evid. Code, §§ 210, 351, 1100.)

We also disagree with defendant's assertion that its prejudicial effect grossly outweighed its proper probative value. The evidence was not of other crimes or misconduct that is inherently prejudicial. It was not "offered to prove his . . . conduct on a specified occasion" or to prove his "disposition" to commit fraud or murder in violation of either subdivision (a) or (b) of Evidence Code section 1101. We see no error in the ruling of the trial court.

6. Pittman's Crime Books

Defendant contends that the court's "most serious error" concerning character evidence was the alleged "wholesale admission" of Pittman's gym bag containing over a dozen crime books which were seized from Pittman when he was arrested on October 22, 1984. This contention is incorrect. Only two

books were marked for identification and received in evidence, to wit, People's exhibit 85A entitled, "The Black Bag Owner's Manual, Part 2, The Hit Parade" and People's exhibit 85B entitled, "The Hit Man, A Technical Manual for Independent Contractors."60/

The two books which were admitted contained information on how to kill a person, such as what kind of clothes to wear, what type of weapon to use, how to make a silencer, how to dispose of the murder weapon, how to dispose of the body as well as how to handle the moral, ethical and emotional implications of killing another human being. The books cannot properly be described as "character evidence." Rather, they were circumstantial evidence that Pittman had the knowledge and the ability to kill another human being and corroborated the testimony that defendant admitted that Pittman was the shooter. No error occurred in their admission. (See e.g. People v. Daniels (1971) 16 Cal.App.3d 36, 46.)

60/ The exhibits in this case contain no reference to a People's Exhibit 85 nor was the gym bag containing the remaining books marked or received in evidence. We can only assume that the purported existence of a People's Exhibit 85 refers to an exhibit received in Pittman's trial.

7. Pittman's Guns

Defendant's objection that the testimony regarding Pittman's possession of a number of guns including a handgun, a derringer, a small black automatic, a pen gun and a .357 should have been excluded because there was no showing that any of these guns were the instrumentalities used in the crime is equally without merit.

Levin's body was never found and, with the exception of defendant's statement that "Jim's silenced pistol" was used to kill Levin and a shotgun was used to destroy the identifiable parts of Levin's body, defendant did not specify with what type of gun Levin was killed. While Karny believed it was a .25 caliber pistol that he had seen at the office and at the apartment he shared with defendant at the Manning, there was no evidence as to the actual weapon used.

When the specific type of weapon used to commit a homicide is not known, it is permissible to admit into evidence weapons found in the defendant's possession that could have been the weapon employed. (People v. Riser (1956) 47 Cal.2d 566, 577, disapproved on other grounds in People v. Moise (1964) 60 Cal.2d 631; People v. Chapman (1959) 52 Cal.2d 95, 98.) The same rule applies to weapons found in the possession of Pittman as the act of one conspirator is the act of all. (People v. Harper (1945) 25 Cal.2d 862, 871.)

8. Pittman's Karate Lessons

Defendant also contends the testimony that Pittman taught karate to defendant was improper character evidence which allowed the prosecution to portray defendant and Pittman "as two deviant kindred spirits who dabbled in guns, martial arts, and finally murder." Defendant's portrayal of this evidence is exaggerated. Karate is a popular sport whose practitioners are not commonly associated with criminal behavior. Karate studios dot the landscape of cities, towns, and villages across America. Television programs such as "Kung Fu," movies such as "The Karate Kid" and "The Karate Kid II," and cult heros such as the late Bruce Lee have entertained millions of Americans. Karate is not similar to "other crimes" or "gang affiliation" evidence which, because of its inherently prejudicial impact, should be excluded unless it has substantial probative value which cannot be proved by any other less prejudicial evidence. (See People v. Thompson (1980) 27 Cal.3d 303, 316-318 and People v. Cardenas (1982) 31 Cal.3d 897, 904-905.)

The karate evidence was not offered in this case for the improper purpose of proving that either Pittman or defendant had the disposition to commit murder or to prove defendant's conduct on any particular occasion. (Evid. Code,

§ 1101, subds. (a) & (b).) The evidence was admitted to explain how and why defendant and Pittman, who came from worlds apart, grew close enough to plot murder. The record clearly reflects that the foundation of their relationship was defendant's admiration of Pittman's skill in karate. Defendant's desire to become proficient in karate led to the development of their close personal and business relationship. It was not the fact of karate but their mutual interest in karate which would explain to the jury the bond of what otherwise would have been an unlikely friendship.

9. Pittman's Exhibition to the Jury

Defendant's next complaint is that Pittman was exhibited to the jury in jail "blues" and the prejudice flowing from that exhibition outweighed the probative value of allowing the jury to observe Pittman's physical stature.

The record is not entirely clear as to how Pittman was dressed. He may have been dressed in jail clothes at the time he was identified in court by one of the New York witnesses, however, we think not. The court made efforts to see that he was wearing civilian clothes, was not in chains, and that he was seated at counsel table rather than being escorted into the courtroom from "lockup." It was defense counsel who informed the jury during his closing argument that Pittman was "in

custody awaiting trial." If he was not in jail attire, the issue was waived and no prejudice occurred.

Even assuming that, with all of the court's precautions, Pittman was seen by the jury in jail clothing, we conclude defendant was not prejudiced thereby. It is settled that the right to due process and a fair trial is abridged if the accused is compelled to "stand trial before a jury while dressed in identifiable prison clothes . . . ." (Estelle v. Williams (1976) 425 U.S. 501, 512; People v. Taylor (1982) 31 Cal.3d 488, 494; People v. Kent (1981) 125 Cal.App.3d 207, 211.) The appearance of the defendant in prison clothes impairs the fundamental presumption of innocence, impinges upon the tenets of equal protection by operating against those who cannot secure release by posting bail before trial, and compromises the credibility of a defendant who also takes the stand as a witness. (People v. Taylor, supra, at pp. 494-495; People v. Williams (1979) 93 Cal.App.3d 40, 67; People v. Froehlig (1991) 1 Cal.App.4th 260, 263-264.) When a codefendant is exhibited before the jury in jail clothing the "question is whether such procedure or practice is equally offensive to the right of a defendant to a fair trial. The answer depends on the possible effect of the procedure upon the jury's determination of the issues before it." (People v. Williams, supra, 93 Cal.App.3d at p. 67.)

In this case, Pittman was exhibited not just for identification purposes but as corroboration of the Plaza Hotel

witness's testimony as to Pittman's ability to break through the door to his room to retrieve his luggage when his fraud was discovered and that it took five security guards to prevent Pittman's escape from the hotel. Pittman's attempt to escape was "consciousness of guilt" evidence necessary to overcome the defense assertion that Pittman was in New York using Levin's credit cards with Levin's permission.

Pittman's appearance in this context did not lead to impairment of defendant's presumption of innocence because Pittman had not been convicted of any crime as the jury was informed by defense counsel during closing argument. Defendant was out on bail; consequently, there was no suggestion of an equal protection problem operating against him. Pittman did not testify; thus, his credibility was not an issue which might have been affected by jail clothing. The Pittman exhibition was brief and not in a context which would inflame the jurors against defendant. (Cf. People v. Williams, supra, 93 Cal.App.3d at p. 64-66.) And, the jury was instructed pursuant to CALJIC No. 2.11.5 to "not discuss or give any consideration to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted." Thus, on the facts of this case, any error which may have occurred must be deemed harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

10. The Paradox Philosophy

Defendant contends that the paradox philosophy was character evidence which should have been excluded. He argues that its only possible probative value was to explain why Karny advised defendant to tell other BBC members that he had murdered Levin and to explain why Karny and Dicker did not act earlier in turning defendant in to the police. This minimal probative value, defendant asserts, was grossly outweighed by the danger that the jury would use this evidence to infer that defendant had murdered Levin because of an amoral belief system.

Defendant's contention is premised on a misconception of character evidence. "'Character' is one of the most elusive concepts in the law of evidence, and certain basic distinctions are essential to any understanding of the highly specialized rules governing its admissibility and manner of proof." (1 Witkin, Cal. Evidence (3d ed. 1986) § 321, p. 294.) Thus, a comparison of the paradox philosophy with those rules is essential to an understanding of why it is not evidence of defendant's character.

We begin with the fact that defendant's paradox philosophy is not anyone's opinion of defendant; it is not evidence of his reputation; it is not evidence of any specific instances of his conduct. (See e.g. Evid. Code, §§ 787, 1101,

subd. (a).) It is not a crime, civil wrong or any type of "act". (See e.g. Evid. Code, §§ 788, 1101, subd. (b).) It is not a religious belief or lack thereof. (Evid. Code, § 789.) Nor is it evidence of his habits or custom. (Evid. Code, § 1105.)

That the paradox philosophy is not character evidence becomes even clearer when compared with the laws describing the admissibility of hearsay statements. A statement is defined as an "oral or written verbal expression . . . or non verbal conduct. . . ." (Evid. Code, § 225.) "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) The paradox philosophy fits that description. Whether one characterizes it as his "moral justification" for committing crimes or "an amoral belief system," it was defendant's own "oral" and "written verbal expression" offered to prove the circumstances in which defendant believed it was acceptable to commit unlawful acts including murder.

As so defined, the evidence that defendant believed in the paradox philosophy meets the requirements of the exception to the hearsay rule contained in Evidence Code section 1250, in that it described defendant's "then existing state of mind . . . (including a statement of intent, plan, motive, design, [and] mental feeling . . . .)" (Evid.Code § 1250, subd. (a).) As evidence of his state of mind, his belief in the paradox

philosophy, by reasonable inference, was evidence that defendant harbored malice aforethought and deliberated and premeditated Levin's murder. It also manifested defendant's incentive to commit such a crime when "justified."

We thus conclude that evidence of the paradox philosophy was admissible under both subdivisions (a) and (b) of Evidence Code Section 1250 as statements of the defendant offered to prove his state of mind and to explain his acts and conduct. Evidence such as motive or incentive to commit a crime has a direct tendency to resolve doubts as to the identity of the slayer, the degree of the offense, the insanity of the accused, or the justification or excusability for a defendant's acts, and is admissible, no matter how discreditably it may reflect upon the defendant. (People v. Gonzales (1948) 87 Cal.App.2d 867, 877-878.)

Moreover, as respondent contends, paradox philosophy evidence was properly admitted for a host of other reasons as well.[61/] It was the principle upon which the BBC was founded and explained how the group functioned. It was integral to

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61/ At trial the prosecution argued, and the court agreed, that the paradox philosophy was not character evidence. The People's theory was it showed what bound the BBC together and was integral to explaining the defendant's actions and the way that the witnesses perceived and reacted to them.

explaining who was selected to attend the June 24 meeting and defendant's confession to the members. It explained the role of other BBC members in the murder and its aftermath. It was even helpful to the defense view that defendant's June 24 confession was a story to hold the BBC together rather than the truth. The foregoing issues as well as the credibility of the witnesses including defendant, whose credibility as a hearsay declarant was in issue, all were of consequence to the determination of defendant's guilt. (Evid. Code, § 210.) The probative value of the paradox philosophy on these issues adds to our determination that any prejudicial effect was negated by its evidentiary importance.

11. Restriction of Rebuttal Evidence to Paradox Philosophy

Defendant contends the trial court committed error by striking defense witness Roberts' testimony that the May brothers were dealing cocaine. Roberts had testified this was an example of a time that defendant discussed the paradox philosophy at a BBC meeting. According to defense counsel, the evidence was to show that defendant typically discussed the paradox philosophy in terms of helping members resolve their problems. The court ruled that not a word about cocaine had been mentioned throughout the trial in connection with the

paradox philosophy and that the defense was using the example as a ruse for character assassination.

Whether or not this was the defense's objective, a review of the record reveals that the court's ruling did not restrict the jury from hearing favorable testimony about the paradox philosophy. Roberts testified that she heard defendant discuss the paradox philosophy with people when they had problems and were trying to have a better view of their lives, careers and goals. Roberts understanding was that the philosophy assisted a person in obtaining a more positive way of viewing life. She also referred to instances in which defendant discussed the philosophy with Karny when Karny was going through emotional problems. Roberts also testified that the paradox philosophy expression of "black is white, white is black" was used by everyone in the group to help them be objective and to change their perspective when they were having a bad day.

A trial court is vested with wide discretion in admitting or rejecting proffered evidence and its decision to exclude evidence is not grounds for reversal on appeal unless the error complained of resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; People v. Wein (1977) 69 Cal.App.3d 79, 90.) We conclude that exclusion of this one example of the use of the paradox philosophy was not

an abuse of discretion and that no miscarriage of justice occurred.

12. Evidence of Defendant's Financial Dealings

Defendant acknowledges that extreme financial embarrassment is admissible to show a motive for robbery, but he argues the following evidence was cumulative and caused him to be tried as much for his financial misdeeds as for the murder of Levin: testimony that defendant lost $484,000 in commodities trading in Chicago during 1981 and 1982; that in 1982, defendant had been "railroaded" off of the Chicago Mercantile Exchange and returned to Los Angeles with only $4 in his pocket; that prior to August 1983, defendant and investor Weiss discussed placing a portion of their mutual profits in a trust fund for needy people; that in October 1983 Los Angeles brokerage houses did not want to do business with defendant; that in January 1984, Weiss refinanced his house in order to raise an additional $50,000 in investment money; and that in September 1984, investor Julius Paskan loaned defendant $2,000 which he failed to pay back.

We conclude that evidence of defendant's financial dealings cannot be isolated and analyzed in a piecemeal fashion or out of context. Defendant contended at trial, and still contends on appeal, that the BBC businesses had several

promising deals in the works. The defense developed its theory through its own witnesses and cross-examination of the People's witnesses that defendant and his businesses were not experiencing such severe difficulties that murder was a viable option.

In contrast to the defense theory, the prosecution's evidence portrayed a course of conduct engaged in by defendant that enmeshed him in a financial disaster from which there was no escape. For at least three years defendant had been successful in averting financial disaster by convincing investors to part with larger and larger sums. But each time defendant had to go back to the investors for more money, he suffered a concomitant loss of some other important advantage such as his seat on the Chicago Exchange and his credit with brokerage houses. By June 1984, the well was running dry. Investor Weiss, who sincerely admired defendant based upon his belief that they shared a desire to use their profits to help needy people and who had previously brought in hundreds of thousands of dollars in investment money, had to refinance his home to come up with additional investment money.

Defendant's financial situation was so desperate that the defense theory that defendant only had to wait for one of his "promising deals" to come to fruition was exposed as a fraud by evidence that three months after Levin's murder, defendant still was drowning financially. Investor Paskan

agreed to loan defendant $215,076.56 and when he arrived at the BBC office to obtain defendant's signature on the promissory note he overheard defendant's secretary indicating she had not received her salary check. Thus, he loaned defendant an additional $2,000 for his secretary which defendant also could not repay.

None of the evidence was offered to prove that defendant was predisposed to steal from investors or was involved in commodities swindles. It was offered to prove that defendant's burgeoning debt and shrinking financial support had reached crisis proportion and that only the infusion of huge sums of money could alleviate the crisis. This financial crisis provided defendant with a motive to murder Levin. "It has been held that evidence of defendant's financial situation at the time of the offense is admissible to show motive where circumstantial evidence is largely relied upon for conviction [citations]." (People v. Martin (1971) 17 Cal.App.3d 661, 668.) The fact that the evidence may also disclose information derogatory to defendant's character does not affect its pertinency nor constitute a valid objection to its admission. (Id. at p. 669; People v. Gonzales, supra, 87 Cal.App.2d at pp. 877-878.)

We find that under the facts of this case, all of defendant's financial dealings were necessary for the jury to comprehend just how desperate defendant was for money. Thus,

the reason for exclusion of evidence which is merely cumulative, that its slight probative value is outweighed by its prejudicial effect, (People v. Mincey (1992) 2 Cal.4th 408, 439; People v. Carter (1957) 48 Cal.2d 737, 749) fails in the present case.

13. Distribution of the "At Levin's To Do" List to Jurors

During the trial, and five weeks before its receipt into evidence, copies of the seven page list entitled "At Levin's To Do" were distributed to each juror by the clerk at the court's request. The jurors were permitted to read and follow along with their copies during the testimony of Martin Levin and other witnesses. The copies were retained by the jurors in their notebooks during the trial. Defendant claims that this was one of the many instances of judicial favoritism that compromised his trial and that its retention by the jurors throughout the trial was a prejudicial and unprecedented violation of procedural rules. We are of the opinion that while the procedure was unusual, it violated no rules, did not show bias on the part of the judge, and no prejudice resulted.

Section 1137 is the operative statute governing what exhibits the jurors may take with them into the jury room. It provides that "[u]pon retiring for deliberation, the jury may take with them all papers (except depositions) which have been

received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person. The court shall provide for the custody and safekeeping of such items."

As can be seen, nothing in section 1137 precludes a court from exercising its broad authority to regulate the manner in which exhibits are displayed to the jurors during the course of a trial. Unless otherwise provided by law, the court has the discretion to control all proceedings during trial and to regulate the order of proof. (§ 1044; Evid. Code, § 320.)

Accordingly, a judge may permit counsel to display exhibits, such as photographs, films and articles, as early in the trial as opening statement. Even where items such as maps or sketches are not independently admissible in evidence, the court has the discretion to permit their display to jurors if such items will aid their understanding of the testimony. (People v. Green (1956) 47 Cal.2d 209, 215, disapproved on other grounds in People v. Morse (1964) 60 Cal.2d 631.) In the circumstances of this case, in which there was no question as to the admissibility of the exhibit, we conclude that it was

within the discretion of the trial court to distribute the seven-page exhibit to the jurors.

It also appears from the record that it was a consistently common practice throughout the trial for both sides, to show or pass various pieces of evidence to the jurors during the testimony of witnesses prior to their formal admission into evidence. For example, the defense passed around photographs of the cyclotrons, photographs of Levin, photographic lineups, Clayton Brokerage statements, and Levin's planning diary and the prosecution showed a portion of the Microgenesis contract and an enlargement of Pittman's handwriting samples. Thus, no inference of favoritism appears from the distribution of the lists.

Nor can we glean prejudice from early distribution of the exhibit. We agree with defendant that the exhibit was a highly incriminating piece of evidence but we are not persuaded that its early distribution gave it prejudicial emphasis. The jurors could have copied the information contained in the seven pages verbatim, either from testimony or the enlarged display, into their notebooks. Thus, in either event, the jury would have had the information in their possession during the remainder of the trial. Unlike a situation where jurors are exposed to information not received in evidence (see e.g. People v. Martinez, supra, 82 Cal.App.3d at p. 21-22), the usual "harmless error" test for determining prejudice applies.

Under the circumstances of this case, we are not of the opinion that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the early distribution of the exhibit to the jurors. (People v. Watson, supra, 46 Cal.2d at p. 836.)

14. Eisenberg's Opinion Testimony

On cross-examination, defense counsel elicited attorney Eisenberg's opinion that Pittman tended to exaggerate "greatly," that defendant "was always trying to look good," that saying Pittman was his bodyguard was part of defendant's "playing the role" to impress the BBC boys and the investors. On redirect, the prosecutor followed up on these questions by asking Eisenberg, "[a]nd is there a difference in your mind in the nature of that type of an attempt to make an impression on someone as opposed to someone saying to a group of people he knows, I just killed somebody?" Eisenberg replied, "Day and Night."

Initially, the court overruled defense counsel's objection. Eisenberg was then asked to explain his opinion. In response, he testified that having an attorney, as well as Pittman, the fancy furniture and the nice offices were intended to elicit a certain response from the investors, i.e. to have them put money into the entity. Then he testified that he was

not at the meeting were defendant made the statements, at which point counsel's foundation and hearsay objections were sustained and the court struck the answer "to which all of the objections were going."

Defendant contends that Eisenberg's opinion usurped the jury's fact finding powers and that because of the manner in which the court struck the answer it is unlikely that this had any real effect on the jury. Even assuming that the jury was not clear as to what answer had been stricken, this contention must be rejected.

Defendant "opened the door" to the question through his own questioning. The reasonable inference flowing from Eisenberg's responses to defense counsel's questions was that when defendant told the boys he and Pittman had killed Levin, it was just more posturing by defendant to keep them under control. The prosecutor was well within his right to further pursue the matter during redirect. (See e.g. People v. Burton (1981) 117 Cal.App.3d 382, 388.) A lay witness may give an opinion if it is "helpful to a clear understanding of his testimony." (Evid. Code, § 800, subd. (b).)

15. Defendant's Connection to the Eslaminia Homicide

Defendant, Pittman, Dosti and BBC member, Reza Eslaminia, were charged with the kidnapping and death of Eslaminia's father in Northern California. Karny's grant of

immunity encompassed both the Levin and Eslaminia cases. Defendant moved for an order allowing him to impeach Karny with evidence that he had received immunity in the Eslaminia homicide but excluding evidence that defendant was also charged in the Eslaminia case on the ground that "other crimes evidence," is inadmissible under Evidence Code sections 1101, subdivision (b) and 352.

The prosecution vigorously opposed admission of the Eslaminia immunity agreement unless the jury learned that Karny's immunity involved testifying against the defendant in that case as well. It feared that if the jury was led to believe that Karny was involved in a homicide not involving defendant, it would infer that Karny acted independently of defendant in this case and murdered Levin himself. This implication was contrary to the prosecution's case which was based upon evidence that defendant was the leader of the BBC and that Karny and the other members acted only under defendant's direction and influence.62/

62/ During the penalty phase, Karny testified members of the BBC concocted a plan to kidnap Eslaminia's father to force him to turn over his fortune, estimated at $30 million, and then to kill him. Karny testified that defendant coordinated all of the details of the plan and volunteered to be the "master of torture" because he did not believe the others had the emotional constitution to handle the type of torture which would be necessary to force Eslaminia to part with his fortune. Eslaminia suffocated to death in trunk being used to transport him from northern to southern California.

The court ruled that if the defense chose to cross-examine Karny about his grant of immunity in the Eslaminia case, the prosecution could ask Karny on redirect examination who the parties in that case were and their relationships. However, the prosecution was precluded from going into the facts of the Eslaminia case.

Defendant contends that the court's ruling was a de facto denial of his Sixth Amendment confrontation rights. We disagree. Notwithstanding the court's ruling, defendant chose to thoroughly cross-examine Karny regarding his immunity in the Eslaminia case. That the jury learned that defendant also was a defendant in that case was not an abuse of discretion.

The relevance and probative value of an immunity agreement is to show the witness may have a motive to fabricate testimony and such agreements are almost always admissible for that purpose. But in a situation where the jury could draw an impermissible inference from such evidence, the trial court must balance its probative value against its prejudicial impact and the possibility the jury will use the evidence improperly. (People v. Rodriguez, supra, 42 Cal.3d at p. 750; People v. Allen (1978) 77 Cal.App.3d 924, 931-933; United States v. Roberts (9th Cir. 1980) 618 F.2d 530, 535.)

Evidence of the full extent of Karny's immunity agreement does not bring into play the Zemavasky "rule of evidence that when any witness admits bias and prejudice on

cross-examination, on redirect the reasons for such prejudice cannot be gone into, at least where such reasons involve other alleged offenses outside the issue." (People v. Zemavasky (1942) 20 Cal.2d 56, 63; People v. Morris (1988) 46 Cal.3d 1, 39.) The reason for the Zemavasky rule is obvious. It is intended to prevent the prosecution from eliciting otherwise inadmissible other crimes evidence under the guise of rehabilitation.

However, there is no bar to admission of other crimes evidence when relevant to prove some fact other than disposition to commit such a crime. (People v. Thomas, supra, 2 Cal.4th at p. 520; People v. DeSantis (1992) 2 Cal.4th 1198, 1226-1227; People v. Manson (1976) 61 Cal.App.3d 102, 130-131.) Here, the evidence was admissible to rebut the improper inference which the prosecution correctly feared would flow from a redacted immunity agreement.

Evidence Code section 356 provides the authority for correcting such an improper inference. In the event one part of an act, declaration, conversation, or writing is admitted in evidence, the opponent is entitled to have placed in evidence any other act, declaration, conversation, or writing which is necessary to make it understood. (People v. Hamilton (1989) 48 Cal.3d 1142, 1174; People v. Ketchel (1963) 59 Cal.2d 503, 536, overruled on other grounds in People v. Morse (1964) 60 Cal.2d 631, 638, 649.)

Here, the court properly balanced the relevance and prejudice to both sides and issued a ruling consistent with Evidence Code sections 356 and 1101 which portrayed the immunity agreement fully and placed it in context so the jury was not misled about its terms or importance. The ruling was broad enough to permit defendant to fully explore on cross-examination the inducements from the prosecution that may have motivated Karny's testimony and the prosecution was precluded from eliciting any testimony about defendant's involvement in the Eslaminia homicide other than that he was a codefendant. The jury was also instructed that evidence that defendant was charged with murder in San Mateo County was received for the limited purpose of providing a complete record of the immunity agreement and could not be considered for any other purpose. Thus, no error occurred.

16. Admissibility of Out of Court Statements

Defendant contends that a number of hearsay statements were admitted into evidence which deprived him of his right to confront the witnesses against him. We conclude that some statements were not received for their truth, some were received without objection or the objection was waived and the remainder were harmless.

Defendant first claims as hearsay the rebuttal testimony of Detective Thomas Edmonds regarding statements of people he interviewed in Arizona while looking for Levin or the person defense witnesses, Canchola and Lopez, believed was Levin.

The defense having produced two witnesses who claimed to have seen Levin driving a classic car in a gas station in Tuscon, Arizona, it was incumbent upon the prosecution to show that the police had followed up on that lead and what, if anything, their investigation revealed. Thus, Detective Edmonds described how he went to the Vickers gas station where "Levin" was seen and spoke to the manager and his assistant who referred him to people at a classic auto dealership who in turn sent him to a Catholic church which had recently sponsored an auto show. He spoke to the priest, looked through the church records, spoke to a local police officer and finally located a gray haired man named Richard Herman who owned a classic Hornet automobile and fit the general description given by the witnesses. The officer took pictures of Herman, his automobile and the Vickers gas station where Herman purchased his gasoline and incorporated them in photographic lineups which he then showed to Canchola and Lopez. Neither Herman nor his car nor his gas station was identified by the witnesses. The officer concluded that Herman was not the person seen by the witnesses and he was never able to locate the person they did see.

The information provided to Detective Edmonds was not hearsay. Whether or not any of the interviewees told Detective Edmonds the truth was not the issue. The issue was whether the police made a concerted effort to find the person Canchola and Lopez had seen and the results of those efforts. "Evidence of a declarant's statement is not hearsay evidence if it is not being offered to prove the truth of the facts stated in the statement but to prove, as relevant to a disputed fact in an action, that the recipient or hearer of the statement obtained certain information by hearing or reading the statement and, believing such information to be true, acted in conformity with such belief." (Jefferson, Jefferson's Synopsis of California Evidence Law (1985) § 1.4, p. 21; see also People v. Tahl (1967) 65 Cal.2d 719, 739.)

Defendant next claims that Levin's conservator, David Ostrove, testified to out of court statements for their truth to dispute the defense assertion that Levin had hidden assets upon which he could live after his disappearance. He further contends such evidence should have been produced by way of properly qualified business records. (Evid. Code, § 1271, subd. (c).)

Ostrove testified that he found passbooks from various banks among Levin's possessions that had entries reflecting

that deposits in the hundreds of thousands of dollars had been made in 1971 and 1972. Ostrove wrote to the banks to collect the funds and was told by the banks that the accounts had been closed because the checks that had been used to open them were returned for nonsufficient funds. In the case of Credit Suisse, Ostrove received a bank statement reflecting a balance of only $3.89.63/

Again we conclude that neither the testimony nor the bank statement was offered for its truth. Verbal or written statements may justify an inference concerning a fact in issue, regardless of the truth or falsity of the statement itself. Where the assertion is to be disregarded, and the indirect inference, such as belief, intent, motive, or other state of mind, is to be regarded, such statements are relevant as circumstantial evidence. (1 Witkin, Cal. Evidence (3d ed. 1986) §§ 593-595, pp. 566-568.)

63/ Bank statements qualify as business records and are admissible upon proof of a proper foundation. (Evid. Code, § 1271; People v. Dorsey (1974) 43 Cal.App.3d 953, 960-961.) Ostrove identified People's exhibit 5 as the bank statement which he received from Credit Suisse. Defendant did not object to receipt of the bank statement, thus his hearsay objection is waived. A failure to make a timely and specific objection at trial waives assertion of error on appeal. (Evid. Code, § 353; People v. Green (1980) 27 Cal.3d 1, 22; People v. Welch (1972) 8 Cal.3d 106, 114-115, People v. Dorsey, supra, at p. 959.)

In our opinion, Ostrove's testimony was circumstantial evidence of the intent of the banks involved not to release any money. Whether or not the bank records were correct or the bank officials were telling the truth, Ostrove was unable to obtain any funds from the accounts. Ostrove was the court appointed conservator of Levin's estate with legal authority to receive Levin's funds. The banks's refusal to release money in the accounts to Ostrove, for any reason other than he had no authority to claim the money, was circumstantial evidence that the banks also would refuse to allow Levin to withdraw money from the accounts. The jury would be justified in inferring that if, the conservator of Levin's estate could not obtain any money from the accounts, neither could Levin.

Defendant also claims that Ostrove's testimony that Levin had filed lawsuits against the government for its failure to issue him a press pass was inadmissible hearsay. We alsofind this claim also without merit. In this instance, Ostrove's testimony was reflective of Levin's state of mind. "A declaration of a state of mind is not made inadmissible by the hearsay rule when offered to prove the acts or conduct of

the declarant. (Evid. Code, § 1250, subd. (a)(2).)"[64/] (People v. Duran (1976) 16 Cal.3d 282, 295; People v. Ruiz (1988) 44 Cal.3d 589, 608.)

Testimony about the lawsuits was not offered to prove the matters contained therein, i.e. that Levin had the right to a press pass, but rather was offered to prove that Levin entertained the particular state of mind which he claimed in the lawsuits. The jury could reasonably conclude that it would make no sense for Levin to expend money in legal fees to prosecute lawsuits to obtain a press pass that would have no value if he planned to disappear.

Defendant acknowledges on appeal that the relevancy of the lawsuits was to show that Levin, in the months before his disappearance, had conducted himself in a manner inconsistent with an intent to voluntarily disappear. But he claims that

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64/ Evidence Code section 1250 provides:
"(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Ostrove's testimony that Levin's press pass was the subject of the lawsuits was untrustworthy and should have been excluded unless the prosecution produced the official court records of the lawsuits pursuant to the business records exception to the hearsay rule. (Evid. Code, § 1271.) However, defendant was informed that the prosecution had copies of the pleadings available and could produce them for examination upon request. No such request was made and no foundational or best evidence objection to Ostrove's testimony was interposed. Accordingly, this contention is not cognizable on appeal. (Evid. Code, § 353; People v. Green, supra, 27 Cal.3d at p. 22; People v. Welch, supra, 8 Cal.3d at pp. 114-115.)

Defendant next argues the court improperly overruled his hearsay objections to testimony by BBC members Raymond, Dicker and Taglianetti. Raymond testified that David May told him he was investing in commodities with defendant in the spring and summer of 1983 and was doing very well. Dicker testified that Tom and David May lost money in the summer of 1983. We agree with defendant's arguments but conclude the errors were harmless. Tom May subsequently testified without objection to the amounts he and his brother had invested in accounts controlled by defendant in the spring and early summer of 1983 and that the accounts were doing well, but that in August 1983 the accounts were wiped out. Thus, the jury

properly had before it in Tom May's testimony the very statements that were erroneously admitted. When the evidence in question is cumulative of other properly admitted evidence to the same effect, no prejudicial error occurs. (People v. Green, supra, 27 Cal.3d at p. 27.)

Raymond also testified that he was introduced to defendant by David May who had told him he joined an investment club organized by defendant, and that May bragged about the affluence of the other kids who belonged to the club. Defendant failed to object to the foregoing testimony at trial. Thus, he may not claim it was inadmissible hearsay on appeal. (Evid. Code, § 353; People v. Green, supra, 27 Cal.3d at p. 22; People v. Welch, supra, 8 Cal.3d at pp. 114-115.) In any event, the testimony was admissible for the nonhearsay purpose of showing how Raymond met defendant and came to be involved in the BBC. (Evid. Code, § 1200.)

Taglianetti testified that in April 1984 he was at the BBC office when Pittman came into the office with a person he knew as "Nick." Pittman and Nick went into defendant's office and test-fired a gun. After Nick and Pittman left, Taglianetti and Eisenberg went into defendant's office and saw a gun with a silencer attached in defendant's desk drawer. As a prelude to this testimony, Taglianetti was asked: "Who was Nick?" He

replied: "From my understanding, he was a private investigator."

Defendant claims his hearsay objection to Taglianetti's reply should have been sustained as Taglianetti could only have gained his "understanding" from the hearsay testimony of others. We disagree. Taglianetti's testimony was nonhearsay evidence of Taglianetti's belief. It was not offered for the proof of the matter asserted, to wit, that Nick was a private investigator. Defendant's hearsay objection was properly overruled. (Evid. Code, § 1200.)

17. Cross-examination of Prosecution Witnesses, May, Furstman, Karny and Weiss

Defendant contends the trial court committed reversible error by limiting his cross-examination of prosecution witnesses, May, Furstman, Karny and Weiss. We disagree. "The trial court has a clear duty to supervise the conduct of the trial to the end that it may not be unduly protracted. The control of cross-examination is not only within the discretion of the trial court, but, in the exercise of that discretion, the court may confine cross-examination which relates to matters already covered or which are irrelevant. Only a manifest abuse of the court's discretion will warrant a

reversal." (People v. Beach (1983) 147 Cal.App.3d 612, 628; People v. Kronemyer (1987) 189 Cal.App.3d 314, 352; Evid. Code, § 765.) No manifest abuse of discretion has been shown in this case in that cross-examination was not restricted as to some witnesses and it was properly curtailed as to the others.

Defense counsel's cross-examination of Tom May as to whether May and his brother were trying to market their story to the movies is an instance in which, contrary to defendant's contention, there was no improper restriction of cross-examination. Any paucity in the defense questioning on that subject appears to be a tactical decision of defense counsel.

Initially, the court sustained the prosecution's relevancy objection and warned defense counsel that since many people involved in the case were trying to market the story, he would "open the door." Defense counsel stated he did not mind since it went to May's interest in the outcome of the case and bias. The court then asked May whether he had any interest in the outcome of the case except to see that justice was done. When May replied, "None at all," counsel was permitted to ask May, without objection or interference, if he had an interest in a potential motion picture resulting from this case. May admitted that a television movie deal had been signed. Counsel

then asked no further questions, presumably because he obtained the admission he was seeking. Thus, no error occurred.

The next instance where cross-examination was not improperly curtailed relates to defendant's questioning of Levin's attorney, Furstman. Defendant claims his cross-examination was improperly restricted when he was unable to elicit from Furstman whether Levin's parents had expressed any reservations about filing a missing person report after Levin disappeared. The court sustained a hearsay objection, indicating that because both parents would be testifying in the case, counsel could ask them directly.

The issue was whether the Levins believed their son had disappeared voluntarily due to his legal problems. That inference was presented by other evidence. Furstman testified that Levin's parents did not express an interest in filing a missing person report until days after June 12, which was the date Levin was due back in Los Angeles. Carol Levin testified she let her husband take care of filing the report and they let "weeks" go by before filing the report because Furstman said, "Let's wait. Martin Levin testified he did not file a missing person report until June 21 because Furstman wanted to see if something materialized. Thus, the inference that the Levins believed their son's disappearance was related to his legal problems was clearly presented from that evidence, as well as

the evidence that the Levins' home was released as security for Levin's bail and that the Levins were consulting with Levin's criminal defense attorney.

Cross-examination of Karny regarding Pittman's posing as Levin in New York was argumentative and properly curtailed. Defense counsel asked Karny if he and Pittman had any discussion that a person of Pittman's appearance, might have difficulty impersonating a fortyish "Jewish fellow." Evidence of the dissimilarity between Pittman and Levin was before the jury as was evidence that Pittman made no effort to disguise himself or avoid calling attention to himself while he was in New York. An argumentative question is one designed to place the examiner's inferences from or interpretations of the evidence before the jury, rather than one which seeks to elicit new facts or additional information. (1 Jefferson, California Evidence Benchbook (2d ed. 1982) § 27.9, p. 764; see e.g. Estate of Loucks (1911) 160 Cal. 551, 558; Schuh v. Oil Well Supply Co. (1920) 50 Cal.App. 588, 590.)

The court also properly curtailed cross-examination of Karny as to whether he was afflicted with Meunieres Syndrome. According to defense counsel's offer of proof, Meunieres Syndrome is a type of disease which affects memory, the ability to perceive accurately, the ability to articulate the perception of truth and the ability to hear the spoken word. However, defense counsel was not seeking to prove that Karny

suffered from those symptoms. He sought to impeach Karny by showing that Karny had lied in his draft registration by claiming to suffer from Meunieres Syndrome.

The law is now clear, as it was not in 1987 when this trial took place, that specific instances of a witnesses' conduct are admissible to attack or support the credibility of that witness. (People v. Harris (1989) 47 Cal.3d 1047, 1080-1082.) However, pursuant to section 352, the court still retains the power to "prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (People v. Wheeler (1992) 4 Cal.4th 284, 296.) Evidence that Karny may have lied to avoid the draft, while relevant to his credibility, is just such a collateral issue. Where the collateral fact involves conduct for which the witness has neither been charged nor convicted and which involves a strong reason to lie which furnishes no motive for the witness to testify falsely, its probative value is weak and it is properly excluded. (People v. Lavergne (1971) 4 Cal.3d 735, 742-743.)

In the last of his contentions in this category, defendant does not claim that his cross-examination of Weiss was restricted. Weiss had testified that defendant had signed a promissory note in which he agreed to repay the investors the money they lost within one year, if he made the money, in exchange for a release of all claims against defendant and

Financial Futures. Weiss testified that he did not know of any other source that defendant had for getting the money to pay off the promissory notes. Defense counsel asked Weiss if he was aware that defendant spent the year in which the money was to be repaid in jail. Weiss said, "Yes." At that point, defense counsel concluded his cross-examination. The judge then told counsel he did not understand the purpose of that particular question. Defense counsel responded, "impossibility is a defense of contract law, Your Honor." The judge then asked: "You mean even if the thing results from his conduct? Is that what you are saying? You create your own impossibility?" Defense counsel answered, ". . . we don't know about conduct until the jury decides, Your Honor."

Contrary to defendant's assertions, the court's question enabled the defense to give the jury a preview of the inference it was seeking to establish which was that defendant's inability to satisfy frustrated investors was caused by his being in jail. The court's questions were not prejudicial to defendant and in no way limited his cross-examination of the witness.

18. Court's Examination of Defense Witnesses

During direct examination by defense counsel, Lynn Roberts was asked if her film producer husband had a financial

interest in the outcome of the case. She answered, "No," and also testified he was not producing a film about this case. The judge, apparently reading from a newspaper article which reported that her husband had selected defendant's theatrical agents, asked Roberts (1) if she knew Burton Moss and Sy Marsh; (2) whether her husband told her he had hired theatrical agents to write defendant's life story; and (3) whether she knew if her husband was going to receive anything as a result. To these questions, Roberts testified: (1) the two men were theatrical agents who had known her husband for years; (2) her husband was contacted by Marsh and asked for an introduction to defendant; and (3) that her husband was not going to receive anything from their plan to write defendant's life story. In conclusion to the court's questions, Roberts testified that "all this has done is cost us a lot of money."

Defendant complains on appeal that the foregoing questions are objectionable in that they assume facts not in evidence. The problem with a question which assumes facts not in evidence is that the witness may have no knowledge that the facts exist and may not even believe such facts, but can not answer the question without necessarily accepting the existence of the unproved facts. (See e.g. Love v. Wolf (1964) 226 Cal.App.2d 378, 390.) Contrary to defendant's assertions, Roberts was not faced with such a problem inasmuch as she was

able to answer the court's questions without, at the same time, being forced to accept as true facts of which she was unaware or believed to be untrue. In any event, defendant did not raise this objection at trial and it is too late to urge it as error for the first time on appeal. (Evid. Code, § 353; People v. Green, supra, 27 Cal.3d at p. 22; People v. Welch, supra, 8 Cal.3d at pp. 114-115.)

Defendant also asserts that the court's questions, stimulated by the newspaper article, violated discovery rules. However, the record reflects that the judge had received the newspaper article within 30 minutes prior to questioning the witness, the judge's questioning followed the prosecution's cross-examination of the witness, defense counsel was then given the newspaper article and had the opportunity to examine it fully prior to his redirect examination, and Roberts' answers were not prejudicial to defendant.

Thus, unlike the judicial misconduct in People v. Handcock (1983) 145 Cal.App.3d Supp. 25, 31, also cited as error in Ryan v. Commission on Judicial Performance (1988) 45 Cal.3d 518, 536, the judge in this case did not conduct an independent investigation of the facts leading to the discovery of new incriminating evidence against the defendant; did not interrupt the defendant's testimony to call his own witness; and did not call his own witness with insufficient notice for

the defense to adequately prepare its questions or to more fully explore the ramifications of the evidence.

We conclude that the foregoing questions, as well as an additional question asking Lynn Roberts if she realized the significance of her testimony with respect to 10:30 p.m. on June 6 in that she was furnishing defendant with an alibi, were not argumentative. They were asked to resolve whether Roberts had a financial interest in the outcome of the case and whether she and defendant had discussed her testimony in light of other evidence that Roberts was very fond of defendant, he resided in her home, and she came to court with him. The court's questions were designed to elicit additional information not to place any particular inferences or interpretations of the evidence before the jury. (1 Jefferson, Cal. Evidence Benchbook, supra, § 27.9; Estate of Loucks, supra, 160 Cal. at p. 558; Schuh v. Oil Well Supply Co, supra, 50 Cal.App. at p. 590.)

Nor, did the court's questions exhibit partisanship to such a degree as to give rise to a reasonable possibility that they contributed to a conviction. (People v. Handcock, supra, 145 Cal.App.3d Supp. at p. 33; Chapman v. California (1967) 386 U.S. 18, 23.) Nothing about the court's questions, even if the jury was aware the court was looking at a newspaper article, telegraphed to the jury a message that Roberts' testimony was

to be disbelieved or that the court had evidence to prove the defendant's guilt.

Defendant makes the same arguments with respect to the court's questions of Canchola and Lopez as to why they believed the person they saw in Arizona was gay. However, the fact that the judge participated in the examination of the witnesses does not necessarily equate with an unwarranted, partisan interference with the case just because that participation was contrary to the desires or strategy of defense counsel. "'The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his [or her] power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still [the judge] is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished when a few questions asked from the bench might elicit the truth. It is [the judge's] primary duty to see that justice is done both to the accused and to the people. [The judge] is, moreover, in a better position than the reviewing court to know when the circumstances warrant or require the interrogation of witnesses from the bench. . . .'" (People v. Handcock, supra, 145 Cal.App.3d Supp at p. 29.) In this case, the witnesses' description of the person they saw in Arizona was unclear and the court was acting within its powers in

clarifying that testimony. Nothing about the questions would lead the jury to believe that the judge was of the opinion that the prosecution rather than the defense should prevail in the case. (Ibid.; Evid. Code, § 775; see also People v. Alfaro, supra, 61 Cal.App.3d at p. 426-427; People v. Rodriguez (1970) 10 Cal.App.3d 18, 32-33; People v. Ottey (1936) 5 Cal.2d 714, 721.)

Assuming it appeared, at the time, that the court was expressing an opinion by asking these questions, that inference was properly dispelled by the curative instructions given by the court.[65/] (People v. Phillips, supra, 41 Cal.3d at p. 58.) The jury was instructed pursuant to CALJIC No. 1.02 that it "must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer." It was further instructed pursuant to a modified version of CALJIC No. 17.30, as follows: "I have not intended by anything I have

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65/ Defense counsel was invited to, but did not, submit a pinpoint limiting instruction to the court. Thus, the trial court was under no duty to give any additional limiting or "curative" instructions. (People v. Wyatt (1989) 215 Cal.App.3d 255, 258; People v. Kendrick (1989) 211 Cal.App.3d 1273, 1276-1278; People v. Stelling (1991) 234 Cal.App.3d 561, 567.

said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion." [¶] ". . . I express no opinion as to the guilt or innocence of the defendant."

19. Prosecutor's Cross-Examination of Brooke Roberts

Defendant contends the prosecutor was argumentative and expressed his personal belief that Brooke Roberts was lying. During cross-examination, Roberts was asked if she had heard anything about Levin between the date defendant purportedly went to dinner with Levin on June 6th and the date defendant returned from London. The following exchange then occurred: [¶] "A [by Ms. Roberts]: Did I hear anything about him? [¶] Q [by Mr. Wapner]: Right, anything about him? His name? Anything? [¶] A Yeah. I think I did. Yeah. [¶] Q What? [¶] A I don't know. [¶] Q Well, if you think you heard something, what is it that you think you heard? [¶] A I can't make something up right now. I don't know. [¶] Q If I give you some time, can you make something else up? [¶] A No."

The prosecutor's question was argumentative in that it did not seek to elicit new facts or additional information, but instead placed the prosecutor's inference that Roberts was lying before the jury. (1 Jefferson, Cal. Evidence Benchbook, supra, § 27.9; Estate of Loucks, supra, 160 Cal. at p. 558; Schuh v. Oil Well Supply Co., supra, 50 Cal.App. at p. 590.)

Nevertheless, the question was responsive to Roberts' previous answer and did not fall to the level of prejudicial misconduct which occurs when a prosecutor improperly implies to the jury that he or she secretly possesses information unknown to the jury as to a witness' credibility. (See e.g. People v. Perez (1962) 58 Cal.2d 229, 246.)

In summary, the questions posed by the court and the prosecutor were not of a nature which infringed on a specific guaranty of the Bill of Rights. None were so egregious as to infect the trial with such unfairness as to make defendant's conviction a denial of due process. (People v. Pitts (1990) 223 Cal.App.3d 606, 693; People v. Handcock, supra, 145 Cal.App.3d Supp. at p. 33-34.)

E. PROOF OF CORPUS DELICTI

Defendant contends that Levin was a thief and con artist, without a wife or children. Levin was facing a prison

sentence of eight years for theft, was being investigated for income tax fraud, owed substantial sums of money to a variety of people and was facing lawsuits and other claims in excess of $250,000. Just before his disappearance, Levin had engaged in scams or bank withdrawals which netted him large sums of money and had arranged for his bail to be reduced which would eliminate the need for his parents' property to serve as security for his bail. Levin's dead body was never found. There was no visible sign of a struggle or foul play at his residence the morning following his disappearance and two people believed they saw Levin two years later. Thus, defendant argues that homicide is only one of many possibilities explaining Levin's disappearance and without the statements of defendant and Pittman, the corpus delicti of murder was not proved. We find these arguments unpersuasive.

"The corpus delicti of murder consists of the death of the alleged victim and a criminal agency as the cause of that death." (People v. Small (1970) 7 Cal.App.3d 347, 354.) A slight or prima facie showing, based wholly on circumstantial evidence, permitting a reasonable inference that a person died as a result of a criminal agency is sufficient proof of the corpus delicti "'. . . even in the presence of an equally plausible noncriminal explanation of the event.' [Citation.]" (People v. Ruiz (1988) 44 Cal.3d 589, 611; People v. Towler

(1982) 31 Cal.3d 105, 115; People v. Jacobson (1965) 63 Cal.2d 319, 327; People v. Bolinski (1968) 260 Cal.App.2d 705, 714-717.) (Emphasis added.)

The corpus delicti evidence in this case bears remarkable similarities to the circumstantial evidence found sufficient in People v. Ruiz, supra, 44 Cal.3d at pp. 610-611. In Ruiz, the victim's body was never found nor was there evidence of blood, a struggle or a weapon. However, there was evidence that she abruptly disappeared; failed to contact her friends, her mother, her physician or her pastor; failed to seek resumption of Medi-Cal and Social Security payments; and abandoned several personal effects, including her purse.

Levin also disappeared abruptly; he failed to contact his mother, friends, lawyers, business associates, and answering service; he abandoned virtually all of his clothes and other valuable personal property, including luggage, airline tickets, traveler's checks, a car, and approximately $35,000. A comforter, sheet, bed pillow, robe, jogging suit, and television remote control were the only items found missing from his apartment. Open, uneaten cartons of take-out food were left out, his security alarm was not engaged and his dog was left unattended. These factors alone, under Ruiz, are sufficient proof of the corpus delicti of murder.

However, in this case the seven pages entitled "At Levin's To Do" discovered in Levin's apartment provides independent proof that Levin was the victim of murder and may be considered without resorting to explanations of the items contained therein given by defendant to Karny. The notes, such as "close blinds," "scan for tape recorder," "tape mouth," "hand cuff," "put gloves on," "get alarm access code and arm code," "kill dog," and "Jim digs pit," found in Levin's apartment shortly after he mysteriously disappeared provide more than adequate proof that Levin was dead as the result of a criminal agency.

Clearly, defendant's extrajudicial statements connecting him to the seven pages are inadmissible, but for purposes of satisfying the corpus delicti rule, it is unnecessary to show that defendant was connected to the seven pages or committed the offense.[66/] "'"All that need be shown by independent evidence before a confession may be introduced

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66/ Defendant was connected to the seven pages independent of his admissions to Karny by his stipulation that all seven pages were in his handwriting.

is that a crime has been committed by someone." [Citations.]'" (In re Robert P. (1981) 121 Cal.App.3d 36, 39; emphasis in original; People v. Ruiz, supra, 44 Cal.3d at p. 610.)

"The corpus delicti rule originated in the judicial perception of the unreliability of extrajudicial confessions, and in the fear that a defendant, perhaps coerced or mentally deranged (since he has confessed to a crime he did not commit) would be executed for a homicide which never occurred." (People v. Hamilton, supra, 48 Cal.3d at p. 1176.) Here, reliance upon the abstract language contained in the seven pages to show that Levin met with foul play does not do violence to the rationale supporting the corpus delicti rule. (Warszower v. United States (1941) 312 U.S. 342, 347; cf. People v. Beagle (1972) 6 Cal.3d 441, 455, fn. 5.)

Defendant also contends the corpus delicti of robbery was not proved independent of his statements. In support thereof, he points to evidence from which it could be inferred that the Microgenesis transaction between defendant and Levin could be considered an ordinary business transaction which only coincidentally was consummated about the same time Levin disappeared. Once again, the presence of a noncriminal explanation of the event is not controlling.

The corpus delicti of robbery is satisfied by evidence that force or fear was used to compel Levin to make a check

which was taken against his will.[67] (See e.g. People v. Richards (1885) 67 Cal. 412, 422; Pen. Code, § 7, subd. (12) ["The words 'personal property' include money, goods, chattels, things in action, and evidences of debt"].)

The elements of robbery are (1) the taking of personal property; (2) from the person or in the person's immediate presence; (3) against the person's will; and (4) by means of force or fear. (§ 211.) Again, the seven pages are significant. They not only provide circumstantial evidence that Levin was the victim of force and violence but show the connection of that force and violence to the taking of personal property from Levin. On the same pages containing the foregoing quotations such as "tape mouth," "hand cuff," "kill dog" and "Jim digs pit," are found notes such as "have Levin sign agreements and fill in blanks," "determination of consideration - Swiss bank checks," and "execution of agreement." Other pages contain notations regarding

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[67] The People's sole theory of robbery was the taking of a $1.5 million check from Levin at gun point. The prosecutor did not argue that Levin's credit cards also were taken by force or fear. Instead, he argued that Pittman's possession of Levin's credit cards the following day showed that Pittman participated in the murder and that Pittman went to New York to make it look like, if anything happened to Levin, it happened in New York.

"Microgenesis of North America," "Swiss Cashiers Checks," and "create a file."

Defendant's possession of a $1.5 million Swiss check and the Microgenesis agreement, both bearing Levin's signature, on the day following Levin's unexpected disappearance along with Pittman's appearance in New York the following day with Levin's credit cards provide an equally plausable criminal explanation of the events. No other evidence was necessary to provide the corpus delicti of robbery.

F. PROSECUTORIAL MISCONDUCT

Defendant's claim of prosecutorial misconduct is based on a series of remarks by the prosecutor in his final rebuttal argument that there was no reasonable explanation for certain items of evidence; that Barens failed to explain other items of evidence during his closing argument; and that the defense failed to offer evidence of a search for Levin in Arizona. Defendant contends the prosecutor's arguments were merely a ploy to avoid the restriction contained in Griffin v. California (1965) 380 U.S. 609, 615 against making express or implied negative comments about a defendant's decision not to testify.

Virtually, the same arguments were advanced and found to be unmeritorious in People v. Miller (1990) 50 Cal.3d 954, 996-997 and People v. Bethea (1971) 18 Cal.App.3d 930, 936-937. "'Although Griffin prohibits reference to a defendant's failure to take the stand in his own defense, that rule does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]'" (People v. Miller, supra, at p. 996.)

There is a qualitative difference between arguments which suggest there has been no "denial" or "refutation" of the People's evidence and arguing that the defense has failed to "explain" certain items of evidence. (See e.g. People v. Geoviannini (1968) 260 Cal.App.2d 597, 603-605; People v. Northern (1967) 256 Cal.App.2d 28, 30-31; People v. Ham (1970) 7 Cal.App.3d 768, 778-779, disapproved on other grounds in People v. Compton (1971) 6 Cal.3d 55, 56-60.) For example, "the word 'denial' connotes a personal response by the accused himself. Any witness could 'explain' the facts, but only defendant himself could 'deny' his presence at the crime scene." (People v. Vargas (1973) 9 Cal.3d 470, 476.)

In the context of this circumstantial evidence case in which the defendant used cross-examination of People's

witnesses and presented his own witnesses to provide alternate explanations of incriminatory evidence, we do not read the prosecutor's argument as a commentary on defendant's failure to testify.

G. DISCOVERY OF IMPEACHMENT EVIDENCE RELATING TO "THE HOLLYWOOD HOMICIDE"

Defendant contends he was prejudiced by being denied access to police records concerning the death of Richard Mayer in a Hollywood motel during October 1986. The procedural aspects of this discovery issue, which came to be known as "the Hollywood homicide," spanned a three month period. On December 2, 1986, two months before opening statements, the prosecution disclosed that Karny was a possible suspect in the Hollywood homicide investigation and offered to provide the defense with any future investigation reports. Just the day before this disclosure, defense counsel had received a stenciled note, signed "'Friend of Honest Cop,'" which stated that there was a cover-up by Hollywood Division police officers regarding a murder at the Hollywoodland Motel involving Karny.

On December 4, the defense filed a formal noticed motion for discovery of all information relating to the Hollywood homicide. The hearing on the motion was set for

December 11, 1986. In support thereof, defense counsel stated in a sworn declaration that he was informed and believed the investigation into the homicide and the prosecution of Karny was being deliberately delayed by the prosecution and its agents in order to induce Karny "to continue bearing false witness" against defendant and "to present Karny in a false light." He further alleged on information and belief that on November 25, 1986, a meeting had been held in the offices of the Los Angeles County District Attorney in which high-ranking members of that office were present along with Vance, the prosecutor in the Eslaminia case, in which a "decision to delay and/or kill the investigation of Karny for the homicide" was discussed.

On December 9, 1986, the prosecution filed points and authorities in support of a motion to exclude any reference to Karny's possible connection with the unsolved Hollywood homicide and submitted the declaration of John Vance, in which Vance denied attending a meeting described by Barens, and further denied that he participated in a discussion to "'kill the investigation.'"

On December 10, 1986, the defense took the discovery motion off calendar and the matter was recalendared upon defense request for January 14, 1987. On January 13, 1977, the Los Angeles Police Department submitted two sworn declarations

of Antonio Diaz, the detective assigned to investigate the Hollywood homicide. Detective Diaz swore that he had definitely eliminated Karny as a suspect in the case.

Based upon the elimination of Karny as a suspect, the Los Angeles Police Department asserted that its investigative file was no longer discoverable and was privileged under Evidence Code section 1040, subdivision (b) and invited the court to review its file in camera pursuant to Evidence Code section 915, subdivision (b). The department's claim of privilege was based upon Detective Diaz's declaration that the homicide remained unsolved and release of information regarding the investigation would jeopardize his effectiveness in investigating and solving the case as others might become privy to information known only to the perpetrator(s) and the police. The court indicated its intention to review the investigative files in camera and set into motion the procedures for that review.

However, the next day, defendant formally withdrew his request for the Hollywood homicide files for "good faith, tactical" reasons which defense counsel refused to

explain.[68] With the motion no longer before the court, both the defense and prosecution objected to the court reviewing any documents contained in the police file. Accordingly, and with reluctance, the court agreed not to hold its previously scheduled in camera review of the files.

Subsequently, on March 3, 1987, the matter was brought back before the court upon a similar motion filed by Pittman. Defendant filed a brief notice of joinder in Pittman's motion without submitting any supporting affidavits as to why there had been a sudden change of tactics and failed to appear to argue the motion. Pittman's motion was heard and denied on March 5, 1987, just six court days before Karny took the witness stand. Based upon the original affidavits on file, the court found no necessity to hold an in camera review of the Hollywood homicide files, finding no special consideration was

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[68] The court was perplexed at Barens' formal withdrawal of his motion and objection to its in camera review of the file, but stated it understood Barens was abandoning that phase of the case. Barens replied that all he was doing was "withdrawing the motion in this forum," that there is another case where things are going on and that "inextricably . . . these things tend to overlap." On December 2, 1986, when the matter was first discussed in chambers, the court approved defendant discussing the matter with the lawyer representing him in the Eslaminia case.

given to Karny by the prosecution since Karny had been eliminated as a suspect in that murder.69/

We have set forth the time frame in which the matter was brought before the court because "[d]iscovery procedures should be conducted during the pretrial period, thereby providing all parties concerned with a fair opportunity to litigate whatever controversies may arise and avoiding the need to interrupt, stay, or compromise the trial. Even though the burden of producing the information sought may not itself be great, the very fact of being confronted with a discovery motion after the trial has commenced may jeopardize the prosecution and result in a serious interruption of the trial and harassment of counsel." (City of Alhambra v. Superior Court (1988) 205 Cal.App.3d 1118, 1139, (conc. opn. of Danielson J.)

69/ On the same date, the prosecution requested an order prohibiting any type of electronic media coverage of Karny's testimony. In support thereof, the prosecution filed a declaration by Special Agent Oscar Breiling in which he stated that in late 1985 he had learned of a plot to kill Karny and, as a result, he had placed Karny in a witness protection program. He also stated that Karny had been "framed" for the Hollywood homicide and after an "in depth investigation" Karny had been eliminated as a suspect in that case.

In the present case, the prosecution had provided timely notice of the Hollywood homicide to the defense and the defense failed to provide any explanation or justification for removing the matter from the earlier calendar date. The delay in seeking discovery was reason alone for denying the requested discovery since the delay was not fully and satisfactorily explained and justified or shown to be essential to the defense.

In addition to the delay in seeking discovery, the record fails to show that the information in the Hollywood homicide file would reasonably assist defendant in preparing his defense. "A motion for discovery by an accused is addressed to the sound discretion of the trial court, which has inherent power to order discovery in the interests of justice. [Citations.] [¶] An accused, however, is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure and without a prior showing of good cause." (Hill v. Superior Court (1974) 10 Cal.3d 812, 816-817; Ballard v. Superior Court (1974) 64 Cal.2d 159, 167.)

An affidavit or declaration may be considered by the trial court in support or opposition to a motion. (Code Civ. Proc., §§ 2009, 2015.5; § 1102.) "Where there is a substantial conflict in the facts presented by affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal. [Citation.] These rules are

applicable in a criminal matter." (People v. Kirk (1952) 109 Cal.App.2d 203, 207.)

Applying these rules to the present case, we cannot say as a matter of law or fact that the court abused its discretion in determining there was insufficient cause to conduct an in camera hearing to review the police files in question. While the court could consider the declarations filed by the attorneys for defendant and Pittman based upon their information and belief that Karny was a possible suspect in the Hollywood homicide (see e.g. City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 93), their evidentiary significance was of far less weight than the declarations filed in opposition to defendant's discovery motion.

The declarations of the investigating officer were based upon his personal knowledge. In his sworn declaration, Detective Ruiz declared, "My partner and I are actively investigating this homicide. Based on the investigation that has been done so far Dean Karny has definitely been eliminated as a suspect in the Hollywood homicide." We conclude that the trial court was warranted in finding from Detective Ruiz's affidavits that there was no plausible justification for inspection of the records.

H. KARNY'S STATE BAR FILE

The defense served a subpoena duces tecum upon the State Bar of California seeking any documents relating to Karny which could lead to Karny's impeachment or which tended to show a bias, interest or motive on his part to give false testimony against defendant. The State Bar turned over two of its files which contained matters already made public but claimed its remaining five files were confidential and privileged.

The court conducted an in camera review[70/] of the remaining files, designated as files 3 through 7, found nothing which could be helpful to the defense, upheld the privileges asserted by the State Bar and refused to make any of the files available to the defense. Defendant claims he had a right to determine for himself whether the State Bar's files would be helpful to the defense and questions whether, in fact, the files were privileged.

70/ As in People v. Barnard (1982) 138 Cal.App.3d 400, 405, footnote 1, no issue has been raised as to the sufficiency of appellant's preliminary showing of relevancy. Therefore, we follow the example of the parties and the trial court and assume that an adequate showing was made in the first instance to require the in camera hearing.

In answer to defendant's question, the files were privileged. The State Bar is a "public entity," and the information it acquires in confidence is privileged. (See Gov. Code, §§ 6001, 6252, subd. (a), 6254, subd. (f); Evid. Code, §§ 195, 200, 1040, subds. (a) & (b); Chronicle Pub. Co. v. Superior Court (1960) 54 Cal.2d 548, 566, 570-573; Reznik v. State Bar (1969) 1 Cal.3d 198, 204-205; Brotsky v. State Bar (1962) 57 Cal.2d 287, 302-303; American Federation of State etc. Employees v. Regents of University of California (1978) 80 Cal.App.3d 913, 918.)

Defendant had no right to inspect files to which a claim of privilege was asserted. It is the duty of the court to make the preliminary determination as to whether official information is privileged and it may examine records in camera if necessary in order to make that determination. (Evid. Code, §§ 400, 402, 915 subd. (b); American Federation of State etc. Employees v. Regents of University of California, supra, 80 Cal.App.3d at p. 916; In re Muszalski (1975) 52 Cal.App.3d 475, 482.) The records inspected by the court in camera were sealed and made part of the record for review on appeal. This procedure provides a reasonable compromise between defendant's desire to determine for himself the relevance and importance of the material and the confidentiality of those items not related to the case. (People v. Roberts (1992) 2 Cal.4th 271, 302; In

re Waltreus (1965) 62 Cal.2d 218, 223-224; People v. Barnard, supra, 38 Cal.App.3d at p. 407.)

The State Bar records have been transmitted to this court for our review with the exception of file 7. The trial transcript reveals and our in camera review of files 3 through 6 confirms that, with one exception, each file contains information acquired in confidence and each is subject to the official information privilege. (Evid. Code, § 1040, subd. (a); Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d at p. 566.) File 3 contains information regarding a complaint made by Karny against an attorney arising out of a fee dispute in a civil case; file 4 contains two applications by Karny to take the State Bar examination and responses to the State Bar's confidential questionnaires sent to Karny's references in connection therewith; file 5 contains letters from people concerned about Karny's suitability to be admitted to the bar and the State Bar's responses thereto; file 6 contains letters and notes of the State Bar attorney and investigator concerning their investigation of Karny and file 7 is alleged to contain communications between the State Bar's attorney and the State Bar's Subcommittee on Moral Character and the Committee of Bar Examiners.

Thus, the issue before us is whether the court abused its discretion by its implied determination that the necessity for preserving the confidentiality of the information

outweighed the necessity for disclosure in the interest of justice--the principle which also guides our in camera determination. (Evid. Code, § 1040, subd. (b)(2); Shepherd v. Superior Court (1976) 17 Cal.3d 107, 124-126; Pitchess v. Superior Court (1974) 11 Cal.3d 531, 538; American Federation of State etc. Employees v. Regents of University of California, supra, 80 Cal.App.3d at p. 918.)

We find no abuse of discretion with respect to the court's determination regarding file 3. Complaints about attorneys are highly confidential unless they result in disciplinary action. Maintaining the confidentiality of such complaints protects attorneys against the "irreparable harm" which can be caused by publicity where groundless charges have been made. (Chronicle Pub. Co. v. Superior Court, supra, 54 Cal.2d at p. 569.) Karny could be subject to impeachment if it turned out that the charges filed by Karny against the attorney were groundless. Nevertheless, Karny's complaint arose out of a collateral matter not directly relevant to defendant's trial. On balance, the attorney's right to privacy and to be protected against "irreparable harm" outweighed defendant's right to possible impeachment on a collateral matter.

We also find no abuse of discretion with respect to file 4's responses to questionnaires about Karny. People who provide information to the State Bar about applicants have a right to expect the information they provide will remain

confidential so they will speak freely and honestly without fear of repercussion. The State Bar must be able to assure confidentiality to its respondents during the course of its admission proceedings or the State Bar cannot fulfill its obligation to evaluate the moral fitness of persons to become members of the bar. (See e.g. Chronicle Pub. Co. v. Superior Court, supra, at pp. 566-567.) Our review of such items in file 4 reveals no information bearing any relevancy to the evidence received at trial or that would be helpful to the defense. No disclosure was required.

However, other information contained on Karny's bar applications, also located in file 4, was not entitled to such a high degree of confidentiality. State Bar applicants obviously understand that they are accorded a much lesser standard of privacy inasmuch as they must disclose personal information in order for the State Bar to investigate their moral character.

Here, Karny's bar applications, executed under penalty of perjury, omitted the addresses of the apartments in which he had resided with defendant and omitted all relationships with the BBC and it's various business enterprises contrary to his

testimony at trial.71/ Defendant's interest in obtaining prior inconsistent statements executed under penalty of perjury directly contradicting Karny's testimony outweighed any necessity for preserving the confidentiality of that information and it should have been disclosed. The court's refusal to disclose such information in Karny's bar applications was an abuse of discretion.

Nevertheless, we find no prejudice arising from such error. Evidence that Karny lied to the State Bar in hopes of hiding his involvement with the BBC to gain admission to the State Bar, is unlikely to have altered the jury's view of his credibility. Karny had been exposed to substantial impeachment and the jury was instructed to view his testimony with greater care than the testimony of other witnesses. Cross-examination of Karny regarding false statements on his bar application is unlikely to have persuaded the jury that Karny was not privy to inside information about the BBC as defendant now suggests on appeal. Karny's close identification with defendant and the BBC was corroborated by a number of witnesses including defense witness, Brooke Roberts. A misapplication of Evidence Code

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71/ This information is no longer confidential having been disclosed during the course of discovery by order of the court in the Eslaminia trial.

section 1040 does not result in prejudice where the witness has been thoroughly impeached by other means. (People v.Roberts, supra, 2 Cal.4th at p. 302; People v. Gonzalez (1990) 51 Cal.3d 1179, 1241-1242; Delaware v. Van Arsdall (1986) 475 U.S. 673, 683-684.)

Turning to the contents of file 5, we find no abuse of discretion by the trial court. Nothing contained in the letters requesting an investigation of Karny's moral character was based upon the personal knowledge of the informants. Rather, it was based upon information contained in published news articles. Accordingly, the necessity for preserving the confidentiality of the complainant's identity outweighed the necessity for disclosure. (Chronicle Pub. Co. v. Superior Court, supra, at pp. 566-567.)

A different situation is presented by file 6 in that some of the information contained therein was not acquired in confidence. A State Bar investigator spoke to the investigating officers and prosecutors involved in prosecuting defendant who provided information about Karny's involvement in the deaths of Levin and Eslaminia as well as information regarding the promises made to Karny to obtain his testimony in both cases. The same information had been disclosed by such officials to the defense. Therefore, such information was not acquired in confidence by the State Bar. Information which is

not provided in confidence or which is no longer confidential because it has been provided to the defense is not privileged just because it has been placed in an "investigatory file." (Evid. Code § 1040 subd. (a); Williams v. Superior Court (1993) 5 Cal.4th 337, 355; People v. Roberts, supra, 2 Cal.4th at p. 302.) Thus, the court erred in denying defendant access to the non-privileged information located in file 6.72/

To the extent that file 6 contains inter-office communications between the State Bar's investigator and the State Bar's legal counsel reflecting thought processes and recommendations based upon information obtained in confidence during the course of Karny's investigation, such documents are protected from disclosure by the work-product doctrine. (People v. Collie, supra, 30 Cal.3d at p. 59; Code of Civ. Proc., § 2018, subd. (b).) Unless such documents could lead to relevant evidence, the necessity to preserve such confidential communications outweighs any necessity for disclosure. In our

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72/ We express no opinion as to whether the failure to disclose such documents was prejudicial because neither defendant nor respondent have had an opportunity to view the documents and to brief the issue. Counsel wishing to pursue discovery of this information may seek an order for their disclosure in connection with the related habeas corpus petition in case No. B059613.

view no items met that standard and therefore no injustice occurred by their non-disclosure in this case.

Finally, we look to whether the court erred in not ordering disclosure of the contents of file 7.[73/] The State Bar claimed this file came within the attorney-client privilege in that its documents contained confidential communications from the State Bar's attorney to State Bar committees and its executive director. Public entities and their attorneys may assert the attorney-client privilege. Such privilege applies to legal opinions formed and advice given by the legal counsel in the course of the attorney-client relationship with the public entity. (Roberts v. City of Palmdale (1993) 5 Cal.4th 363.)

There is no dispute that the documents meet this definition and we have encountered no argument in this case

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73/ The information contained in file 7 was not disclosed to the trial court or this court in chambers pursuant to Evidence Code section 915, subdivision (b) as the State Bar did not claim they were covered by the official information privilege contained in Evidence Code section 1040. The State Bar claimed they were subject to the absolute protection provided by the attorney-client privilege. (Evid. Code, § 952; Pen. Code, § 1054.6; Code of Civ. Proc., § 2018, subd. (c).) No order for disclosure of the documents was required in order to rule on said claim. (Evid. Code, § 915, subd. (a).)

which persuades us that the defendant's right to discovery outweighs the strong policy supporting the need for the State Bar to keep its attorney's communications about Karny confidential. We find no abuse of discretion.

I. JURY INSTRUCTIONS

Defendant contends numerous errors in jury instructions denied him a fair trial.74/

1. Instruction on the Role of the Court

We begin with the court's modification of CALJIC No. 17.30 the underscored portions of which defendant claims gave the jury a mixed message and allowed the jury to imagine what sort of comment the court would have given had it so chosen: "I have not intended by anything I have said or done, or by any

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74/ Some of the errors claimed with respect to jury instructions have been analyzed and addressed in earlier parts of this opinion and, therefore, are not included in this section.

questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion. [¶] You are to disregard any verbal exchanges between counsel and the court or any differences among us on rulings made by the court. The decision as to the guilt or innocence of the defendant is to be decided solely by you on the evidence received and on the court's instructions. I express no opinion as to the guilt or innocence of the defendant. The participation by the court in the questioning of witnesses is encouraged by our Supreme Court which has stated that there should be placed in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases instead of being in the position of a mere referee or automaton as to the ascertainment of the facts. Although I am vested with the power to comment on the facts in the case and to express my opinion on the merits of the case, I have nonetheless refrained and do refrain from doing so letting you be the final and sole judges of the facts and the guilt or innocence of the defendant."

As respondent correctly points out, "[t]here were verbal exchanges between the court and counsel and disagreements among them concerning the court's evidentiary rulings; there were questions asked of witnesses by the court; and there were statements by counsel in response to those questions suggesting [incorrectly] that the court was acting inappropriately in questioning witnesses." Thus, we agree with respondent that it was appropriate for the court to instruct the jury on how they should view those matters.

The trial court's instruction was a correct statement of the law governing the court's right to participate in the trial. (People v. Rodriguez, supra, 42 Cal.3d 730, 766; People v. Brock (1967) 66 Cal.2d 645, 650; People v. Rigney (1961) 55 Cal.2d 236, 241; People v. Ottey, supra, 5 Cal.2d at pp. 722-723.) We find no error.

2. Refusal of Time of Offense Instruction

Defendant cites a number of cases indicating that when the date and time of an offense is material the judge has an obligation to instruct the jury to limit its consideration to the time period covered by the defendant's alibi. (People v. Jones (1973) 9 Cal.3d 546, 556, overruled on other grounds in

Hernandez v. Municipal Court (1989) 49 Cal.3d 713; People v. Wrigley (1968) 69 Cal.2d 149, 157; People v. Brown (1960) 186 Cal.App.2d Supp. 889, 892-894; People v. Neighbors (1947) 79 Cal.App.2d 202, 204; People v. Morris (1906) 1, 8-9.) Thus, he contends the court erred by refusing the following proferred instruction: [¶] The prosecution evidence has fixed the crime charged as occurring on June 6, 1984. The defendant has offered an alibi for that day. In light of the defendant's alibi defense, the time the alleged offense was committed becomes material. The jury is limited in its consideration of the evidence to the period which the prosecution has selected as the time of the commission of the offense charged. If you have a reasonable doubt that the offense was committed on that particular day the defendant is entitled to an acquittal."

Defendant cites cases for a correct principle of law, but which are not applicable to the instant case. In each of the alibi cases cited by defendant, the jury was misinstructed by the court that they could convict the defendant if they found the offense had occurred at any time instead of at the time testified to by the prosection witnesses. In the present case, the jury was not misinstructed. Rather, instead of the defense's requested instruction, the court gave the following

standard alibi instruction set forth in CALJIC No. 4.50: [¶] The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal."

There was no argument or theory upon which the jury could have believed that if Levin was murdered, he was murdered at some time other than on the night of June 6, 1984. Thus, CALJIC No. 4.50 was a proper instruction on the law. No other or additional instructions were necessary or appropriate. (People v. Wright (1988) 45 Cal.3d 1126, 1134-1135.)

3. Adoptive Admissions

Defendant asserts that the court had a sua sponte duty to instruct the jurors pursuant to CALJIC No. 2.71.5 because of his lengthy silence when confronted with the "seven pages" by

Detective Zoeller.[75] In our view, the giving of CALJIC No. 2.71.5 would have been more harmful to defendant than helpful.

First, it is highly unlikely that the jury would not have found the foundational elements present as this evidence was not contradicted. Secondly, in light of the fact that the jury was instructed pursuant to CALJIC No. 2.03 that defendant's false or deliberately misleading statements could be considered as tending to prove a consciousness of guilt, and given that defendant stipulated that the "seven pages" were in his handwriting, defendant's silence which was followed by his denial of any knowledge of the "seven pages" would have over-emphasized the consciousness of guilt circumstance

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[75] CALJIC No. 2.71.5 provides: "If you should find from the evidence that there was an occasion when [a] . . . defendant, 1) under conditions which reasonably afforded him an opportunity to reply, 2) failed to make a denial [or] [made false, evasive or contradictory statements] in the face of an accusation, expressed directly to [him] . . . or in [his] . . . presence, charging [him] . . . with the crime for which such defendant now is on trial or tending to connect [him] . . . with its commission, and 3) that [he] . . . heard the accusation and understood its nature, then the circumstance of [his] . . . [silence] [and] [conduct] on that occasion may be considered against [him] . . . as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the [silence] [and] [conduct] of the accused in the face of it. Unless you find that . . . [the] defendant's [silence] [and] [conduct] at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement."

permitted by CALJIC No. 2.71.5. Accordingly, defendant benefitted by the failure to give CALJIC No. 2.71.5 and it is not reasonable to conclude on these facts that a result more favorable to defendant would have occurred had the instruction been given. (People v. Epperson (1985) 168 Cal.App.3d 856, 862; People v. Watson, supra, 46 Cal.2d at p. 836.)

Defendant's contention that CALJIC No. 2.71.5 should have been given with respect to Pittman's silence when defendant informed the BBC members at the June 24 meeting that he and Pittman had "knocked off" Levin is equally without merit. That issue was not in dispute. Both Karny and Brooke Roberts testified to the occurrence. The only dispute was whether defendant was telling the truth or fabricating a story to save the BBC. Pittman's silence was of no consequence;[76/] he was either silent because he and defendant decided to fabricate a story or because they agreed to tell the truth. The giving of CALJIC No. 2.71.5 would not have guided the jury in resolving that issue. Thus, even assuming that the instruction, which refers to the consciousness of guilt of defendants not their accomplices, was applicable in this case,

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76/ Furthermore, Pittman was not entirely silent. According to Roberts, Pittman told her after the meeting that they had not killed Levin.

the failure to give it was harmless. (People v Smith, supra, 187 Cal.App.3d at pp. 679-680; People v. Epperson, supra, 168 Cal.App.3d at p. 862; People v. Watson, supra, 46 Cal.2d at p. 836.)

4. Lack of Unanimity Instruction on Robbery Charge

Defendant also contends that some jurors could have found him guilty of robbery based upon the taking of the $1.5 million check while others could have found him guilty based upon taking Levin's credit cards. Therefore, he argues the court had a sua sponte duty to give the jury the unanimity instruction set forth in CALJIC No. 17.01 with respect to the robbery charge.77/

77/ If given, CALJIC No. 17.01 would have read as follows: "The defendant is accused of having committed the crime of robbery. The prosecution has introduced evidence tending to prove that there is more than one [act] . . . upon which a conviction . . . may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] . . . committed any one or more of such [acts]. . . . However, in order to return a verdict of guilty, . . . all jurors must agree that [he] . . . committed the same [act] . . . or [acts]. . . . It is not necessary that the particular [act] . . . agreed upon be stated in your verdict."

Once again we disagree. From opening statement to closing argument, the prosecution relied on only one act-- the forcible taking of the $1.5 million check, as the basis of the robbery charge.

Our search of the transcript reveals no instance in which the prosecutor argued or that the defendant believed that, in the alternative, the taking of Levin's credit cards also could be construed as the basis of the robbery charge. Where the prosecutor has elected, as he did in this case, to rely on one act to form the basis of the charge, and where the defense is an alibi for the time that the robbery and murder were alleged to have occurred, and where the jury's verdict implies that it did not believe the defense offered, the failure of the court to instruct pursuant to CALJIC 17.01 is not prejudicial error. (People v. Diedrich (1982) 31 Cal.3d 263, 280-283; People v. Deletto (1983) 147 Cal.App.3d 458, 464-473; People v. Gonzalez (1983) 141 Cal.App.3d 786, 790-792; People v. Madden (1981) 116 Cal.App.3d 212, 216 fn. 4; People v. McIntyre (1981) 115 Cal.App.3d 899, 908-911; People v. LaMantain (1949) 89 Cal.App.2d 699, 701.)

5. Reasonable Doubt Instruction

In a supplemental brief, defendant contends that CALJIC No. 2.90 improperly equates reasonable doubt with moral certainty and thus violates his federal constitutional right to due process.78/ In support of his position, defendant relies on the decision of the United States Supreme Court in Cage v. Louisiana (1990) 498 U.S. 39.

Defendant's contention is without merit. This issue has specifically been addressed and decided adversely to defendant by our Supreme Court in People v. Sandoval (1992) 4 Cal.4th 155, 185-186; People v. Johnson (1992) 3 Cal.4th 1183, 1234-1235; People v. Morris (1991) 53 Cal.3d 152, 214; and

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78/ The trial court instructed the jury as to reasonable doubt in the language of CALJIC No. 2.90, which reads:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] guilt is satisfactorily shown, [he] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that conduction that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

People v. Jennings (1991) 53 Cal.3d 334, 385-386. In People v. Sandoval, the Supreme Court held, "(a)s we noted in Jennings and Johnson, despite use of the term 'moral certainty' in CALJIC No. 2.90, the instruction does not suffer from the flaws condemned in Cage v. Louisiana (citation) 4 Cal.App.4th 155, 186."79/

J. LIMITATIONS ON VOIR DIRE

Defendant urges this court to remand his case for retrial so that the following two questions can be asked on voir dire of a new jury: 1) "This case might be closely followed by local, state, national, and international electronic and print media. What does that fact indicate to you. . . .? and 2) Would you be more likely to find the defendant guilty or innocent because of the fact of the media's coverage of this case?" Defendant contends that because these two questions were eliminated by the court at his trial, he was unable to weed out those jurors who had biases against him

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79/ The United States Supreme Court has granted certiorari in Sandoval v. California (September 28, 1993) ___ U.S. [62 U.S.L. Week 3241].)

which were triggered, not by what they had read, seen or heard, but by the mere "existence" of the media coverage itself, i.e. the lights, cameras, and microphones.

It is clear that where a case generates widespread publicity, the content of that publicity can have an impact on a person's ability to serve as an impartial juror. In such a case, the court may have a duty to make an inquiry adequate to uncover any prejudices caused by such publicity. (See e.g. United States v. Dellinger (7th Cir. 1972) 472 F.2d 340, 375.) On the other hand, it is not clear that there is any corrolation between the fact that a case generates publicity and prejudice in the minds of potential jurors. Courts have considerable discretion to "contain voir dire within reasonable limits" and need not permit inordinately extensive questioning based merely on counsel's speculation that someone "might" be prejudiced by the presence of the media. (See e.g. People v. Williams (1981) 29 Cal.3d 392, 408; Mu'Min v. Virginia (1991) ___ U.S. ___; 114 L.Ed.2d 493, 508-510; 111 S. Ct. 1899.) Reversal is required only if the doctrine is actually relevant, and the excluded questions are found "substantially likely to expose strong attitudes antithetical to defendant's cause." (People v. Williams, supra, 29 Cal.3d at p. 410; People v. Fuentes (1985) 40 Cal.3d 629, 639; emphasis added.)

The voir dire examination regarding the widespread publicity generated by this case was by no means perfunctory. We note that defendant does not claim that he was disallowed from questioning prospective jurors as to the content of media reports, i.e. whether they had been influenced by reading or hearing prejudicial and biased media accounts of the case. In fact, the jurors were thoroughly questioned during individual voir dire as to their exposure to pretrial publicity, whether the publicity would have any impact on their impartiality, and whether they would still be able to render a verdict based only on the evidence presented in court.

Nor was counsel totally precluded from asking the questions by the court's ruling. Two jurors were questioned by both the court and counsel with respect to the fact the case was generating publicity. During Hovey voir dire, juror Clements stated she had seen some television cameras in the hall and some reports on the evening news. When asked what conclusions she drew from the media attention, she reponded that she assumed it was an important case because the last time she served as a juror she saw no cameras in the hall. When asked what she meant by "important case," she responded, "Publicity attracted." During general voir dire, Chier asked juror Simon, without any objection from the court or the prosecutor, "I take it, you probably have not been able to

avoid noticing that there has been some press around the hallway from time to time. What does it suggest to you, if anything, the fact that there are news cameras around here from time to time?" Simon replied, "That this is an interesting case." Chier then asked, "And does it suggest to you or in any way imply that Mr. Hunt is guilty of anything?" Simon answered, "No." Chier's follow up question reemphasized that the defendant was presumed to be innocent which Simon indicated she understood. All of the subsequent jurors were asked whether their answers to all of the questions put to the other prospective jurors would be substantially the same. Thus, the issue was raised, notwithstanding the judge's ruling, sufficiently early in the general voir dire as to give all but one of the jurors who ultimately served on the case the opportunity to answer the questions.

— Given the foregoing record and the purely speculative theory that the fact of publicity alone might generate prejudice, we find this contention wholly without merit.

K. DEFENDANT'S RIGHT TO BE PRESENT

Defendant contends that his absence from a number of conferences held in chambers and at the bench prejudiced his trial. Specifically, he states that he should have been

present 1) on January 15, 1987, when the court appointed Barens to represent him; 2) when the court decided to distribute the "seven pages" to the jury; 3) when Barens was asked his tactical reason for eliciting evidence that defendant had asked to speak to his attorney when confronted with the "seven pages"; 4) when Barens objected to the judge's gestures during testimony of defense witnesses; 5) at the hearing regarding the juror's "recipe of the week"; and 6) at all conferences in which the court used strong language to chastise Chier. Defendant's basic assertion is that an informed client serves as an important check against counsel's errors and omissions.

Defendant's arguments are, in reality, a restatement of his earlier complaints that he was denied the effective assistance of counsel. His reliance upon cases such as People v. Ebert (1988) 199 Cal.App.3d 40, 44-47 and People v. Blye (1965) 233 Cal.App.2d 143, 147-150 is misplaced inasmuch as those cases involved instances where the defendant's attorney actually and fundamentally undermined the defense. In Blye, the defendant's attorney privately exposed to the judge and prosecutor details of his client's defense, and that he did not intend to call the defendant as a witness because he believed he would be suborning perjury. (People v. Blye, supra, at p. 148.) In Ebert, the defendant's advisory counsel moved to withdraw because she believed, perhaps incorrectly, that the

defendant planned to present false testimony. If defendant had been present he may have corrected the erroneous impression. Instead, the attorney withdrew from the case and defendant was deprived of all assistance of counsel at his trial. (People v. Ebert, supra, at p. 43.)

In the present case, defendant was fully aware of the basis upon which his attorneys were appointed to represent him and the compensation they were to receive well before the evidentiary phase of the trial began. The judge's attitude toward Chier was evident before, during, and after the guilt verdict, yet, defendant made it clear that he wished to retain the services of Chier. We have previously rejected each of defendant's complaints about his legal representation finding that counsel's representation was competent. His counsel did not engage in any conduct undermining the proper functioning of the adversarial process. (Strickland v. Washington, supra, 466 U.S. p. 686.)

The cases have uniformly held "that the accused is not entitled to be personally present either in chambers or at bench discussions which occur outside of the jury's presence on questions of law or other matters in which defendant's presence does not bear a '"reasonably substantial relation to the fullness of his opportunity to defend against the charge."' [Citations.] Stated in another way, '[W]hen the presence of

the defendant will be useful, or of benefit to him and his counsel, the lack of his presence becomes a denial of due process of law.' [Citations.] The burden is upon defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial. [Citations.]" (People v. Jackson (1980) 28 Cal.3d 264, 309-310; People v. Price (1991) 1 Cal.4th 324, 407-408; People v. Cox (1991) 53 Cal.3d 618, 653; People v. Deere (1991) 53 Cal.3d 705, 722-723; People v. Lang, supra, 49 Cal.3d at p. 1026; People v. Bittaker (1989) 48 Cal.3d 1046, 1080; People v. Hovey (1988) 44 Cal.3d 543, 573-574.) Defendant has not met that burden.

L. EXCLUSION OF DEFENDANT'S LAW CLERK FROM COURTROOM

Chier utilized the services of a third year law student as a law clerk to research motions, summarize preliminary hearing and trial transcripts and to run errands and research issues as they arose during the trial. On March 4, 1987, the trial court excluded the law clerk from the courtroom because he had violated a restraining order by making disparaging remarks about the judge to a woman who appeared to be a member of the press. In a note to the judge, and in a subsequent hearing, the woman stated that the clerk had engaged her in a

conversation in which he insinuated that the judge was unfair because he and prosecutor Wapner's father were old friends.

Defendant claims that the court's exclusion of the law clerk was error because the restraining order was ambiguous and the court disregarded established procedural rules governing contempt proceedings. He also claims his rights to a public trial and to the effective assistance of counsel were infringed.

The restraining order was prompted by the court's concern that the case would be tried in the press and it was clarified when questions arose throughout the trial. The defense "enjoyed the benefit of the order to the extent it prevented the district attorney and prosecution witnesses from making extrajudicial statements about the cause." Having done this, defendant is not in a position to complain for the first time about any ambiguity in the order after it has become history. (People v. Watson (1971) 15 Cal.App.3d 28, 42.)

Attorneys have a duty to maintain the respect due to the courts of justice and judicial officers. (Bus. & Prof. Code, § 6068, subd. (b).) This duty, by implication, requires them to supervise persons acting under their direction to assure that they too will maintain the respect due to the courts and its judicial officers. (See e.g. Code Civ. Proc., § 1209, subd. (c).) But speech reflecting upon a judicial

officer may not be punished by contempt unless it is made in the immediate presence of the judge while court is in session and in such a manner as to actually interfere with court proceedings. (Code Civ. Proc., § 1209, subd. (b).)

Here, the speech was not made in the court's presence and the court did not initiate contempt proceedings. Since the law clerk was not charged with either criminal or civil contempt, arising out of his personal attack on the integrity and dignity of the court, he was not entitled to the procedural protections set forth in Turkington v. Municipal Court (1948) 85 Cal.App.2d 631, 635 as defendant asserts.

However, short of its contempt power, a court still has the inherent power to exercise reasonable control over all proceedings connected with the litigation in order to maintain the dignity and authority of the court. (People v. Fusaro (1971) 18 Cal.App.3d 877, 887-888; Mowrer v. Superior Court (1969) 3 Cal.App.3d 223, 230.) But judges are also cautioned to exercise their powers with great prudence and caution especially when it is their integrity that has been attacked They are required to bear in mind that they are not so much engaged in vindicating their own character, "'"as in promoting the respect due to the administration of the laws.'"' (Mowrer v. Superior Court, supra, 3 Cal.App.3d at p. 232.)

In our view, the exclusion of the law clerk was imprudent. We do not see why a reprimand and warning to the law clerk would not have been sufficient to prevent future conduct of the same type. Nevertheless, we see no grounds for reversal. That a lesser remedial measure might have been taken by the court does not mean that the court's actions amounted to a denial of defendant's right to a public trial.

"'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.' [Citations.]" (People v. Woodward (1992) 4 Cal.4th 376, 385. Exclusion of Chier's law clerk did not substantially implicate those factors. No other members of the press, public, or defense team were excluded. Accordingly, the error was harmless beyond a reasonable doubt. (Id. at p. 387.)

The exclusion of his law clerk was an irritation and aggravation to Chier who complained that he was less effective because he had to spend extra time explaining issues to his clerk which could have been more readily grasped if the clerk

was seated in the courtroom. But Chier did not contend, and defendant has failed to demonstrate, that Chier was unable to investigate any facts, or that he neglected to raise pertinent points of law, or that any potentially meritorious defense went unexplored as a result of his law clerk's absence from the courtroom. It is not reasonably probable that a determination more favorable to defendant would have resulted if the law clerk had been permitted to remain in the courtroom and the error was "harmless beyond a reasonable doubt." (People v. Phillips, supra, 41 Cal.3d at p. 60; Chapman v. California, supra, 386 U.S. at p. 24.)

M. VIOLATION OF RULE 980 GOVERNING ELECTRONIC COVERAGE OF TRIAL

Defendant contends the court disregarded some of the procedures governing the photographing, recording, and broadcasting of trials by the media set forth in rule 980 of the California Rules of Court. Specifically, he claims the court ignored his right to advance notice of a request for film or electronic media coverage[80/] and eventually allowed too

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80/ Rule 980(b) of the California Rules of Court provides that "[f]ilm or electronic media coverage is permitted only on written order of the court." Rule 980(b)(1) sets forth the following requirement: "A request for an order shall be made on a form approved by the Judicial Council, filed a reasonable time before the portion of the proceeding to be covered. The clerk shall promptly inform the parties of the request." (Emphasis added.)

many cameras, microphones, lights, equipment operators and equipment bearing media insignias into the courtroom.[81/] The result, he claims, was a violation of his due process right to have his case tried in a sober courtroom environment. (Chandler v. Florida (1980) 449 U.S. 560; Sheppard v. Maxwell (1966) 384 U.S. 333; Estes v. Texas (1965) 381 U.S. 532.)

We find no error in the court permitting the occasional expansion of electronic media coverage in this case which attracted such a high degree of public interest. The

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81/ Rule 980(b)(3) of the California Rules of Court provides in pertinent part: "Unless the court in its discretion and for good cause orders otherwise, the following rules apply: [¶] (i) One television camera and one still photographer, with not more than two cameras and four lenses, are permitted. [¶] (ii) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Motorized drives, moving lights, flash attachments, or sudden lighting changes shall not be used. [¶] (iii) Existing courtroom sound and lighting systems shall be used without modification. An order granting permission to modify existing systems is deemed to require that the modifications be installed, maintained, and removed without public expense. Microphones and wiring shall be unobtrusively located in places approved by the court and shall be operated by one person. [¶] (v) Equipment or clothing shall not bear the insignia or marking of a media agency."

electronic media plays an important role in disseminating public information and rule 980(b)(3) of the California Rules of Court grants the court the discretion to permit additional equipment in the courtroom. It is appropriate to grant the media access "except where to do so will interfere with the rights of the parties, diminish the dignity of the court, or impede the orderly conduct of the proceedings." (KFMB-TV Channel 8 v. Municipal Court (1990) 221 Cal.App.3d 1362, 1368-1369.)

Furthermore, we find there was substantial compliance with California Rules of Court, rule 980. The court approved each instance in which a request for electronic coverage was submitted. On 15 separate occasions between October 6, 1986 and March 30, 1987, the court signed written orders permitting electronic coverage of aspects of the trial. There is nothing in the record indicating that the clerk informed the parties of these requests as required by California Rules of Court, rule 980(b)(1), but counsel was not taken by surprise by such coverage. The defense had been informed during jury voir dire that the court was going to permit electronic coverage of the trial and the defense took advantage of such coverage by giving interviews in the hallway when the cameras were present. When the defense registered a specific objection to a television channel's request to view the "seven pages" and that one of

their witnesses not be filmed, their objections were sustained. When law enforcement objected to electronic coverage of Karny's testimony because they believed his life was in danger, the defense objected and insisted he receive the same media coverage as all other witnesses. We find no abuse of discretion by the absence of formal notice to the defense. (See e.g. People v. Spring (1984) 153 Cal.App.3d 1199, 1207.)

Nothing in the record reflects that the electronic coverage of the trial was anything other than a minor inconvenience. Usually, only one camera was present in the courtroom at any given time and there were days when no cameras were present in the courtroom at all. To avoid media contamination of the jury, the court issued gag orders to the attorneys and others to preclude them from giving the press any information that had not already been introduced in trial. The jury was strongly admonished to disregard stories appearing in the press. This admonition led to the dismissal of one juror when three other jurors and a member of the press reported to the court that the juror had been watching television and reading newspaper stories about the case.

Finally, electronic coverage of trials is no longer presumed unconstitutional as it was in Estes and there is not a scintilla of evidence in the record that even one occurrence

similar to the abuses found unconstitutional in Sheppard 82/ tainted defendant's trial. Defendant has failed to establish that the presence of the broadcast media had an adverse effect upon any of the participants in his trial or that the ability of the jurors to decide the case on only the evidence was compromised. Without such a showing of prejudice, a violation

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82/ When Estes was decided in 1964, the federal courts and 48 states prohibited television in the courtroom. (Estes v. Texas, supra, 381 U.S. at p. 550.) The Supreme Court was concerned that televising trials would improperly influence jurors, impair the testimony of witnesses, distract judges and intrude into the confidential attorney-client relationship. Thus, the "probability of prejudice" caused by electronic coverage was sufficient reason alone to reverse Estes's conviction. However, the court was aware "that ever-advancing techniques of public commmunication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials." (Id. at pp. 544-552.)

Sheppard, whose trial occurred in 1952, was subjected to virulent and incriminating publicity, including being examined for over five hours without counsel in a televised three-day inquest before his trial began. The media was allowed to take over the tiny courtroom. Reporters were all over the courthouse. They hounded the defendant and most of the participants; they were assigned seats within the bar precluding privacy between the defendant and his lawyer. The jurors were thrust into the role of celebrities, and were constantly exposed to incriminating matters not introduced at the trial. The judge's failure to "fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom" mandated a reversal. (Sheppard v. Maxwell, supra, 384 U.S. at pp. 338-349, 363.)

of rule 980 is not an error of constitutional dimensions. (Chandler v. Florida, supra, 449 U.S. at pp. 581-582; People v. Spring, supra, 153 Cal.App.3d at pp. 1207-1208.)

N. CONDUCT OF JUDGE

We close our analysis of the fairness of defendant's trial by examining whether any other conduct of the judge, so far not examined, showed such a pro-prosecution, anti-defense bias as to lead to a miscarriage of justice. Defendant cites instances too numerous to recount here in which he claims the court disparaged and derided the defense theory, defense witnesses and the defense attorneys and took over the examination of prosecution and defense witnesses by questions designed to elicit testimony adverse to the defendant.

Respondent acknowledges that there were a few instances where the court's conduct "veered from its proper course," but urges us not to reverse defendant's conviction because in most of the instances of claimed judicial misconduct which were preserved for review by appropriate objection, the court was properly exercising its power to control and participate in the trial. Respondent further argues that any errors were harmless in that the record as a whole establishes that both sides were treated evenhandedly. Much of the court's conduct toward

cocounsel Chier was instigated by Chier's, discourteous, disrespectful, and provocative behavior and/or did not take place in the jury's presence.

There is support in the transcript for both positions. Our reading of the trial transcript reveals that the judge walked a very fine line between partisan advocacy and impartial intervention to see that a guilty defendant was not "wrongfully acquitted or unjustly punished." (People v. Murray (1970) 11 Cal.App.3d 880, 885; internal quotations omitted.) He did, indeed, interject himself into the trial. He thoroughly questioned both prosecution and defense witnesses and actively interposed his own objections to questions asked by both sides although far more frequently to defense questions. There were times when the judges's remarks in front of the jury were caustic, but we also note that most were the result of defense counsels' inappropriate comments, arguments or speaking objections which should have been made at side bench. The court made it abundantly clear in a number of chambers and bench conferences that he did not regard Chier as the lawyer in the case, that Chier's presence was totally unnecessary and a

waste of taxpayer's money.[83/] There are other times when the court was solicitous of Chier and listened courteously to his legal arguments. It is also clear that the court held Barens in high esteem.

The cases deciding when a judge's handling of a trial crosses the line from "activism" to reversable error are mixed. There are instances in which a court's conduct was so biased that a reversal was required without regard to the strength of the evidence against the accused. (See People v. Mahoney (1927) 201 Cal. 618, 626-627.) In other cases, the court's lack of impartiality contributed to a reversal where the evidence was not strong. (See People v. Pitts, supra, 223 Cal.App.3d at pp. 811-815; People v. Fatone (1985) 165 Cal.App.3d 1164, 1170-1175.) In still other cases, even where trial judges committed misconduct by partisan displays of impatience, irritation and sarcasm and persistently questioned witnesses, eliciting testimony seriously adverse and harmful to

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83/ The judge's disagreements with Chier were based upon Chier's abrasive and contentious demeanor, his interuption of discussions between the court and Barens, and upon his belief that Chier wrote frivolous motions vilifying the court and then violated the court's order against speaking to the press by handing the motions out to the press without showing them to Barens, serving them on the deputy district attorney or filing them in court.

the defendant, reversal was not required if the conviction was based on overwhelming evidence of guilt. (See People v. Rigney, supra, 55 Cal.2d at pp. 241-244; People v. Williams (1962) 200 Cal.App.2d 838, 846-848; People v. Campbell (1958) 162 Cal.App.2d 776, 786-788; United States v. Poland (9th Cir. 1981) 659 F.2d 884, 892-894.) It is also true that "'"[w]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and evidence given during the trial of an action, it does not amount to . . . prejudice . . . ."' [Citation.]" (People v. Hamilton (1988) 45 Cal.3d 351, 378.)

Threading our way through the mixed messages contained in the foregoing cases, we return for guidance to the basic principle contained in the California Constitution, article VI, section 13 which requires us to determine whether the court's conduct caused a miscarriage of justice. With that standard to guide us, we begin by repeating that in our opinion, notwithstanding all of the evidence indicating that Levin merely disappeared of his own accord, we have found the jury's verdict is supported by overwhelming evidence that that was not the case. That defendant had the motive, the opportunity, the enterprise, the philosophy and the tools to kill Levin is corroborated by defendant's multiple admissions of responsibility for Levin's murder. In short, the evidence of defendant's guilt was overwhelming.

With the strong evidence of defendant's guilt in mind, we turn to the court's examination of the witnesses. It was extensive and rarely elicited responses which helped the defense. However, in our view, the court's questioning was unnecessary and harmless when compared with the totality of the evidence elicited through the professional and thoroughly competent manner in which the case was handled by the deputy district attorney. We find the court's questioning of witnesses did not lead to a miscarriage of justice. (People v. Harbolt (1988) 206 Cal.App.3d 140, 157-158; cf. People v. Rigney, supra, 55 Cal.2d at pp. 241-244; People v. Campbell, supra, 162 Cal.App.2d at pp. 786-788.)

Chier's inability to accept the court's rulings without continued argument or sarcasm triggered the court's vitriolic comments to him. Nevertheless, we do not approve or condone the court's remarks. There are more appropriate ways to handle abrasive attorneys than to respond in kind, because to do so is usually prejudicial to a defendant. But, in this case, we are not persuaded that the court's remarks interfered with the jury's proper fact finding process. Defendant was represented before the jury by a courteous, competent attorney who was held in high esteem by the judge. Furthermore, there are no implications in the record that the judge was biased or prejudiced against the defendant as an individual or as a member of a cognizable group; the judge at all times treated

defendant with courtesy and respect. (Cf. In re Marriage of Iverson (1992) 11 Cal.App.4th 1495 [court employed gender-based stereotypes in its decisionmaking process].) We cannot assume that the jury was incapable of evaluating the evidence in this case without regard to the interactions between the judge and attorneys. (People v. Fusaro, supra, 18 Cal.App.3d at pp. 887-891; (People v. Denton (1947) 78 Cal.App.2d 540, 548-550; People v. Knight (1941) 44 Cal.App.2d 894-898; United States v. Poland, supra, 659 F.2d at pp. 892-894.)

In fact, in addition to the standard jury instruction requiring the jury not to take its cue from the judge's questions or rulings (CALJIC No. 17.30), the jury was explicitly instructed "to disregard any verbal exchanges between counsel and the court or any differences among [them] on rulings made by the court." The jury was further instructed that "[t]he decision as to the guilt or innocence of the defendant is to be decided solely by you on the evidence received and on the court's instructions. [The court] express[es] no opinion as to the guilt or innocence of the defendant." We presume the jurors were intelligent people who followed the court's instructions. (People v. Phillips, supra, 41 Cal.3d at p. 58.)

Ultimately, in our view no miscarriage of justice, as defined under state constitutional standards, occurred in this case. (People v. Watson, supra, 46 Cal.2d at p. 836.)

Defendant's trial was not perfect. No trial is. But perfection is not required, only fairness. (Delaware v. Van Arnsdall, supra, 475 U.S. at p. 681.) As stated in Chapman v. California, supra, 386 U.S. at page 22 "judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" We do not find that what errors or defects occurred in this case affected the substantial right of defendant or contributed to his conviction.

IV. DISPOSITION

The judgment is affirmed.

BARON, J.*

We concur:

ARMSTRONG, Acting P.J.

GODOY PEREZ, J.

*Assigned by the Chairperson of the Judicial Council.

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THE COURT: IT IS HERE.

MR. BARENS: WE ARE LOOKING AT IT.

THE COURT: THAT IS ALL RIGHT, I WILL SEE IT LATER.

MR. BARENS: MAY I JUST STEP OUT THE DOOR ONE MINUTE, YOUR HONOR?

THE COURT: YES.

(FURTHER PAUSE IN PROCEEDINGS.)

MR. WAPNER: JEFF RAYMOND.

JEFFREY DAVID RAYMOND,

CALLED AS A WITNESS BY THE PEOPLE, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: IF YOU WOULD RAISE YOUR RIGHT HAND TO BE SWORN, PLEASE.

YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: IF YOU WOULD BE SEATED THERE AT THE WITNESS STAND. NOW IF YOU WOULD STATE YOUR NAME FOR THE RECORD, PLEASE.

THE WITNESS: THE FULL NAME?

THE CLERK: YES, PLEASE.

THE WITNESS: JEFFREY DAVID RAYMOND.

THE COURT: JEFFREY WHAT?

THE WITNESS: DAVID RAYMOND.

THE COURT: RAYMOND, ALL RIGHT.

DIRECT EXAMINATION

BY MR. WAPNER:

Q MR. RAYMOND, DO YOU KNOW SOMEBODY -- FIRST OF ALL, DO YOU KNOW THE DEFENDANT IN THIS CASE?

A YES, I DO.

Q HOW DO YOU KNOW HIM?

A I HAVE KNOWN HIM FOR A COUPLE OF YEARS.

Q YOU HAVE TO KEEP YOUR VOICE UP SO THIS LADY IN THE WHITE SWEATER BACK HERE CAN HEAR YOU.

THE COURT: HE ASKED HOW YOU KNOW HIM.

THE WITNESS: THROUGH BUSINESS, SOCIALLY.

Q BY MR. WAPNER: HOW DID YOU FIRST MEET HIM?

A I MET HIM THROUGH DAVE MAY.

Q WHO IS DAVID MAY?

A A FRIEND OF MINE FROM ORANGE COAST COLLEGE.

Q WHEN DID YOU FIRST MEET DAVID MAY?

A I BELIEVE IT WAS IN '79 AT ORANGE COAST COLLEGE.

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Q AND AT SOME TIME, DID DAVID MAY MENTION TO YOU SOMETHING ABOUT THE DEFENDANT IN THIS CASE?

A THAT WOULD HAVE BEEN IN THE SUMMER OF 1983 OR THE SPRING OF 1983.

Q SPRING AND SUMMER OF 1983?

A CORRECT.

Q WHAT DID HE TELL YOU?

MR. BARENS: OBJECTION, HEARSAY, YOUR HONOR.

THE COURT: OVERRULED.

MR. BARENS: THANK YOU, YOUR HONOR.

THE WITNESS: HE TOLD ME THAT HE WENT TO SCHOOL WITH JOE HUNT AND THAT HE WAS INVESTING MONEY WITH HIM AND WAS DOING QUITE WELL.

Q BY MR. WAPNER: WHEN YOU SAY DOING QUITE WELL, WHERE -- FIRST OF ALL, WHAT WAS THE NATURE OF YOUR FRIENDSHIP WITH DAVID MAY?

A SOCIALLY.

Q WERE YOU CLOSE FRIENDS?

A HE WAS MY BEST FRIEND AT THE TIME.

Q WHEN HE WOULD TELL YOU THESE THINGS, WAS THAT WHEN YOU GOT TOGETHER WITH HIM SOCIALLY?

A YES.

Q WHAT DID HE SAY?

A JUST KIND OF -- I WENT TO ARIZONA STATE AND WE WERE GOING OUR SEPARATE WAYS. IT WAS JUST KIND OF, WHAT ARE YOU DOING AND WHAT I AM DOING AND HE WOULD TALK ABOUT THESE MEETINGS WITH HIS NEW GROUP OF INVESTORS AND ALL THIS MONEY THAT HE WAS MAKING IN THE COMMODITIES MARKET.

Q DO YOU KNOW HOW MUCH IT COST OVERTIME TO BUILD THE ONE CYCLATRON THAT YOU BUILT?

A WE SPENT ABOUT $50,000 ON MATERIALS AND PARTS.

Q DID YOU SIGN THE CHECKS TO BUY THOSE?

A DAVE AND I DID MOST OF THEM.

Q DO YOU KNOW WHERE THE MONEY CAME FROM TO GO INTO THE ACCOUNT TO SIGN THE CHECKS?

A WHEN WE NEEDED MONEY, WE WOULD SUBMIT A BUDGET TO THE OFFICES ON 3RD STREET AND IF IT WAS APPROVED, THEN EITHER BEN DOSTI OR JOE HUNT WOULD TRANSFER MONEY INTO THE CYCLATRON ACCOUNT.

Q DO YOU KNOW WHERE THEY GOT THE MONEY FROM?

A I WAS UNDER THE IMPRESSION THE MONEY CAME FROM PROFITS FROM THE COMMODITIES MARKET, TRADING.

Q WHEN YOU WERE WORKING THERE, DID YOU GET PAID?

A NO.

Q HOW DID YOU SUSTAIN YOURSELF?

A MY -- I DIDN'T PAY RENT. I WAS LIVING FOR FREE FOR RENT AND I GOT MONEY FROM MY PARENTS OR SOMETIMES, JOE WOULD GIVE US SOME MONEY.

Q CAN YOU EXPLAIN WHAT YOU MEAN WHEN YOU SAY "SOMETIMES JOE WOULD GIVE US SOME MONEY"?

A WELL, JOE USUALLY HAD A LOT OF MONEY IN HIS WALLET WHEN HE WOULD GO OUT AND HE WOULD GIVE OUT A HUNDRED-DOLLAR BILL OR SO TO SOMEONE.

Q WHAT DO YOU MEAN WHEN YOU SAY HE USUALLY HAD A LOT OF MONEY IN HIS WALLET?

A I MEAN EVERY TIME I SAW HIM, HE HAD HUNDREDS OF

DOLLARS IN HIS WALLET.

Q EVERY TIME THAT YOU SAW HIM?

A I WOULD SAY 90 PERCENT.

Q DID YOU PAY RENT AT THE WILSHIRE MANNING?

A NO.

Q DID THE BBC HAVE JUST THAT ONE APARTMENT AT THE WILSHIRE MANNING?

A BEN DOSTI RENTED ONE BELOW, TWO FLOORS DOWN OR ONE FLOOR DOWN.

Q HOW MANY PEOPLE LIVED DOWN THERE BESIDES BEN DOSTI?

A ONE OTHER, STEVE, I DON'T RECALL STEVE'S -- I CAN'T RECALL HIS LAST NAME.

Q LOPEZ?

A YES, THAT'S RIGHT.

Q AND YOU MOVED INTO THE WILSHIRE MANNING IN FEBRUARY?

A YES.

Q DO YOU RECALL WHEN IT WAS THAT JOE HUNT MOVED IN THERE?

A NO, I DON'T.

Q WAS IT BEFORE YOU?

A YES.

Q AND DURING THE TIME WHEN -- IN THE SUMMER OF 1983 WHEN YOU WERE IN AND OUT OF THE OFFICES ON 3RD STREET, DID JOE HUNT EVER TALK TO YOU ABOUT COMMODITIES OR TALK TO YOU ABOUT TRADING COMMODITIES?

A YES, HE DID.

Q DID HE EVER MENTION ANYTHING TO YOU ABOUT A PERSON NAMED RON LEVIN?

A YES, HE DID.

Q AND WHAT DID HE SAY?

A THE FIRST TIME I HEARD RON LEVIN'S NAME WAS WHEN JOE WAS TALKING ABOUT AN INVESTOR HE WANTED -- A WEALTHY PERSON HE WANTED TO INVEST IN THE MARKET AND HE WAS TRYING TO PERSUADE RON LEVIN TO INVEST MONEY WITH HIM.

Q AND WHAT DID HE SAY IN THAT REGARD?

DID HE TELL YOU WHO RON LEVIN WAS?

A I WAS -- AT FIRST, HE WAS EXTREMELY WEALTHY. LATER ON I WAS TOLD THAT HE WAS THE HEIR TO THE THRIFTY FAMILY.

Q WHO TOLD YOU THAT?

A JOE HUNT.

Q THAT WOULD BE THRIFTY DRUG STORE?

A YES.

Q DO YOU REMEMBER WHEN HE TOLD YOU THAT?

A NOT EXACTLY, NO.

Q AND DID JOE HUNT TELL YOU THAT HE WAS DOING ANYTHING IN TERMS OF TRADING COMMODITIES FOR --

A FOR RON LEVIN?

Q FOR RON LEVIN, YES.

Q YES, HE DID.

Q WHAT DID HE SAY?

A WELL, AFTER TIME, HE CONVINCED RON LEVIN TO INVEST, I THINK, SIX OR SEVEN MILLION DOLLARS WITH HIM.

Q AND DID JOE HUNT TELL YOU WHAT THE UNDERSTANDING

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WAS IN TERMS OF HOW THE PROFITS WOULD BE SHARED, IF THERE WERE ANY PROFITS?

A ON ALL COMMODITIES INVESTMENTS, JOE WAS TO RECEIVE 50 PERCENT OF THE PROFIT.

Q WHEN YOU SAY ALL COMMODITY INVESTMENTS, THAT HAS TO DO WITH OTHER INVESTORS ALSO?

A HE WAS INVESTING DAVE AND TOM'S MONEY AT THE TIME AND SOME OTHER INVESTORS I DIDN'T KNOW.

Q TOM AND DAVE MAY INVESTED MONEY WITH HIM?

A YES.

Q DID YOU SEE PEOPLE COMING TO THE OFFICES ON 3RD STREET TO INVEST MONEY DURING THAT TIME?

A NOT THAT I RECALL.

Q HOW OFTEN WERE YOU AT THE 3RD STREET OFFICES DURING THE SUMMER OF 1983?

A I WOULD SAY I WAS THERE ABOUT HALF OF THE TIME.

MR. WAPNER: YOUR HONOR, MAY WE APPROACH THE BENCH BRIEFLY?

THE COURT: YES.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MR. WAPNER: CAN I ASK YOU IF WE CAN JUST BREAK AT THIS TIME? THERE ARE SOME THINGS I WANT TO DISCUSS WITH THIS WITNESS. I KNOW WE HAVE GOT ANOTHER TEN MINUTES BUT IF IT IS ALL RIGHT WITH THE COURT, I WOULD APPRECIATE THAT.

THE COURT: THAT IS ALL RIGHT. ANY OBJECTION?

MR. BARENS: ACTUALLY, YOUR HONOR, I WANTED TO GO HOME WHEN HE BROUGHT UP THE SEVEN PAGES. THANK YOU, YOUR HONOR.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: LADIES AND GENTLEMEN OF THE JURY, I THINK ALTHOUGH NORMALLY WE ADJOURN AT 4:30, THERE ARE SOME THINGS THAT HAVE TO BE TAKEN UP OUTSIDE OF THE PRESENCE OF THE JURY SO I WILL ASK YOU TO COME BACK TOMORROW MORNING AT THE USUAL TIME OF 10:30 IN THE JURY ASSEMBLY ROOM AND WHEN WE ARE READY FOR YOU, WE WILL ASK YOU TO COME IN.

GOOD NIGHT. AND THE SAME ADMONITION I GAVE YOU WOULD STILL APPLY.

(AT 4:20 P.M. AN ADJOURNMENT WAS TAKEN UNTIL THURSDAY, FEBRUARY 19, 1987, AT 10:30 A.M.)

SANTA MONICA, CALIFORNIA; THURSDAY, FEBRUARY 19, 1987; 10:40 A.M.
DEPARTMENT WEST C HON. LAURENCE J. RITTENBAND, JUDGE
(APPEARANCES AS NOTED ON TITLE PAGE.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.
YOU MAY PROCEED.
MR. WAPNER: THANK YOU, YOUR HONOR.

JEFFREY DAVID RAYMOND,
CALLED AS A WITNESS BY THE PEOPLE, HAVING BEEN PREVIOUSLY SWORN, TESTIFIED FURTHER AS FOLLOWS:
THE CLERK: EXCUSE ME JUST ONE SECOND.
YOU HAVE PREVIOUSLY BEEN SWORN. YOU ARE STILL UNDER OATH.
IF YOU WOULD JUST STATE YOUR NAME AGAIN FOR THE RECORD.
THE WITNESS: JEFFREY DAVID RAYMOND.

DIRECT EXAMINATION (RESUMED)
BY MR. WAPNER:
Q MR. RAYMOND, I BELIEVE WE LEFT OFF IN THE SPRING AND SUMMER OF 1983.
BEFORE YOU EVEN GOT INVOLVED IN THE BBC, YOU WERE AWARE THAT DAVE MAY HAD INVESTED SOME MONEY WITH JOE HUNT?
A YES.
Q AND HAD TOM MAY ALSO INVESTED SOME MONEY WITH JOE HUNT?
A I BELIEVE HE INVESTED A LITTLE BIT LATER BUT HE

ENDED UP INVESTING, TOO.

Q DO YOU KNOW WHAT FORM THAT INVESTMENT TOOK, WHAT IT WAS INVESTED IN?

A FINANCIAL FUTURES.

Q AND DURING THE SPRING AND SUMMER OF 1983, DID YOU BECOME AWARE OF AN ASSOCIATION THAT JOE HUNT HAD WITH SOMEONE NAMED RON LEVIN?

A LATER IN THE SUMMER I DID, YES.

Q HOW DID YOU HEAR ABOUT THAT?

A JOE WAS TALKING ABOUT THIS PERSON THAT HE MET THROUGH A FRIEND THAT HAD A LOT OF MONEY.

MR. BARENS: YOUR HONOR, COULD WE HAVE A HEARSAY OBJECTION, CONTINUING IN NATURE?

THE COURT: YES.

MR. BARENS: THANK YOU, YOUR HONOR.

THE COURT: GO AHEAD.

THE WITNESS: OKAY. THAT HE WAS TRYING TO GET HIM TO INVEST INTO THE COMMODITIES MARKET.

Q BY MR. WAPNER: DID HE SAY WHAT HE WAS DOING IN THAT REGARD?

A WELL, FIRST HE WAS MEETING SOCIALLY, TAKING HIM OUT TO DINNER AND SO FORTH, TRYING TO GET HIM TO INVEST A LOT OF MONEY WITH HIM.

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Q AND WHAT HAPPENED AFTER THAT?

A WELL, EVENTUALLY, RON LEVIN DID INVEST SOME MONEY WITH JOE.

Q HOW DID YOU FIND THAT OUT?

A FIRST I HEARD IT FROM TOM MAY. THEN LATER ON, JOE TALKED ABOUT IT AND BEN DOSTI.

Q DO YOU KNOW HOW MUCH MONEY?

A I WAS TOLD THE AMOUNT WAS ABOUT SIX OR SEVEN MILLION DOLLARS.

Q WHAT ARRANGEMENT DID YOU KNOW, DID JOE HUNT HAVE WITH THE PEOPLE -- WITH THE PEOPLE WHO INVESTED MONEY WITH THEM?

A HE WAS TO SHARE 50 PERCENT OF THE PROFITS FROM THE INVESTMENT.

Q WAS THAT THE ARRANGEMENT TO YOUR UNDERSTANDING, THAT HE HAD WITH ALL OF HIS INVESTORS?

A YES.

Q DURING THE SPRING AND EARLY SUMMER OF 1983, HOW DID THINGS APPEAR TO BE GOING AT THE OFFICES OF THE BBC?

A WELL, FINANCIAL FUTURES WERE DOING REALLY WELL.

Q HOW DO YOU KNOW THAT?

A JOE AND BEN WOULD ALWAYS BE CELEBRATING. THEY WOULD SAY THEY MADE $100,000 ONE DAY. I SAW JOE DO A SOMERSAULT IN THE OFFICE, ONCE.

Q DO YOU WANT TO TELL US ABOUT THAT?

A HE JUST DID A FLIP AFTER THE MARKET CLOSED BECAUSE HE MADE A LOT OF MONEY THAT DAY.

Q HE ACTUALLY DID A SOMERSAULT?

A YES.

Q WHAT ELSE HAPPENED TO INDICATE TO YOU THAT THEY WERE MAKING A LOT OF MONEY?

A JOE, BEN AND DEAN STARTING BUYING NICER CLOTHES. THEY SPENT A LOT MORE MONEY. THEY WERE LOOKING INTO BUYING AN EXPENSIVE APARTMENT.

THEY JUST HAD A LOT MORE CASH IN THEIR WALLETS. IT LOOKED LIKE THERE WAS A LOT MORE MONEY AROUND.

Q HOW MUCH OF THAT FLOWED DOWN TO YOU AT THAT POINT?

A NONE.

Q OR ANYBODY ELSE?

A NONE.

Q WHAT INDICATIONS DID YOU HAVE THINGS WERE GOING WELL?

A WELL, JOE HIMSELF, WAS STATING HOW MUCH MONEY HE WAS MAKING IN THE MARKET.

Q WHAT DID HE SAY?

A EVERY DAY HE WOULD SAY, "WE MADE $40,000," OR THAT THEY MADE A HUNDRED THOUSAND DOLLARS OR THEY WOULD ALWAYS REPORT PROFITS EVERY DAY.

Q AND WHAT ELSE WAS GOING ON AT THE OFFICES?

A WE WERE ALSO TRYING TO START UP SOME COMPANIES. THE CYCLATRONICS, WE WERE LOOKING FOR A WAREHOUSE SITE TO BUILD IT. AND THERE WAS A FIRE SAFETY COMPANY WHICH HIS FATHER WAS TRYING TO GET FUNDED.

Q WHOSE FATHER?

A JOE HUNT'S FATHER.

Q WHAT WAS THE FIRE SAFETY COMPANY ALL ABOUT?

A A FIRE RETARDANT THAT YOU SPRAYED ON WOOD SHINGLE ROOFS SO THAT IT WOULD MAKE IT FIRE PROOF.

Q DID THE COMPANY GET OFF THE GROUND?

A WE BOUGHT INVENTORY AND RAN INTO SOME PROBLEMS. THE FIRE MARSHAL DIDN'T APPROVE OF THE PRODUCT AFTER A WHILE.

Q WHAT ELSE WAS GOING ON IN TERMS OF THINGS AT THE OFFICES DURING THAT TIME?

A I WOULD SAY THAT THERE WERE A LOT OF MEMBERSHIPS. IT WAS SOCIAL, YOU KNOW, MORE PEOPLE GETTING INVOLVED. AND THEY HAD DIFFERENT IDEAS THEY WERE BRINGING TO THE OFFICES.

Q HOW MANY PEOPLE DID YOU HAVE ANY ESTIMATION OF, WERE INVOLVED DURING THAT TIME?

A JOE HUNT SAID THERE WAS THIRTY SOME MEMBERS AT THAT TIME. BUT I NEVER SAW MORE THAN MAYBE 15 OR 16.

Q AND WERE YOU DURING THAT TIME -- WHAT WERE YOU DOING?

A I WAS SPENDING TIME LOOKING FOR A LOCATION TO BUILD THE CYCLATRON.

Q AND AT SOME POINT, DID YOU BECOME AWARE THAT SOMETHING HAPPENED WITH THE MONEY, SOME OF THE COMMODITIES MONEY?

A LATER IN THE SUMER, THERE WAS -- I WAS IN THE OFFICE WITH DAVE AND TOM MAY AND JOE BROUGHT THEM INTO THE OFFICE AND ANNOUNCED TO THEM HE LOST ALL THEIR MONEY THAT HE WAS TRADING.

Q DO YOU REMEMBER WHEN THAT WAS APPROXIMATELY?
A NO, I DON'T.
Q AND WHAT DID JOE HUNT SAY?
A HE JUST SAID THAT HE WAS TRADING THEIR MONEY AND HE LOST IT ALL THAT DAY.
Q WHAT ELSE DID HE SAY AT THE TIME HE SAID HE LOST IT ALL?
A WELL, WHEN THEY ASKED FOR AN EXPLANATION -- THEY WERE UNDER THE IMPRESSION HE WAS TRADING SPREADS, WHICH YOU BUY AND SELL AT THE SAME TIME SO YOUR RISK IS MINIMAL -- BUT JOE SAID HE WENT TO OUTRIGHTS, WHICH IS UNLIMITED RISK AND SO ONE DAY THEY LOST ALL THEIR INVESTMENT SO THEY THOUGHT -- LET'S SEE --
Q LET ME STOP YOU FOR ONE SECOND.
A OKAY.
Q DO YOU WANT TO GO A LITTLE MORE SLOWLY AND EXPLAIN WHAT YOU MEAN BY A SPREAD?
A OKAY. A SPREAD IS WHEN YOU BUY -- BUY AND SELL SOMETHING AT THE SAME TIME, AT DIFFERENT TIMES, YOU CAN BUY A MARCH OPTION FOR A SECURITY AND THEN YOU SELL A JUNE OPTION AND HE WAS BETTING ON THE DIFFERENCE IN THE PRICE FLUCTUATIONS OVER TIME.
Q IS THAT A METHOD OF KIND OF HEDGING YOUR BETS SO YOU KIND OF COVER BOTH SIDES OF ONE POSITION SO IF ONE GOES UP AND THE OTHER GOES DOWN, YOU DON'T LOSE?
A YES, IT REDUCES IT DRAMATICALLY.
Q AT THE TIME THAT JOE HUNT WAS TELLING DAVID AND TOM MAY ABOUT LOSING THE MONEY, WHAT DID HE SAY WITH REGARD

TO HOW IT WAS LOST?

A WELL, HE SAID HE HAD THIS GREAT OPPORTUNITY FOR A -- HE KNEW THE MARKET WAS GOING TO GO UP AND HE BOUGHT AN OUTRIGHT, WHICH MEANS HE DIDN'T COVER THE OTHER END OF IT, HE JUST BOUGHT AN OUTRIGHT POSITION.

Q WHAT DID HE SAY HAPPENED?

A THAT THE MARKET HAD A DIP DOWN IN THE OTHER DIRECTION AND HIS MARGIN WAS WIPED OUT.

HE SAID THAT CANTOR-FITZGERALD TRIPLED THE MARGIN.

Q WHO IS CANTOR-FITZGERALD NOW?

A THE BROKERAGE HOUSE.

MR. BARENS: EXCUSE ME, YOUR HONOR. MIGHT WE APPROACH?

THE COURT: ALL RIGHT.

MR. BARENS: I WOULD NOT TAKE UP YOUR TIME IF IT WASN'T IMPORTANT.

THE COURT: YES, ALL RIGHT.

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH:)

MR. BARENS: YOUR HONOR, I AM CONCERNED ABOUT WHAT APPEARS TO BE HEARSAY EVIDENCE AND I WANT TO MAKE SURE --

THE COURT: HE IS RELATING A CONVERSATION HE HAD WITH JOE HUNT, THE DEFENDANT.

MR. BARENS: HE IS ALSO RELATING CONVERSATIONS AS TO WHAT THE MAYS SAID AND HE IS STARTING TO TALK ABOUT WHAT THE MAYS WERE THINKING, HE USED THAT EXPRESSION A MOMENT AGO.

I HAVE A SENSE, YOUR HONOR, THAT YOUR HONOR WOULD BE DISPOSED TO ALLOW, DURING THE WITNESSES TESTIMONY ANY STATEMENT MADE ABOUT JOE HUNT ABOUT ANYTHING. I DO WANT TO

CONTINUE MAKING HEARSAY OBJECTIONS.

THE COURT: I WILL SEE THAT YOU HAVE A CONTINUING OBJECTION TO ANY STATEMENT THAT IS MADE BY ANY WITNESS ABOUT WHAT JOE HUNT TOLD SOMEBODY ELSE, IS THAT WHAT YOU WANT?

MR. BARENS: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BARENS: HOW SHOULD WE HANDLE, YOUR HONOR, ABOUT HEARSAY STATEMENTS BY OTHER PERSONS THAN JOE HUNT?

YOUR HONOR, I DON'T WANT TO BELABOR WITH THESE HEARSAY OBJECTIONS ABOUT THIRD-PARTY STATEMENTS AND I DON'T WANT TO IRRITATE THE COURT BY MAKING THOSE OBJECTIONS.

I DON'T KNOW HOW TO HANDLE IT OTHERWISE.

THE COURT: YES?

MR. WAPNER: WELL, I DON'T KNOW WHY COUNSEL IS WORRIED ABOUT IRRITATING THE COURT, IF HE HAS AN OBJECTION TO MAKE HE SHOULD MAKE IT AND THEN THE COURT WILL RULE ON THE OBJECTION. THAT IS HOW WE DO THINGS.

MR. BARENS: ALL RIGHT.

THE COURT: WHAT IS YOUR ANSWER TO HIS CONTENTION THAT THESE ARE HEARSAY STATEMENTS?

MR. WAPNER: THE STATEMENTS THAT ARE MADE BY THE DEFENDANT ARE IN THE NATURE OF ADMISSIONS SO IF THEY ARE HEARSAY, THEY COME UNDER THE EXCEPTION TO THE HEARSAY RULE FOR A PARTY'S ADMISSIONS.

MR. BARENS: EXCUSE ME, YOUR HONOR.

THE COURT: I DON'T WANT TO MAKE ANY RULING IN ADVANCE.

WHAT I AM TELLING YOU NOW IS THAT YOUR OBJECTION TO THE STATEMENTS BEING MADE BY THIS WITNESS AS TO THE

CONVERSATIONS HAD WITH JOE HUNT ARE PERFECTLY PROPER AND I AM GOING TO OVERRULE YOUR OBJECTION.

MR. BARENS: COULD I JUST RESPOND TO ONE POINT, YOUR HONOR? WE DO NOT DEEM THESE ADMISSIONS IN ANY WAY BUT, RATHER, INADMISSIBLE CHARACTER EVIDENCE BECAUSE THERE ARE NO ADMISSIONS TO ANY CRIMINAL ACTIVITY BY THE STATEMENTS THAT ARE BEING ATTRIBUTED TO HUNT NOW BY DISCUSSING WHETHER HE HAD MADE MONEY IN THE MARKET IN 1983, SO I DON'T SEE IT AS AN ADMISSION IN ANY WAY TO ANY CRIMINAL ACTIVITY.

THE COURT: I DON'T THINK IT IS A QUESTION OF ADMISSIONS. I THINK IT IS A QUESTION OF THE OPERATION OF THIS ENTIRE ORGANIZATION, THE BBC, AND HE IS JUST TESTIFYING TO SOME ASPECTS OF IT. I WILL PERMIT IT TO GO IN.

MR. WAPNER: ALSO, JUST FOR THE RECORD, THE HEARSAY EXCEPTIONS FOR ADMISSIONS OF A PARTY DON'T HAVE ANYTHING TO DO WITH THE ADMISSION OF CRIMINAL ACTIVITY OR ADMISSION OF WRONGDOING.

THE COURT: I AGREE.

MR. BARENS: THANK YOU, YOUR HONOR.

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(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE AND HEARING OF THE JURY:)

MR. WAPNER: AT THE TIME THAT MR. HUNT WAS EXPLAINING TO DAVE AND TOM MAY ABOUT WHAT HAPPENED AT THE CANTOR-FITZGERALD BROKERAGE HOUSE, YOU MENTIONED SOMETHING ABOUT CANTOR-FITZGERALD TRIPLING THE MARGIN?

A YES.

Q WHAT DID HE SAY?

A HE SAID THAT HE WAS BLAMING THE BROKERAGE HOUSE FOR SELLING THE POSITION OUT.

THEY SOLD IT AUTOMATICALLY BECAUSE THE MARGIN WAS TRIPLED. THEY DIDN'T COVER THE MARGIN.

Q DO YOU KNOW WHAT THAT MEANS WHEN THEY SAY THAT THE MARGIN WAS TRIPLED?

A WELL, THERE IS A MINIMUM AMOUNT --

MR. BARENS: OBJECTION, NO FOUNDATION FOR KNOWLEDGE.

THE COURT: IF YOU KNOW, YOU CAN TELL US. GO AHEAD.

THE WITNESS: THERE WAS A MINIMUM AMOUNT REQUIRED TO KEEP IN YOUR ACCOUNT WHEN YOU ARE BORROWING MONEY OR IN CASE OF OPTIONS, YOU HAVE TO KEEP A MINIMUM AMOUNT TO COVER THE LOSSES, THE PARTICULAR LOSSES.

Q BY MR. WAPNER: AND DID JOE HUNT SAY WHAT HAPPENED TO THE POSITION?

A THE POSITION WENT DOWN AND THE BROKERAGE HOUSE SOLD OUT, SOLD IT AT A LOWER PRICE AND IT WAS TO BE WIPED OUT OF ALL OF THE CASH THEY HAD, PLUS MORE. SO THEY ACTUALLY OWED THE BROKERAGE HOUSE MORE MONEY.

Q DID JOE HUNT SEEM CONCERNED ABOUT THAT AT THE TIME?

A YES. HE WAS CONCERNED BUT HE OFFERED A SOLUTION.

Q WHAT WAS THE SOLUTION THAT HE OFFERED?

A HE TOLD THEM AT THE TIME THAT HE WAS ALSO TRADING RON LEVIN'S MONEY AND HAD THE SAME POSITION AND RON LEVIN WAS ABLE TO COVER HIS MARGIN OR THAT HE HAD ENOUGH CASH IN HIS ACCOUNT THAT IT WASN'T CALLED AND HE DOUBLED RON LEVIN'S MONEY AT THE SAME TIME.

Q DID HE SAY AT THAT TIME, HOW MUCH MONEY HE WAS ENTITLED TO BY DOUBLING RON LEVIN'S MONEY?

A THREE AND A HALF MILLION DOLLARS.

Q WHAT DID HE SAY TO THE MAY BROTHERS REGARDING GETTING THEM THEIR MONEY?

A HE WAS GOING TO PAY BACK -- HE WAS GOING TO GIVE THE MAYS THEIR MONEY THROUGH THE MONEY THAT HE EARNED THROUGH THE TRADING OF RON LEVIN'S MONEY.

Q AND DID YOU EVER HEAR JOE HUNT MAKE ANY STATEMENTS TO ANYBODY ELSE ABOUT MAKING MONEY FOR RON LEVIN?

A THERE WAS A BOARD MEETING WITH COGENCO, THE COMPANY WE MERGED WITH. WE MERGED THE TWO COMPANIES TOGETHER AND HE ANNOUNCED IN FRONT OF 100 PEOPLE -- HE WAS TALKING ABOUT THE COMMODITIES. HE SAID THAT HE WAS TRADING 13 MILLION DOLLARS AND THAT HE DOUBLED SOMEBODY'S -- I DON'T KNOW IF HE MENTIONED RON LEVIN'S NAME SPECIFICALLY BUT HE WAS REFERRING TO THAT ACCOUNT.

Q AND WAS COGENCO?

A IT WAS A COMPANY DOWN IN SAN CLEMENTE THAT WAS

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AN ENERGY COMPANY WE MERGED WITH.

Q JOE HUNT WAS TALKING TO THE SHAREHOLDERS OF THAT COMPANY?

A YES.

Q AT THAT TIME, WHAT DID HE SAY?

A THEY ASKED HIM TO DESCRIBE WHAT THE BBC WAS AND WHAT THEY DID AND HE WAS TALKING ABOUT HIS COMMODITIES TRADING AND HE BROUGHT UP THE ACCOUNT WITH LEVIN, SAYING THAT HE DOUBLED -- HE STARTED WITH 7 MILLION AND DOUBLED IT TO 14 MILLION.

Q TOWARD THE END OF THE YEAR IN 1983 -- WELL, DO YOU REMEMBER WHEN THAT MEETING WAS, THE BOARD OF DIRECTORS OR THE SHAREHOLDERS MEETING WITH COGENCO?

A NOVEMBER OR DECEMBER OF '83.

Q DID YOU DO ANYTHING WITH RESPECT TO THE COGENCO COMPANY?

A YES.

Q WHAT?

A WE WENT DOWN THERE TO AUDIT THE BOOKS AND TO LOOK -- AFTER THE MERGER, WE WENT THROUGH THE COMPANY AND WE LOOKED AT THE PATENTS THAT THEY HAD AND WE TRIED TO GO OVER THE BOOKS AND LOOK AT THE CASH FLOW AND TRIED TO SEE WHAT WAS GOING ON.

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Q WHEN YOU SAY "WE" WHO ARE YOU TALKING ABOUT?

A DAVE MAY AND MYSELF.

Q AND WHEN DID YOU DO THAT?

A NOVEMBER OR DECEMBER.

Q OF '83?

A YES.

Q THE COMPANY WAS LOCATED IN SAN CLEMENTE?

A SAN JUAN CAPISTRANO, I BELIEVE.

Q WHERE WERE YOU LIVING AT THAT TIME?

A ON BALBOA ISLAND. I LIVED WITH DAVE MAY ON BALBOA ISLAND.

Q AND DID YOU LIVE IN A HOUSE OR AN APARTMENT?

A IT WAS A RENTED HOUSE.

Q WHO PAID FOR THE RENT ON THAT HOUSE?

A THE BBC DID.

Q IT WAS ON THE BEACH?

A BAY FRONT.

Q AND HOW LONG DID YOU STAY IN THAT HOUSE?

A WE WERE THERE I THINK, THREE MONTHS OR TWO MONTHS.

Q AND WHEN YOU LEFT THAT HOUSE, WHERE DID YOU GO?

A MOVED BACK UP TO L.A.

Q WHERE DID YOU MOVE?

A I MOVED INTO DAVE'S APARTMENT UNTIL FEBRUARY. THEN I MOVED INTO THE MANNING.

MR. WAPNER: MAY I HAVE A MOMENT?

THE COURT: THE MANNING? YOU MEAN THE WILSHIRE MANNING?

THE WITNESS: YES.

Q BY MR. WAPNER: WHEN WAS IT THAT YOU MOVED INTO THE WILSHIRE MANNING?

A FEBRUARY.

Q HOW DID YOU COME TO MOVE INTO THE MANNING?

A THERE WAS A THIRD ROOMMATE, I DON'T RECALL HIS NAME NOW, BUT HE MOVED OUT AND THERE WAS AN EMPTY ROOM AND JOE ASKED ME TO MOVE IN.

Q JOE HAD ASKED YOU TO MOVE IN?

A YES.

Q AND DID YOU DO THAT?

A YES.

Q AND WHEN YOU MOVED INTO THE MANNING, WHAT WERE YOU DOING IN TERMS OF WORK?

A AT THE TIME WE WERE -- WE HAD RENTED THE WAREHOUSE DOWN IN GARDENA AND WE WERE STARTING TO BUILD THE CYCLATRON.

Q AT THE TIME THAT YOU --

YOUR HONOR, I HAVE TWO PHOTOGRAPHS WHICH I WOULD LIKE TO HAVE MARKED COLLECTIVELY AS 183 FOR IDENTIFICATION; ONE APPEARS TO BE A PICTURE OF AN APARTMENT BUILDING AND THE OTHER APPEARS TO BE THE PICTURE OF THAT SAME BUILDING.

THE COURT: 183, THEY WILL BE SO MARKED.

Q BY MR. WAPNER: MR. RAYMOND, SHOWING YOU THESE TWO PHOTOGRAPHS THAT ARE MARKED 183 FOR IDENTIFICATION, DO YOU RECOGNIZE THOSE?

A YES.

Q WHAT ARE THEY?

A THAT IS THE WILSHIRE MANNING.

Q AND WHAT FLOOR OF THAT APARTMENT BUILDING DID

YOU LIVE ON?

A THE 15TH.

Q WAS THAT AN APARTMENT BUILDING OR CONDOMINIUM COMPLEX?

A THEY WERE CONDOS BUT YOU COULD RENT THEM OUT, TOO.

Q WAS THE BBC RENTING THE ONE THAT YOU LIVED IN?

A YES.

Q WHAT WAS THE NUMBER OF THE UNIT THAT YOU LIVED IN?

A 1505.

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Q AFTER YOU MOVED INTO THE MANNING, DO YOU EVER REMEMBER SEEING A PERSON DEPICTED IN THIS PHOTOGRAPH THAT IS PEOPLE'S 175?

A YES.

Q AND WHEN DID YOU FIRST SEE OR MEET THIS PERSON?

A I BELIEVE I MET HIM AROUND DECEMBER WHEN JOE -- WHEN THEY FIRST MOVED IN THE MANNING, IT WAS NOVEMBER, DECEMBER, AND JOE BROUGHT HIM TO THE THIRD STREET OFFICES AND INTRODUCED HIM TO EVERYONE THERE.

Q SO THAT WAS ACTUALLY BEFORE YOU MOVED IN?

A YES.

Q HOW WAS HE INTRODUCED TO YOU, BY WHAT NAME?

A JIM GRAHAM.

Q WAS THAT THE NAME THAT YOU ALWAYS KNEW HIM BY?

A YES.

THE COURT: GRAHAM, IS THAT G-R-A-H-A-M?

THE WITNESS: YES.

Q BY MR. WAPNER: AND WHEN YOU WERE INTRODUCED TO HIM BY JOE HUNT, WHAT DID JOE SAY?

A HE JUST INTRODUCED HIM BY HIS NAME AND SAID THAT HE WAS A SECURITY GUARD AT THE MANNING, I BELIEVE.

Q AND FROM THE TIME THAT YOU FIRST MET HIM, WHAT CONTACT DID YOU HAVE WITH HIM AFTER THAT?

A WELL, AT FIRST I DIDN'T SEE HIM VERY MUCH AND THEN AROUND -- WHEN I MOVED IN, HE WOULD COME OVER TO THE MANNING AND TEACH HIM KARATE LESSONS.

Q WHEN YOU MOVED INTO THE MANNING, WHAT WAS MR. GRAHAM -- WAS MR. GRAHAM STILL WORKING THERE?

A NO.

HE STARTED WORKING FOR THE BBC.

Q WHEN DID HE START TO WORK FOR THE BBC?

A I BELIEVE AROUND THE BEGINNING OF THE YEAR.

Q OF 1984?

A YES.

Q WHAT DID HE DO FOR THE BBC?

A HE WAS TO HELP US WITH IMPORTING CARS.

Q AND DID THE BBC HAVE A COMPANY FOR THAT PURPOSE?

A YES, WESTCARS, INC., OR SOMETHING LIKE THAT.

Q AND YOU MENTIONED THAT MR. GRAHAM CAME OVER TO GIVE KARATE LESSONS?

A YES.

Q WHERE DID HE COME?

A TO THE WILSHIRE MANNING.

Q WHAT PART OF THE BUILDING?

A IN OUR LIVING ROOM. WE HAD A BLUE DUMMY THAT THEY WOULD PRACTICE ON IN THE LIVING ROOM.

Q WHOM DID HE GIVE KARATE LESSONS TO?

MR. BARENS: WE HAVE AN OBJECTION AS TO RELEVANCY IN THIS AREA.

THE COURT: OVERRULED.

MR. BARENS: THANK YOU, YOUR HONOR.

Q BY MR. WAPNER: WHO DID HE GIVE KARATE LESSONS TO?

A JOE HUNT, DEAN KARNY; TOM MAY, I THINK, TOOK SOME.

Q UP UNTIL THE TIME YOU SAW JOE HUNT TAKING KARATE LESSONS, HAD YOU EVER SEEN HIM DO ANY KIND OF PHYSICAL

ACTIVITY OR EXERCISE OR ANYTHING?

A NO.

Q DID YOU EVER SEE HIM DO ANY OTHER KINDS OF PHYSICAL ACTIVITY OR EXERCISES BESIDES THE KARATE LESSONS?

A NO.

Q AND HOW OFTEN WOULD MR. GRAHAM GIVE JOE HUNT AND DEAN KARNY THESE KARATE LESSONS?

A A FEW TIMES A WEEK.

Q HOW LONG DID THAT GO ON?

A FOR A FEW MONTHS.

Q BEFORE THE PERSON YOU KNEW AS MR. GRAHAM CAME ON THE SCENE AT THE BBC, HAD YOU SEEN ANY WEAPONS OF ANY TYPE ASSOCIATED WITH THE BBC?

A NO.

Q DID YOU SEE ANY CLANDESTINE-TYPE TAPE RECORDERS OR ANYTHING LIKE THAT BEFORE MR. GRAHAM CAME ON THE SCENE?

A NO.

Q AND AFTER YOU HAD BEEN INTRODUCED TO MR. GRAHAM, DID YOU EVER SEE ANY -- DID YOU SEE MR. GRAHAM IN POSSESSION OF ANY WEAPONS?

A YES.

Q WHAT KIND?

A HE -- HE HAD A DERRINGER STRAPPED TO HIS ANKLE THAT HAD FOUR BARRELS ON IT AND HE HAD A PEN GUN THAT HE SHOWED US.

Q CAN YOU DESCRIBE WHAT YOU MEAN BY A PEN GUN.

A IT LOOKED LIKE A REAL FAT BALL-POINT PEN AND HE SAID IT LOOKS LIKE A TOY BUT IT WAS A GUN.

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Q DID YOU EVER SEE HIM SHOOT IT?

A NO.

Q WHAT ABOUT THE OTHER GUN THAT YOU SAY HE HAD STRAPPED TO HIS ANKLE? DID YOU EVER SEE HIM SHOOT THAT?

A NO.

Q DID YOU SEE HIM SHOOT ANY GUN?

A YES. HE HAD A SMALL, BLACK, AUTOMATIC GUN THAT I SAW HIM SHOOT.

Q WHERE DID YOU SEE HIM SHOOT THAT?

A AT THE WAREHOUSE IN GARDENA.

Q DO YOU KNOW ANYTHING ABOUT GUNS?

A VERY LITTLE.

Q DID YOU EVER SEE THE GUN CLOSE UP?

A YES.

Q DO YOU KNOW WHAT CALIBER IT WAS?

A NO.

MR. BARENS: WE HAVE AN OBJECTION, 1100 AND 352, TO THE GUN TESTIMONY.

THE COURT: OVERRULED.

MR. BARENS: THANK YOU. FOR THE RECORD, YOUR HONOR.

THE COURT: YES.

Q BY MR. WAPNER: AND DURING THE TIME THAT -- WELL, LET ME PHRASE THE QUESTION THIS WAY.

WERE YOU EVER PRESENT AT THE WILSHIRE MANNING WHEN A PHONE CALL CAME IN THAT YOU THOUGHT WAS SOMEWHAT UNUSUAL?

A YES.

Q WHEN WAS THAT?

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A PROBABLY AROUND MAY OR JUNE OF 1984.

Q AND WHAT HAPPENED?

A JIM'S WIFE CALLED AND ASKED FOR --

MR. BARENS: OBJECTION TO THE TESTIMONY ABOUT WHAT WE ARE GOING TO HEAR ABOUT WHAT JIM'S WIFE SAID ON A PHONE CALL.

THE COURT: OVERRULED.

MR. BARENS: THANK YOU, YOUR HONOR.

THE WITNESS: JIM'S WIFE ASKED FOR JOE. JOE WAS NOT THERE.

SHE GAVE ME A MESSAGE TO TELL HIM WHEN HE GOT IN. IT WAS LIKE, "TELL HIM, GREEN, BLUE, RED."

Q BY MR. WAPNER: ALL RIGHT.

A SHE SAID TO TELL HIM WHATEVER THAT MEANS.

Q DID JOE HUNT COME IN AT SOME POINT LATER?

A YES.

Q WHAT DID YOU DO?

A I TOLD HIM THE MESSAGE.

Q WHAT DID HE DO?

A HE GRABBED HIS COAT AND RAN OUT OF THE HOUSE AS FAST AS HE COULD AND TOOK OFF.

Q DID YOU SEE HIM AGAIN?

A YES. HE SHOWED UP AT THE MANNING WITH JIM ABOUT HALF AN HOUR LATER.

THE COURT: BY JIM, WHO DO YOU MEAN?

THE WITNESS: JIM GRAHAM.

Q BY MR. WAPNER: WHAT HAPPENED WHEN THEY CAME BACK?

A JIM WAS LAUGHING ABOUT IT. I OVERHEARD HIM SAYING THAT IT TOOK 17.7 SECONDS, THE TIME. I GOT THE IMPRESSION

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THAT THEY HAD SOME SECRET CODE AND RENDEZVOUS SET UP AND JIM WAS TESTING JOE.

MR. BARENS: YOUR HONOR, I OBJECT TO THAT. I MAKE A MOTION TO STRIKE.

THE COURT: OVERRULED. THE MOTION TO STRIKE IS DENIED.

MR. BARENS: THANK YOU.

Q BY MR. WAPNER: AND I WANT YOU TO CONTINUE NOW WITH WHAT HAPPENED. DID YOU EVER SEE ANY OF THE MONEY FROM -- OR ANY EVIDENCE OF THE MONEY THAT JOE HAD CLAIMED THAT HE HAD OBTAINED FROM RON LEVIN?

A NO.

Q DID JOE HUNT EVER MAKE ANY STATEMENTS TO YOU ABOUT THAT?

A ABOUT THE ACTUAL CASH OR THE TRADING OF THE ACCOUNT?

Q EITHER.

A I SAW THE -- HE NEVER RECEIVED THE MONEY FROM RON LEVIN.

Q HOW DO YOU KNOW THAT?

A WELL, IT TOOK SEVERAL MONTHS TO FIGURE THAT OUT. AT FIRST, AFTER --

Q WELL, WHAT IS THE FIRST THING THAT HAPPENED?

A WELL, THERE WAS A MEETING THAT I DIDN'T ATTEND, WHERE HE WAS SUPPOSED TO DIVVY UP THE PROFITS FROM THE RON LEVIN TRADING, THE THREE AND A HALF MILLION DOLLARS.

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Q AFTER THAT, WHAT?

A WELL, I ASKED DAVE AND TOM WHAT AMOUNT THEY WERE TO GET AND THEY -- I DON'T RECALL THE NUMBER NOW. BUT THEY

ENDED UP NEVER GETTING IT.

Q WHAT HAPPENED AFTER THAT?

A WELL FIRST, THEY WERE TO RECEIVE CASH. THEN THERE WAS A SHOPPING CENTER THEY SAID THEY WERE GOING TO --

MR. BARENS: OBJECTION.

THE COURT: WE'LL HAVE A CONTINUING OBJECTION SO THAT YOU DON'T HAVE TO INTERRUPT THE TESTIMONY AS TO ANY CONVERSATIONS THAT HE HAD WITH ANYBODY BUT JOE HUNT. ALL RIGHT?

MR. BARENS: YOUR HONOR, FOR THE RECORD, MY OBJECTION SPECIFICALLY IS FOR HEARSAY STATEMENTS OF PARTIES -- IN OTHER WORDS, TESTIMONY OF PARTIES OTHER THAN MR. HUNT AS BEING REFERENCED THAT THE COURT IS PERMITTING.

WE HAVE A SPECIFIC HEARSAY OBJECTION TO EACH AND EVERY STATEMENT OF EACH AND EVERY PERSON IDENTIFIED, AS THOUGH THE OBJECTION WAS MADE AT THAT PARTICULAR TIME DURING THE PROCEEDINGS.

THE COURT: ALL RIGHT.

MR. BARENS: THANK YOU.

THE COURT: GO AHEAD.

Q BY MR. WAPNER: ALL RIGHT. WERE YOU TOLD BY DAVE AND TOM MAY OF THIS MEETING WHERE THEY WERE SUPPOSED TO DIVVY UP THE PROFITS?

A WELL, WAS I TOLD ABOUT THE MEETING?

Q YES.

A YES.

Q AND HOW DID YOU FIND OUT ABOUT THIS SHOPPING CENTER?

A LATER ON, TOM SAID THAT -- TOM TOLD ME THAT LEVIN WAS NOT GIVING UP THE CASH, THAT HE INSTEAD, INVESTED IT IN THE SHOPPING CENTER. HE WAS TO RECEIVE A PERCENTAGE OWNERSHIP IN THE SHOPPING CENTER FOR COMPENSATION.

Q WHAT HAPPENED AFTER THAT?

A THERE WAS -- IT TOOK ABOUT A MONTH OR TWO AND THEY WERE WAITING FOR DOCUMENTS FROM THE ATTORNEY'S OFFICE AND CONTRACTS, BUT THEY NEVER MATERIALIZED.

Q AND AT THAT PARTICULAR TIME, WHAT HAPPENED?

A WELL FINALLY, I THINK IT WAS IN FEBRUARY -- JANUARY OR FEBRUARY, THAT JOE HUNT REALIZED HE WAS NEVER GOING TO SEE ANY MONEY FROM RON LEVIN.

Q HOW DO YOU KNOW THAT?

A HE STATED SO HIMSELF.

Q DID HE SAY THAT TO YOU?

A I HAD A CONVERSATION WITH HIM ABOUT THE -- IT WAS ABOUT THE MONEYS.

AND HE SAID THAT HE REALIZED THAT HE WOULDN'T GET IT DIRECTLY FROM RON LEVIN, THAT HE WAS NOT GOING TO PAY HIM THE MONEY.

Q HE SAID THAT TO YOU?

A YES.

Q WHERE DID THAT COVNERSATION TAKE PLACE?

A I THINK IT OCCURRED IN THE BACK OF A JEEP ON THE WAY HOME FROM THE OFFICE.

Q WHEN HE TOLD YOU THAT HE REALIZED RON LEVIN WAS NOT GOING TO PAY HIM THE MONEY, WHAT DID YOU DO OR SAY?

A WELL, THERE WERE SOME OTHER THINGS THAT HAPPENED

PRIOR TO THIS ABOUT RON LEVIN. I REALLY DIDN'T LIKE DOING BUSINESS WITH HIM.

Q SUCH AS WHAT?

A WELL, HE WAS ARRESTED FOR A VIDEO SCAM WHEN HE GAVE A BAD CHECK.

Q HOW DID YOU FIND OUT ABOUT THAT?

A I FIRST HEARD IT THROUGH -- I THINK JOE HUNT OR BEN DOSTI TOLD ME. BUT THEN THERE WAS AN ARTICLE IN THE PAPER ABOUT IT.

Q WHERE DID YOU SEE THE ARTICLE IN THE PAPER?

A IN THE L.A. TIMES.

Q DID YOU SEE IT ON YOUR OWN OR WAS IT POINTED OUT TO YOU?

A I BELIEVE IT WAS SHOWN TO ME.

Q WHO SHOWED IT TO YOU?

A I THINK MY GIRLFRIEND DID.

Q DO YOU KNOW IF JOE HUNT EVER SAW THAT ARTICLE?

A NO.

Q AND DO YOU KNOW WHETHER HE WOULD HAVE -- WELL, STRIKE THAT.

WHAT ELSE WITH REGARD TO --

DID JOE HUNT EVER SAY ANYTHING TO YOU ABOUT WHETHER HE HAD -- ABOUT LEVIN BEING ARRESTED?

MR. BARENS: YOUR HONOR, PERHAPS WE SHOULD HAVE A FOUNDATION IN TERMS OF TIME AND PLACE.

THE COURT: YES, I THINK SO.

MR. BARENS: AND THE USUAL STUFF.

THE COURT: I THINK YOU MIGHT INDICATE THAT, PLEASE.

MR. WARNER: WELL, IF HE DIDN'T MAKE THE STATEMENT, THEN WE DON'T NEED TO GET THE FOUNDATION.

THE COURT: ALL RIGHT.

Q BY MR. WARNER: DID JOE HUNT EVER TELL YOU ANYTHING ABOUT WHETHER HE KNEW RON LEVIN WAS ARRESTED?

A NO.

Q SO MUCH FOR THE FOUNDATION.

AND WHAT ELSE HAPPENED WITH LEVIN THAT YOU WERE AWARE OF?

A WELL, IT WAS MORE PERSONALITY. JOE WAS DESCRIBING RON LEVIN'S PERSONALITY AS A CONNIVER, MANIPULATOR AND HE TALKED ABOUT AN OPTION ON HIS HOUSE WHERE RON LEVIN WROTE ON THE BACK OF A CHECK SAYING THAT "IF YOU CASH THIS CHECK, I AM ENTITLED TO BUY YOUR HOUSE" AND THE LADY HAD CASHED

IT SO HE HAD AN OPTION. SO HE WAS VERY MANIPULATIVE AND NOT A VERY TRUSTWORTHY PERSON.

Q SO WHEN JOE HUNT TOLD YOU THAT HE WASN'T GOING TO GET THE MONEY --

A YES.

Q -- FROM LEVIN, WHAT DID YOU SAY?

A OH, I SAID I -- I DIDN'T EXPECT IT AT THAT TIME FROM ALL OF THE OTHER THINGS THAT WERE HAPPENING AND I SAID " WELL --"

Q YOU DIDN'T EXPECT WHAT?

A TO GET ANY MONEY FROM RON LEVIN, IT WASN'T CONSISTENT WITH HIS PERSONALITY AFTER WHAT JOE WAS DESCRIBING, AS JOE DESCRIBED HIM.

Q WHAT DID YOU SAY?

A WELL, FIRST I SAID "WELL, THAT IS FINE. WE SHOULDN'T BE DOING BUSINESS WITH THAT TYPE OF PERSON ANYWAYS." AND --

Q WHAT DID JOE HUNT SAY?

A HE SAID "DON'T WORRY ABOUT IT. I WILL TAKE CARE OF IT."

I DON'T KNOW EXACTLY BUT ESSENTIALLY HE SAID THAT HE WOULD -- THAT WE WOUDLN'T DEAL WITH RON LEVIN ANYMORE. HE WOULD TAKE CARE OF THE MONEY THAT HE OWED US.

MR. BARENS: YOUR HONOR, COULD WE GET A FOUNDATION ON THAT, YOUR HONOR?

Q BY MR. WAPNER: WHERE DID THAT CONVERSATION TAKE PLACE?

A THAT WAS IN THE JEEP COMING FROM THE OFFICE.

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THE COURT: WHEN WAS THAT NOW?

THE WITNESS: LIKE FEBRUARY.

Q BY MR. WAPNER: GOING FROM THE OFFICES ON THIRD STREET?

A YES.

MR. WAPNER: YOUR HONOR, I HAVE ANOTHER PHOTOGRAPH I WOULD LIKE TO MARK AS 184 FOR IDENTIFICATION.

THE COURT: ALL RIGHT.

Q BY MR. WAPNER: IT APPEARS TO BE A PICTURE OF AN OFFICE BUILDING, YOUR HONOR.

MR. RAYMOND, I AM GOING TO PUT THIS PICTURE UP ON THE BOARD AND ASK YOU IF YOU RECOGNIZE THIS PICTURE, PEOPLE'S 184?

A YES.

Q WHAT IS THAT?
A THAT IS THE OFFICE ON THIRD STREET.
Q AND WAS IT ON YOUR WAY BACK IN A JEEP LEAVING THAT OFFICE THAT THE CONVERSATION YOU HAVE JUST RELAYED TOOK PLACE?
A YES.
Q DO YOU REMEMBER WHERE YOU WERE GOING?
A NOT EXACTLY, NO.
Q WHOSE JEEP WAS IT?
A JOE'S.
Q WHAT COLOR WAS IT?
A BLACK.
Q AND DO YOU REMEMBER WHEN IN FEBRUARY THAT CONVERSATION TOOK PLACE?
A NO.
Q DURING THE LATE WINTER AND EARLY SPRING OF 1984, WAS THERE ANY EVIDENCE THAT YOU COULD SEE OF COMMODITY TRADING ACTUALLY GOING ON?
A WHAT TIME PERIOD WAS THAT?
Q IN THE LATE WINTER AND EARLY SPRING, FEBRUARY, MARCH, APRIL OF --
A I NEVER SAW ANY.
I NEVER WENT TO THE BROKERAGE HOUSE. I ONLY HEARD STORIES ABOUT THE TRADING SO I NEVER KNEW.
Q DURING THAT TIME WAS JOE HUNT --
WHEN YOU WERE LIVING AT THE MANNING, DID HE APPEAR TO GET UP EARLY?
A WHEN I FIRST MOVED IN, HE WAS ALWAYS GONE EARLY,

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OF THE JURY:) J. H. Trial '87

DIRECT EXAMINATION

BY MR. WAPNER:

Q MR. BROWNING, WHAT IS YOUR OCCUPATION?

A I AM A BIOCHEMIST.

Q AND DID YOU INVENT A MACHINE CALLED THE CYCLATRON?

A YES.

Q IS THERE ANOTHER NAME FOR IT ALSO?

A I REFER TO IT AS AN ATTRITION MILL.

THE COURT: ATTRITION MILL?

THE WITNESS: ATTRITION MILL, YES, SIR.

Q BY MR. WAPNER: CAN YOU EXPLAIN TO US WHAT THAT MACHINE IS?

A IT IS A DEVICE FOR REDUCTION OF PARTICLE SIZE OF VARIOUS MATERIALS, ORE, ROCKS, SO TO SPEAK.

Q KEEP YOUR VOICE UP SO THAT LADY BACK HERE CAN HEAR YOU.

A IT REDUCES THE PARTICLE SIZE FROM A QUARTER OR HALF INCH PARTICLES TO A PARTICLE SUBSTANTIALLY FINER TO TALCUM POWDER.

Q WHEN DID YOU START WORKING ON THAT DEVICE?

A APPROXIMATELY 17 YEARS AGO.

Q WHEN YOU STARTED WORKING ON THAT, WHO WAS WORKING ON IT WITH YOU?

A NO ONE.

Q AND DID YOU EVENTUALLY BUILD A PROTOTYPE MACHINE?

A YES, SEVERAL OF THEM.

Q AND DID YOU HAVE ONE THAT WAS WORKING SOMETIME IN 1983?

A YES.

Q AND WHERE WAS THAT MACHINE?

A THAT MACHINE WAS LOCATED AT HISPERIA, CALIFORNIA.

Q AND WAS IT IN 198 --

WELL, AT SOME POINT DID YOU MEET THE DEFENDANT IN THIS CASE?

A YES, IN NOVEMBER, 1982.

TO THE OFFICE AT THAT POINT?

A YES.

IT HAD TO DO WITH THE ESCROW ON THE HOUSE AND THE ULTIMATE PLANS TO CLOSE THAT ESCROW ON THE 6TH OF JULY.

Q ALL RIGHT, SIR, WHEN YOU CAME THERE THEN, WERE YOU SURPRISED OR -- YES, WERE YOU SURPRISED THAT THIS CONTRACT WAS PUT BEFORE YOU, SIR?

A YES.

Q WHERE DID THAT OCCUR, WHAT WAS THE SETTING OF WHERE THAT OCCURRED, WHERE WERE YOU?

A THAT WAS IN THE OFFICE OF THE BBC ON THIRD STREET IN BEVERLY HILLS.

Q AND ABOUT WHAT TIME WAS IT?

A I BELIEVE IT WAS ABOUT 9:00 O'CLOCK, 11:00 O'CLOCK IN THE MORNING.

Q AND PRESENT, SIR, WAS?

A MR. HUNT AND MYSELF, BECAUSE I HAD GONE THERE TO SEE HIM.

Q AND YOU WERE THE ONLY TWO PRESENT?

A I BELIEVE SO.

Q AND HUNT SHOWED YOU THIS AGREEMENT?

HAD YOU EVER HEARD OF RON LEVIN BEFORE THAT DAY?

A YES.

Q AND WHAT HAD YOU HEARD ABOUT HIM?

A IN JANUARY OF 1983, WHEN MR. HUNT HAD FORMULATED THE FIRST AGREEMENT THAT WE HAD SIGNED, HE SAID THAT HE WAS GOING TO HAVE THE AGREEMENT REDONE BY COMPETENT LEGAL PEOPLE.

HE REPRESENTED TO ME AT THAT TIME THAT MR. HUNT

False

(SIC) WAS HIS COUNSEL AND --

THE COURT: AND MR. HUNT?

THE WITNESS: AND MR. HUNT (SIC) WAS A GRADUATE OF LAW SCHOOL.

MR. BARENS: I AM SORRY --

THE COURT: MR. HUNT?

THE WITNESS: I MEAN MR. LEVIN. I AM SORRY.

THE COURT: HE WAS HIS LAWYER?

THE WITNESS: THAT MR. LEVIN WAS MR. HUNT'S ATTORNEY; THAT HE HAD GRADUATED FROM LAW SCHOOL, THAT HE WAS AN ATTORNEY.

Q BY MR. BARENS: WHEN HUNT TOLD YOU THAT, DID HE APPEAR TO BELIEVE THAT?

A I HAD NO REASON NOT TO.

Q THAT OCCURRED WHEN, THIS CONVERSATION?

A THE ONE PERTAINING TO MR. LEVIN BEING AN ATTORNEY?

Q YES, SIR.

Q WAS ON, I BELIEVE, THE 5TH OF JANUARY, 1983.

Q NOW, DID YOU HAVE ANOTHER CONVERSATION IN MARCH OF 1984 DOWN IN GARDENA WHERE MR. LEVIN'S NAME CAME UP AGAIN?

A I DON'T REMEMBER ONE.

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Q SIR, DID YOU HAVE A CONVERSATION IN MARCH OF 1984 WHERE MR. HUNT TOLD YOU THAT RON LEVIN WAS AN INVESTOR HE WAS COURTING, SO TO SPEAK, FOR THE TECHNOLOGY?

A NOT AS AN INVESTOR, NO. HE HAD GIVEN ME A CERTAIN EXPLANATION PERTAINING TO MR. LEVIN AS SOMEONE WHO OWED HIM MONEY. AND THAT WAS THE GIST OF THE CONVERSATION PERTAINING TO MR. LEVIN AT THAT TIME.

Q THERE WAS NO CONNECTING OF THE DEBT ON THE MONEYS OWED TO MR. HUNT AND THE TECHNOLOGY? WAS THERE SOME ASSOCIATION OR LINKING OF THE TWO AT THAT PARTICULAR TIME?

A NOT AT THAT TIME, NO.

Q WAS THERE LATER?

A ONLY THE ADVENT OF SEEING THIS AGREEMENT.

Q HOW DID MR. LEVIN'S NAME COME UP IN WHAT I AM CALLING THE MARCH CONVERSATION? I DON'T KNOW IF YOU CAN GIVE ME THAT. DOES THAT SOUND LIKE THE DATE, SIR?

A I DON'T REMEMBER THE TIME OF THAT CONVERSATION, WHETHER IT WAS IN MARCH OR WHAT MONTH IT WAS.

I HAVE NOT THE SLIGHTEST IDEA. I JUST REMEMBER A CONVERSATION THAT MR. HUNT HAD WITH ME PERTAINING TO MR. LEVIN.

Q ALL RIGHT. SO, DO YOU HAVE SOME REFERENCE OF LEVIN'S NAME COMING UP AT LEAST TWICE BEFORE JUNE OF '84?

A YES, ONCE WHEN HE WAS REPRESENTED AS AN ATTORNEY AND AT THE TIME THAT MR. HUNT TOLD ME MR. LEVIN OWED HIM SOME MONEY.

Q AND WAS HE AGAIN DISCUSSED AS AN ATTORNEY THE SECOND TIME?

A NO.

THE COURT: OKAY. I THINK WE'LL TAKE OUR RECESS AT THIS TIME UNLESS YOU WANT TO FINISH UP THIS AREA.

MR. BARENS: I COULD NOT TODAY, YOUR HONOR.

THE COURT: THIS PARTICULAR AREA?

MR. BARENS: NO. MY NEXT QUESTION GOES INTO A NEW AREA, SIR.

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY, WE'LL TAKE OUR ADJOURNMENT NOW UNTIL MONDAY MORNING AT THE USUAL TIME, 10:30.

THANK YOU. PLEASE REPORT TO THE JURY ASSEMBLY ROOM. HOPEFULLY, WE WILL GET TO YOU BY THAT TIME. THE SAME ADMONITION STILL APPLIES. GOOD NIGHT. HAVE A NICE WEEKEND.

(AT 4:33 P.M. AN ADJOURNMENT WAS TAKEN UNTIL MONDAY, FEBRUARY 23, 1987, AT 10:30 A.M.)

SANTA MONICA, CALIFORNIA; MONDAY, FEBRUARY 23, 1987; 10:40 A.M.
DEPARTMENT WEST C HON. LAURENCE J. RITTENBAND, JUDGE
(APPEARANCES AS NOTED ON TITLE PAGE
EXCEPT MR. CHIER IS NOT PRESENT.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.
I THINK WE HAD DR. BROWNING.

GENE BROWNING,
CALLED AS A WITNESS BY THE PEOPLE, HAVING BEEN PREVIOUSLY SWORN, RESUMED THE WITNESS STAND AND TESTIFIED FURTHER AS FOLLOWS:

THE CLERK: YOU HAVE PREVIOUSLY BEEN SWORN. YOU ARE STILL UNDER OATH.
JUST STATE YOUR NAME AGAIN FOR THE RECORD.
THE WITNESS: MY NAME IS GENE BROWNING.

CROSS-EXAMINATION (RESUMED)

BY MR. BARENS:

Q GOOD MORNING, DR. BROWNING.

A GOOD MORNING.

Q DR. BROWNING, WE WERE TALKING, AS YOU MAY RECALL, LAST THURSDAY ABOUT THE SPECIFIC APPLICABILITY OF YOUR PARTICULAR TECHNOLOGY FOR GRINDING SILICA AND YOU HAD, I BELIEVE, TOLD ME THAT IT HAD SOME FUNCTION IN THAT AREA.
DURING 1982, IN THAT REGARD WERE YOU CORRESPONDING AND NEGOTIATING WITH A J. M. HUBER, H-U-B-E-R, CORPORATION?

A THEY WERE ONE OF THE COMPANIES WHO HAD SENT

YOU WANT TO DO.

MR. BARENS: COULD YOUR HONOR PLEASE REFRESH ME ON WHAT OUR LAST EXHIBIT LETTER WAS?

THE COURT: I THOUGHT IT WAS J.

MR. BARENS: THANK YOU, YOUR HONOR.

MR. WAPNER: WE CALL EVAN DICKER. HE IS IN OUR OFFICES. HE IS ON HIS WAY DOWN. IT WILL JUST BE A MINUTE.

THE COURT: ALL RIGHT.

(PAUSE.)

EVAN GEORGE DICKER,

CALLED AS A WITNESS BY THE PEOPLE, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: RAISE YOUR RIGHT HAND TO BE SWORN.

YOU DO SOLEMNLY SWEAR THAT THE TESTIMONY YOU MAY GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: BE SEATED. STATE AND SPELL YOUR NAME FOR THE RECORD.

THE WITNESS: EVAN GEORGE DICKER.

THE COURT REPORTER: PLEASE SPELL YOUR NAME.

THE WITNESS: D-I-C-K-E-R.

DIRECT EXAMINATION

BY MR. WAPNER:

Q MR. DICKER, DO YOU KNOW THE DEFENDANT IN THIS CASE?

A YES.

Q HOW DO YOU KNOW HIM?

A I MET HIM ON A SKI TRIP IN THE WINTER OF 1982.

Q AND HOW DID YOU HAPPEN TO BE ON THE SKI TRIP?

A I WAS INVITED BY FRIENDS OF MINE.

Q AND WHO WAS THE --

THE COURT: WHOM?

THE WITNESS: FRIENDS.

THE COURT: WHOM?

THE WITNESS: FRIENDS.

Q BY MR. WAPNER: WHO WERE THE FRIENDS OF YOURS THAT INVITED YOU?

A DEAN KARNY AND BEN DOSTI AND RONALD PARDOVITCH.

Q AND WHEN YOU MET MR. HUNT IN 1982 -- WAS IT 1982 THAT YOU MET HIM?

A IT WAS THE WINTER THAT WOULD BEGIN IN 1981 AND END IN 1982. SO, DECEMBER 1981 TO FEBRUARY 1982.

Q YOU DON'T REMEMBER THE EXACT DATE OF THE TRIP?

A NO, I DON'T.

Q AND WHEN YOU MET HIM AT THAT TIME, WAS THIS PRETTY MUCH JUST A SOCIAL MEETING?

A YES, IT WAS.

Q NOW, WHO THOUGHT UP THIS ORGANIZATIONAL STRUCTURE?

A I DON'T KNOW.

I KNOW IT IS CONTAINED WITHIN THE HANDBOOK AND I DON'T KNOW WHO IS RESPONSIBLE FOR AUTHORING IT.

Q WHEN YOU SAID THE HANDBOOK, YOU ARE REFERRING TO 182-A FOR IDENTIFICATION?

MR. BARENS: YOUR HONOR, I AM NOT SURE OF THE RELEVANCY OF THE AREA WE ARE INTO.

THE COURT: WELL, AS I UNDERSTAND, HE IS DESCRIBING THE ENTIRE BBC COMPLEX; ISN'T THAT RIGHT?

MR. WAPNER: WELL, PRETTY MUCH HIS ROLE IN IT SO HOPEFULLY, THE JURY WILL HAVE SOME UNDERSTANDING OF WHERE HE FITS IN THE WHOLE PICTURE.

THE COURT: ALL RIGHT, GO AHEAD.

Q BY MR. WAPNER: WHEN WAS IT THAT THE BBC MOVED INTO THE OFFICES ON THIRD STREET?

A JUNE OF 1983.

Q AND DURING THAT TIME, WAS THERE SOME COMMODITY INVESTMENTS GOING ON?

A I UNDERSTAND THERE WAS, YES.

Q AND WAS JOE HUNT ALSO TRADING OR DID YOU BELIEVE -- STRIKE THAT.

WERE YOU TOLD AT THAT TIME THAT MR. HUNT WAS TRADING COMMODITIES FOR A PERSON NAMED RON LEVIN?

A I DON'T KNOW IF IT WAS AT THAT EXACT TIME BUT I BELIEVE SOMETIME IN THAT AREA I WAS TOLD HE WAS, YES.

Q AND WHEN YOU SAY IN THAT AREA, CAN YOU BE ANY

MORE SPECIFIC IN TERMS OF WHAT YOU MEAN?

A JUNE, JULY, AUGUST, SEPTEMBER OF 1983, SOMEWHERE IN THAT TIME FRAME.

Q AND HAD YOU EVER MET RON LEVIN BEFORE?

A YES, I HAD.

Q WHEN HAD YOU MET HIM?

A APPROXIMATELY TWO AND A HALF YEARS -- I GUESS IN 1981 SOMETIME.

Q WHERE DID YOU MEET HIM?

A AT HIS APARTMENT.

Q IN WHAT SITUATION DID YOU MEET HIM?

A I WAS AT A BIRTHDAY PARTY BEING HELD FOR NEIL ANTIN.

Q WHO IS NEIL ANTIN?

A NEIL ANTIN WAS -- I MET HIM ORIGINALLY THROUGH A FRIEND OF MINE WHO HE WAS DATING AND HE SUBSEQUENTLY BECAME A FRIEND OF MINE AND AT ONE TIME WAS A MEMBER OF THE BBC.

Q WHO WAS THE FRIEND HE WAS DATING?

A PHOEBE VREELAND.

THE COURT REPORTER: WOULD YOU SPELL THAT?

THE WITNESS: P-H-O-E-B-E V-R-E-E-L-A-N-D.

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Q AFTER YOU WENT TO THE BIRTHDAY PARTY AND YOU MET MR. LEVIN, WHAT KIND OF CONTACT IF ANY, DID YOU HAVE WITH HIM AFTER THAT?

A POSSIBLY I MIGHT HAVE SEEN HIM SOME PLACE. BUT NO DIRECT CONTACT.

Q AND DO YOU KNOW HOW MR. HUNT CAME TO KNOW MR. LEVIN? OF YOUR OWN PERSONAL KNOWLEDGE?

A I COULD GUESS.

Q I DON'T WANT YOU TO GUESS. IF YOU KNOW --

A NO. I DON'T KNOW.

Q OKAY. AND WHEN YOU BECAME AWARE -- WELL, HOW WAS IT THAT YOU BECAME AWARE --

A EXCUSE ME. WHEN YOU SAID DID I HAVE ANY SUBSEQUENT CONTACT WITH MR. LEVIN --

Q YES?

A WAS THAT BEFORE JUNE OF '83, BETWEEN MEETING HIM IN JUNE OF '83?

Q YES.

A THEN MY ANSWER WAS CORRECT.

Q OKAY. HOW WAS IT THAT YOU BECAME AWARE THAT JOE HUNT WAS ALLEGEDLY TRADING COMMODITIES FOR MR. LEVIN?

A I THINK I WAS TOLD BY MR. HUNT.

Q WHAT WERE YOU TOLD?

A THAT HE WAS HANDLING ACCOUNTS FOR RON LEVIN WITH A GREAT DEAL OF MONEY IN THEM.

Q AND DID HE TELL YOU HOW MUCH MONEY WAS INVOLVED?

A I UNDERSTAND THE FIGURE TO BE -- I DON'T RECALL THE EXACT FIGURES. BUT IT WAS MANY MILLIONS OF DOLLARS OR

A MILLION OR MILLIONS OF DOLLARS.

Q AND DID MR. HUNT TELL YOU WHAT HIS ARRANGEMENT WAS WITH MR. LEVIN IN TERMS OF PROFITS FROM THE TRADING, IF ANY?

A WE WERE TO GET -- THE BBC WAS TO GET A CERTAIN PERCENTAGE OF PROFITS THAT HE MADE. I DON'T RECALL THE EXACT PERCENTAGE.

Q AND DID JOE HUNT AT ANY TIME TELL YOU THAT HE HAD MADE MONEY FROM MR. LEVIN?

A YES, HE DID.

Q WHAT DID HE TELL YOU HE HAD MADE?

A AT SOME POINT, HE TOLD ME THAT HE HAD BEEN SUCCESSFUL IN MAKING EITHER SIX AND A HALF OR ELEVEN MILLION.

Q WHY DO YOU SAY IT IS EITHER ONE OR THE OTHER?

A BECAUSE I THINK SIX AND A HALF WAS EITHER THE TOTAL SUM HE MADE OR THE BBC SHARE OF THE MONEY. I DON'T RECALL WHICH IT WAS.

Q AND DID HE EVER SAY WHAT HAPPENED -- DID YOU EVER SEEN ANY OF THAT MONEY?

A NO, WE DID NOT.

Q WHAT DID MR. HUNT TELL YOU ABOUT WHAT HAPPENED WITH THE MONEY?

A AT SOME POINT IN TIME, HE TOLD US THAT MR. LEVIN WOULD NOT GIVE US THE MONEY AND THAT HE WAS GOING TO GIVE US INSTEAD OF THE MONEY, AN INTEREST IN A SHOPPING CENTER IN CHICAGO.

Q WHO DID HE SAY THAT TO?

A THAT WAS TOLD AT THE MEETING, BBC MEETING THAT

WAS HELD AT THE OFFICE.

Q DO YOU REMEMBER WHEN THAT WAS?

A NO, I DON'T.

Q DO YOU REMEMBER WHO WAS THERE?

A SPECIFICALLY, NO.

Q AND WHAT SPECIFICALLY, DID MR. HUNT SAY ABOUT A PERCENTAGE OF THE SHOPPING CENTER?

A JUST THAT WE WERE TO RECEIVE A PERCENTAGE OF THE SHOPPING CENTER IN CHICAGO.

Q DID HE EVER DOLE OUT PERCENTAGES OF THE SHOPPING CENTER TO PEOPLE?

A AT SOME TIME PRIOR TO THAT, WHEN WE STILL BELIEVED WE WERE GETTING THE MONEY, HE HAD DOLED OUT THE MONEY.

Q WAS THAT ALSO AT A MEETING?

A YES, IT WAS.

Q WHERE WAS THAT MEETING HELD?

A AT OUR OFFICES ON THIRD STREET.

Q WHO WAS PRESENT AT THIS MEETING?

A AGAIN, I DON'T RECALL.

Q WHAT DID JOE HUNT DO AT THAT MEETING?

A JOE DISCUSSED HOW CERTAIN PEOPLE WERE GOING TO BE REIMBURSED FOR THEIR CONTRIBUTIONS TO THE BBC FROM THIS MONEY AND CERTAIN OF THE MONEY WAS TO GO TO THE BBC FOR ITS CONTRIBUTION.

Q DID HE SAY SPECIFICALLY WHO WAS GOING TO BE REIMBURSED FOR THEIR CONTRIBUTIONS OR HOW MUCH THEY WERE GOING TO GET?

A YES.

Q WHAT DID HE SAY?

A I DON'T RECALL ANY OF THE SPECIFIC FIGURES.

Q DO YOU REMEMBER -- I MEAN, ARE WE TALKING ABOUT HUNDREDS OF DOLLARS, THOUSANDS OF DOLLARS, TENS OF THOUSANDS? DO YOU KNOW?

A I THINK IT VARIED FROM TENS OF THOUSANDS TO HUNDREDS OF THOUSANDS.

Q DO YOU HAVE ANY RECOLLECTION OF HOW MUCH YOU WERE SUPPOSED TO GET?

A NO, I DON'T.

Q IF IT WAS HUNDREDS OF THOUSANDS, WOULD YOU REMEMBER, DO YOU THINK?

A YES. I BELIEVE IT WAS SOMEWHERE IN THE TENS OF THOUSANDS, LOWER TENS OF THOUSANDS.

Q DID YOU EVER SEE ANY OF THAT MONEY?

A NO, I DID NOT.

Q DID YOU EVER GET A PERCENTAGE OF THE SHOPPING CENTER?

A NO, I DID NOT.

THE COURT: IS THIS A GOOD PLACE TO STOP?

MR. WAPNER: I THINK IT IS. I AM GOING INTO SOMETHING ELSE.

THE COURT: LADIES AND GENTLEMEN, WE'LL TAKE OUR NOON RECESS AT THIS TIME. THE SAME ADMONITION THAT I GAVE YOU APPLIES.

WE'LL REASSEMBLE HERE AT 1:30 THIS AFTERNOON.

(AT 11:58 A.M. PROCEEDINGS WERE ADJOURNED TO RESUME AT 1:30 P.M. OF THE SAME DAY.)

SANTA MONICA, CALIFORNIA; MONDAY, FEBRUARY 23, 1987; 1:40 P.M.
DEPARTMENT WEST C HON. LAURENCE J. RITTENBAND, JUDGE
(APPEARANCES AS NOTED ON TITLE PAGE.)

THE COURT: ALL RIGHT, YOU MAY CONTINUE.

MR. WAPNER: THANK YOU, YOUR HONOR.

EVAN GEORGE DICKER,
THE WITNESS ON THE STAND AT THE TIME OF ADJOURNMENT, RESUMED THE STAND AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION (RESUMED)

BY MR. WAPNER:

Q MR. DICKER, WE LEFT OFF WITH MR. HUNT DISCUSSING, FIRST OF ALL, THE PROFITS FROM LEVIN'S TRADING AT A MEETING WITH THE BBC MEMBERS. THAT WAS AT THE BBC OFFICES ON THIRD STREET?

A YES, IT WAS.

Q DO YOU KNOW HOW MANY PEOPLE WERE THERE, APPROXIMATELY?

A I WOULD ESTIMATE APPROXIMATELY 18.

Q DO YOU HAVE ANY WAY OF PUTTING A TIME FRAME ON THAT PARTICULAR MEETING?

A NO, I DON'T.

Q AND WHO LED THAT MEETING?

A I RECALL JOE LEADING THE MEETING.

Q WHEN HE SPOKE AT THAT MEETING, WHAT DID HIS ATTITUDE APPEAR TO BE?

A HE WAS VERY PLEASED ABOUT HAVING THE MONEY TO DISTRIBUTE, OR ANTICIPATING RECEIVING THE MONEY TO DISTRIBUTE.

Q AND DID HE TALK AT THAT MEETING ABOUT HOW MUCH EACH PERSON WAS GOING TO GET?

A YES, HE DID.

Q AND AFTER THAT AT SOME POINT, THERE WAS ANOTHER MEETING TO DISCUSS DISTRIBUTING THE PORTIONS OF THE SHOPPING CENTER, IS THAT RIGHT?

A CORRECT.

Q WHERE DID THAT MEETING TAKE PLACE?

A ALSO AT THE OFFICES.

Q WHEN HE DISCUSSED THAT, HOW MANY PEOPLE WERE THERE AT THAT MEETING?

A I BELIEVE IT WOULD ALSO HAVE BEEN ABOUT 18.

Q ALL MEMBERS OF THE BBC?

A YES.

Q WHAT WAS HIS ATTITUDE DURING THE CONDUCT OF THAT MEETING?

A I WOULD CALL HIM BEING SOMEWHAT DISAPPOINTED BY NOT HAVING THE CASH BUT PLEASED TO HAVE THE SHOPPING CENTER TO DISTRIBUTE.

HE ALSO FELT THE SHOPPING CENTER, WHILE IT WAS NOT THE CASH ASSET, IT WOULD BE OUR FIRST SORT OF PROPERTY THAT THE BBC WOULD HOLD. I THINK HE WAS EXCITED BY THAT FACT, ALSO.

Q DID JOE HUNT LEAD THAT MEETING ALSO?

A YES, HE DID.

Q AND AT SOME POINT AFTER THAT, THIS IS CONTINUING ON WITH THE SAME SUBJECT MATTER, DID SOMETHING HAPPEN WITH REGARD TO THE SHOPPING CENTER?

A AT SOME POINT, IT BECAME OBVIOUS THAT MR. LEVIN WAS NOT GOING TO GIVE US THE SHOPPING CENTER.

Q DO YOU REMEMBER WHEN?

A NO, I DON'T.

Q DO YOU REMEMBER HOW IT BECAME OBVIOUS?

A JUST BY HIS CONTINUAL REFUSAL TO TURN OVER ANY OWNERSHIP PAPERS. THAT IS WHY I REMEMBER IT.

Q AND WHAT DO YOU MEAN "CONTINUAL REFUSAL TO TURN OVER OWNERSHIP PAPERS"?

A HE WOULDN'T GIVE US THE OWNERSHIP PAPERS OR ANY PROPERTY OR SHOW US ON THE TITLE OR --

Q WERE YOU PRESENT WHEN HE WAS EVER ASKED TO DO THAT?

A NO, I WAS NOT.

Q HOW DO YOU KNOW THAT WAS GOING ON?

A I WAS TOLD.

Q BY WHOM?

A I DON'T RECALL, BY SOME MEMBERS OF THE BBC.

Q FOR HOW LONG OF A PERIOD OF TIME AFTER THE MEETING ABOUT THE SHOPPING CENTER WAS IT THAT THERE WERE ATTEMPTS BEING MADE TO GET THE TITLE TO THE SHOPPING CENTER?

A I THINK IT WAS CONTINUING. I DON'T REMEMBER FOR HOW LONG.

Q AND DO YOU REMEMBER ANY POINT IN TIME WHEN IT BECAME OBVIOUS TO YOU THAT THERE WAS NOT GOING TO BE A SHOPPING CENTER?

A I DNO'T RECALL THE SPECIFIC POINT IN TIME.

Q DO YOU REMEMBER ANY POINT IN TIME WHEN MR. HUNT

SAID ANYTHING ABOUT THAT?

A NO, I DON'T.

Q NOW, DO YOU REMEMBER ANY DISCUSSION ABOUT MONEY THAT JOE HUNT MADE OR LOST TRADING FOR TOM AND DAVID MAY?

A I UNDERSTOOD THAT EARLIER APPROXIMATELY IN THE SUMMER OF 1983, JOE HAD LOST SOME MONEY THAT THE MAYS HAD GIVEN HIM.

MR. BARENS: MOVE TO STRIKE AS HEARSAY, YOUR HONOR.

THE COURT: WHERE DID YOU HEAR THAT FROM?

THE WITNESS: I BELIEVE THE MAYS OR POSSIBLY ALEX GAON.

THE COURT: OVERRULED.

MR. BARENS: THANK YOU, YOUR HONOR.

Q BY MR. WAPNER: AND WHEN YOU WERE FIRST BECOMING INVOLVED IN THE BBC, JOE HUNT AND DEAN KARNY LIVED IN A CONDOMINIUM IN THE VALLEY; IS THAT RIGHT?

A THAT'S CORRECT.

Q WAS THAT A CONDOMINIUM, AS FAR AS YOU KNOW, OWNED BY DEAN KARNY'S PARENTS?

A THAT'S CORRECT.

Q DID THEY MOVE SOMEWHERE AT SOME POINT?

A YES, THEY DID.

Q WHERE DID THEY MOVE TO?

A I BELIEVE THEY STAYED A COUPLE OF WEEKS AT SORT OF AN APARTMENT HOTEL ON WILSHIRE CALLED THE BERMUDA AND THEN THEY MOVED INTO A RENTED CONDOMINIUM IN THE WILSHIRE MANNING.

MR. WAPNER: MAY I HAVE ONE MOMENT?

(PAUSE IN PROCEEDINGS.)

Q BY MR. WAPNER: AFTER THE PLACE ON WILSHIRE THAT THEY STAYED FOR A FEW WEEKS, DID THEY MOVE AFTER THAT?

A YES, THEY MOVED INTO THE WILSHIRE MANNING.

Q AND WHO MOVED INTO THE WILSHIRE MANNING?

A I BELIEVE IT WAS DEAN, JOE, BEN AND I BELIEVE BROOKE ALSO MOVED IN WITH THEM.

Q BROOKE ROBERTS?

A CORRECT.
Q AND DEAN IS DEAN KARNY?
A CORRECT.
Q AND BEN IS BEN DOSTI?
A CORRECT.
Q WHEN DID THEY DO THAT, MOVE TO THE WILSHIRE MANNING?
A IN THE LATTER PART OF 1983.
Q IT WOULD BE IN APPROXIMATELY OCTOBER?
A YES.
Q AND AT SOME POINT AFTER JOE HUNT MOVED INTO THE WILSHIRE MANNING, DID YOU MEET SOMEONE THAT YOU CAME TO KNOW AS JIM GRAHAM?
A YES, I DID.
Q WHERE DID YOU FIRST MEET MR. GRAHAM?
A EITHER AT THE WILSHIRE MANNING OR THE BBC OFFICES.
Q HOW DID YOU COME TO KNOW HIS NAME?
A I WAS INTRODUCED TO HIM AS JIM GRAHAM.
Q BY WHOM?
A I BELIEVE BY MR. HUNT.
Q AT THE TIME YOU WERE INTRODUCED, WERE YOU TOLD ANYTHING ELSE BY MR. HUNT?
A NOT INITIALLY, NO, EXCEPT THAT HE WOULD START WORKING FOR THE BBC OR WORKING WITH THE BBC.
Q DURING THE TIME THAT YOU WERE INVOLVED WITH THE BBC, DID YOU KNOW MR. GRAHAM BY ANY OTHER NAME?
A NO, I DID NOT.
Q DID YOU EVER COME TO KNOW HIM BY THE NAME OF

Q BUT HE SEEMED TO HAVE SOME CONSULTING, INTERFACING WITH THOSE OTHER GENTLEMEN?

A HE WOULD DISCUSS IT WITH OTHER PEOPLE, YES, AND IN PARTICULAR, THOSE TWO PEOPLE.

Q WOULD YOU EVER BE IN A POSITION TO OVERHEAR THOSE DIALOGUES?

A NONE THAT I RECALL RIGHT NOW.

Q I AM SORRY, SIR?

A NONE THAT I RECALL.

Q ALL RIGHT. NOW YOU MENTIONED THAT HE INDICATED TO YOU AT A POINT IN TIME THAT HE WAS HANDLING MILLIONS OF DOLLARS FOR MR. LEVIN?

A THAT IS CORRECT.

Q AND DID YOU BELIEVE THAT?

A YES.

Q DID MR. HUNT SEEM TO BELIEVE THAT?

A YES, HE DID.

Q DID EVERYBODY ELSE THERE SEEM TO BELIEVE THAT?

A YES, THEY DID.

Q ISN'T IT TRUE THAT HUNT HAD TOLD EVERYBODY AT THE BBC HE WAS HANDLING MILLIONS FOR LEVIN?

A I CANNOT TELL YOU WHAT HE TOLD EVERYONE. BUT I RECALL CONVERSATIONS IN MY PRESENCE TO OTHER MEMBERS OF THE BBC WHERE JOE TOLD THEM HE WAS HANDLING LARGE AMOUNTS OF MONEY, MILLIONS OF DOLLARS FOR RON LEVIN.

Q AND WHAT WAS HIS ATTITUDE ABOUT THAT? DID HE TRY TO ACT LIKE A BIG MAN BECAUSE HE WAS HANDLING AN ACCOUNT WITH MILLIONS IN IT AND NONE OF THE REST OF YOU WERE HANDLING

Q AND WHAT RISK DID THE BBC HAVE IN THAT TRANSACTION?

A THE BBC, ONLY TO ITS REPUTATION, SO PROBABLY VERY LITTLE.

Q BUT THE BBC DID NOT STAND AS A GUARANTOR ON THE INVESTMENTS MADE IN THE LEVIN TRADING ACCOUNT, DID IT?

A NOT TO MY KNOWLEDGE, NO.

Q AND IT HAD NOT PUT ANY OF ITS OWN MONEY INTO THE ACCOUNT, HAD IT?

A TO MY KNOWLEDGE, NO.

Q SO THUS, TO YOUR KNOWLEDGE, THE GENESIS OF THAT TRANSACTION WAS SOLELY BETWEEN HUNT AND LEVIN?

A YES.

Q AND PRIOR TO THE COMMENCEMENT OF THAT RELATIONSHIP YOU HAD NEVER HEARD ANY DISCUSSION, HAD YOU, SIR, BY HUNT SAYING "WELL, I AM GOING TO OPEN AN ACCOUNT FOR MR. LEVIN AND HE IS GOING TO INVEST A CERTAIN AMOUNT OF MONEY," HAD YOU HEARD THAT BEFORE?

A I HAD NOT HEARD THAT BEFORE, NO.

Q OKAY. THE FIRST TIME YOU HEARD ABOUT IT IS WHEN HUNT SAYS "LISTEN, I HAVE MADE A LOT OF MONEY FOR RON LEVIN THAT WE ARE ALL GOING TO BENEFIT FROM"?

A I MAY HAVE BEEN AT SOME TIME PRIOR TOLD THAT BY ONE MEMBER OF THE BBC OR ANOTHER, THAT WE WERE TRADING FOR RON LEVIN OR JOE WAS TRADING FOR RON LEVIN.

Q YOU NEVER KNEW THAT TO BE A FACT?

A KNEW THAT HE WAS ACTUALLY TRADING TO BE A FACT?

Q NO.

THAT THE BBC WAS TRADING FOR LEVIN.

A I NEVER KNEW THE BBC WAS TRADING FOR LEVIN AS A FACT, NO.

Q ALL RIGHT. YOU DIDN'T HEAR OF ANY BBC TRADING ACTIVITY FOR LEVIN THAT YOU ARE AWARE OF, DID YOU?

A NO.

Q ALL RIGHT. THUS, THE ONLY TRADING YOU EVENTUALLY HEARD ABOUT WAS TRADING IN SOME ACCOUNT THAT HUNT WAS ENGAGED IN WITH LEVIN?

A THAT'S CORRECT.

Q NOW, WHEN THE MATTER OF THOSE TRADES DIDN'T COME THROUGH IN THE SENSE THAT YOU SAY YOU NEVER SAW ANY CASH FROM THAT TRANSACTION, THE NEXT THING YOU HEARD WAS THAT YOU WERE GETTING AN INTEREST IN A SHOPPING CENTER SOMEWHAT IN LIEU OF THE PROCEEDS FROM THE COMMODITIES TRADING?

A THAT'S CORRECT.

Q BEFORE THAT, HAD YOU HEARD THERE WAS SOME EFFORT BY HUNT TO TRY TO COLLECT THE MONEY FROM THE COMMODITIES TRADING ACCOUNT?

A I DID NOT HEAR THAT, NO.

Q HUNT NEVER SAID THAT HE WAS TALKING WITH LEVIN AND EXPECTING TO GET THE MONEY THAT WAS DUE THE BBC FROM HIM?

A THAT HE DID SAY, YES.

Q AND DID HE SAY THAT GENERALLY TO MOST OF THE BBC PEOPLE?

A I CAN -- I DON'T RECALL SPECIFICALLY HEARING ANY CONVERSATIONS BETWEEN HUNT AND ANY OTHER BBC MEMBERS WHERE THAT WAS MENTIONED BUT IT WAS MY UNDERSTANDING THAT IT WAS

BEING FREELY DISCUSSED, JOE'S EFFORTS TO GET THE MONEY FROM MR. LEVIN.

Q OKAY. SO HE ACTED IN FRONT OF EVERYONE AT THE BBC AS THOUGH HE HAD A BELIEF IN FACT THOSE MONEYS WOULD BE RECEIVED?

A YES, HE DID.

Q AND SUBSEQUENTLY, HOW MUCH TIME PASSED BETWEEN THE TIME YOU ORIGINALLY HEARD THOSE MONEYS WERE GOING TO BE RECEIVED AND THE FIRST DISCUSSIONS ABOUT A SHOPPING CENTER?

A TO THE BEST OF MY RECOLLECTION, BETWEEN A MONTH AND TWO MONTHS.

Q NOW DURING THAT MONTH TO TWO MONTHS, WERE PEOPLE IN THE BBC ASKING QUESTIONS OF HUNT OR AMONGST THE OTHER MEMBERS ABOUT WHAT THE STATUS OF COLLECTING THE MONEYS FROM LEVIN WAS?

A I DON'T RECALL BEING PRESENT FOR ANY DISCUSSIONS.

Q YOU DESCRIBED YESTERDAY THERE WAS A CERTAIN AMOUNT OF CONCERN OR A QUESTION ABOUT RECEIPT OF THE FUNDS?

A I CERTAINLY FELT THAT, YES.

Q AND DO YOU KNOW IF THE OTHER YOUNG MEN IN THE BBC WERE CONCERNED AS WELL?

A I DON'T SPECIFICALLY RECALL ANY CONVERSATIONS BEING DISCUSSED WITH ME IN THAT REGARDS BUT I KNOW I HAD THE FEELING SO --

Q TELL ME THE FEELING YOU HAD.

A I HAD A FEELING JUST KNOWING ABOUT LEVIN AND HIS CHARACTER THAT IT WOULD SEEM COMMON THAT HE WAS INVOLVED IN DEALS WITH PEOPLE AND JUST NEVER PAID OFF THEIR PORTION.

Q DID YOU EVER GET A FEELING THAT HUNT'S REPUTATION OR CREDIBILITY WAS ON THE LINE IN THIS TRANSACTION?

A I DIDN'T FEEL THAT HIS CREDIBILITY OR REPUTATION WOULD BE -- NOT IN MY EYES, IT WOULD NOT BE HARMED.

Q IN ANYONE ELSE'S EYES?

A POSSIBLY, YES.

Q THERE WAS SOME SENSE YOU HAD THAT HUNT COULD SUSTAIN A LOSS OF FACE IN THIS SETTING, WERE THIS TRANSACTION TO FAIL?

A HE WOULDN'T HAVE, IN MY EYES. BUT IT IS POSSIBLE THAT HE COULD HAVE IN SOMEONE'S.

Q ALL RIGHT. LATER ON, THE SHOPPING CENTER AS TOLD TO YOU, DID YOU FEEL THAT THAT CAUSED HIM TO HAVE SOME REAFFIRMATION OF HUNT'S STATUS IN THE GROUP WHEN YOU WERE TOLD YOU WERE NOT GOING TO LOSE MONEY? INSTEAD OF THE MONEY, YOU ARE NOW GOING TO HAVE A SHOPPING CENTER? DID THAT APPARENTLY RECONFIRM HUNT'S VALIDITY AS A BUSINESSMAN?

A YES.

Q MR. BARENS: ALL RIGHT.

THE WITNESS: EXCUSE ME. YOUR HONOR, THE PEOPLE ARE STARING IN THE DOOR. COULD WE JUST --

THE COURT: ALL RIGHT.

MR. BARENS: THANK YOU.

(PAUSE.)

Q BY MR. BARENS: OKAY. SO HUNT'S STOCK APPARENTLY GOES UP A BIT WHEN THIS SHOPPING CENTER TRANSACTION IS DISCUSSED.

NOW, HOW LONG DID YOU FOLKS BELIEVE THAT THE SHOPPING CENTER WAS A REALITY?

MR. WAPNER: EXCUSE ME. IF THERE IS AN OBJECTION, IT IS ONLY TO THE EXTENT THAT HE IS ASKING FOR OTHER PEOPLE'S OPINIONS, AS OPPOSED TO JUST THIS WITNESS.

THE COURT: SUSTAINED.

Q BY MR. BARENS: MR. DICKER, HOW LONG DID YOU

AND OTHER PEOPLE THAT YOU ARE AWARE OF FROM THE WAY THEY ACTED AND SPOKE, BELIEVE THAT THE SHOPPING CENTER WAS A REALITY?

A I WOULD SAY ONE TO THREE MONTHS.

Q NOW, DURING THAT ONE TO THREE MONTHS, THERE WERE SOME EFFORTS GOING ON TO GET TITLE DOCUMENTS TO THE SHOPPING CENTER?

A IT WAS MY UNDERSTANDING, YES.

Q AND WHO DID YOU HAVE THAT UNDERSTANDING FROM?

A I DON'T RECALL PRECISELY.

Q DID YOU HEAR JOE HUNT SAYING THAT HE WAS UNDERTAKING CERTAIN MEASURES TO TRY TO SECURE AND CONFIRM THE EXISTENCE OF THE BBC'S INTEREST IN THE SHOPPING CENTER?

A I THINK THERE WAS. I DO RECALL JOE HAVING A DISCUSSION. I DON'T RECALL WITH WHOM, ABOUT SENDING SOMEBODY TO CHICAGO TO LOOK AT THE SHOPPING CENTER.

Q RIGHT. WHO WERE YOU GOING TO SEND?

A I DON'T RECALL.

Q WAS IT BEN DOSTI?

A IT MAY VERY WELL HAVE BEEN.

Q ALL RIGHT. ONCE YOU SAY THAT THE EFFORTS CONFIRMED THE POSSESSION THAT YOU HAD IN THE SHOPPING CENTER, YOU WERE EXACTLY IN THE ANALOGOUS POSITION TAKEN TO INSURE THE CASHING OF THE CHECK FROM LEVIN? THAT IS THE WAY IT LOOKED TO YOU WHEN YOU LOOKED AT THEM?

THE ACTIVITY TO CONFIRM THE EXISTENCE OF THE SHOPPING CENTER, TO GET THE TITLE DOCUMENTS THEN SEND SOMEONE TO TAKE A LOOK AT THEM, IS ANALOGOUS TO THE EFFORTS THAT YOU UNDERTOOK TO CASH THE CHECK AND SEND SOMEONE TO SWITZERLAND

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TO TRY TO UNDERTAKE THOSE EFFORTS AS WELL?

A I THINK IF YOU LOOK AT IT, YOU KNOW FROM A DISTANCE, IT DOES SEEM SIMILAR, YES.

I THINK THAT THERE IS A DISTINCTION IN ONE SIDE WHERE YOU ARE TRYING TO CASH A CHECK. AND IN ANOTHER SIDE, YOU ARE TRYING TO CONFIRM PROPERTY.

Q RIGHT.

A ONE IS A NEGOTIABLE INSTRUMENT.THE PROPERTY IS -- IT IS REASONABLE TO TAKE A LOOK AT PROPERTY THAT YOU NOW BELIEVE YOU ARE ENTITLED TO.

Q ALL RIGHT. WELL, AS WE GO THROUGH IT, THEY BOTH INVOLVED PAPER WORK? IN OTHER WORDS, YOU HAD PAPERS THAT YOU WERE TRYING TO EXECUTE UPON OR VERIFY THE EXISTENCE OF? IS THAT AGREED?

THE COURT: DID YOU HAVE ANY PAPERS IN CONNECTION WITH THE --

THE WITNESS: THE SHOPPING CENTER?

THE COURT: -- THE SHOPPING CENTER?

THE WITNESS: NONE THAT I KNOW OF.

THE COURT: THERE WERE NO PAPERS ACTUALLY AT ALL NEGOTIATED ON THAT PARTICULAR THING, WERE THERE?

THE WITNESS: NOT THAT I KNOW OF, NO.

Q BY MR. BARENS: ON THE SHOPPING CENTER, DID YOU NOT HEAR THAT EFFORTS WERE BEING UNDERTAKEN TO VERIFY THE LEGAL TITLE ON THE SHOPPING CENTER BY WAY OF A TITLE REPORT OR DEED OR SOME DOCUMENT ANALOGOUS THERETO?

A I NEVER HEARD THERE WERE ANY EFFORTS MADE TO SECURE A TITLE REPORT ON THE SHOPPING CENTER.

Q HOW ABOUT ANY OTHER WRITTEN REPORT YOU GENTLEMEN COULD OBTAIN AS TO TITLE, WHERE THERE EFFORTS IN THAT REGARD?

A I THINK WE WERE SEEKING TO GET SOME EVIDENCE OF TITLE, YES.

Q EVIDENCE OF TITLE TO YOU, SIR, WOULD BE SOME SORT OF WRITING, WOULD IT NOT?

A IT WOULD BE, YES.

Q AND DO YOU REMEMBER THE DISCUSSIONS ATTENDANT WITH SENDING SOMEONE TO THE SHOPPING CENTER SITE?

A I DO RECALL SENDING -- THE DISCUSSION ABOUT SENDING SOMEONE TO THE SHOPPING CENTER.

Q THEREFORE, YOU HAD SOME KNOWLEDGE AS TO THE LOCATION OF THE SHOPPING CENTER?

A YES, I THINK I BELIEVE I RECALL SOME KNOWLEDGE

WITH REGARDS TO THE LOCATION OF THE SHOPPING CENTER.

Q IN REFERENCE TO THE MILLION FIVE CHECK, THAT IS WRITTEN ON A FOREIGN BANK ACCOUNT, IS IT NOT, SIR?

A YES, IT WAS.

Q AND NONE OF YOU HERE HAD ANY PAPERWORK ON THAT ACCOUNT, DID YOU?

A WE HAD THE CHECK.

Q I AM TALKING ABOUT THE PAPERWORK AS FAR AS TITLE TO THE ACCOUNT OR ANY BANK STATEMENTS ON THE ACCOUNT, THINGS OF THAT NATURE.

A NOTHING BESIDE THE CHECK, NO.

Q AND DID ANY OF YOU HAVE ANY PARTICULAR EXPERTISE CONCERNING FOREIGN BANKING MATTERS?

A NONE THAT I AM AWARE OF, NO.

Q SO YOU HAD NEVER PERSONALLY ENGAGED IN CASHING A SWISS CHECK BEFORE, HAD YOU, SIR?

A NO, I HAD NOT.

Q AND THUS, THERE WAS A MEETING WHEREIN, OR SOME DISCUSSION WHEREIN YOU DETERMINED THAT IT WAS ADVISABLE IN A BUSINESS SENSE TO SEND MR. DOSTI OVER TO SEE WHAT COULD BE DONE TO EXPEDITE THAT MATTER?

A I THINK IF THERE WAS A MEETING OR DISCUSSION, IT WAS HELD PRIOR TO MY ARRIVING AT THE OFFICE THAT DAY.

Q AND THEN YOU LATER HEARD ABOUT IT?

A I WAS LATER INSTRUCTED TO PREPARE THE MINUTES.

Q AT THAT SPECIFIC MOMENT IN TIME, IN YOUR MIND WAS THERE ANYTHING SINISTER ABOUT THAT ACTIVITY?

A SINISTER ABOUT SENDING MR. DOSTI TO EUROPE TO

ACCOUNTS WITH ANYTHING IN IT?

A I THINK THAT MORE THAN TRYING TO ACT LIKE A BIG MAN, HE WAS TRYING TO ACT LIKE IT WAS NO BIG DEAL.

Q HE WAS TRYING TO ACT SELF-EFFACING?

A NO. JUST THAT THIS WASN'T -- ALMOST LIKE IT WASN'T ANYTHING NEW AND IT WASN'T ANYTHING THAT PARTICULARLY UPSET HIM. THIS IS JUST HANDLING MILLIONS OF DOLLARS WAS THE SAME AND SHOULD BE THE SAME TO HANDLE SMALL AMOUNTS OF MONEY.

Q WAS HE GIVING YOU THE IMPRESSION THAT HANDLING MILLIONS OF DOLLARS WAS, JUST FOR HIM AT LEAST, BUSINESS AS USUAL?

A YES.

Q AND THAT WAS THE PERCEPTION YOU HAD?

A THAT WAS THE PERCEPTION I HAD.

Q AND YOU BELIEVED THAT?

A AND I BELIEVED THAT.

Q DID EVERYONE ELSE APPEAR TO YOU TO BELIEVE THAT?

A I DON'T RECALL SPECIFICALLY WHAT OTHER PEOPLES' BELIEFS WERE.

Q DID ANYBODY EVER COME TO YOU AND SAY "OH, COME ON NOW, EVAN, THAT IS NOT TRUE. [illegible] IS NOT HANDLING MILLIONS FOR LEVIN AT ALL"?

A NOT THAT I RECALL RIGHT NOW, NO.

Q DID ANYBODY --

A NOT THAT I RECALL.

Q YOU DON'T EVER RECALL THAT HAPPENING, DO YOU?

A NO, I DON'T.

Q YOU DON'T RECALL ANYBODY SAYING TO YOU, "YOU KNOW, HUNT IS GIVEN TO FITS OF FANTASY OCCASIONALLY AND SAYS THINGS THAT AREN'T TRUE"?

A AT WHAT POINT? YOU MEAN AT ANY TIME?

Q SURE.

A I THINK I MAYBE HAVE NOW LEARNED THAT THERE WERE SOME THINGS JOSEPH HUNT MIGHT HAVE TOLD ME THAT WERE UNTRUE BUT AT THAT TIME --

Q HOW DO YOU KNOW WHEN SOMEONE IS TELLING THE TRUTH UNDER THE PARADOX PHILOSOPHY, CAN WE EVER KNOW?

A I THINK -- WELL, I CAN'T ANSWER THE QUESTION "UNDER THE PARADOX PHILOSOPHY."

Q THAT IS THE SETTING IN WHICH I GAVE YOU THE QUESTION, SIR.

A THEN I CAN'T ANSWER THE QUESTION.

Q IS THE TRUTH THAT YOU JUST CAN'T KNOW?

A I GUESS WHAT SOMEBODY IS TELLING, I GUESS YOU SORT OF VIEW IT IN A MANNER THAT IS ADVANTAGEOUS TO YOU AND WORKS OUT AND YOU TAKE THE CIRCUMSTANCES AND USE THEM TO YOUR BEST ADVANTAGE.

Q AND THUSLY, SINCE WE CAN'T KNOW WHATEVER SECRET AGENDAS AN INDIVIDUAL MIGHT HAVE, WE CAN'T REALLY BE CERTAIN AT ANY GIVEN POINT IN TIME WHETHER HE IS TELLING THE TRUTH OR NOT UNLESS WE KNOW HIS AGENDA ON SOME BASIS?

A I THINK WHAT IT ACTUALLY WORKS OUT TO BE, UNLESS YOU HAVE OTHER FACTS, YOU COULD NEVER TELL WHEN SOMEBODY IS TELLING THE TRUTH OR NOT.

Q RIGHT.