CHAPTER FIVE:
MENS REA, CONCURRENCE, CAUSATION

By now, we know that:

- A criminal offense requires a criminal intent, with the exception, of course, of strict liability crimes (discussed below) and criminal negligence.
- The requirement of a criminal intent is based on "moral blameworthiness," which is a conscious decision to intentionally or knowingly engage in criminal conduct or to act in a reckless or negligent fashion.
- Mens rea consists of four states of mind. The most serious or culpable is: purposely, followed by knowingly, recklessly and then, negligently.
- Strict liability offenses require an actus reus, but do not incorporate a mens rea requirement. These typically are public welfare offenses or crimes that protect public safety and security by regulating food, drugs and transportation.

CONCURRENCE

There must be a concurrence between a criminal intent and a criminal act that causes a prohibited harm or injury.

CAUSALITY

A criminal act must be the cause in-fact or "but for" cause of a harm or injury as well as the legal or proximate cause.

- Factual cause simply requires you to ask whether "but for" the defendant's act the victim would have died?
- Legal or Proximate Cause
    - "But for" your act the victim would not have been placed in the situation that led to the injury or loss.
    - *Sine qua non*: Latin term for "*without which it could not be*" which is referred to as "*but for*." Literally translated it means that without the initiating event or act, the injury or loss could not have occurred. Sometime referred to as the "but for test." (But for A happening, B or C could not have occurred)
- Intervening Cause
    - *Coincidental intervening acts* arise when a defendant's act places a victim in a particular place where the victim is harmed by an unforeseeable event. A coincidental intervening act does not break the chain of causation caused by a defendant's criminal act unless the intervening act was unforeseeable.
    - *Responsive intervening act* does not break the chain of causation caused by a defendant's criminal act unless the intervening act was both abnormal and unforeseeable. These acts are a reaction to the conditions made by the defendant for the victim, in which case the defendant is the proximate cause – unless - the intervening cause is unforeseeable and very highly unlikely, bizarre, and abnormal. The question is, did the defendant foresee, predict, anticipate or intend the consequences? ***(The intended consequences doctrine)***

Year and a Day rule.

Your text mentions the "year and a day" rule, which refers to the length of time in which a victim must die, from the date of the incident, to be considered a homicide case. In California, this can be changed statutorily, and in fact was changed to three years and a day.

PC 194. Death of Victim (must occur) Within Three Years and a Day
To make the killing either murder or manslaughter, it is not requisite that the party die within three years and a day after the stroke received or the cause of death administered. If death occurs beyond the time of three years and a day, …

Note, the statute includes this language: … *"there shall be a rebuttable presumption that the killing was not criminal. The prosecution shall bear the burden of overcoming this presumption. In the computation of time, the whole of the day on which the act was done shall be reckoned the first."*

Rebuttable Presumptions:

Rebuttable presumptions (in Latin, ***praesumptio iuris tantum***) is an assumption that is made that is taken to be true unless someone comes forward to contest it and prove otherwise. Rebuttable presumptions in criminal law are somewhat controversial in that they do effectively reverse the presumption of innocence in some cases. Many presumptions are "rebuttable," which means that the person against whom the presumption applies may present evidence to the contrary, which then has the effect of nullifying the presumption. This then deprives the person that tried to use the presumption with the advantage of the "free" evidence and makes him present evidence to support the fact, which might have been proven by the presumption.

In essence, there is the opportunity to both sides to prove that the death did or did not occur as a direct result (*but for* or *sine qua non)* the actions of the defendant. The prosecution burden is to overcome that presumption, whereas the defense would want to "presume" that the death was not attributable to the defendant. How does this case most often play out? With long-term hospital care where the victim is on life support, in a coma or has complications from the injuries suffered in the initial attack. (Shooting, stabbing, etc.,) With modern medicine, Life Flight helicopters, new cardio-pulmonary devices in police cars, it is no wonder that victims are transported faster to hospitals, and receive care very quickly. However, in many cases where complications may arise, the question is then what actually killed the person. Was it pneumonia or staph infection? Or was it really the reason why they were in the hospital in the first place; having been shot, stabbed or otherwise that put them in a life-threatening situation? Imagine the irony of a defendant serving time and being released while you are in a coma. You then die, and the person cannot be retried!

Killed by the Neighbors Dogs!

In perhaps one of the more bizarre cases from San Francisco, a beautiful blonde neighbor who lived next to two San Francisco attorneys, was killed by the couples 120-pound dog, a "Presa Canario" The neighbor, Diane Whipple was attacked in the common hallway of their San Francisco apartment building in January 2001 by two mammoth dogs in the presence of their owners. Both defendants went public with their feelings that they bore no responsibility for the incident.

They implied that the victim was partly at fault, since the victim was wearing perfume, and suggested that since she was an athlete, perhaps she was using steroids which also could be sensed by the dogs. The defendants lost further credibility when they legally adopted a 39-year-old convict serving a life sentence. The convict had been tied to a white supremacist prison gang.

The inmate, Paul Schneider, who goes by the nickname "Cornfed," reportedly ordered a contract on the life of one of the prosecutors in the dog mauling case, Kimberly Guilfoyle-Newsom, a former lingerie model who is the wife of then City Councilman, and now Mayor of San Francisco, Gavin Newsome. (Court TV)

Where would the issue of "intent" be in this type of case? Go to Court TV and look up the case!
People v. Noel & Knoller (2005) 128 Cal.App.4th 1391 [1] The convictions were affirmed.

THE EVIDENTIARY BURDEN

In California, the evidentiary burden is twofold; one is the burden of having to go first in a criminal case. This is referred to as the prosecutions "Case in Chief." The second is to gain a conviction beyond a ***reasonable doubt***.

Both the California Penal Code and the California Evidence Code, address the issue of intent. To even clarify the wording is understood, PC 7 defines...

1. The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.
2. The words "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. ***(sections 3-4 are skipped intentionally)***
5. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

Your text cites the Model Penal Code's attempt to clearly define the mental intent required for crimes by providing four easily understood levels of responsibility. All crimes requiring a mental element (some do not as we shall see) must include one of the four mental states provided in the Model Penal Code. These four types of intent in descending order of seriousness are:

- Purposely. "You borrowed my car and wrecked it on purpose."
- Knowingly. "You may not have purposely wrecked my car, but you knew that you were almost certain to get in an accident since you had never driven such a powerful and fast automobile."
- Recklessly. "You may not have purposely wrecked my car, but you were driving over the speed limit on a rain soaked and slick road in heavy traffic and certainly realized that you were extremely likely to get into an accident."
- Negligently. "You may not have purposely wrecked my car and apparently did not understand the power of the auto's engine, but I cannot overlook your lack of awareness of the risk of an accident. After all, any reasonable person would have been aware that such an expensive sports car would pack a punch and would be difficult for a new driver to control."

This merely means that a defendant acted "on purpose" or "deliberately." In legal terms, the defendant must possess a specific intent or "conscious object" to commit a crime or to cause a result. California statutes clarify this in PC 20, 21 and Evidence Code 668.

1 http://www.lexisnexis.com/clients/CACourts/? Search Appellate cases for 128 Cal.App.4th 1391 And http://www.courttv.com/trials/dogmaul/index.html

PC 20. Unity of Act and Intent or Negligence
In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

PC 21. Intent Manifested by Circumstances
(a) The intent or intention is manifested by the circumstances connected with the offense.
(b) In the guilt phase of a criminal action or a juvenile adjudication hearing, evidence that the accused lacked the capacity or ability to control his conduct for any reason shall not be admissible on the issue of whether the accused actually had any mental state with respect to the commission of any crime. This subdivision is not applicable to Section 26.

Even attempts are made culpable by the Penal Code. This is also discussed in a later chapter.

PC 21a. Elements of Attempt
An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

EC 668. Presumption; Unlawful Intent from Unlawful Act
An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

In criminal negligence cases, the Evidence Code clarifies that there is a presumption of liability when one does fail to exercise due care or is negligent:

EC 669. Presumption; Failure to Exercise Due Care or Negligence
(a) The failure of a person to exercise due care is presumed if:
(1) He violated a statute, ordinance, or regulation of a public entity;
(2) The violation proximately caused death or injury to person or property;
(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

STRICT LIABILITY

Your text cites Strict Liability statutes as a crime that does not require a mens rea and an individual may be convicted based solely on the commission of a criminal act. For example, if you failed to have your driver's license with you when driving your car, do the police have to prove beyond a reasonable doubt that you had the mens rea to drive without your license? Or if you were speeding?

Would they have to prove you had the mens rea to break the speed limit law? Of course not. In either case, the mere fact that you left your drivers license at home, or were speeding, is enough to cite you and hold you accountable for either violation. This is the essence of strict liability law; that you, for whatever reason, simply failed or ignored the law and were caught!

Malum Prohibita vs Malum in se crimes
Strict liability crimes or offenses are also referred to as malum prohibita offenses. These are acts that are "wrong," because they are prohibited by statute. Whereas, malum in se crimes are those acts which are inherently wrongful such as rape, robbery and murder.

For example, the following laws are illegal because they are statutes designed to protect the public and require no criminal intent, or motive. Committing the act itself is sufficient to prosecute.

VC 12951. Possession of (drivers) License

- *The licensee shall have the valid driver's license issued to him or her in his or her immediate possession at all times when driving a motor vehicle upon a highway.*
- *The driver of a motor vehicle shall present his or her license for examination upon demand of a peace officer enforcing the provisions of this code.*

Notice there's no mention of the word "intent." The law simply states you "shall," meaning you better have your license with you when driving or you're subject to not only a citation, but in California, may even have your car impounded!

Other sample sections include:
VC 22350. Basic Speed Law
No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

VC 23103. Reckless Driving
Any person who drives any vehicle upon a highway in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Street Racing.
Street racing in California is illegal. The CHP and local police have a very low tolerance for street racers and have seen far too many fatal accidents related to illegal street racing. Illegal street racers face arrest, jail, having their cars impounded and having their licenses revoked.

A first conviction on a street racing violation means:

- Minimum county jail sentence of 24 hours and maximum of 90 days.
- Vehicle may be impounded for at least 30 days.
- Owner responsible for vehicle's towing and storage charges ($1,000 or more).
- If owner fails to pay, vehicle could be sold at a lien sale.
- Anyone who aids or abets a street race also faces a maximum 90-day jail sentence.

VC 23109. Speed Contests

(a) No person shall not engage in any motor vehicle speed contest on a highway. As used in this section, a motor vehicle speed contest includes a motor vehicle race against another vehicle, a clock, or other timing device. For purposes of this section, an event in which the time to cover a prescribed route of more than 20 miles is measured, but where the vehicle does not exceed the speed limits, is not a speed contest.
(b) No person shall not aid or abet in any motor vehicle speed contest on any highway.
(c) No person shall not engage in any motor vehicle exhibition of speed on a highway, and no person shall aid or abet in any motor vehicle exhibition of speed on any highway.
(d) No person shall not for the purpose of facilitating or aiding or as an incident to any motor vehicle speed contest or exhibition upon a highway in any manner obstruct or place any barricade or obstruction or assist or participate in placing any barricade or obstruction upon any highway.

VC 23109.2. Speed Contest; Arrest of Driver and Removal of Vehicle

(a)(1) Whenever a peace officer determines that a person was engaged in any of the activities set forth in paragraph (2), the peace officer ***may immediately arrest and take into custody*** *that person and may cause the removal and seizure of the motor vehicle used in that offense …*

So, the words "mens rea," or "intent" were not present in any of these statutes. That's because they are "strict liability" offenses.

Review Questions

1. In the Dog Mauling case, do you agree with the verdict? Why or why not?
2. Do you think that street racing should be illegal? Why or why not?
3. What are the differences between *malum prohibita* and *malum in se* crimes? Which is more serious?
4. Assume that Sam had shot Stan with a 9mm handgun with the intent to kill him. However, Stan has survived his wounds but ultimately died 12 years after the incident, and Sam had served 5 years on an attempted murder charge. Could Sam now be tried for Stan's death?
5. What does ***rebuttable*** mean? Is it only used by the prosecution or the defense?

Web Resources

Dog Mauling Case: Defendants – Marjorie Knoller and Robert Noel. Victim: Diane Whipple
http://www.lexisnexis.com/clients/CACourts/? Search Appellate cases for 128 Cal.App.4th 1391

Court TV: http://www.courttv.com/trials/dogmaul/index.html

Legal Definitions:
http://dictionary.law.com/
http://sixthformlaw.info/

For more information on Street Racing, here are some resources for you:

- http://www.chp.ca.gov/html/streetlegal.html
- www.cops.usdoj.gov/mime/open.pdf?Item=1418
- http://www.nhra.com/streetlegal/

Case Study #1: People v. Superior Court (Decker) (Nov. 17, 2004) 124 Cal.App.4th 104

Discussion Question: Do you think that this case is a good one to clarify the differences between criminal intent, concurrence and causation? In this case the defendants never got to the point where they actually did anything other than plan and reconnoiter. What do you think?

In this case, having the mens rea or intent to carry it out is one thing. Actually trying to carry it out and some external factor occurs to prevent it from being completed. Are you still liable even though you couldn't complete it, despite your best efforts to commit the crime? An "attempt" has been committed whenever the defendant has done some overt act beyond mere preparation that sufficiently evidences his or her specific intent to carry through with his or her plan to commit a criminal offense.

Facts

The defendant (Decker) contacted a Temple City gunsmith, telling the gunsmith that he was looking for a "contractor" to do some work, eventually admitting that what he wanted was for his sister to be murdered. The gunsmith arranged to have defendant meet someone identified as "John" from Detroit (since all contract killers seem to come from Detroit). Unbeknownst to defendant, John was actually an undercover police officer to whom the gunsmith had reported defendant's solicitation. Defendant told John that he wanted his sister killed because she owed him a lot of money and that her demise was the only why he was going to get it. They worked out a deal whereby John would kill defendant's sister for a total of $35,000; $5,000 of which would be paid up front. The rest was to be paid when defendant got the money due to him upon his sister's death. John obtained assurances from defendant that he did in fact want his sister murdered, John telling him that once he received the down payment there was no turning back. Defendant assured John that he was "100 percent absolutely positive that he wanted the job done." Defendant gave John $5,000 in cash. Defendant was later arrested and charged with attempted murder and solicitation of murder. The trial court dismissed the attempted murder count. The People's petition for mandate, asking for reinstatement of the attempted murder count, followed.

Issue

Has the defendant done some overt act, beyond mere preparation, that evidences how serious he is in his specific intent to commit the target offense? A robber, for instance, does not need to be actually walking in the door of a 7-Eleven to be guilty of the crime of attempted robbery. The core issue now is where we draw the line between "mere preparation" and those "overt acts" committed while moving towards the commission of the crime? For that, we must await guidance from future cases.

Decision

The Second District Court (Div. 4) granted the People's petition, reinstating the attempted murder count after a long exhaustive discussion on the law of attempts. The crime of attempt is comprised of two elements; (1) a specific intent to commit a target offense and (2) a direct but ineffectual act, beyond mere preparation, done towards committing that target offense. Although other cases talk in terms of having to get "dangerously close," the Court here held that the "direct but ineffectual act" need not be the ultimate step toward the consummation of the target offense. After completing the "mere preparation" necessary to starting the plan in action, any further overt act done towards the commission of the target offense is legally sufficient to trigger attempt liability irrespective of whether it is the first or some subsequent act directed towards that end. That "overt act" need only be something that sufficiently evidences the defendant's intent to carry through with his plan. Here, defendant paid "John" $5,000 after having been told that once this down payment is made it is too late to turn back. Paying John evidenced defendant's sincere intent to have his sister killed. As such, he committed the crime of attempted murder. Also, the Court noted the fact that the attempt occurred in the context of a sting operation is irrelevant. It is still no less of an attempt.

Case Study #2: People v. Schmies (1996) , 44 Cal. App. 4th 38

This case, mentioned in your text, raises the question of causation in a criminal case involving police pursuit of a fleeing motorist. The principal question relates to the admissibility of evidence concerning the reasonableness of the pursuing officers' conduct.

Discussion Question:
Do the actions of the officers in the pursuit negate the liability of the person being pursued? This also brings up the issue of transferred intent, which is the basis of the Felony Murder rule also.

Facts
The defendant, Claude Alex Schmies, fled from an attempted traffic stop and engaged in a high-speed vehicle chase with peace officers. During the chase, one of the pursuing patrol cars struck another car. The driver of the other car was killed and the police officer was injured. Charged with a variety of offenses, defendant was acquitted of second degree murder (Pen. Code, § 187, 189) but convicted of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1) and reckless driving causing great bodily injury (Vehicle. Code, § 23104, subd. (b). At 4:30 p.m. on October 24, 1992, California Highway Patrol (CHP) Officer Steven Petch was driving southbound on Interstate 5. Another CHP Officer, Christopher Homen, was approximately two-tenths of a mile behind him in another patrol car.

Schmies, who was driving a motorcycle, entered the highway and accelerated to a speed of approximately 90 miles per hour. Officer Petch activated his lights for a traffic stop. Defendant slowed down, looked over his shoulder and then sped up.

Officer Petch turned on his flashing lights and siren and radioed to Officer Homen, "Here we go." Officer Petch also notified radio dispatch about the pursuit and, after getting behind the motorcycle and obtaining its license number, asked dispatch to check on the vehicle. The report came back clear: the motorcycle had not been reported stolen, nor were there any outstanding warrants.

The pursuit continued along Interstate 5 at speeds in excess of 90 miles per hour. Officer Petch drove alongside defendant to try to keep him on the freeway. He got a clear look at defendant and the motorcycle.

Defendant cut in front of Officer Petch and took an exit from the freeway. Both Officer Petch and Officer Homen followed in their cars. Officer Petch had turned on all of his emergency lights as well as his siren. Officer Homen did not have overhead lights, but had activated a light on the side of his car and also turned on his siren.

Defendant drove through stop signs and over double yellow lines to weave around cars. He drove through red lights as well. Defendant went at speeds of up to 95 miles per hour, and came perilously close to falling off his motorcycle on sharp turns.

Defendant drove through the intersection of Churncreek and Parsons. Officer Petch followed. A car on Parsons that had been stopped to allow Officer Petch to go through started into the intersection, apparently unaware of the second patrol car driven by Officer Homen. Officer Homen tried to avoid the car but hit it broadside. The driver, Jane Abbett, was killed and Officer Homen was injured.

Defendant drove on, trying to evade Officer Petch. At this point, Officer Petch had pursued defendant for approximately 5.5 miles. Officer Petch was unable to follow when defendant drove down an abandoned road, but saw defendant drive into an apartment complex. Defendant was arrested shortly afterward. He had hidden his motorcycle, helmet and sweatshirt in a wooded area.

Issue

At trial, defendant attempted to demonstrate that Officer Homen's actions broke the chain of causation, absolving defendant of responsibility for Abbett's death and Officer Homen's injuries. To this end, defendant tried to obtain a complete copy of the CHP's pursuit policy to learn whether Officer Homen's actions violated CHP guidelines. CHP opposed this request, asserting in part that disclosure of the complete policy would jeopardize officer safety. CHP did, however, release a "sanitized" version of the policy to defendant.

Finding this version of the policy unsatisfactory, defendant renewed his request for complete disclosure. The trial court denied the motion, ruling that the policy was irrelevant to determining whether Officer Homen's actions were reasonably foreseeable.

Decision

The court refused to permit defendant's expert witnesses to testify as to the reasonableness of the pursuit. The court distinguished the question of foreseeability from the question of reasonableness, and ruled that while defendant could argue that Officer Homen's conduct was not reasonably foreseeable, he could not introduce evidence relating to the reasonableness of Officer Homen's action, an area the court deemed irrelevant to the issues at hand.

On appeal, defendant challenged the trial court's exclusion of evidence of the CHP pursuit policies as well as evidence relating to the reasonableness of the officers' actions. The Court found no error in the judgment.

Case Study #3: *People v. Brady (2005)* 129 Cal. App. 4th 1314

Discussion Question:
Do you think that the defendants should have been convicted of murder, since it was essentially a fire that got out of control, and that they had no direct involvement with controlling what happened later? The "Felony Murder Rule" is in another chapter, but for this answer, think of the key issue of "causation" and discuss your view. You'll have to research the case to find out what the court ruled.

Facts
The defendants, Franklin Brady and Richard Mortensen, were accused of causing the deaths of two firefighter pilots (Groff and Stratte) who collided when responding to a fire that broke out near defendants' methamphetamine laboratory in a wooded area of Mendocino County. They were tried jointly on various charges, including murder, manufacturing and conspiracy to manufacture methamphetamine with special allegations that their illegal acts caused two deaths, and recklessly causing a fire that resulted in the death of the firefighters.
The following evidence was presented at trial:
At approximately 3:00 p.m. on August 27, 2001, a forest fire was reported in a wooded area of Mendocino County just south of Ukiah. Because of the remote location, air support was required to control the fire. California Department of Forestry and Fire Protection (CDF) officer James Davis supervised nine air tankers and three helicopters fighting the fire. Pursuant to CDF protocol, the air tankers carrying fire retardant flew counterclockwise at an altitude of 1,000 to 1,5000 feet until they reached the fire, and then descended to approximately 200 feet as they approached the drop site.

About 6:40 p.m., after pilot Groff had completed six successful drops and Stratte had made five successful drops, Groff's plane collided with Stratte's plane. CDF Officer James Wattenburg, who was on the ground at the time of the collision, reported seeing Stratte's plane flying in pattern and then descending for its drop when a third plane approached from the wrong direction and collided with his plane. Other witnesses confirmed that Groff's plane was flying very low, below the tree line, and in the opposite direction than the other planes had been flying. Neither pilot survived the collision.

CDF Officer Jim Robertson was the first firefighter to reach the site where the fire started. When he arrived he saw a trailer that had almost burnt to the ground. The flames coming from the trailer were blue, green and orange. Other officers reported seeing purple and yellow colored smoke coming from the trailer. Neighbors Chris Fisher and Jennifer Provost were at the scene when Robertson arrived. Fisher testified that when he arrived at the scene the trailer was not on fire but that it burst into flames a few minutes later. He told Robertson that he thought people had been cooking methamphetamine in the trailer. Provost testified that she stopped at the scene because she saw a grass fire in a 20-foot wide oval about 10 feet from the trailer. Brady was there and asked for help, so she went home to get water. When she returned, the trailer was on fire and Brady was gone. Provost told Robertson that she had seen a black jeep leaving the scene of the fire. Robertson put out a radio bulletin for officers to be on the lookout for a possible arson suspect driving a black jeep.

CDF Officer Larry Grafft heard the radio bulletin and responded to a location on Highway 101 where the black jeep had been pulled over. Brady had been riding in the jeep with Mortensen.
The "Alibi!"
Brady said that he had started the fire in the fire ring outside the trailer to boil water for a sitz bath for his hemorrhoids. After unsuccessful attempts to build the fire, Brady threw a piece of wood on some burning paper. Sparks flew from the fire ring and nearby dry grass caught fire. Brady tried

unsuccessfully to stomp out the grass fire. He and Mortensen tried to extinguish the fire with the water for his bath, a shovel and cans of soda, but they gave up when the fire grew too big and crossed the road, but that burning paper blew out of the fire ring and the fire "took off." He tried to fight the fire with a shovel and water but left when the water ran out.
Brady was arrested on suspicion of arson, but Mortensen was released. After Brady's arrest, Grafft responded to the fire scene where he found the camping ring, a washtub, and a shovel without a handle. The area was still smoking and there were pink and blue flames inside the trailer.

The officers determined that defendants were likely manufacturing methamphetamine at the trailer, and Mortensen was arrested later that night at Brady's house. The arresting officer searched Brady's house pursuant to a search warrant and found a glass containing a mixture of acetone and methamphetamine in the freezer. In a box in a bedroom he also found three pipes and suspected methamphetamine residue. In Mortensen's black jeep the officer found store receipts dated August 26 and 27 for one gallon of acetone, four gallons of denatured alcohol, one pair of leather gloves, three 5-gallon buckets, and plastic tubing.

A toxicologist testified that a sample of Mortensen's blood, taken after his arrest, tested positive for a large quantity of methamphetamine, indicating that he was a regular user. Brady's blood also tested positive for methamphetamine, albeit for a much smaller concentration.

CDF Officer Ceriani, an expert on the use of solvents and accelerants in the investigation of wildfires, investigated the fire on August 27. Ceriani identified one point of origin of the fire in or around the firepit outside the trailer. He did not go into the trailer because it appeared to have been a methamphetamine laboratory and he requested the Mendocino Major Crimes Task Force to investigate. He opined, however, that the trailer must have burned at a higher than normal temperature to cause the damage he observed, and that a sudden ignition of a large quantity of accelerants likely caused a pressure wave that pushed the windows out of the trailer.

Task Force Officer Robert Nishiyama investigated the fire scene and testified as an expert in the recognition of methamphetamine laboratories. He explained how glass laboratory equipment found inside the trailer is used to manufacture methamphetamine. Nishiyama also reported finding three heating mantles in the trailer. Although a number of the members of the family of Joe Edelman, who owned the trailer, testified that the trailer did not have electricity and that the generators had not worked for years, Nishiyama identified wires that may have been connected to the heating mantles and a power strip next to the mantles with what appeared to be remnants of plugs and wires leading into it. Nishiyama also found a Coleman camp stove and Coleman fuel in and around the trailer. Finally, he testified that the liquid mixture found in Brady's freezer was evidence of a finished "cook" because the dirty methamphetamine is washed in acetone at the end of the ephedrine reduction manufacturing process. Based on this evidence, Nishiyama believed the trailer was an operational laboratory and not merely a storage facility.

Mathew Kirsten, a California Department of Justice criminalist, also investigated the fire. He tested personal items taken from defendants after their arrest and found traces of methamphetamine and ephedrine on their clothing. He confirmed that the liquid mixture found in Brady's freezer contained methamphetamine manufactured by the ephedrine reduction process. He also explained that purple smoke from the fire is consistent with burning iodine, which is used in the manufacture of methamphetamine. In his expert opinion, based on Mortensen's recent purchases, the large quantity of glassware, and the fact that a flask was sitting on a heating mantle, the trailer housed an operational methamphetamine laboratory.

Officer Mark McNelly, a special agent with the Mendocino Major Crimes Task Force at the time of the fire, also examined the burnt-out trailer. Based on the placement of the glassware that he found, he also believed the trailer was an operational lab, not merely a storage facility.

Brady testified that during the summer of 2001, he had gone to the trailer approximately six times to help Edelman clean the area to prepare it for sale. Sometime in August 2001, Mortensen had come to the trailer with Brady, and Brady had suggested that he store his lab equipment there. Brady knew that the equipment was used for making methamphetamine.

On August 26, 2001, Brady and Mortensen went to several stores, where Mortensen bought duct tape, a hose, denatured alcohol, and acetone. Brady assumed that Mortensen was buying the materials to manufacture methamphetamine. That night they drove to the Edelman property and spent the night. The following morning Mortensen put his glassware and recent purchases in the trailer.

Issue

Brady and Mortensen were charged by information with the murder of Lawrence Groff (count one, Pen. Code, § 187, subd. (a)); the murder of Lars Stratte (count two, Pen. Code, § 187, subd. (a)); manufacturing methamphetamine with special allegations that Groff and Stratte suffered great bodily injury and death during the commission of the offense (count three, Health & Saf. Code, §§ 11379.6, subd. (a), 11379.9, subd. (a)); recklessly setting a fire to a structure or forest land that caused the deaths of Groff and Stratte with special allegations that Groff and Stratte were killed while employed to suppress that fire (count four, Pen. Code, §§ 452, subd. (a), 452.1, subd. (a)(2)); and conspiracy to manufacture a controlled substance with the following overt acts: both defendants purchased chemicals to be used in manufacturing methamphetamine, transported and/or stored chemicals to be used in the process of manufacturing methamphetamine, and entered a trailer for the purpose of manufacturing methamphetamine (count five, Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379.6, subd. (a)).

Mortensen was convicted only of manufacturing and conspiring to manufacture methamphetamine. He appeals on the grounds that there is no substantial evidence to support the conviction and that the court improperly admitted evidence of a prior conviction for manufacturing methamphetamine. Brady was convicted of recklessly starting a fire that caused the deaths of the pilots and of manufacturing and conspiracy to manufacture methamphetamine. His primary contention on appeal is that the jury instructions and the exclusion of four categories of evidence precluded the jury from properly determining whether his conduct proximately caused the death of the pilots. He also contends that the trial court improperly removed six potential jurors for cause based on their stated inability to follow the court's incorrect instructions on proximate cause. In a supplemental brief, Brady contends that the trial court also erred in failing to instruct the jury that it must unanimously agree which activity constituted the manufacture of methamphetamine. In the published portion of this opinion, the court addressed only the issues relating to proximate and superseding causation.

Decision

The judgments are affirmed. A petition for a rehearing was denied July 5, 2005, and appellants' petition for review by the Supreme Court was denied September 7, 2005.

Answers to Review Questions

Chapter 5

1. In the Dog Mauling case, do you agree with the verdict? Why or why not?
A. This is calls for a subjective answer, but the verdict was clear; the defendants were liable .

2. Do you think that street racing should be illegal? Why or why not?
A. Subjective answer. In California it is illegal.

3. What are the differences between *malum prohibita* and *malum in se* crimes? Which is more serious?
A. The Malum in Se Crimes are more serious as they are crimes that are inherently evil. Prohibita crimes are violations of statutes but not necessarily harmful.

4. Assume that Sam had shot Stan with a 9mm handgun with the intent to kill him. However, Stan has survived his wounds but ultimately died 12 years after the incident, and Sam had served 5 years on an attempted murder charge. Could Sam now be tried for Stan's death?
A. No, he cannot be. This is, or would be, "double jeopardy."

5. What does ***rebuttable*** mean? Is it only used by the prosecution or the defense?
*A. Rebuttable presumptions (in Latin, **praesumptio iuris tantum**) is an assumption that is made that is taken to be true unless someone comes forward to contest it and prove otherwise. Rebuttable presumptions in criminal law are somewhat controversial in that they do effectively reverse the presumption of innocence in some cases. Many presumptions are "rebuttable," which means that the person against whom the presumption applies may present evidence to the contrary, which then has the effect of nullifying the presumption. This then deprives the person that tried to use the presumption with the advantage of the "free" evidence and makes him present evidence to support the fact, which might have been proven by the presumption. They may be used by either prosecution or defense.*