to take the stand, but because of the fact that they are subject to impeachment by reason of such prior conviction of a felony, and thus an issue can be placed before the jury which prejudices them and deprives the accused of a fair trial on the specific question of guilt or innocence of the charge with which they are faced.

Other reasons are set forth in appellant's briefs herein.

The Applicable Law

There are several decisions of the United States Supreme Court which have settled the law on this question but the case of Tot v. United States, 319 U. S. 463, only will be quoted since, it is believed, it will suffice for present [fol. 688] purposes.

Tot was charged with violation of the Federal Firearms Act which provided, "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearms or ammunition which has been shipped or transported interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

The Opinion states, "The Government's evidence was that Tot had been convicted of assault and battery in 1925, and had pleaded non vult to a charge of burglary in 1932 in state courts, and that, on September 22, 1938, he was found in possession of a loaded automatic pistol."

The Court said:

> "The Government argues that the presumption created by the statute meets the test of due process heretofore laid down by this court. The defendants assert it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant, * * *
>
> [fol. 689] "The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a

rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact."

Justice Roberts disagrees with this theory upon seemingly incontrovertible reasoning. He says:

"We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary (468) because of lack of connection between the two in common experience."

Where a law permits the jury to make a presumption or inferences the basis of its verdict, the law is void.

Justice Roberts said:

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate [fol. 690] the statutory provision."

"In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper, but the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existance of all the facts essential to guilt. This is not permissible."

The Tot opinion states:

"The Congress has power to prescribe what evidence is to be received in the courts of the United States. The Section under consideration is such legislation.

> But the due process cal*u*ses of the Fifth and Fourteenth Amendments sets limits upon the power of Congress or that of a state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated."

It seems obvious that the instant opinion conflicts violently with the foregoing decision.

The instant opinion concedes that it is a matter of conflicting probabilities—whether the failure to explain or deny has resulted from consciousness of guilt or some one [fol. 691] of numerous other reasons; the instant opinion at length discusses considerations of policy and convenience and thereby indicates that these questions are involved in arriving at its conclusion and were subjects which affected the adoption of said provisions.

The Tot opinion renders all such matters irrelevant and improper.

Hence, petitioner urges that this entire question be reviewed again.

II

The Court Errs In Holding That the Evidence Justifies the Verdict and Is Not Contrary to the Law and the Evidence.

In petitioner's briefs heretofore filed and arguments to the court, this assignment has been presented quite fully from the standpoint of a review of the evidence and the permissible interpretations thereof.

The present purpose is to point out, from the opinion and decision of this court, reasons a fatal lack of evidence.

The opinion recites the circumstances which it holds strongly connected the defendant with the murder of Stella Blauvelt. These circumstances are:

1. Fingerprints on the surface of the inner door to the garbage compartment of the victim's kitchen.

2. The key to the apartment could not be found.

[fol. 692] 3. (a) Tops of woman's stockings which were taken from different places in defendant's room.

(b) At the end of each part, away from the top was a tied knot or knots.

(c) They were not all of the same color.

(d) None of them matched with the bottom part of a stocking found under the body, or with others found in the victim's rooms.

5. The body had no stocking or shoes on it.

6. The deceased had been seen wearing stockings on the day of the murder.

7. There were stockings hanging in said kitchen and drawers in a dressing alcove, but no other parts of stockings were found.

8. The defendant gave the police false addresses.

9. When shown a picture of the deceased, defendant refused to look at it, stating that he did not like to look at dead people.

10. Deceased was in the habit of wearing rings with large sized diamonds and wore them on the fatal day.

11. A witness said he heard defendant ask someone whether he was interested in buying a diamond ring.

12. Testimony that screws were hanging in the hinges of the door, also fragments of wood.

13. The garbage pail was not in its customary place.

[fol. 693] Assuming that all of the above circumstances were established by admissible evidence, petitioner contends that it is insufficient to justify a reasonable belief that he was the murderer.

The opinion recites the prosecution's theories but they do not concern this discussion.

Unless, by some other circumstances, the accused was connected with the crime, numbers 2, 12 and 13 are entirely irrelevant.

Items 3 to 7 inclusive could not logically or legally warrant more than a conjecture or suspicion that the defendant had some connection, perhaps remote and innocent, with the murder.

Taken singly and collectively they did not show; That any one other than the victim removed her stockings; and no other evidence showed that she had not done so; that any stocking found in defendant's room had ever been in the

victim's room or in her possession; the fact that there were knots in the stocking was meaningless in the absence of proof that knots were involved in the murder.

Items (3d) and 7 tend to show that the stockings found in defendant's room were not connected with any possessed by the deceased.

Appellant insists that it is far-fetched and unwarranted to say as the opinion does that the presence of these women's stockings imply "a fetish or sexual degeneracy." Surely [fol. 694] every unmarried man who has some article which women wear in among his possessions is not to be stigmatized as a degenerate. To so consider this circumstance is to take judicial knowledge that men who do these things have no innocent motive; that they have no women relatives or friends for or from whom they were obtained, perhaps for some temporary purpose.

Surely humanity is not commonly believed and known to be so low.

The opinion views these stockings, wholly unconnected with the deceased as a "logical link in the chain of evidence", but it fails to say or suggest, except by the suggestion of fetish, with what link this alleged one connects.

It is urged that this is a matter which deserves reconsideration.

Items 10 and 11 could not warrant more than a suspicion. Without some proof that the ring about which Adamson is said to have spoken was not owned by him, or was one of the victim's, or that the defendant had no rings of his own, his possession of a diamond ring is no *evidence,* and supplies no link in the supposed chain of evidence to identify the defendant as the robber.

Item 9 is not susceptible of even a suspicion of the essential connection. Many people do not like to gaze at dead bodies. It is common knowledge that at funerals only rela- [fol. 695] tives and close friends usually view the body.

Item 8, false statements to the police, have been held properly received in evidence as an admission against interest on the theory of concealment, but a mere admission of concealment, alone or with other similar admissions, has never been held sufficient to connect an accused with a crime.

Item 12 has been mentioned. It should be added that, without proof that the fragments had the appearance of

freshness, they would be insignificant, and the same is true of the presence of the screws.

The only real item of evidence as a circumstance connecting Adamson with the murder, including the prosecution theories, is the fingerprints.

Assume that the crime was committed by someone as the prosecutor contended, the presence of fingerprints is a circumstance which, aside from the defendant's right to remain mute, could call for an explanation.

But the burden is still on the People to prove the defendant guilty beyond a reasonable doubt, and for some reason not explained the experts failed to give their opinion as to whether the imprints were made at all recently or may have been old and hence unimportant.

The opinion herein mentions no evidence of this nature and we have found none.

In view of the circumstances of this case, wherein the [fol. 696] investigation and the securing of the fingerprints promptly after the crime was committed by someone, the circumstance of the presence of fingerprints on the door alone is irrelevant, or a weak or strong link to connect the defendant with the crime, depending on proof of when they were imprinted.

From the foregoing, petitioner contends that the decision in this case requires reconsideration. Otherwise, the wrong and an innocent man may pay the death penalty for another's foul murder.

III

The Court errs in holding that the evidence in support of the judgment is so strong that it is improbable that but for said error the jury would have failed to find the defendant guilty.

Petitioner believes that it has been shown that the evidence against him in this case is decidedly weak, and that no incriminating circumstance proved points unerringly to his guilt, but are all susceptible of interpretation in favor of innocence or as being harmless.

It is conceded in the opinion filed by this Court that error was committed in the instructions given and refused. Thus, the court said in its opinion:

"The jury, however, is concerned with the scope and nature of the consideration that it may give to defendant's failure to explain or deny incriminating evidence [fol. 697] and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference or guilt, but should be considered only in relation to evidence that he fails to explain or deny."

The court also says in its opinion:

"The following proposed instruction, however, should have been given:

'You are instructed that the fact that the prosecutor has a right to comment on the failure of the *the* defendant to take the stand does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt and by competent and legal evidence.' "

These instructions were requested by the defendant and refused by the court. The existence of error, therefore, is apparent. The question remains as to whether such error gave rise to a miscarriage of justice.

In People v. O'Bryan, 165 Cal. 55, this Court first undertook to consider what constitutes a miscarriage of justice. In that case, the defendant had been taken by the sheriff before the grand jury and sworn and questioned concerning his connection with the crime. He was not in any way warned of his right to refuse to answer the questions or that they might be used against him. His statements fell short of constituting a confession, but did constitute ad- [fol. 698] missions damaging to him.

This court, in affirming the conviction, said:

"Section 4½ of Article 6 of our Constitution must be given the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal, which must be overcome by a clear showing that no injury could have resulted.

> On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guarantees accorded persons accused of crimes by other parts of the constitution or to overthrow all statutory rules of procedure and evidence in criminal cases."

And:

> "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly, legal procedure in which the substantial rights belonging to defendants shall be respected."

And further:

> "We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury [fol. 699] has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error commit-ed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, *and that it would have been reached if the error had not been committed,* a new trial is not to be ordered." (Italics is ours.)

In People v. O'Bryan, every material matter covered by the admissions of the defendant was shown by other evidence, which was not contradicted. It is apparent, therefore, that a very different question was presented and where the errors simply resulted in cumulative testimony being placed before the jury, from the situation which exists here, where the rights of the appellant in a case in which conflicting inferences might reasonably be drawn from the evidence were not protected by proper instructions upon important questions of law—questions which, indeed, were the very most important presented in this case.

The question of the proper construction of Section 4½ of Article 6 of the Constitution was again before this court in the case of People v. Fleming, 166 Cal. 357. In that case, the Court said:

> "In view of the very grave doubt as to the guilt of the defendant of the crime charged against him and in view of the nature of the acts charged against the

> defendant as shown by the testimony of the witnesses [fol. 700] for the prosecution, we are of the opinion that, despite the general instructions of the court to the jury to the effect that they must base their verdict exclusively on the evidence, the conduct of the special prosecutor in the matters we have been discussing, which clearly constitute misconduct on his part, contributed materially to the verdict that was rendered."

In the instant case, the court invokes the rule that no objection being made to the argument of the prosecutor or at the time that his misconduct in the argument cannot be urged on appeal. We have always thought there is a tendency to carry this rule beyond the demands and, indeed, beyond the purposes of justice. However, we do not seek to question it here. What we are trying to do is to point out that by reason of that argument, it was particularly important that the instructions which were refused erroneously should have been given. Even though it were conceded that standing alone the mere failure to give those instructions would not likely affect the verdict of the jury, still when the prosecutor made language which could be "construed as a declaration that the jury should infer guilt solely from defendant's silence", then the cause of justice imperatively demanded that the jury be informed as a matter of law, that guilt could not so be inferred. The prosecutor has the closing argument. What he says is the last thing heard by the jury. It is that which is freshest and most active in the jurors' mind when they retire. In [fol. 701] the absence of instructions to the contrary, the jury naturally would assume the accuracy of the argument of the Deputy District Attorney, and would regard the silence of the defendant as a circumstance in the case from which an inference of guilt could be drawn.

In People v. Bennett, 79 Cal. App. 76, it was held that any act or action of a trial court in the trial of a criminal case which must necessarily have the effect of denying the accused a trial by a fair and impartial jury will not be mitigated by the terms of Section 4½ of Article 6 of the Constitution. It is our understanding that injury is no longer presumed from error; that the burden is cast upon a defendant upon appeal to show affirmatively that there has been a miscarriage of justice.

People v. Hoffman, 199 Cal. 155.

In the civil case of Mintzer v. City of Richmond, it was held to be incumbent upon the party appealing to show not only abstract error but error prejudicial to him upon the facts in evidence. That, then, is the burden which devolved upon appellant; that that burden he assumed, for he did show that on the vital question of the effect of his failure to testify the Court did refuse to give such instructions as if given and followed would have prevented the jury from following the argument of the District Attorney, which the Court properly has held constitutes misconduct.

For these reasons, we submit that there has been such a [fol. 702] miscarriage of justice as under the Constitution requires a new trial; that appellant has successfully assumed the burden of showing some very much more than mere abstract error; that he has shown errors which lent plausibility to an argument against appellant which ought not to have been made and which the court cannot say was not adopted by the jury as one of the reasons, and perhaps a principal reason, why their minds were satisfied as to the guilt of appellant.

Respectfully submitted, Morris Lavine and Milton B. Safier, by Milton B. Safier, Attorneys for Petitioner.

[fol. 702a] Received copy of the within Petition for Rehearing this January 18, 1946.

Robert W. Kenny, Attorney General, by Frank Richards, Deputy.

[fol. 703] IN SUPREME COURT OF CALIFORNIA

Crim. 4622

PEOPLE

v.

ADAMSON

ORDER DENYING PETITION FOR REHEARING—January 31, 1946

Appellant's petition for rehearing denied.
Dated: January 31, 1946.

[fol. 704] IN THE SUPREME COURT OF CALIFORNIA

Criminal No. 4622

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Respondent,

vs.

ADMIRAL DEWEY ANDERSON, Defendant, Appellant

On Appeal from the Superior Court in and for the County of Los Angeles. (Superior Court No. 98,734)

JUDGMENT—January 4, 1946

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgments and the Order denying a New Trial of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and same are hereby affirmed.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 4th day of January, 1946, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 4th day of February, A. D. 1946.

A. V. Haskell, Clerk, by L. F. White, Deputy. (Seal 247.)

[fol. 704a] [File endorsement omitted]

IN THE SUPREME COURT OF CALIFORNIA

Cr. No. 4622

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellee,

v.

ADMIRAL DEWEY ADAMSON, Defendant and Appellant

Appeal denied April 8, 1946. Gibson, (Copy illegible)

PETITION FOR APPEAL—Filed April 3, 1946

[fol. 705] Aggrieved by the final decision of the Supreme Court of the State of California, on January 4, 1946, and by the order of the Supreme Court of California denying his petition for rehearing on January 31, 1946, appellant, Admiral Dewey Adamson, hereby prays that an appeal be allowed to the Supreme Court of the United States and for an order permitting appellant to proceed in forma pauperis, and that said order, in lieu of a bond, act as a supersedeas.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fol. 706] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 3, 1946

Appellant Admiral Dewey Adamson assigns the following errors in the record and proceedings in said case:

I

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 amendment to the California Constitution, Article I, Section 13, permitting comment by the court or counsel on defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California Penal Code, Section 1323,

inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in [fol. 707] holding that the 1934 amendment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13 and California Penal Code, Section 1323, allowing comment by the court or counsel on defendant's failure to explain or deny any evidence or facts in a criminal case against him inherently, and as construed and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

IV

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the prosecutor repeatedly commented to the jury upon the defendant's failure to take the stand, to the extent of telling the jury:

> "And here we started out in this case with a defend- [fol. 708] ant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case.",

that it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that said Article I, Section 13 and said Penal Code Section 1323 do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorize the jury to presume that the defendant who fails to explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 709]

VI

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the People against the defendant and to draw unrestricted inferences therefrom against the defendant with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

VII

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due

process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stock-
[fols. 710-713] ings, which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

For which errors appellant prays that the said judgment of the Supreme Court of the State of California in the above-entitled cause be reversed.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fol. 714] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant, Admiral Dewey Adamson, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California of January 4, 1946, (order denying petition for rehearing entered January 31, 1946,) and from each and every part thereof and having presented his petition for appeal, assignments of error, and prayer for reversal pursuant to the applicable rules and statutes,

It Is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of California.

It Is Further Ordered that the Clerk *of the Clerk* of the Supreme Court of California have prepared and certified a transcript of the record, proceedings, and judgments and order in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Supreme Court of the United States within thirty days from this date.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this fifteenth day of April, 1946.

[fol. 715] Citation in usual form showing service on Robert W. Kenny, omitted in printing.

[fol. 716] [File endorsement omitted.]

[fol. 717] IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

PRAECIPE FOR RECORD—Filed April 3, 1946

To the Clerk of the Supreme Court of the State of California:

You will please prepare the following record in the above-entitled cause for the Supreme Court of the United States:

1. Complete reporter's transcript of all testimony and evidence offered or received and all rulings of the court, pages 1 to 492, inclusive, also the reporter's transcript of the argument of counsel contained in the reporter's supplemental transcript on appeal, pages 1 through 75;

2. Clerk's transcript as follows:

(a) The information, pages 1 to 5, inclusive;
(b) Arraignment and plea, page 6;
(c) Withdrawal of public defender, page 7;
(d) Minutes of the trial, pages 8 to 18;
(e) Verdict, pages 17, 18;
(f) Instructions given, pages 19 through 32;
[fol. 718] (g) Instructions refused, pages 33 through 59;
(h) Verdicts, pages 60, 61;
(i) Motion for new trial, pages 62 to 65;
(j) Order denying motion for new trial and judgments, pages 66 to 71;
(k) Commitment on death sentence, pages 72 to 74;
(l) Notice of appeal, page 75;
(m) Notice for preparation of record, pages 76 to 78;
(n) Grounds for appeal, page 78;
(o) Certification of County Clerk, page 80.

3. Opinion and judgment of the Supreme Court of the State of California of January 4, 1946;

4. Appellant's petition for rehearing;

5. Order of California Supreme Court of January 31, 1946, denying petition for rehearing;

6. Remittitur;
7. Affidavit for leave to proceed in forma pauperis and order thereon;
8. Petition for appeal;
9. Assignments of error;
10. Prayer for reversal;
11. Order staying execution;
12. Order for clerk to prepare and certify transcript;
13. Statement of jurisdiction on appeal;
14. Citations;
15. Notice to the Attorney General and Statement of [fol. 719] Rule 12, Subdivision 3, Rules of the Supreme Court.
16. Praecipe.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fols. 720-722] Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 723] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD—Filed May 20, 1946

Comes now the appellant and designates the points upon which he intends to rely on this appeal as the following:

I

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13, permitting comment by the court or counsel on defendant's personal failure to explain or deny any evidence or facts in a criminal case against him and the similar provision of the California Penal Code, Section 1323, inherently, and as construed and applied in this case, do not violate due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in

[fol. 724] holdingthat the 1934 Amed*n*ment to the California Constitution, Article I, Section 13, and California Penal Code, Section 1323, inherently, and as construed and applied in this case, are not unconstitutional in shifting the burden of proof to the defendant and infringing the presumption of innocence and thereby denying due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that the 1934 Amendment to the California Constitution, Article I, Section 13 and California Penal Code, Section 1323, allowing comment by the court or counsel on defendant's failure to explain or deny any evidence or facts in a criminal case against him inherently, and as construed and applied in this case, are not unconstitutional as violating the privileges or immunities clause of the Fourteenth Amendment to the Constitution of the United States.

IV

The Supreme Court of the State of California in its opinion, decision, determination and judgment erred in holding that where the prosecutor repeatedly commented to the jury upon the defendant's failure to take the stand, to the extent of telling the jury:

> "And here we started out in this case with a defend-
> [fol. 725] ant, as counsel says, clothed with the presumption of innocence. But as this testimony moved forward piece by piece, bit by bit, article by article, this testimony stripped this defendant of that presumption of innocence, and finally, at the conclusion of the People's case, when he did not take the stand, or did not put any witnesses on the stand, he stood there with that presumption removed, based on the evidence in this case."

that it was not a violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that said Article I, Section 13 and said Penal Code Section 1323 do not violate the due process clause of the Fourteenth Amendment of the Federal Constitution in that they each authorize the jury to presume that the defendant who fails to explain or deny any evidence against him is guilty as charged, although there is no reasonable or logical connection between such presumption and the basic fact upon which it is based, to wit, failure to testify, and said opinion, decision, determination and judgment in so holding, itself violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

[fol. 726]

VI

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that a law which permits and in effect encourages the jury to give additional or conclusive weight to any and all evidence introduced by the People against the defendant and to draw unrestricted inferences therefrom against the defendant with respect to any such evidence which the defendant might reasonably be expected to explain or deny, where he fails to testify, even though he may have produced proof of convincing character, does not permit and encourage the jury to infer and presume the defendant's guilt from his mere failure to testify or to personally, under oath and during the trial, explain or deny any evidence against him, and by such error said opinion, decision, determination and judgment itself violates and sustains a law which violates the defendant's rights to due process of law and to the protection of the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States.

VII

The Supreme Court of the State of California in its opinion, decision, determination and judgment, erred in holding that Admiral Dewey Adamson was not denied due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by the introduction in evidence of portions of women's stockings,

[fol. 727] which were admittedly not part of the deceased's stockings, and which served no other purpose than to influence or inflame the passions and prejudices of the jury, and to imply to this negro defendant a sex fetish and a low moral character.

The defendant also designates as the record on appeal the entire reporter's transcript and the Clerk's Transcript on appeal, and the entire record as forwarded to this court.

Morris Lavine, Milton B. Safier, Attorneys for Appellant.

[fol. 727a] Rec'd copy of the within this May 18th, 1946. Robert W. Kenny, Attorney General, Frank Richards, Dep., Attorneys for Appellee.

[fol. 727b] [File endorsement omitted.]

[fol. 728] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 10, 1946

On Consideration of the motion for leave to proceed *in forma pauperis* in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 729] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 10, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on cover: In forma pauperis. Enter Morris Lavine. File No. 50,912. California, Supreme Court. Term No. 102. Admiral Dewey Adamson, Appellant, vs. People of the State of California. Filed May 7, 1946. Term No. 102, O. T. 1946.