SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VAENE SIVONGXXAY,

Defendant and Appellant.

No. S078895

(Fresno Superior Court
No. 590200-2)

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Fresno
Honorable Gene M. Gomes, Judge

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VAENE SIVONGXXAY, Defendant and Appellant.	No. S078895 (Fresno Superior Court No. 590200-2)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a death sentence. (Pen. Code, § 1239, subd. (b).) [1]

INTRODUCTION

Appellant and codefendant Oday Mounsaveng, Laotian nationals, were charged in Fresno County with five commercial robberies that occurred between July and December of 1996, the last of which resulted in the shooting death of the store's owner, Henry Song. Both defendants waived jury trial for guilt and penalty and were found guilty of all charges. Following a penalty phase, appellant was sentenced to death, and Mounsaveng was sentenced to life without the possibility of parole.

1. All further statutory references made herein are to the Penal Code, unless otherwise stated. The record on appeal is designated herein as follows: "MRT" refers to the municipal court's reporter's transcript; "SRT" refers to the superior court's reporter's transcript; and "CT" refers to the clerk's transcript.

STATEMENT OF THE CASE

On May 23, 1997, an information was filed in the Fresno County Superior Court charging appellant and Oday Mounsaveng with robberies of five commercial establishments, beginning in late July and ending on December 19, 1996, and with the shooting death of jewelry store owner Henry Song. (3 CT 707-714.) In addition to the murder count, one special circumstance was alleged: a killing while engaged in the commission of robbery. (§ 190.2, subd. (a)(17).) The information charged both defendants with 14 counts of robbery and one count of attempted robbery (§§ 211, 212.5 & 664), as well as multiple firearm use enhancements and two great bodily injury enhancements. (§§ 12022, subd. (a)(1), 12022.5 & 12022.7, subd. (a).)

On May 28, 1997, the defendants' motion to dismiss the information for failure to take a time waiver was denied. (1 SRT 3-7; 2 SRT 305-307.) On May 29, 1997, the defendants were arraigned in superior court and entered not guilty pleas and denied the special allegations. (2 SRT 304-311.) On June 20, 1997, the prosecution informed the defendants of its intent to seek the death penalty. (3 CT 717.)

On April 6, 1998, the prosecution filed an amended information adding allegations that each defendant had suffered several prior convictions. (3 CT 759-767.) On June 8, 1998, appellant filed an objection to the amended information. (3 CT 770-772.) On July 27, 1998, the objection was overruled, and the defendants again entered not guilty pleas. (4 SRT 651-653.) On that date, the prosecution filed a notice of aggravation. (3 CT 780-790.)

On December 17, 1998, appellant and Mounsaveng waived a jury trial. (6 SRT 903-905; see Arg. 1, *post.*)

Trial began on January 11, 1999, before the Honorable Gene M. Gomes, of the Fresno County Superior Court. (7 SRT 1010.) The People were represented by then-Fresno County Deputy District Attorney Jennifer

Detjen. The codefendant was represented by Ernest Kinney. Appellant was represented by Rudy Petilla. [2]

On March 11, 1999, the trial court found both defendants guilty of all charges (count 9 was found to be an attempted robbery (17 SRT 3762)), and found the special circumstance and all sentencing enhancements to be true. (15 SRT 3138-3148.)

The penalty phase began on March 17, 1997. (15 SRT 3162.) On April 1, 1997, the trial court sentenced appellant to death, and Mounsaveng to life without the possibility of parole. (17 SRT 3754-3759; 4 CT 986-987.)

On April 29, 1999, the trial court denied its sua sponte motion to reduce appellant's death sentence to a sentence of life without the possibility of parole. (17 SRT 3780-3782; § 190.4, subd. (e).) The court sentenced appellant to death on count 1; and to 76 years, 8 months on the determinate counts and sentencing enhancements. (4 CT 988-1002.)

Appellant's appeal to this Court is automatic. (§ 1239, subd. (b).)

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2. Mr. Petilla was also the trial attorney *People v. Doolin* (2009) 45 Cal.4th 390, a Fresno capital case tried shortly before this case. In that case, he entered into a "flat fee" compensation agreement of $80,000. Of that amount, he retained 89% ($71,000). Over a dissent by Justice Kennard, joined by Justice Werdegar, this Court overruled the state law "informed speculation" standard for conflict of interest cases, and concluded that, even assuming deficient performance by counsel, there was no prejudice on the record. (*Id.* at pp. 411-421.) The dissent would have concluded that, based on an informed speculation, the county's fee agreement adversely affected counsel's representation at the penalty phase, requiring reversal of the death judgment. (*Id.* at p. 464 (conc. & disn. opn. of Kennard, J.).)

STATEMENT OF FACTS

A. The Guilt Phase

1. The Prosecution's Guilt Phase Case

The prosecution presented evidence regarding the robberies of five commercial establishments in Fresno, beginning in late July and ending on December 19, 1996. [3]

a. July 31, 1996: Thanh Tin Jewelry [Count 16]

On July 31, 1996, in the early afternoon, two men attempted to rob the Thanh Tin jewelry store. Only the store owners -- Liem Phu Huynh and Phung Ngoc Ho (count 16) -- were present at the time. According to their testimony, the younger man (Mounsaveng) had been in the store in the past and earlier that day. He grabbed Ho by the neck and pointed a gun at her head. She shouted to her husband, who pressed the store's alarm. As soon as it sounded, the men fled. No property was taken during the incident. (7 SRT 1021-1022, 1043, 1049-1052, 1088-1089, 1132-1135, 1147-1150.)

Subsequently each witness positively identified Mounsaveng as one of the perpetrators. (7 SRT 1049-1050, 1132-1134.) Huynh positively identified appellant (7 SRT 1052), but Ho was more ambiguous. She was not sure when shown photos, evinced some reservation at the preliminary hearing, yet, in court, was very sure. (7 SRT 1139, 1189, 1192.) Latent fingerprints taken from the store did not match either defendant. (13 SRT 2437; 15 SRT 3063.) There was no evidence that appellant had a gun. (15 SRT 3097; see also 14 SRT 2911 [Mounsaveng's testimony].)

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3. Codefendant Mounsaveng testified at trial, and "admitted to being at each and every one of these robberies" (14 SRT 3103), but alleged that he was acting under duress. (See *post.*) He admitted having a gun at each of the robberies, but alleged that it was unloaded. (14 SRT 2911-2916; 15 SRT 3001, 3007.)

b. August 16, 1996: JMP Mini-Mart [Counts 14-15]

The afternoon of August 16, 1996, Phayvane Boulome, one of the owners of the JMP Mini-Mart, and her stepdaughter Bobbie Her (count 15), were in their store, while Xeng Wang Her (count 14), the other owner, was returning from the bank with $8,000 cash in a bag. Appellant and Mounsaveng arrived and went in and out of the store. Appellant picked up some merchandise, and placed it on the counter, but continued wandering around the store. (7 SRT 1193-1196, 1197-1198; 8 SRT 1241-1243)

After Xeng Wang Her returned, and when there were no other customers in the store, Bobbie Her heard a click that sounded like a gun. She pressed the silent alarm. As she started to use her phone, Mounsaveng jumped over the counter and took the phone. (7 SRT 1209-1210, 1214; 8 SRT 1349-1350.) Appellant pulled a small, black gun and brought her father to the register. (7 SRT 2911-2912.) After forcing him to the ground, appellant kicked and hit him. (7 SRT 1212-1213; 8 SRT 1329-1330.) After Mounsaveng had taken the bag of money and other property, including a gun, appellant kicked Mr. Her in the back of the head, and then kicked him again as they were leaving. (7 SRT 1215, 1222; 8 SRT 1333-1334.)

Phayvane Boulome confirmed these events in her testimony (8 RT 1241-1248), and added that Mounsaveng dragged her by the collar to the register and told her to open it or he would shoot her. (8 SRT 1250-1251.)

During the forensic investigation, Officer Kai Drechsler lifted four latent fingerprints from the grocery items left at the counter. (7 SRT 1061-1063; Exh. 49.) Officer Robert Barbery matched one of those prints to appellant. (11 SRT 2062-2063.)

In March of 1997, Bobbie Her was shown photo lineup, and picked out both of the defendants. She also identified both at the preliminary hearing in May of 1997. (7 SRT 1219-1221.) Her and his wife each identified appellant from a photo lineup. (8 SRT 1244, 1261, 1327-1328, 1358.) At trial,

all three identified appellant. (7 SRT 1197; 8 RT 1243-1244; 8 SRT 1326.)

According to the witnesses, appellant was wearing a short-sleeve shirt. Yet, none of the witnesses noticed the prominent tattoo on appellant's arm. (7 SRT 1073, 1231; 8 SRT 1269, 1372.) [4]

c. October 10, 1996: Phnom Penh Jewelry [Counts 12-13]

The third robbery occurred on the afternoon of October 10, 1996, at the Phnom Penh Jewelry store. Present were the owners, Kee Meng Suy (count 13) and Suntary Heng (count 12), and their small children. In the past, they had repaired a Buddha pendant for Mounsaveng: in late August 1996, Mounsaveng came in with his common-law wife, Kathy Sengphet, who signed a pawn slip. (9 SRT 1437, 1441-1442; 9 SRT 1602; Exh. 80.)

On the day of the robbery, Mounsaveng, accompanied by appellant, came to the store to have the pendant repaired. Suy repaired the Buddha, brought it back to the sales counter, and handed it to Mounsaveng. Mounsaveng looked at it, then handed it back, saying it was still not fixed. Suy went back to his work bench to do further repairs. (9 SRT 1444-1445; 9 SRT 1604-1605.) Because it was close to lunch, Heng took her two small children to the back of the shop to feed them. (9 SRT 1446.)

While Suy was at his work bench, both men pulled handguns, ran to the work bench, and forced him to the ground, where they bound him with duct tape and electrical wire, and duct-taped his mouth and his eyes. (9 SRT 1448-1449; 9 SRT 1608.) Both men, but particularly appellant, kicked and beat Suy into unconsciousness. (9 SRT 1447-1450, 1608-1611.)

Mounsaveng demanded from Heng the keys to the cash register and the safe, and she gave them to him. She saw Mounsaveng take items from the

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4. Appellant has a large tattoo of a tiger and a goddess that extends from his right palm to his right elbow. (7 SRT 1073-1075, 1234-1235.) The trial court made a judicial finding regarding the tattoo. (9 SRT 1521.)

showcase, the safe, and her purse. Appellant took jewelry and put it in his pocket. (9 SRT 1452-1453.) The total loss was $30,000 including $10,000 cash. (9 SRT 1457.) After the men left, Heng pushed a silent robbery alarm. (9 SRT 1454.) The police arrived and an ambulance was called for Suy. (9 SRT 1457-1458.) He suffered bruises below one eye and on his lower back. (9 SRT 1614-1615.)

Officer Sean Ryan testified that he was dispatched to the Phnom Penh Jewelry store and found a man taped and tied to a chair, crying and shaking. (10 SRT 1749-1751.) The man had abrasions to his upper torso and chest; and abrasions and contusions on his face and head. (10 SRT 1752.) Notwithstanding their emotional state and the absence of an interpreter, the man and his wife gave descriptions of the robbers. (10 SRT 1753-1754, 1757, 1760.) Both suspects were Laotian; one was thinner than the other; the older was heavier; they were wearing short sleeve shirts. (10 SRT 1755-1756, 1765, 1768.) Each time the suspects kicked her husband in the stomach or face, Heng pleaded with them not to hurt her family. (10 SRT 1762.)

Officer Dave DeSoto found three latent fingerprints from the west display counter at Phnom Penh Jewelry. The latents compared positively to appellant's right and left palms. (9 SRT 1477-1478, 1485-1486.)

Both witnesses positively identified Mounsaveng from a photo lineup as one of the participants, but had trouble identifying appellant. (9 SRT 1616-1619; 10 SRT 1722-1723, 1729.) At trial, however, both made in-court identifications of appellant. (9 SRT 1440; 9 SRT 1604-1605.) Although the witnesses noticed a small tattoo supposedly on appellant's left hand, they did not mention that to the police; the first time they referred to it was at the preliminary hearing. (9 SRT 1516-1517, 1659-1661; 10 SRT 1732-1735.) As noted, appellant has a large, unmistakable tattoo on his right arm; he has none on his left hand. (9 SRT 1516-1517, 1521, 1668.)

d. December 14, 1996: JMP Mini-Mart [Counts 4-11]

The JMP Mini-Mart was targeted for a second time on December 14, 1996. On this occasion, a number of customers were present with the owners, Xeng Wang Her (count 4) and Phayvane Boulome.

Boulome and Her testified that the same two men from the August robbery burst through the store, each with handguns; appellant ordered everyone to the ground. (8 SRT 1249, 1337-1338.) Mounsaveng ran to Her, pointed his gun at him and demanded money. Mounsaveng took Her's gun from under the register then led him to a small back room and closed him in. (8 SRT 1338-1342.) Mounsaveng then dragged Boulome to the register and told her to open it or he would shoot her. (8 SRT 1251-1252.) The men took cartons of cigarettes, some change, and $2-3,000 cash. (8 SRT 1346.) After the men left, Her came out of the room and saw people crying. (8 SRT 1344.)

The store customers testified as follows. Ogee Xiong (count 6) entered the store with her daughter, Karen Lee (count 5) right after the two men arrived. (9 SRT 1669-1671.) Karen saw a man behind the register, pointing a gun at her mother's stomach. (8 RT 1392.) Both Karen and her mother gave their purses to the robbers. (8 SRT 1393-1395; 9 SRT 1672-1673.) There was much kicking, hitting and screaming. (8 RT 1396.)

Choua Yang (count 7) was inside the store when the two defendants entered, pointed their guns and yelled that a robbery was occurring and everyone should get down. She got down to the ground and saw Mounsaveng approach and point his gun at the owner. One of the men took her purse from her. (9 SRT 1680-1682.)

May Ker Yang (count 8) was in the store when the two men entered. She believed that the men were Laotian, and saw that each had a black gun. She was ordered to get down, and her purse was taken. (9 SRT 1687-1690.)

Yang's elderly grandmother, Ying Xiong (count 9), was also in the market when the men entered. When the men pointed their guns and

demanded that everyone get down, she threw her purse away from her and laid down. (8 SRT 1376-1377.) Appellant walked up to her, kicked her in the mouth, and hit her twice on the back of her neck, ordering her to get up and find her purse. She tried but could not find it. After the men left, Xiong had a spilt lip and was bleeding. (8 SRT 1377-1379; see also 8 SRT 1346-1347.)

Chong Chou Thao (count 11) [5] and his wife, Der Her (count 10), entered the store while the robbery was in progress. (8 SRT 1297-1298; 8 SRT 1309-1310.) The robbers pointed guns at them and made them lie on the ground with the others. (8 SRT 1299; 8 SRT 1310.) Appellant pulled some papers from Thao's back pocket, then threw them to the ground. He also made Thao pull out and show his wallet; when appellant saw that there was no money, Thao returned it to his pocket. (8 SRT 1299-1300.) Thao's wife was threatened and forced to give up her necklace and ring. (8 SRT 1312.)

Many of the witnesses subsequently identified appellant as one of the perpetrators. Xeng Wang Her identified appellant in court. (8 SRT 1326.) Boulome identified both defendants in court. (8 SRT 1243.) Karen Lee identified Mounsaveng, but not appellant. (8 SRT 1400.) Ogee Xiong identified appellant. (9 SRT 1677.) Chou Yang made no identification. (9 SRT 1680.) May Ker Yang identified appellant (9 SRT 1692); Xiong did not (8 SRT 1384). Neither Chong Chou Thao nor Der Her appears to have made an identification. (8 SRT 1303-1306; 8 SRT 1314.) [6] No witness remembered appellant having a tattoo. (E.g., 8 SRT 1371 [Xeng Wang Her]; 8 SRT 1270-1271 [Boulome]; 8 SRT 1431-1432 [Karen Lee]; 9 SRT 1700-1703 [May Ker Yang].)

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5. The information refer to this witness as "Chai Thao." (3 CT 763.)

6. District Attorney investigator Xong Vue Yang testified that, on May 14, 1997, he showed a photo lineup to Thao, who picked out Mounsaveng somewhat reluctantly, but did not identify appellant. (10 SRT 1711-1713, 1716-1717.)

Fingerprints were lifted from a suspect vehicle close to the store, but did not match either defendant. (15 SRT 3057-3059, 3061-3063.)

e. December 19, 1996: Sean Hong Jewelry [Counts 1-3]

The final robbery occurred on December 19, 1996, at Sean Hong Jewelry, owned by the homicide victim, Henry Song (counts 1 & 2), and his wife, Seak Ang Hor (count 3). In late November 1996, a Laotian man that she identified as appellant purchased jewelry worth $340, and signed the pawn slip as "Say Tlay." (10 SRT 1788-1789, 1791; Exh. 52-C.) Thereafter, appellant left a stone pendant in the shape of the Buddha to be repaired. (10 SRT 1791-1792.) The next time Hor saw appellant was December 19, 1996, when he and Mounsaveng came to the store. (10 SRT 1792-1793.) Hor made an in-court identification of Mounsaveng. (10 SRT 1805.)

The store had a video surveillance camera and Song, who was repairing jewelry, turned it on when the two men entered. (10 SRT 1795-1797, 1799-1800.) Appellant asked to see the Buddha pendant, and Hor retrieved it from the safe. (10 SRT 1804, 1906.) After looking at it, the men said they did not have the money yet, so Song took back the pendant and walked toward his workplace. (10 SRT 1906-1907, 1949.)

At that moment, Mounsaveng pointed a gun at Song and screamed "give the money and gold." Hor immediately pressed the silent alarm. Appellant then pointed a gun at her, and Mounsaveng forced her husband to the register. The men pushed Hor and Song to the safe room: Mounsaveng pulled Hor by her hair, while she crawled along with him. (10 SRT 1907-1910, 1950, 1969.) Mounsaveng left the three others in the safe room and closed the door. Appellant told Hor to open the safe. She did not because she could not remember the numbers. Mounsaveng then returned and beat her husband's head with his gun. (10 RT 1910-1911, 1934-1935, 1951.)

A struggle between appellant and Song began in the safe room. (11 SRT 1974.) Her husband tried to grab the gun from appellant; while doing so,

he struggled with appellant, and was holding appellant's right hand; their bodies were close together. (11 SRT 1963-1964.)

Hor crawled away from the safe room and banged and kicked on a wall in an attempt to alert her neighbors. (10 SRT 1912-1913, 1936.) At some point, Mounsaveng said "let's go," and she pushed the button for him to leave. Appellant pointed his gun at her, and told her to give him the money; she gave him money from the register; he used his gun to smash a display case, grabbed jewelry, and left. (10 SRT 1914-1916.) The defendants took approximately $30,000 to $40,000 in cash and jewelry. (10 SRT 1919.) Hor returned to the back room and saw that her husband was on the floor and bleeding. She never heard gunshots or saw a gun being fired. (19 SRT 1916, 1955, 1978.)

Officer Raymond Hernandez, Jr., was on duty on December 19, 1996, and was flagged down by several citizens near Sean Hong Jewelry. (10 SRT 1769-1771.) When he entered the store, he found Hor hysterical. (10 SRT 1779.) Around the display case, he found Song, face up, and arms above his head, his head facing north. (10 SRT 1774-1775, 1783; Exhs. 20-22.) He observed damage to a display case: broken glass on top. (10 SRT 1776-1777; Exh. 18.) He could not determine, based on the position of the body, whether the victim fell forward or back. (10 SRT 1781.) Hypothetically, if the victim fell backward after he was shot, that would indicate that the shots came from south to north. (10 SRT 1783-1784.)

Homicide Detective Guy Ballesteros arrived at the scene and found the victim dead, with several holes in his clothing and a fair amount of blood from the victim's nose; there were no blood splatters. (10 RT 1840-1842.) He located the videotape machine in the work area. The recorder was on, and the camera was hidden in a wall above the safe. He removed the videotape and gave it to Detective Wells. (10 SRT 1823, 1826-1828.) The store's safe was in a small, poorly lit area in the back: it was closed and locked. (10 SRT 1833;

Exh. 111 [diagram].) One of the display cases was damaged and had broken glass. (10 RT 1838.) An expended 9-mm cartridge was found on the floor under the work bench; others were on a table full of cloth. (10 SRT 1844.) A total of three casings and two slugs were found. (10 SRT 1863, 1880.) A large mirror had been struck by a bullet, and a small red tray had bullet damage. (10 SRT 1845-1846, 1878, 1896.) There was a hole in the Plexiglas window facing outside; there were pieces of Plexiglas outside the window. (10 RT 1847.)

In December 1996, Steve Jernigan was employed by the Fresno Police Department, and helped process the crime scene with an Officer Clement. [7] He was unemployed at the time of trial. (11 SRT 2145-2146, 2165.) Jernigan collected fragments from outside the window hole and the display case. (11 SRT 2148.) Two expended cartridge casings and two bullet fragments were located; a third expended cartridge was found the following day. (11 SRT 2155-2158.) Officer Clement collected the casings and fragments. (11 SRT 2181.) Officer Jernigan did not know whether the hole in the window was in fact caused by a bullet; Clement wrote "apparent bullet hole." (11 SRT 2169.) Jernigan saw the owner's .45 handgun, but never touched it; the report, written by Officer Clement, stated that it had seven live cartridges. (11 SRT 2174, 2183-2184.)

According to Jernigan, Clement also processed the crime scene for latent fingerprints. (11 SRT 2158-2159.) She obtained latent fingerprints from a display case; four were matched by Officer Douglas Durham to appellant. (11 SRT 2047-2048; Exh. 51.) Officer Durham also compared latent fingerprints found on the pawn slip for the pendant with appellant's

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7. Although Officer Clement wrote the report about the crime scene processing from which Officer Jernigan read (11 SRT 2167), she did not testify. There is an indication in the record that she was having surgery at the time of trial. (15 SRT 3075.)

fingerprints and found a match. (11 SRT 2042-2046; Exh. 52.)

On December 19, 1996, Detective Richard Byrd was dispatched to an alley several blocks from the homicide scene. There, he found a white Toyota car with its engine running, front doors open, its ignition punched and the heater on high. Inside the car was a woman's gold watch on the front seat amongst shattered glass, a live 9-mm round in the map compartment, and a small gold ring in the console area. (10 SRT 1811-1813; Exhs. 36 & 37; see also 11 SRT 2152-2153, 2162 [Jernigan testimony]; 11 SRT 2002-2003 [Det. Wells].)

The following day, Detective Ballesteros found the victim's .45 hand gun at the scene. No one checked to see whether it had been recently fired. (10 RT 1843, 1856; 11 SRT 2173-2174.)

Forensic pathologist Dr. Venu Gopal performed the autopsy on the victim. Song was 48 years old, nearly 67 inches tall, and weighed 167 pounds. (12 SRT 2319.) There were three gunshot wounds to his body: one bullet travelled left to right, entering the right upper chest, then going through the lung and heart, with an exit wound at the right side of the back, angling slightly down; another bullet entered slightly below the first wound, went through the lung, but exited at the left side of the back at the same level as the entry wound; and a third bullet entered the left side of the abdomen, and exited on the right side of the abdomen at the same level. (12 SRT 2320-2322, 2349-2351; Exh. 118.) The third wound was survivable; the first two were not. (12 SRT 2342, 2359-2360, 2368.) Dr. Gopal was unable to determine the order of the wounds (12 SRT 2320, 2341); death could have been immediate (12 SRT 2343-2344, 2359). Based on the absence of obvious soot or stippling around the perforations, the victim was anywhere from 24 to 36 inches from the gunman when shot. (12 SRT 2331-2332, 2347.) There was a laceration on the victim's left ring finger. (12 SRT 2334-2337 2345; Exhs. 39 & 117.) The cause of death was perforation of the heart and lungs from multiple gunshot

wounds. (12 SRT 2326.)

Officer Robert Barbery was present at the autopsy and saw cuts and scrapes on the victim's hands. (11 SRT 2056-2057, 2075.) These wounds could be an indication of a struggle. (11 RT 2068-2069.) Barbery collected a gunshot residue test from both of the victim's hands. (11 RT 2060-2061, 2065.)

Detective Solomon Wells interviewed Hor, and she made no mention of tattoos on the suspects. (11 SRT 2028.) Wells also testified that he received the store surveillance videotape from Detective Ballesteros. Exhibit 77 is not a complete copy of the videotape; portions were apparently removed. The tape begins with the two robbers speaking peacefully with the owners, and continues until the arrival of law enforcement. (11 SRT 1983-1985.) He also received the pawn slip from Hor. (11 SRT 2003.)

The store surveillance videotape was not of a very good quality. Detective Ballesteros watched the videotape and testified there was no way of telling which robber did the shooting. The video did not capture who was where at the time of the shooting. (10 SRT 1861.) Nor did it reveal whether the victim had a gun when he was shot. (10 SRT 1877.)

Detective Wells described the videotape as follows:

> at about 11 minutes and 40 seconds into the videotape, Mounsaveng pulled a handgun from underneath his jacket; appellant then pulled a gun from underneath his jacket and pointed it at the wife;
>
> at 14 minutes and 31 seconds into the videotape, there was a struggle in front of the video monitor, and a woman appeared at the far southeast end of the store and began kicking the wall;
>
> seconds later, Mounsaveng came into view of the camera, jumping over the counter across the customer area; he then jumped back down to the floor, and turned to the north where the struggle was occurring, and pointed his handgun in the direction of the struggle;
>
> there were a multitude of sounds, including two distinct sounds that Wells believed were caused by a weapon being discharged, but he could not determine which weapon was being used;

> at 14 minutes, 41 seconds into the videotape, Mounsaveng came back into view from behind the east counter, running towards the west side of the store where the struggle between the victim and appellant was still occurring; and
>
> shortly thereafter, Mounsaveng asked the wife to open the door; about 15 minutes, 12 seconds into the videotape, Mounsaveng ran out of the store.

(11 SRT 2016-2019.) The prosecutor, in her closing argument, noted that Mounsaveng appeared "very calm" on the videotape; after laughing and smiling, he initiated the robbery by pulling his gun. By contrast, appellant looked startled and did not expect the robbery "to go down at that time[.]" (15 SRT 3098.)

In February 1998, Detective Wells took the videotape to the Department of Justice and asked Harold Davis, a photo electronics expert, to enhance the audio portion. (11 SRT 1989; 12 SRT 2292-2293.) The process Davis used is intended to reduce interfering sounds so that voices may be heard more clearly. (12 SRT 2294, 2297.) However, the human voices on the audiotape cannot be distinguished one from the other. (12 SRT 2294, 2308-2309.) Davis produced an audio cassette. (12 SRT 2295; Exh. 113.) He had not listened to the tape in a year, had no notes on its contents, and did not recall the circumstances of the crime. (12 SRT 2296, 2300-2301.)

In February 1998, Stewart Shockley, a photo electronics specialist with the Department of Justice, was given the videotape and was able to extract a number of photos of the perpetrators. (13 SRT 2491-2493; Exhs. 60-70.) Each photo is one frame, and there are 30 frames per second. (13 SRT 2495.) The prosecution went through the videotape and determined which photos they wanted. (13 SRT 2497.) Exhibit 64 shows a suspect pointing his arm to the west or southwest, and may show that person holding two guns. (13 SRT 2495, 2498.)

The trial court watched the videotape. (11 SRT 1996; Exh 77.) It later watched the videotape with the "enhanced" audiotape prepared by Davis (12

SRT 2374), along with a transcript of the audiotape. The court received the transcript as an exhibit, but stated that it would not heed the determination that had been made as to which person uttered which words. (11 RT 1997-1999; Exhs. 59 & 59-A.)

Because Hor could not recall hearing or seeing the gunshots, the prosecution called Dr. Terrell, a forensic psychiatrist, to testify about the effects of trauma on memory. (12 SRT 2381.) He testified that "Acute Stress Disorder" was similar to Post-Traumatic Stress Disorder, but with a shorter duration, and can be precipitated by actual or threatened death, or serious injury to physical integrity. The symptoms include numbing, detachment, lack of emotional responsiveness, a reduction in awareness of one's surroundings, and dissociative amnesia. The disorder can cause a person to fail to recall important aspects of an event. (12 RT 2383-2384.) Dr. Terrell watched the videotape of the Sean Hong robbery, and confirmed that the incident was an extremely traumatic event. (12 SRT 2386.) If a percipient witness (Mrs. Hor) had no memory of seeing or hearing the killing, given that gunshots are loud, she "very likely had post-traumatic stress disorder." (12 SRT 2386.) Dr. Terrell never met or examined Mrs. Hor. (12 RT 2406.)

Iqbal Sekhon testified that he was a criminalist with the Department of Justice and performed, inter alia, crime scene reconstructions. (13 SRT 2438-2439.) In September 1997, he received a number of items from Fresno law enforcement related to this case, including spent cartridges, glass fragments, a gunshot residue test, photos, and the videotape of the Sean Hong incident. (13 SRT 2440-2443.) In April 1998, over a year after the event, he went to the store with Detective Wells. They could not gain entry as they had the wrong key, but Wells pointed things out to Sekhon through the window. (13 SRT 2444.)

Sekhon opined that the three spent cartridges found at the scene were fired from the same gun. (13 SRT 2446-2447.) He compared the glass

fragments from the display case with those found in the nearby car and concluded that they were consistent with each other. In his opinion, the hole in the store's window was caused by a bullet exiting the store. (13 SRT 2454-2456.) With respect to the gunshot residue test performed on the victim, he did not examine the test for residue, but rather for gunshot powder particles; he found none. (13 SRT 2456.)

Sekhon tried to reconstruct the crime scene and the location of the shooter and the victim. (13 SRT 2457.) No bullets or bullet strikes were found under the body. (13 SRT 2457.) He did not determine the victim's position when shot, although the lack of bullet strike marks under the body indicates that he was probably standing. (13 SRT 2461-2462.) Sekhon listened to the videotape and tried to differentiate gunshots and other sounds, but could not. (13 SRT 2469.)

The convoluted circumstances that led to the identification of the defendants are set forth in the affidavit in support of the arrest warrants. (3 Supp. CT 1-6, 7-12.) Appellant was arrested in Fresno on February 12, 1997. (7 SRT 1039-1040; 1 CT 22.) Mounsaveng was arrested in Minnesota on February 7, 1997. (9 SRT 1558.) After his arrest and during his transport from Minnesota to Fresno, Mounsaveng attempted to escape at the Los Angeles Airport and was shot in the back several times by law enforcement. He is partially paralyzed for life as a result. (14 SRT 2945-2948, 2950.)

Appellant was interrogated by Detective Wells on February 12 and 13, 1997. Mounsaveng's counsel, not the prosecution, offered appellant's February 12 statements. (11 SRT 2012-2013, 2584-2586.) According to Wells, appellant initially said "he didn't do nothing" and had never been to Sean Hong Jewelry. (11 SRT 2586-2587.) At some point, appellant changed his demeanor and said that he would tell the truth. He had not intended for anyone to get hurt, and Mounsaveng had shot the store owner three times. (11 SRT 2588-2590.) Appellant then told about his struggle with the owner:

they fought vigorously, and the owner hit appellant in the head with a chair. When asked why he stopped fighting, appellant admitted that he was the one who shot the owner. (11 SRT 2592-2593.) He was scared and thought the owner was going to kill him. He said that he did not mean to shoot him, that it was an accident. He apologized to Wells for not telling the truth earlier. He apologized to the victim's wife and her family for his actions. (11 SRT 2594-2596.)

Appellant also said that he did not want to commit the robbery, but was forced to do so: "he had to do it because he feared the other guy, his accomplice in this robbery, would shoot him[.]" (13 SRT 2605.) He had been "given a lot of cocaine and he could hardly think." (13 SRT 2601-2602, 2608.) He maintained, however, that the Sean Hong robbery was the only one with which he was involved. (13 SRT 2604, 2609.) He sobbed during the interrogation. (13 SRT 2610-2611.)

On redirect-examination, the prosecutor brought out that Detective Wells also interrogated appellant the following day, February 13, 1997. (13 SRT 2613-2615.) This time, Wells brought an interpreter; the objective was to clarify the statements made by appellant the day before. (13 SRT 2623, 2626, 2640.) Appellant said that he received the gun from Mounsaveng. At one point, while wrestling with the victim, he handed his gun to Mounsaveng. Mounsaveng gave it back and told him to shoot and kill the owner. (13 SRT 2630-2632, 2641, 2644-2645.) Appellant also stated that there were three other individuals waiting in the getaway car. (13 SRT 2641.) [8]

2. Mounsaveng's Guilt Phase Case

Kathy Sengphet testified that Mounsaveng was the father of her two children. On December 4, 1995, they were at the hospital when Mounsaveng

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8. Neither audiotapes nor transcripts of the February 12 and 13 interrogations were introduced in evidence. (See 13 SRT 2648, 2662.)

left with his two year old. (14 SRT 2779.) When he returned, he said that he had been kidnapped and threatened. She did not believe him until they arrived home, and she saw three men standing by a car waiting for him: an African-American man and two Laotians. (14 SRT 2782.) Her young son told her that his father had been tied up and gagged. (14 SRT 2838, 2854-2855.) One of the Laotians pointed a handgun at her car; he looked like appellant. (14 SRT 2797-2798.) Mounsaveng told her to report the kidnapping to the police without giving his name. (14 SRT 2819.) She called the police and gave a statement. (14 SRT 2785.)

Shortly thereafter, Sengphet and Mounsaveng moved to Portland, Oregon. In January 1996, she saw appellant at their house talking to Mounsaveng. (14 SRT 2801-2802.) Later, shots were fired at their house. (14 SRT 2787-2788.) Sengphet moved to Minnesota around September 1996; Mounsaveng joined her there in January 1997. (14 SRT 2790, 2823.) When the police came to arrest him for the capital crime, he told her not to give his real name. (14 SRT 2847.) When asked whether she would lie for him to avoid a death sentence, she said, "I want to help him, but I just want to help him through the truth." (14 SRT 2857-2858.)

Although Sengphet believed that appellant had been present at the kidnapping and Portland incidents, appellant introduced court and prison records showing that he had been incarcerated in Washington on those dates. (14 RT 2833-2834; 14 SRT 2925; 15 SRT 3036; Exh. 121.)

Mounsaveng testified at the guilt phase that he was born in Laos in 1971, left at age eight and lived in a camp in Thailand for a year, and emigrated to Bellevue, Washington in 1981. He was educated through the 11th grade. He met his common-law wife, Kathy, in Fresno and they had two children. (14 SRT 2867-2871; 14 SRT 2953.) He admitted having been convicted of theft on August 15, 1989. (14 SRT 2954.)

Mounsaveng also admitted involvement in the charged offenses, but

claimed that he had acted under duress. Similar to Sengphet's testimony, he testified that the coercion began in December 1995, when he and Sengphet were at the hospital with their two children, and he received a telephone call from a drug dealer that he knew as "Turre," who asked to meet. (14 RT 2874-2875, 2964.) Mounsaveng took one of his children and went to meet Turre. When he arrived, Turre, another man, and a third man, who Mounsaveng believed to be appellant, tied him up and drove him around in the car for 90 minutes. They asked if he had any money to pay a debt owed by his friend "Lut." He did not, and he and his son were eventually released. (14 SRT 2876-2882.) Later, when his Kathy saw strange men standing by their house, she called the police and made a report. (14 SRT 2884-2886.)

Afraid for himself and his family, Mounsaveng moved to Portland, Oregon, to stay with his parents. (14 SRT 2888.) On January 17, 1996, however, Turre and two other Asian men appeared at Mounsaveng's parents' house and asked for money. When Mounsaveng responded that he did not have any, the men pointed a gun at him and told him to go with them. He refused and the men left. A short time later a car drove by and three or four shots were fired at the house. (14 SRT 2889-2895; 15 SRT 2981-2985.)

As with Sengphet, Mounsaveng believed that appellant was present at the two incidents, notwithstanding the records showing that appellant was incarcerated on those dates. (14 RT 2925.)

In February or April 1996, Mounsaveng and Sengphet moved back to Fresno. (14 SRT 2899-2900.) In May 1996, Turre, appellant, and an Asian man came to his house with guns and told him that he would have to help rob a store or his family would be hurt. He begged them not to hurt his family, and participated in the robbery by driving the getaway car. (14 RT 2901-2902; 15 RT 2993-2995.) A month and a half later, appellant and two other men contacted Mounsaveng and ordered him to accompany them while they robbed a store. He agreed to act as the getaway driver because he was afraid.

He stated that appellant threatened to "do something" to his family if he did not participate. Mounsaveng was not charged with either of these robberies. (14 RT 2908-2910.)

As noted, in each of the charged robberies, Mounsaveng admitted his own and appellant's involvement. At the July 31, 1996, robbery of Thanh Tin Jewelry, appellant gave him an unloaded gun, and told him to go inside. Appellant pointed a gun at him and said if he did not participate, he would be shot. Mounsaveng was scared for himself and his family. In the store, he grabbed a person by the collar, but did not want anyone to get hurt. He received nothing of value from the robbery. (14 SRT 2911-2912; 15 SRT 3008, 3032-3033.)

At the August 16, 1996, robbery at JMP Mini-Mart, Mounsaveng was present but had an unloaded gun. (14 SRT 2912-2913; 15 SRT 3033-3034.) At the October 10, 1996, incident at the Phnom Penh jewelry store, he again had an unloaded gun. He did not recall hitting or kicking anyone, but pushed people down hard so that they would not get hurt. (14 SRT 2913-2914.) Two other people were in the getaway car. Mounsaveng was forced to participate through fear for his family and himself. (15 RT 2999, 3003.)

At the December 14, 1996, robbery of the JMP Mini-Mart, he testified that only appellant and he were present. (14 SRT 2914.) Again, he had been forced to do the robbery out of fear for his family and himself. (15 SRT 3005, 3007.)

With regard to the December 19, 1996, robbery and killing at Sean Hong Jewelry, Mounsaveng testified that he was forced to participate by appellant and another man. (14 SRT 2915; 15 SRT 3011, 3013.) He was the first to pull out a gun, because appellant told him to, but it was not loaded. (14 SRT 2916-2917; 15 RT 3015-3018, 3037.) Appellant and the owner were on their knees, fighting. Appellant told him to "shoot, shoot," and took one of the guns. Mounsaveng may have said, "I shoot you now, get down." (14

SRT 2918.) He conceded that, in the videotape, it looked like he had possession of both guns at one point. He grabbed Hor by her shirt and pulled her out of the back room, and then went to where appellant and Song were fighting. He never heard any shots and did not fire his gun. (14 SRT 2915, 2924.) He later asked his crime partners for money and received it. (15 RT 3025.) While testifying, he apologized for his involvement in the robberies. (14 SRT 2912, 2945, 2952; 15 RT 2999, 3040.)

Detective Wells testified for Mounsaveng that a man named Say Yaseng was mentioned in the December 1995 kidnapping report. (15 SRT 3046.) Yaseng bears an overwhelming resemblance to appellant. (15 SRT 3042, 3044-3045.)

3. Appellant's Guilt Phase Case

Appellant called several, brief witnesses. Cha Her, a property manager, testified that on December 14, 1996, he heard somebody running behind his office, looked out the window, and saw two people running from the scene. They were 15 to 19 years old, and one had a four to five inch ponytail. (15 SRT 3054-3055.) Officer David Robinson confirmed that interviewed Cha Her after the December 14 incident, and located a white 1984 Toyota Camry. (15 RT 3057-3059.) Officer Janet May testified that after the December 14 robbery at the JMP Mini-Mart, she lifted latent fingerprints from the Camry; none matched either defendant. (15 RT 3061-3063.)

Officer Phyllis Mitchell interviewed a number of the witnesses to the December 14 JMP-Mini Mart robbery, resulting in a composite picture of the suspects: one was 20 to 23 years old, with short hair; the other was about 25 years old, with short curly hair. The witnesses did not mention any tattoos. (15 RT 3065-3069.) Bill Posey, a toxicologist, testified that he performed a drug and alcohol screen on the blood taken from appellant on February 13, 1997. The blood was positive for alcohol and cocaine. (14 RT 2753-2755.)

Counsel also introduced documents from Washington State showing

that appellant was incarcerated during the duress incidents alleged by Mounsaveng. (15 SRT 3074, 3070-3080; Exh. 121.) The introduction of this exhibit would become an issue at the penalty phase.

4. The Prosecution's Rebuttal Case

The prosecution called one witness in rebuttal. Officer Gerald Miller testified that on December 4, 1995, he interviewed Kathy Sengphet with regard to the kidnapping of Mounsaveng. She identified her "ex-boyfriend" as "Mr. T" and said that he lived in Porterville. (15 SRT 3081-3082.) While at the police station, she saw a photo and said "that's the guy" who pointed a gun at her. The photo was of Aloune Yaseng. (15 SRT 3082-3083.) Aloune's twin brother is Say Yaseng. (16 SRT 3300.)

5. The Trial Court's Conclusions

The trial court found both defendants guilty of all charges and enhancements. (15 SRT 3138-3148.) With respect to the Thanh Tin Jewelry incident, count 16, the trial court concluded beyond a reasonable doubt that each of the defendants committed an attempted robbery, that Mounsaveng personally used a firearm during the commission of the offense, and that appellant was "vicariously armed" with a firearm. (15 SRT 3147.) Regarding the JMP Mini-Mart robbery on August 16, 1996, counts 14 and 15, the Court concluded beyond a reasonable doubt that each of the defendants committed the offenses; and that the special allegations were true. The court reached the same conclusion with regard to the robbery at Phnom Penh Jewelry on October 10, 1996 (counts 12 and 13), and the December 14, 1996, robbery at the JMP Mini-Mart (counts 4-11). (15 SRT 3143-3145, 3146-3147). However, count 9 (Ying Xiong) was found to be an attempted robbery. (15 RT 3144.)

With regard to the December 19, 1996, incident at Sean Hong Jewelry, the court disagreed with two points in the testimony by the prosecution's crime scene reconstruction witness, Iqbal Sekhon. First, the court disagreed with Sekhon's opinion "as to hearing the victim, Mr. Song, talking after being

shot." In the court's view, "there was not much movement after the shots were fired." (15 SRT 3140.) The court also disagreed with Sekhon's conclusion that the timing of the shots could not be determined. The court determined when the shots were fired "both by voice and, uh, visual observation when the victim was still alive and when he ceased to be seen or heard." In the court's view:

> Mr. Mounsaveng is clearly in frame and across the room with the female victim when the first shot is fired. He also appears to react to that shot by turning back towards the employee area of the store with his gun in his hand, and then moves out of frame when the next two shots are fired.

That coupled with appellant's statement to Detective Wells that he shot the victim, led the court to believe that appellant was the shooter. (15 SRT 3141.)

With respect to the capital count, count 1, the court found both defendants guilty beyond a reasonable doubt of first degree murder under the felony-murder rule. Appellant was the actual shooter; the primary criminal goal was to rob the jewelry store; and the killing was done to advance the commission of the offense or the escape therefrom. Appellant was in a fierce physical confrontation and battle with the victim, bringing grave danger to the robbery and the escape from the robbery scene. (15 SRT 3141-3142.) The court also found the sole special circumstance -- the killing was committed during the commission of the robbery -- true beyond a reasonable doubt. The enhancements were found true, as were the concomitant robbery counts concerning Song and his wife (counts 3 and 4). (15 SRT 3142-3143.)

With respect to the duress defense raised directly by Mounsaveng and indirectly by appellant (by virtue of his statements to Detective Wells), the court applied a preponderance of the evidence standard and found insufficient evidence of duress as to each defendant:

> Mr. Mounsaveng has established a prima facie case that would lead me to believe there is the possibility that his initial entry into the robbery consortium that Mr. Sivongxxay and possibly others were

> in, however, this is not proof rising to a probability, and would only apply to uncharged robberies that were testified to by Mr. Sivongxxay. It is clear that in -- in between the time of those uncharged robberies that he testified to and the charged -- the first charged offense in this case, he had ample opportunity to alert authorities to protect himself and his family, long periods of time unaccompanied by any other persons who were in a position to threaten him or his family with any imminent peril or danger.

(15 SRT 3147-3148.)

B. The Penalty Phase

At the penalty phase, the trial court considered those portions of the guilt phase that were relevant to penalty. (17 SRT 3581, 3624, 3755; § 190.4, subd. (d).)

1. The Prosecution Case

a. Victim Impact Evidence

The prosecution presented four victim impact witnesses, three of whom were from the victim's immediate family. Henry Song's wife, Seak Ang Hor, testified that they had been married for 30 years and had five children. (15 SRT 3184.) Because of the war in Southeast Asia, the family left Cambodia, and eventually emigrated to Fresno. (15 SRT 3188-3189, 3193-3194.) Her husband was a good person and a hard worker doing jewelry repair. Their entire savings was in the business, which was closed after the crime. (15 SRT 3189-3190.) She drives by the business several times a day and cries. (15 SRT 3191-3192.) On cross-examination, she was asked whether it would make her feel better to see appellant killed. She replied, "It's up to the Court." (15 SRT 3199.) A photo of Hor and her husband was introduced into evidence. (15 SRT 3199-3200; Exh. 129.)

David Song, the victim's eldest son, described finding out that his father had been killed. His mother refused to believe it for two to three days, was numb, and could not eat or sleep. (15 SRT 3202-3205.) His father was a likeable and honest man who treated people right. (15 SRT 3207.) David

spoke with him about what his father would do if there were a robbery. His father was not afraid. When asked whether his father told him that he would fight robbers, David responded, "I would, too, you know, for what you work for." (15 SRT 3207.) He felt sure that his father would try to fight the robbers. (15 SRT 3209, 3211.) The death changed everything in their lives. (15 SRT 3208.)

Lilly Song testified that she was very close to her father and that he took care of her. Her father was a good man who would not hurt an animal. (15 SRT 3213-3214.) She had to quit college to work. (15 SRT 3216.) Over objection, she referred to the defendants as devils and stated: "They should be killed. You know, there's no reason to take somebody's life." (15 SRT 3214.) This testimony was later struck by the trial court. (16 SRT 3360.)

The fourth victim impact witness -- Xeng Wang Her -- was not a victim of the capital crime, but rather a victim of two of the other charged robberies. Over objection (15 SRT 3220-3222), he testified that after the robberies, they were forced to close the store; and that his wife experienced fear and paranoia. (15 SRT 3222-3223.) Shortly thereafter, the trial court ruled that this "factor (b) victim impact testimony" was not admissible, and struck Her's testimony. (15 RT 3244-3245.)

b. <u>Factor (b) Evidence</u>

The prosecution's notice of aggravation listed nine factor (b) incidents allegedly committed by *Mounsaveng*, several of which occurred out-of-state when he was a juvenile. The trial court eventually ruled that those incidents were admissible at the penalty phase, but were not admissible as "strikes." (17 SRT 3633.) They included an assault on a 14-year-old girl (17 SRT 3551-3558 [Tanna White]); a fight between two cars full of youths (16 SRT 3299-3310 [Carrie Barber]; 16 SRT 3337-3345 [Jon Bloker]); and the robbery of a convenience store (16 SRT 3477-3486 [Tuan Tran]; 16 SRT 3291-3296 [Michael Mayes]).

Evidence was also admitted on three domestic violence incidents alleged to have been committed by Mounsaveng. Officer Michael Reid testified that on July 5, 1995, he contacted Mounsaveng's common-law wife, Kathy Sengphet, and she had two long bruises on her thigh, and a pronounced bruise on her jawline. (17 SRT 3610.) Sengphet testified that in December 1994, Mounsaveng pushed her and her head hit a door. Mounsaveng ran when the police arrived, but was arrested. (17 SRT 3583-3585.) On July 4, 1995, she argued with Mounsaveng and he punched her in the face and head, and pulled her by the hair. (17 SRT 3586-3589.) The next day, July 5, another argument occurred and Mounsaveng pushed her into a wall. (17 SRT 3589-3591.)

The notice of aggravation listed 12 factor (b) incidents allegedly committed by *appellant.* (3 CT 784-788.) Most of these were introduced at trial.

Sangieme Keonhothy testified that she knew appellant as "Sone" and lived with him for three to four months in 1996 and 1997 (during the time of the robberies). (16 SRT 3462-3463.) In October 1996, a shotgun was fired outside their apartment, an incident that led to Keonhothy's children being taken away by child protective services. (16 SRT 3464-3466, 3469.) Both appellant and Keonhothy were arrested. (16 SRT 3468.) Appellant was very abusive to Keonhothy. She has a scar over her left eyebrow from where appellant hit her with a handgun; she did not recall the circumstances because she had been smoking cocaine before the incident. When she lived with appellant, he would not allow her to leave the house. (16 SRT 3470-3473, 3493.) He beat and hit her all the time (16 SRT 3473-3474, 3494), broke a finger on her right hand with a gun (16 SRT 3492), and once made her stand in a cold shower, while pointing a knife at her. (16 SRT 3495-3496.) He also fired a gun next to her on one occasion. (16 SRT 3496.) Another time, appellant followed her to her brother's apartment, broke the window with his

hand. (16 SRT 3496-3498.) When the police searched his car, they found a long gun. (16 SRT 3498-3499.) When appellant was in jail before the last arrest, Mounsaveng called looking for him. (16 SRT 3500-3501.) After appellant's arrest for the capital crime, Keonhothy visited him in jail. She denied that appellant threatened to kill her if she did not continue to visit. (16 SRT 3502-3503, 3506-3507.)

Keonhothy did not recall having been convicted in 1991 of a felony violation of section 245, subdivision (a)(1). (16 SRT 3504, 3507-3508.) [9] On cross-examination, she stated that appellant could fly into a rage after smoking cocaine, and she feared that he might beat her up or kill her. (16 SRT 3505-3506.) The only time he was violent was when he used cocaine. (16 SRT 3525.) She was "heavy into cocaine" in the early 1990s and while living with appellant; it affected her memory. (16 SRT 3508, 3522-3523.)

At 11:00 p.m. on September 5, 1996, Fresno police were dispatched to a shooting at an apartment. Officer Leo Martinez arrived and saw a car with an Hispanic driver and an Asian passenger -- appellant -- a block or so from the apartment and stopped them from leaving. (16 SRT 3388-3390, 3393.) The Asian man kept looking down; in Officer Martinez's opinion, he was trying to hide something. The officer found a 9-mm handgun (chrome colored, black grip) under the driver's seat, and removed the occupants from the car. (16 SRT 3391-3392, 3397-3398.) There was no evidence that appellant shot the gun. (16 SRT 3394.) He waived his *Miranda* rights and said that a friend gave him the gun, and he put it under the seat. (16 RT 3398)

Juan Isidro Lopez testified that he had been standing outside his house

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9. The prosecutor "ran her rap sheet," gave it to the court, and stipulated that Keonhothy had been convicted of a felony violation of section 245, subdivision (a)(1). Appellant's counsel noted that the rap sheet appeared to be lengthy. (16 SRT 3509-3512.) Keonhothy did not recall a burglary conviction from 1994. (16 SRT 3514-3515.)

when he heard gunshots. Minutes later, an Asian man walked up and asked for a ride for 20 dollars. (16 SRT 3444-3446.) He had never seen the man before, but agreed to give him a ride. He was quickly stopped by law enforcement, and the man asked him to say that the gun was his in exchange for payment. Lopez declined. (16 SRT 3449-3450, 3453.) Lopez told the district attorney investigator that the man slurred his speech, like he was drunk. (16 RT 3454-3455.) In court, he "guessed" the man was appellant, as it had been a long time. (16 SRT 3456.)

Officer Douglas Scott Durham arrived to process the apartment. (16 SRT 3427.) He saw twelve 9-mm shell casings and bullet strike marks on the walls and garage. (16 SRT 3428.) He discovered one spent copper-jacketed bullet at the scene. (16 SRT 3429.) There were no fingerprints on the gun; and no comparisons to see if the casings matched the gun. (16 SRT 3431.)

On January 17, 1997, Ty Keonhothy lived in the same Fresno apartment complex as his sister, Sangieme, appellant's girlfriend, and knew appellant as "Sone." (16 SRT 3531-3532.) On that day, his sister came to his apartment. Appellant showed up around 10:00 p.m., knocked and asked for Sangieme. It sounded like he was intoxicated. After appellant yelled, broke a window, and entered the apartment, Ty called the police. (16 SRT 3532-3533.) The police searched appellant's car, which was outside the apartment, and found a long, pumping gun. (16 SRT 3534.) Appellant never threatened them with the gun. When appellant was not intoxicated, he was a good man. That was the only time Ty saw him violent. (16 RT 3535-3536.)

That same day, Officer James Beebe responded to the Keonhothy's apartment building and saw appellant covered with blood from a cut on his forearm and screaming. Beebe ordered him to the ground and called for medical assistance. (17 SRT 3544-3545.) Beebe looked at the Ford Thunderbird parked out front, and saw a shotgun (loaded with four shells). (17 SRT 3545-3546.) Appellant appeared to be intoxicated, and Beebe also

confiscated a rock type substance from his front pocket. Appellant was arrested for possession of a firearm in the car, possible possession of a controlled substance, and vandalism for breaking the apartment window. (17 SRT 3458-3459.)

Sheriff's Deputy Eulalio Gomez testified that he was working at the Fresno jail on March 9, 1997, and was investigating a fist fight between appellant and another inmate. (16 SRT 3110-3411.) He determined that appellant was a threat to the staff, and decided to place him into "isolation." (16 SRT 3412.) Isolation meant that appellant would be locked alone in a cell for 24 hours and day, let out every other day for a 30-minute shower. (16 SRT 3415.) When he informed appellant that he was being placed in isolation, appellant became physically and verbally "hostile." (16 SRT 3418.) Physically, he clenched his fists and assumed a combative stance. Verbally, he repeated several times: "I see you all the time on the streets, I'll remember you." Gomez deemed this a threat and gave him a rules violation for those statements. (16 SRT 3413, 3421.) Thus, for two years, while awaiting trial, appellant was locked alone in his cell, 24 hours a day. (16 SRT 3415; see Arg. 3, *post.*)

Two days later, Sheriff's Deputy Victor McGill was working at the Fresno jail, and he asked appellant if he wanted a hearing for a rules violation; appellant said he did not need one because he was guilty. The infraction had to do with an altercation with another inmate: as it was appellant's first offense, the rules violation resulted in the loss of five days of privileges. (16 RT 3381-3384.)

Sheriff's Deputy Terry Ann Bardwell testified that she was working at the Fresno Jail on May 15, 1997, when Sivongxxay arrived on her floor. She searched his property and found a piece of metal five and one-half inches long and one inch wide. (16 SRT 3369-3370.) She could not remember if it was sharpened. (16 SRT 3373.) Her report referred to the object as "contraband."

(Exh. 133; see Arg. 2, *post.*)

c. Factor (c) Evidence

The prosecution's notice of aggravation listed two factor (c) prior convictions against Mounsaveng: a 1990 conviction in Washington for the attempted taking of a vehicle; and a 1991 conviction in Oregon for first degree theft. (3 CT 788.) Documents were introduced to prove the theft conviction. (15 SRT 3229; Exh. 128-B.)

The prosecution's notice listed three prior convictions under factor (c) against appellant:

> 1. A June 11, 1993, conviction in Washington for armed robbery in the first degree;
>
> 2. An April 8, 1993, conviction in Oregon, for unauthorized use of a vehicle; and
>
> 3. A June 2, 1992, conviction in Oregon for unauthorized use of a vehicle.

(3 CT 788-789.) The prosecution introduced records relating to the Washington robbery. (17 SRT 3597; Exhs. 142-145.) It also introduced Exhibits 125 and 126, each showing a conviction in Oregon for unauthorized use of a vehicle. (15 SRT 3227-3228; 15 SRT 3229-3230.)

2. Appellant's Case

As noted, at the guilt phase, appellant introduced prison and court records from Washington State (Exhibit 121) to show that he was incarcerated during the duress incidents alleged by Mounsaveng. (15 SRT 3074, 3070-3080; 17 SRT 3652.) In his penalty phase opening statement, appellant's counsel referred to this exhibit as showing appellant's early childhood in Laos and Thailand. Counsel also stated that a psychiatrist would testify "about the various experiences that my client had to suffer through during his life." (15 RT 3179; see also 15 SRT 3161.) Counsel later announced that:

> I was expecting only Dr. Allan Hedberg for our case. I conferred with him at noon, and in view of what the information I elicited

> from the prosecution's witnesses [*sic*], he will not be testifying. There's nothing to add on top of what the witnesses said about the effects of drugs on my guy.

(17 SRT 3603-3604.) Shortly thereafter, counsel announced that he would "put my client on the stand . . . for a couple of minor things Dr. Hedberg would have testified to if we called him, but we don't need it." (17 RT 3623.)

Appellant testified that he was born in Laos in 1964, had no formal education, and was a member of the Thai army for five years. At age 23, after spending some time in a refugee camp, in 1987 his family emigrated to the United States. (17 RT 3634-3636.)

He admitted having been twice convicted in Oregon for the unauthorized use of a vehicle: in June 1992, and April 1993. In June 1993, he was convicted of robbery in Washington and sentenced to prison. While in prison, he referred himself for a chemical dependency program. (17 SRT 3637-3639.) Near the end of his term, he was transferred to a prison camp. (17 RT 3639.)

3. Mounsaveng's Case

Mounsaveng called one witness at the penalty phase: his common-law wife, Kathy Sengphet, who had testified earlier for the prosecution regarding domestic abuse by her husband. Despite the fact that they argued and fought at times, she still loved him. She testified that he loved his two children by her and they loved him. (17 SRT 3604-3605.) His family was close and loved him. She and the family wanted the judge to impose a life sentence. (17 SRT 3607-3608.)

4. The Prosecution's Re-Opened Case

As noted, at the guilt phase, appellant's counsel introduced Exhibit 121, which includes 33 pages of court and prison records from Washington State. These records were introduced to show that appellant was in prison during the two duress incidents raised by Mounsaveng. (15 SRT 3074.)

Exhibit 121 also includes a two-page affidavit of probably cause setting forth the underlying facts of the Washington state robbery conviction. (Exh. 121, pp. 10-11.) At closing argument, when the prosecutor began addressing those facts, counsel for appellant objected. (17 SRT 3649.) He complained that he had intended to limit the use of Exhibit 121 to those pages showing the incarceration dates. (17 SRT 3649-3656.) He argued that "something happened here that I did not understand." The judge overruled his objection and chided counsel: " You were clearly in the room. You were present. . . . Physically anyway." (17 SRT 3655.) Instead of punishing counsel's client for his "mental omission," the trial court permitted the prosecution to reopen its case to present two witnesses to the Washington robbery. (17 SRT 3656.)

Sounthorn Vichit testified that on September 8, 1992, she lived in Kennewick, Washington with his wife, their children, and others. On that date, they were having a birthday party for his wife's best friend. (17 SRT 3700-3702.) Around midnight, six men in camouflage came in through the bathroom window, each with a gun. They said to "get down," cut the phone lines, tied Vichit's hands, and pulled him into the middle of the room. They asked for money and kicked his right side several times. They took everything he had, including his watch, ring and $60. (17 SRT 3702-3704.) They then took his daughter Alice from her room, and told her to ask her mother for the key to the safe. They took the key, opened the safe, and took all the money and jewelry. A camera, gun and other items were also taken. The men were inside for 45-60 minutes and ransacked the house. (17 SRT 3705-3707, 3712.) They tied up his wife's father, despite his plea that he was old. (17 SRT 3707-3708.) After the event, Vichit went to the hospital: he hurt on his side, had a broken bone, and missed three weeks of work. (17 RT 3709.) He was unable to identify any of the men because they were all wearing masks. (17 SRT 3710.)

His wife, Khamtheuane Vichit, confirmed his testimony. (17 SRT

3713.) The men's faces were covered, each had a gun, and they took all of their property. They threatened to kill her daughter if the key to the safe was not relinquished. (17 SRT 3715-3717, 3722.) One robber engaged her father in a friendly discussion in Lao. (17 SRT 2723.)

5. The Trial Court's Sentencing

On April 1, 1997, the trial court sentenced appellant to death, and Mounsaveng to life without the possibility of parole. (17 SRT 3754-3759; 4 CT 986-987.) The court stated that it was following CALJIC No. 8.88 in reaching its conclusions, and was considering only admissible and relevant evidence. (17 RT 3754-3755.) In mitigation the court considered the following:

> the individual backgrounds of the defendants, including their immigration from Laos, progress through refugee camps, exposure to violence and terror-filled, war-torn country that filled their youth;
>
> the service in the U.S. Army by appellant's father and brother, making the family targets of the Communist regime, and the conscription of appellant into a foreign army;
>
> appellant's drug addiction and request for help with chemical dependence; the ever-increasing need for narcotics to satisfy that addiction;
>
> the remorse shown after the crime evidenced by appellant's confession;
>
> testimony by Mr. Mounsaveng during the guilt phase;
>
> the duress evidence, "each by the other";
>
> the expression of perceived necessity and self-defense for Mr. Sivongxxay brought on by the resistance of Henry Song; and
>
> the injuries, paralysis and physical condition of Mr. Mounsaveng.

(17 SRT 3755.)

In aggravation, the court found that every crime of violence under factor (b) was proven beyond a reasonable doubt. (17 SRT 3755.) With regard to factor (c), the court concluded that every prior conviction was

proven beyond a reasonable doubt. (17 SRT 3755-3756.)

With regard to factor (a), the court found that the videotape showed a struggle with the victim and that appellant was the shooter. The shots were not warning shots as they were relatively close together. They were "shots to kill." (17 SRT 3758.)

The court focused on the long-standing pattern of violent crimes in appellant's life, and his willingness to meet resistance with force. Further, the court emphasized the callousness and brutality of appellant's actions and the number of victims. Moreover, the crimes occurred after appellant escaped from prison (a non-violent walkaway from a camp) which the court considered a threat of violence. (17 SRT 3756-3757.) It also found that the jail incidents were threats of violence. (17 SRT 3757-3758.)

Accordingly, the trial court concluded, "as unpleasant as it is, I find the death sentence to be justified and appropriate" for appellant. With regard to Mounsaveng, the court merely stated that "I find the circumstances in mitigation outweigh the circumstances in aggravation. I find life without possibility of parole to be the appropriate sentence." (17 SRT 3759.)

Because the court was unclear as to whether section 190.4, subdivision (e) [automatic motion to modify the verdict] applied to a bench trial, as a precaution it ordered such a hearing. (17 RT 3759.) On April 29, 1999, the trial court denied its sua sponte motion to reduce the sentence to life without the possibility of parole (17 SRT 3780-3782), and sentenced appellant to death on count 1; and to 76 years, 8 months on the determinate sentencing counts and sentencing enhancements. (4 CT 988-1002.)

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ARGUMENTS

1. APPELLANT WAS DENIED HIS RIGHT TO A JURY TRIAL BECAUSE HIS PUTATIVE WAIVER OF THAT RIGHT WAS NOT KNOWING AND INTELLIGENT AND DID NOT COMPLY WITH STATE AND FEDERAL LAW; THE CONVICTIONS, SPECIAL CIRCUMSTANCE FINDING, AND DEATH SENTENCE MUST BE VACATED

A. Background

At a status conference on November 6, 1998, the court suggested that the parties "start thinking about a jury panel questionnaire[.]" (4 SRT 658.)

On December 17, 1998, several weeks before trial was scheduled to begin, the attorneys for Mounsaveng and appellant notified the trial court that their clients were prepared to waive a jury trial:

> MR. KINNEY [counsel for Mounsaveng]: Your Honor, I believe we're ready to proceed on the 11th [of January]. I've talked with co-counsel and the DA, and for a variety of reasons -- we're prepared to go. We're prepared to -- waive a jury trial and have a judge trial in this death penalty case.
>
> MR. PETILLA [counsel for appellant]: That's correct, Your Honor, and I have, of course -- would acknowledge that this particular court would still be hearing the case.

(6 SRT 903.) The prosecutor agreed that she, too, was ready to waive a jury trial. (6 SRT 903-904.) The court then addressed the defendants as follows:

> Mr. Mounsaveng, Mr. Sivongxxay, you each have a right to a trial, either by a jury of 12 people selected from this community, through a process that you would engage in with your attorneys, the district attorney and the Court, or a trial in front of a judge, acting alone without a jury.
>
> The burden of proof remains the same. The district attorney has the burden to go forth with evidence sufficient to prove your guilt beyond a reasonable doubt. Then, and only then, would we get to a penalty phase.
>
> In a court trial, I would hear the evidence. I, alone, would make the decision on whether that evidence was sufficient to prove your guilt

beyond a reasonable doubt.

> In the event I made such a finding, as to either or both of you, we would then proceed to a penalty phase, where the district attorney would present aggravation evidence. Through your -- you, through your attorney, would have a right to present mitigation evidence, and it would fall upon me to make the decision as to the appropriate punishment, which could result in a death penalty sentence.

(6 SRT 904.) The court asked each defendant and the prosecutor: "Do you give up your right to a jury trial and agree that this Court, alone, will make those decisions[?]" Each responded in the affirmative (the defendants through interpreters), and the court stated, "All right. We'll show a jury waiver on all issues." (6 SRT 905; see also 3 CT 795 [minute order].) No further jury trial waivers were taken. As a result, a court trial was had on the guilt phase, the special circumstance determination, and the penalty phase.

B. The Law Relating to the Right to a Jury Trial and the Waiver of That Right

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, grants criminal defendants the right to be tried by a jury. (U.S. Const., 6th & 14th Amends.; *Duncan v. Louisiana* (1968) 391 U.S. 145, 148-149.) The right to a jury trial in a criminal case is a fundamental constitutional right under the federal Constitution (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282), and an "inviolate right" under article 1, section 16 of the California Constitution. (*People v. Collins* (2001) 26 Cal.4th 297, 304.)

The right to a trial by jury "reflects a profound a profound judgment about the way in which law should be enforced and justice administered." (*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 155.) Its purpose is to prevent oppression by the Government and to establish a bulwark "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (*Id.* at pp. 155-156; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1025-1026, fn. 18.) Further, the jury serves as a link between the community and the penal system. (*Duncan*, *supra*, at p. 156.) This function is particularly

important in a capital case. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 181-182 (joint opinion of Stewart, Powell & Stevens, J.J.); *Witherspoon v. Illinois* (1968) 391 U.S. 510, 519, fn. 15; *People v. Murtishaw* (1981) 29 Cal.3d 733, 771, fn. 34 ["Just as the sentence of death is unique, so is the role of the penalty jury"].)

The essential elements of the right to a jury trial, not subject to legislative or judicial curtailment, are: (1) the number of jurors (twelve); (2) impartiality of the jurors; and (3) unanimity of the verdict. (Cal. Const., art. 1, § 16; *People v. Collins* (1976) 17 Cal.3d 687, 693; *People v. Traugott* (2010) 184 Cal.App.4th 492, 500.)

As with other fundamental constitutional rights, the right to trial by jury may be waived by the accused, both under federal law (*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 158), and state law (Cal. Const., art. I, § 16 [the right may be waived "by the consent of both parties expressed in open court by the defendant and defendant's counsel"]). A valid waiver of the right to trial by jury must be express and made in open court. (*Patton v. United States* (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal Constitution]; Cal. Const., art. 1, § 16; *People v. Collins*, *supra*, 26 Cal.4th at pp. 304-305 & fn. 2 [express waiver in open court required under both state and federal law].)

A trial court may not accept a waiver of the right to a jury trial unless "there is evidence in the record that the decision to do so was knowing, intelligent, and voluntary." (*People v. Collins*, *supra*, 26 Cal.4th at p. 305 & fn. 2, 307-308 [citing state and federal cases]; see also *People v. Weaver* (2012) 53 Cal.4th 1056, 1071-1072.) A waiver is knowing and intelligent if it is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it[.]" (*Collins*, *supra*, at p. 305, internal quotation marks omitted; see also *Weaver*, *supra*, at pp. 1071-1072.) A trial court has a "constitutional procedural duty to advise defendant of his right to jury trial, and to determine impartially whether defendant's waiver of

jury trial was knowing, intelligent, and voluntary." (*Collins*, *supra*, at pp. 308-309.)

The adequacy of a jury waiver is a mixed question of fact and law that is reviewed de novo. (*United States v. Duarte-Higareda* (9th Cir.1997) 113 F.3d 1000, 1002; *United States v. Carmenate* (2d Cir. 2008) 544 F.3d 105, 107; *State v. Rizzo* (Conn. 2011) 31 A.3d 1094, 1111.) "The burden is on the party claiming the existence of the waiver (here, the prosecution) to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver." (*People v. Smith* (2003) 110 Cal.App.4th 492, 500-501.) Given that the right to a jury trial is a fundamental guaranty of the rights and liberties of the people, and courts must make *every reasonable presumption* against its waiver. (*Hodges v. Easton* (1882) 106 U.S 408, 412.)

C. The Trial Court Erred in Accepting Appellant's Invalid Waiver of His Right to a Jury Trial

1. Appellant Did Not Validly Waive His Right to a Jury Trial at the Guilt Phase

A trial court's acceptance of a jury waiver is a serious and weighty matter. The language from the high court in *Patton v. United States*, *supra*, 281 U.S. 276, is apposite: the court's duty "is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof[.]" (*Id.* at pp. 312-313; see also *People v. Collins*, *supra*, 26 Cal.4th at pp. 308-309.) Further, the degree of caution which a trial court must exercise increases "in degree as the offenses dealt with increase in gravity." (*Patton*, *supra*, at pp. 312-313.) In a capital case, that caution must be at its apogee.

There is very little "caution" to be discerned in the trial court's

discharge of its duties here. Its waiver monologue [10] covers approximately one page in the reporter's transcript. It asked no questions of the defendants or their attorneys. It did not ask whether appellant had discussed the matter with his attorney. Nor did it ask appellant whether he understood the court's monologue, or if he even understood the purpose of a jury. (Cf. *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1024 [defendant affirmed that he understood his rights and had discussed the issue with his attorneys].)

Further, the record shows that appellant was uneducated, spoke limited English, and was an adult immigrant from an impoverished, war-torn country. As such, it is unlikely that he understood much if anything about the right to a jury trial and what that entailed. (See *United States v. Mendez* (5th Cir. 1996) 102 F.3d 126, 130 [defendant came from a poor rural country and did not understand the purpose of a jury].) [11] The trial court's one-page jury trial waiver inquiry does not appear to have considered any of those facts. Yet, the

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10. The trial court asked no questions of the defendants or their attorneys; it simply imparted brief information before asking whether the defendants agreed to give up their right to a jury trial. (6 SRT 905.) This was a monologue, not a colloquy. (See *United States v. Lilly* (3d Cir. 2008) 536 F.3d 190, 197-198 [discussing the importance of a thorough, on-the-record colloquy].)

11. Although appellant had three prior convictions, he plead guilty to each; thus, it would be unreasonable to infer that he was familiar with the jury trial right through past experience. (Exhs. 125-B, 126-B & 143; see also *State v. Baker* (Ariz. App. 2007) 170 P.3d 727, 730 ["We are unaware of any case holding that an effective jury trial waiver can be accomplished by reliance upon a defendant's prior experience in the system"].) In short, a "defendant may know of some rights but not this particular right." (*United States v. Robinson* (7th Cir. 1993) 8 F.3d 418, 424-425.) In particular, it is unlikely that appellant, a poor Laotian immigrant, knew anything about the penalty phase, which is a highly complex and specialized proceeding. (American Bar Association Guidelines for the Appointment and Performance of Defense Counsel In Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. (2003) 913, 921.)

court could not meaningfully assess whether the waiver was intelligent and knowing without considering "the unique circumstances" of the case (*Adams v. U.S. ex rel McCann* (1942) 317 U.S. 269, 278), which include the background, experience and conduct of the accused. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

The trial court's monologue also failed to mention the right to a unanimous and impartial jury at the guilt phase, two of the essential elements of a jury trial. (*People v. Traugott*, *supra*, 184 Cal.App.4th at p. 500, citing *People v. Collins*, *supra*, 17 Cal.3d at p. 693.) Further, the court failed to mention the effect of the lack of unanimity in criminal cases (see *People v. Robertson* (1989) 48 Cal.3d 18, 35-38), that should the 12 jurors not reach unanimity at the guilt phase, a mistrial would be declared and the defendant would be tried again by a separate jury. (§§ 1140, 1141.) That fact is part and parcel of the right to a jury trial, and knowledge of that fact is essential to a knowledge of the consequences of the decision to abandon that right.

In determining whether a waiver of the right to jury is knowing and intelligent, courts have considered defense counsel's representations on the record concerning the waiver. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1024, fn. 17; *United States v. Leja* (1st Cir. 2006) 448 F.3d 86, 93-94.) Here, there were none. Courts have also considered the defendant's presence in the courtroom at other times when the waiver was discussed. (See *United States v. Reynolds* (1st Cir. 2011) 646 F.3d 63, 75.) It does not appear that appellant was present during any such proceedings.

The record here simply shows a rote and inadequate inquiry by the trial court into appellant's decision to relinquish his fundamental and crucial right to a trial by a jury of his peers. The record fails to show that the waiver was made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon. In the absence of a knowing and intelligent waiver, the trial court erred in accepting the waiver

and appellant was denied his right to a jury trial. (See *People v. Ernst* (1994) 8 Cal.4th 441, 448.)

2. Appellant Did Not Validly Waive His Right to a Jury Trial for the Special Circumstance Determination

The right to a jury trial under the state and federal Constitutions also applies when a defendant is charged with a special circumstance in a capital case. (*People v. Lewis* (2008) 43 Cal.4th 415, 520-521.) Because the special circumstance finding is the functional equivalent of an element of the crime of capital murder, the state and federal Constitutions require that it be found true by a jury beyond a reasonable doubt. (See *ibid.*)

In *People v. Memro* (1985) 38 Cal.3d 658, 704, this Court held that "an accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to jury trial." (See also Cal. Judges Benchguides, *Death Penalty Benchguide: Pretrial And Guilt Phase* 98 (CJER 2009 rev.), § 98.54, p. 50.) In *People v. Diaz* (1992) 3 Cal.4th 495, 565, the Court explained that the special circumstance waiver need not be distinct in time, but that "the record must show that the defendant is aware that the waiver applies to each of these aspects of trial."

Here, the trial court made no mention of the special circumstance determination or the right to a jury trial thereon. The court merely said that it would decide "your guilt beyond a reasonable doubt," and then immediately began its description of the penalty phase: "In the event I made such a finding, as to either or both of you, we would then proceed to a penalty phase . . . ." There is no mention of the special circumstance determination at all, so there could hardly be a "separate waiver" of the right, as required by *Memro* and *Diaz*.

The trial court also failed to mention the right to a unanimous and impartial jury for the special circumstance determination, essential elements of a jury trial. Nor was appellant made aware of the consequences of the failure

of a jury to reach unanimity. [12] Appellant said nothing to suggest that he understand the right to unanimity at the special circumstance determination, or the nature of the failure of a jury to reach unanimity. And, defense counsel made no representations on the record concerning the special circumstance determination. Because the trial court did not inform appellant of the nature and consequences of the right he was waiving, it would be pure speculation to conclude that appellant's waiver was knowing and intelligent. That fact, coupled with the strong presumption against finding a waiver of fundamental constitutional rights (see *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464; *Hodges v. Easton*, *supra*, 106 U.S at p. 412), compels the conclusion that appellant's waiver was not valid.

Without an adequate, and separate, advisement regarding the nature of the jury trial right as to the special circumstance determination, as well as the consequences of non-unanimity, the trial court erred in accepting the waiver.

3. Appellant Did Not Validly Waive His Right to a Jury Trial at the Penalty Phase

Appellant had a state law right to a jury trial at the penalty phase under section 190.4, subdivision (b). (*People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1024-1026.) [13] That section provides: "If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury

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12. In a jury trial, if the 12 jurors fail to reach unanimity on the truth of the special circumstance, a second jury would be impaneled; should that jury also fail to reach unanimity, the trial court would have discretion to impanel another jury or to sentence a defendant to a fixed term of 25 years. (§ 190.4, subd. (a).)

13. This Court has concluded that a defendant does not have a state or federal constitutional right to jury trial at the penalty phase. (*People v. Robertson* (1989) 48 Cal.3d 18, 36.) The Court should reconsider that holding in light of *Ring v. Arizona* (2002) 536 U.S. 584, and its progeny. (See Arg. 5, *post*; see also *Ring*, *supra*, at p. 614 (conc. opn. of Breyer, J.) ["jury sentencing in capital cases is mandated by the Eighth Amendment"].)

unless a jury is waived by the defendant and the people[.]" That statutory mandate in favor of a jury trial at the penalty phase of a capital case means that even if a defendant has waived a jury trial prior to the guilt phase, a jury trial at the penalty phase is required unless it is separately waived. (*People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1025-1026.) [14]

This Court has construed the statute as a procedural protection for the capitally accused: "as an added protection for criminal defendants, a single jury trial waiver given early in the trial process is insufficient; a defendant must reaffirm his waiver for the penalty phase." (*People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1026-1027.) Thus, an express waiver of the right to a jury trial prior to the guilt phase of a trial does not waive the separate right to a jury at the penalty phase. The court here erred in failing to have appellant reaffirm his jury waiver for the penalty phase at the conclusion of the guilt phase.

Further, the record does not show that appellant was aware of his right to a unanimous and impartial jury at the penalty phase. In a capital case, this knowledge is of particular importance to a knowing and intelligent waiver because a death sentence cannot be imposed without the unanimous agreement of the 12 jurors. (§ 190.4, subd. (b).) The court also failed to explain the consequences of the sentencing jury's failure to reach unanimous agreement as to the appropriate sentence: the court must impanel a new jury; if that jury is unable to reach a unanimous verdict, "the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole." (§ 190.4, subd. (b);

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14. The statute creates a "substantial and legitimate expectation that [a defendant] will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." See *People v. Robertson*, *supra*, 48 Cal.3d at p. 36, citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) An arbitrary deprivation of that expectation would violate the Due Process Clause of the Fourteenth Amendment.

see *People v. Robertson*, *supra*, 48 Cal.3d at pp. 34-38.)

As noted, just as the sentence of death is unique, so is the role of the penalty jury. Here, the trial court mentioned the terms "mitigation" and "aggravation," but failed to define those terms or to explain what kind of evidence was admissible under those rubrics. (See § 190.3.) Nor does the record show that appellant was aware of this Court's oft-repeated and crucial distinction between the guilt and penalty determinations: "unlike the guilt determination, the sentencing function is inherently moral and normative, not factual and, hence, not susceptible to a burden-of-proof quantification." (*People v. Martinez* (2009) 47 Cal.4th 399, 455, internal quotation marks and citation omitted.) And the record does not show that appellant was aware that, unlike a typical criminal trial, the sentencing procedures at the penalty stage must result in a reasoned *moral* response to the defendant's background, character, and crime. (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).)

In *People v. Robertson*, *supra*, 48 Cal.3d 18, this Court concluded that a knowing and intelligent waiver of the right to trial by jury at the penalty phase may be found where the defendant is represented by counsel who discusses the consequences and nature of the proposed waiver with defendant, and where the court engages the defendant in an extensive and thorough voir dire expressly directed to determining whether the waiver was voluntary, knowing, and intelligent. (*Id.* at pp. 36-38 & fn. 4.) In that case, although neither the trial court nor the defendant's counsel explained on the record the effect of a jury deadlock at the penalty phase, this Court "presume[d] that competent counsel would have informed defendant of the consequences of a jury deadlock." (*Id.* at p. 37.) The trial court's substantial colloquy with the defendant assured this Court that the waiver was voluntary, knowing, and intelligent. (*Id.* at 37 and 38, fn. 5; see also *People v. Lookadoo* (1967) 66 Cal.2d 307, 311 [trial court and counsel went to great lengths to explain nature and

consequences of jury trial waiver]; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 344-345 [trial court not required to explain philosophical or tactical differences between court trial and jury trial when defendant represented by competent counsel]; *People v. Martin* (1980) 111 Cal.App.3d 973, 981 [counsel and court informed defendant that right to jury trial included right to have 12 people hear case]; *People v. Tijerina* (1969) 1 Cal.3d 41, 45-46 [when defendant is represented by counsel and is thoroughly questioned on the record before his waiver of a jury trial was accepted, trial court does not have to explain significance of non-unanimity].)

Here, there is no indication on the record that appellant's counsel, Mr. Petilla, discussed with him the nature or the consequences of the proposed waiver of the right to trial by jury at the penalty phase. Nor does the record show the trial court engaging appellant in an extensive and thorough voir dire expressly directed to determining whether the waiver was voluntary, knowing, and intelligent. The opposite occurred here: a rote monologue, followed by a one word, translated agreement.

It is ultimately the responsibility of the court, and not of counsel or the defendant, to ensure that the waiver of a fundamental constitutional right is knowing and intelligent, and that the record so reflects. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244; *People v. Collins*, *supra*, 26 Cal.4th at pp. 308-309.) In these circumstances, it should not be presumed that appellant's trial counsel explained fully the consequences of such a waiver. (*Hodges v. Easton*, *supra*, 106 US at p. 412 [courts must make every reasonable presumption against waiver of jury trial right].)

Because appellant did not make a knowing and intelligent waiver of his right to a jury trial at the penalty phase, the trial court erred in accepting the waiver.

D. The Convictions, Special Circumstance Finding, and the Death Sentence Must Be Reversed

The trial court's erroneous acceptance of the invalid waiver of the right to a jury trial resulted in the denial of appellant's right to a jury trial. (*People v. Ernst*, *supra*, 8 Cal.4th at p. 448.)

Under the federal Constitution, the denial of the right to a jury trial is structural error, requiring reversal without regard to prejudice. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282 ["The deprivation of that right with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'"].) The denial of the state constitutional right to a jury trial is also reversible per se. (See *People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) As this Court explained in *People v. Ernst*, *supra*, 8 Cal.4th 441: "It has long been established that the denial of the right to a jury trial constitutes a "'structural defect' in the judicial proceedings" that by its nature results in . . . a miscarriage of justice." (*Id.* at p. 449.) *Ernst* was reaffirmed in *People v. Collins*, *supra*, 26 Cal.4th 297, where this Court refused to conduct "harmless error" review of the denial of this fundamental constitutional right. Harmless error review is inapplicable to a violation of the right to a jury trial because "where a case improperly is tried to the court rather than to the jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error." (*Id.* at pp. 311-312.) Accordingly, the convictions must be reversed.

Reversal without regard to prejudice is also required of the special circumstance finding. Because special circumstances are elements of capital murder (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 520-521), the state and federal rights to a jury trial apply equally to the special circumstance finding. Even if this Court were to conduct harmless error review, reversal of the death sentence would still be required: as only one special circumstance was alleged, its invalidation would require reversing the death sentence. (§ 190.2, subd. (a);

People v. Marshall (1997) 15 Cal.4th 1, 44.)

With regard to the death judgment, as with the denial of the state constitutional jury trial right guaranteed by article 1, section 16, the improper denial of a jury determination of penalty by its nature results in a miscarriage of justice, requiring reversal without a showing of prejudice. (See *People v. Collins*, *supra*, 26 Cal.4th at p. 311; *People v. Ernst*, *supra*, 8 Cal.4th at p. 449.) The inapplicability of harmless error review at penalty is required because, as with the denial of that right at the guilt phase, the outcome that would have ensued in the absence of the error cannot be meaningfully assessed. (*Collins*, *supra*, at p. 312.) This is particularly true of the penalty phase which, unlike the guilt determination, "is inherently moral and normative, not factual and, hence, not susceptible to a burden-of-proof quantification." (*People v. Martinez* (2009) 47 Cal.4th 399, 455.) The death judgment must therefore be reversed.[15]

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15. A limited remand under these circumstances would be inappropriate. In *United States v. Saadya* (9th Cir. 1985) 750 F.2d 1419, where the defendants' jury trial waivers did not appear on the record, the government asked the Ninth Circuit to remand the case for a hearing on whether the defendants and their former lawyers had actually reached a decision to waive jury. The court of appeals rejected the suggestion, holding that the waiver must be made expressly in open court at the time of the alleged waiver. (*Id.* at pp. 1420-1421.) The court concluded, "we fail to see what purpose could be served" by a post-hoc reconstruction of the events. (*Id.* at p. 1421.)

2. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT'S ERRONEOUS CONSIDERATION OF EVIDENCE THAT APPELLANT POSSESSED A SMALL PIECE OF METAL IN JAIL CONTRIBUTED TO THE VERDICT

Each of the next three arguments concerns the erroneous admission of aggravating evidence at the penalty phase under section 190.3, factor (b). In assessing prejudice, the cumulative effect of the three errors should be considered together. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302-303; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927-928, 934-935; *People v. Hill* (1998) 17 Cal.4th 800, 844.)

A. Background

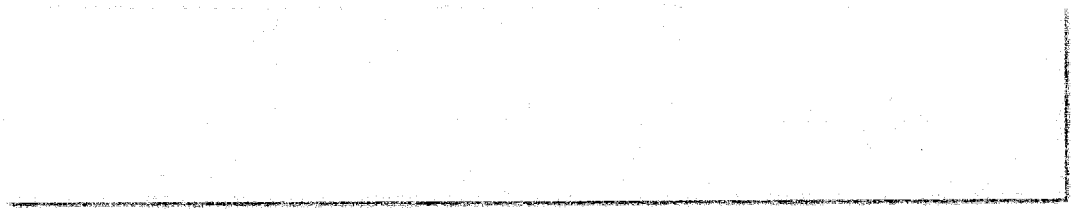
In its notice of aggravation, the prosecution alleged that on May 15, 1997, while awaiting trial in the Fresno County Jail, appellant was found in possession of a small piece of metal. (3 CT 788.) At trial, the prosecutor argued that appellant's possession of that item was a crime of violence and, therefore, admissible under section 190.3, factor (b). (16 SRT 3283-3284.) Appellant objected to the consideration of the evidence under factor (b). (15 SRT 3179; 16 SRT 3284, 3286, 3288.) The trial court stated that it would hear the evidence and "rule on whether there's a way it could amount to proof beyond a reasonable doubt, even if it's admissible." (16 SRT 3286.)

Fresno County Deputy Sheriff Terry Bardwell testified that on May 15, 1997, she was working at the jail, checking in new arrivals to the main floor. (16 SRT 3369.) On that date, appellant arrived on the floor with a bag full of his property. An inmate does not fill his bag when he is moved; a correctional officer performs that duty. When appellant emptied his bag onto a mattress, Bardwell found an item. (16 SRT 3376-3377.)

After refreshing her memory by reviewing her report, Bardwell testified that the item was made of metal. (16 SRT 3370-3371.) She could not remember if the item was sharpened or anything else about it. (16 SRT 3373,

3407.) Her report, marked as Exhibit 133, states: "While searching [appellant's] property a piece of metal was found. The metal being 5 ½ ' long and 1' in width. When asked, [appellant] stated 'he didn't know where the metal came from.'" [16] Bardwell stated, "we consider it contraband, which would be a shank." (16 SRT 3371.) Yet, she disposed of the item because, in her view, it had no evidentiary value. (16 SRT 3371-3372.) Her report mentions "contraband" but not the term "shank" or "weapon." (Exh. 133 [marked but not admitted].) Bardwell considered it a rules violation (16 SRT 3371, 3379), but there was no evidence that appellant was found guilty or received punishment for the perceived infraction.

The following diagram shows the known dimensions of the object:



The trial court mused: "Might have been a shoe horn, about five-and-a-half inches long, inch wide." (16 SRT 3407.)

Appellant moved to strike Bardwell's testimony, arguing that there was no evidence that the item was sharp. (16 SRT 3403, 3406-3407.) The prosecutor argued that the testimony established a violation of section 4502, subdivisions (a) and (c), and that possession of the item constituted a threat of violence. (16 SRT 3403, 3405.) [17]

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16. The report used a single quotation mark to represent an inch. (16 SRT 3378.) When asked by the court to demonstrate the size of the item, Bardwell held her hands one foot apart. (16 SRT 3379.) The court, however, believed that she had measured the item with a ruler when it was discovered. (16 SRT 3406-3407.)

17. Section 4502, subdivision (a) provides that "[e]very person who, while

Footnote continued on next page . . .

The trial court concluded that it would consider the evidence: "It's contraband. It is contraband because it is an item that can be used as a weapon." (16 SRT 3407.) The court gave no source for this conclusion.

B. The Trial Court Erred in Considering This Incident in Aggravation Under Section 190.3, Factor (b)

Section 190.3, factor (b), permits the introduction at the penalty phase of evidence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.) Section 190.3 separately provides that "no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." The purpose of factor (b) is to show the defendant's propensity for violence. (*People v. Melton* (1988) 44 Cal.3d 713, 764.) Its purpose is not to place "all conceivably relevant 'bad character' evidence" before the sentencer. (*People v. Balderas* (1985) 41 Cal.3d 144, 202, fn. 29.)

To be admissible under factor (b), the alleged conduct must demonstrate beyond a reasonable doubt the violation of a penal statute, and involve the express or implied use of force. (*People v. Collins* (2010) 49 Cal.4th 175, 217; *People v. Cain* (1995) 10 Cal.4th 1, 74; *People v. Boyd* (1985) 38 Cal.3d 762, 778.) Whether the alleged conduct constituted an actual crime is a legal question. (*People v. Taylor* (2010) 48 Cal.4th 574, 656.) Whether the conduct posed a threat of violence under factor (b) is also a legal question. (*People v. Butler* (2009) 46 Cal.4th 847, 872 ["We have also consistently ruled that

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at or confined in any penal institution, . . . possesses . . . any dirk or dagger or sharp instrument" is guilty of a felony. Subdivision (c) provides that the term "penal institution" includes a county jail.

whether criminal acts pose a threat of violence is a legal question for the trial court"]; see also *People v. Thomas* (2012) 53 Cal.4th 771, 833-834; *People v. Moore* (2011) 51 Cal.4th 1104, 1139; *People v. Howard* (2008) 42 Cal.4th 1000, 1027-1028.) What the sentencer must decide is whether the conduct was proven by the prosecution beyond a reasonable doubt. (*Thomas*, *supra*, at pp. 833-834.) As this Court stated in *People v. Nakahara* (2003) 30 Cal.4th 705: "The question whether the acts occurred is certainly a factual matter for the jury, but the characterization of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court" (*Id.* at p. 720.) [18]

In this case, the prosecutor alleged that possession of the item violated section 4502, subdivision (a), which prohibits an inmate from possessing, inter alia, a "a dirk or dagger or sharp instrument." (16 SRT 3405, 3736.) The terms "dirk" and "dagger" are defined in section 16470 as "a knife or other instrument . . . that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death." Bardwell did not testify that the item was readily usable as a stabbing weapon, or was capable of inflicting great bodily injury. Thus, the issue is whether it was a "sharp instrument" under section

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18. In several recent cases, this Court has stated: "A trial court's decision to admit, at the penalty phase, evidence of a defendant's prior criminal activity is reviewed under the abuse of discretion standard." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1127; see also *People v. Elliott* (2012) 53 Cal.4th 535, 587.) The progenitor for this statement is *People v. Mickey* (1991) 54 Cal.3d 612, at page 654, which involved the guilt phase denial of a motion to suppress evidence. The Court there stated: "It appears that a ruling on a motion such as the present, which concerns the admissibility of evidence, is subject to review for abuse of discretion." In its very next sentence, however, the Court stated: "The underlying determinations, of course, are scrutinized in accordance with their character as purely legal, purely factual, or mixed." (*Ibid.*)

Here, as argued above, the underlying determinations – whether the conduct violated a penal statute and whether it involved a threat of force or violence – are clearly legal question reviewed de novo.

4502. [19]

The answer to that question is simple and clear. There was no evidence that the item was sharp. Nor was there any evidence that the item had been altered, designed or had a handle. There was no evidence of the width of its edge, whether it was pointed or tapered, of its flexibility or stiffness, or of its weight. In short, there was no evidence of the characteristics that are common to a sharpened or stabbing instrument. (See *People v. Hayes* (2009) 171 Cal.App.4th 549, 554; *People v. Barrios* (1992) 7 Cal.App.4th 501, 506.)

In *People v. Hayes*, *supra*, 171 Cal.App.4th 549, a case involving section 4502, the trial court's instructions to the jury allowed it to "conclude that the instrument in question did not have to be 'sharp' as that term is commonly used." This was error because an element of the offense is that the instrument is sharp. (*Id.* at pp. 551-552.) The court was succinct: "We think it obvious that, to be a 'sharp instrument' under section 4502, the object must be sharp." (*Id.* at p. 560.)

Indeed, in virtually every case involving the "sharp instrument" provision of section 4502, the item was sharp. (*People v. Moore* (2011) 51 Cal.4th 1104, 1118 [a rod sharpened to a point at one end]; *People v. Mills* (2010) 48 Cal.4th 158, 208-209 [sharpened toothbrushes]; *People v. Howard* (2008) 42 Cal.4th 1000, 1012 [long metal screw filed to a point, with plastic and cloth melted around it to serve as a handle; § 4574]; *People v. Carey* (2007)

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19. A separate statute, section 4574, prohibits inmates from possessing a "deadly weapon," defined as an instrument or object capable of inflicting death or great bodily injury. (CALCRIM No. 2746.) A deadly weapon under section 4574 is not the same as a sharpened instrument under section 4502. (See *People v. Hughes* (2002) 27 Cal.4th 287, 383-384.) The prosecutor here, by not relying on section 4574, likely recognized that the small metal item was not a deadly weapon; that is, it could not inflict great bodily injury.

41 Cal.4th 109, 119-120 [a metal weapon measuring 9–3/4 inches long and 1–3/4 inches wide had been sharpened to a point]; *People v. Pollack* (2004) 32 Cal.4th 1153, 1177-1178 [razor blade removed from a disposable razor]; *People v. Carter* (2005) 36 Cal.4th 1215, 1236 [homemade knife wrapped in masking tape]; *People v. Martinez* (2003) 31 Cal.4th 673, 693 [sharpened piece of metal]; *People v. Prieto* (2003) 30 Cal.4th 226, 243 [two pieces of sharpened metal, six to seven inches long and approximately two inches wide]; *People v. Hughes* (2002) 27 Cal.4th 287, 383 [a four-inch, slightly bent but straightened, hard, sharp object with a loop at the end; § 4574]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 63 [three, eight-inch-long wood shafts with sharpened ends]; *People v. Mason* (1991) 52 Cal.3d 909, 956 [straightened, sharpened, heavy-duty paper clip protruding from the end of the plastic barrel of a ballpoint pen]; *People v. Lucky* (1988) 45 Cal.3d 259, 291-292 [items six to eight inches long, made from pieces of straightened and sharpened bedspring].)

The only case where the item was not sharpened, *People v. Roberts* (1992) 2 Cal.4th 271, was relied on by the prosecution at trial (17 SRT 3736), but is readily distinguishable. The defendant in that case was seen hiding an unsharpened piece of metal in his toilet. This Court had its doubts as to whether possession of a mere unsharpened piece of metal was admissible under section 4502 or section 190.3, factor (b). (*Id.* at p. 332 ["There may be doubt whether the crime involved conduct making its commission admissible under the statute"].) However, the defendant admitted while testifying that the piece of metal was a "weapon." That admission rendered him liable for possession of a weapon under section 4502. (*Id.* at p. 332.) [20] Here, there was

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20. The prosecutor here argued that:

> the Court [in *Roberts*] found that the hiding of an unsharpened piece of metal by a prisoner in his toilet was considered to be an act involving an express or implied threat to use violence under

Footnote continued on next page . . .

no admission by counsel or appellant that the piece of metal was a weapon.

Nor, contrary to the trial court's conclusion, did Bardwell opine that the item was capable of being used as a weapon. (Cf. *People v. Mills* (2010) 48 Cal.4th 158, 208 [officers testified that several of the items could be used as deadly weapons].) With regard to Bardwell's statement, "we consider it contraband, which would be a shank" (16 SRT 3371), to the extent that this was an opinion about the item, it has no evidentiary support in the record. A shank is a jail-made stabbing weapon. (*People v. McKinnon* (2011) 52 Cal.4th 610, 682.) There was no evidence here that the item was capable of being a stabbing weapon. And, in any event, Bardwell's opinion is undermined by her lack of memory and disposal of the item. (Cf. *People v. Wallace* (2008) 44 Cal.4th 1032, 1081 [Fresno deputy testified that razor blades were "considered contraband because of their altered condition, which facilitated their use as weapons"].) It is also undermined by the fact that the bag in which the item was found had been packed by other correctional officers, and appellant was presumably escorted to Bardwell's floor. (16 SRT 3376-3377.) These facts raise a reasonable doubt as to whether appellant even knew the item was in his bag.

The fact that Bardwell threw the item away is important for two reasons. First, she saw no evidentiary value in it, notwithstanding the fact that appellant was in jail and charged with a capital crime. (16 SRT 3371-3372.) It is reasonable to infer therefrom that the item was not a shank, did not violate a penal statute, and did not pose a threat of violence. Second, given her lack

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> factor B. That act, that possession, was also a violation of Penal Code section 4502(a) and 4502(c).

(17 SRT 3736.) As shown above, however, the *Roberts* court found the conduct admissible because the defendant admitted that the piece of metal was a weapon.

of memory, the trial court and defense counsel had no way to assess whether the item was sharpened, violated a penal statute, or posed a threat of violence, as is required for admissibility under factor (b). (Cf. *People v. Cain* (1995) 10 Cal.4th 1, 74-75 [even if records of prior violent conduct were destroyed, the conduct was proven through a percipient witness].) Other courts have examined items under statutes prohibiting the carrying of a dirk or dagger. (E.g., *People v. Mowatt* (1997) 56 Cal.App.4th 713, 720, fn. 5; *People v. Barrios* (1992) 7 Cal.App.4th 501, 503, fn. 1.) The deputy's disposal of the item precludes that option here.

In *People v. Forrest* (1967) 67 Cal.2d 478, this Court found that a certain knife was not a dirk or dagger "as a matter of law." (*Id.* at p. 481; see also *People v. Barrios*, *supra*, 7 Cal.App.4th at p. 506.) So, too, here: this small piece of unsharpened metal was not a sharpened or stabbing instrument as a matter of law. The trial court erred in considering this evidence in aggravation under factor (b). (*People v. Boyd*, *supra*, 38 Cal.3d at p. 772.)

C. The Error Violated Appellant's Rights Under State and Federal Law

The trial court's consideration of the inadmissible evidence in aggravation violated the statutory scheme by which this state implements capital punishment: "No evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (§ 190.3; see also § 190.3, factor (b).) The evidence presented here was nonstatutory aggravation, inadmissible under California law, and "not entitled to any weight in the penalty determination." (*People v. Boyd*, *supra*, 38 Cal.3d at p. 773.)

The trial court's error also violated appellant's right to a reliable and individualized penalty determination under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S.

Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.) Because death is qualitatively different from any other kind of punishment, both the state and federal Constitutions require a heightened degree of reliability in the factfinding procedures that lead to a death sentence (see *Ford v. Wainwright* (1986) 477 U.S. 399, 411), and "in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn. of Stewart, Powell, and Stevens, JJ.); *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135). Here, the trial court's consideration of inadmissible evidence in aggravation skewed the weighing process in favor of death, resulting in a diminution of the reliability of the process, and vitiating the court's determination that death was the appropriate sentence. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532 [vacating a death penalty because the trial court considered a factor in aggravation unsupported by the evidence]; cf. *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 ["If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here].)

Further, the court's consideration in aggravation of evidence not within the statutory scheme violated appellant's right to due process under the state and federal Constitutions. A defendant has "a legitimate interest in the character of the procedure which leads to the imposition of sentence." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 (plur. opn.).) Here, section 190.3 created a legitimate expectation that the trial court would follow that section and not consider inadmissible evidence in making its life or death determination. The trial court's failure to do so violated due process. (See *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *People v. Webster* (1991) 54 Cal.3d 411, 439 ["We recognize that due process concerns may arise when the state arbitrarily withholds a nonconstitutional right provided by its laws"].)

With regard to the federal law claims, counsel for appellant did not object on the federal law bases at trial. However, this Court has reiterated that when a defendant fails to articulate constitutional arguments at trial that are then advanced on appeal, they are not necessarily forfeited:

> In each such instance, it appears that either the appellate claim is the kind that required no trial court action to preserve it, or the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as each was wrong on grounds actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendants' new constitutional arguments are not forfeited on appeal.

(*People v. Lewis* (2006) 39 Cal.4th 970, 990, fn. 5.) Here, the federal law claims do not invoke facts or legal standards different from those the trial court itself was asked to apply: the admissibility of the item under factor (b). The trial court's error simply had the additional legal consequence of violating the federal Constitution. The constitutional claims are cognizable. (See also *People v. Partida* (2005) 37 Cal.4th 428, 435.)

Even if an objection were required, this Court may and should overlook that failure and address the claims on the merits. This Court "may consider for the first time on appeal a pure question of law which is presented by undisputed facts." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) As argued above, the issues here are questions of law: whether possession of the item violated a penal statute and posed a threat of violence. Further, a defendant may raise for the first time on appeal "a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) The right not to be sentenced to death on the basis of inadmissible evidence and the right to present mitigation (by rebutting aggravation) are fundamental constitutional rights.

D. Reversal of the Death Sentence Is Required

Federal law error requires the state to prove beyond a reasonable doubt

that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) This Court has stated that the review of state law error at the penalty phase of a capital case is the same "in substance and effect" as the *Chapman* test. (*People v. Nelson* (2011) 51 Cal.4th 198, 218, fn. 15.) Thus, the state law standard presumably looks at whether the error contributed to the verdict. (Cf. *People v. Brown* (1988) 46 Cal.3d 432, 448.) Under any test, the error here requires reversal of the death judgment because the incident clearly contributed to the verdict.

Evidence that a defendant possessed a sharp instrument in jail, as with evidence of escape (see *People v. Gallego* (1990) 52 Cal.3d 115, 196), can weigh heavily in the sentencer's determination of penalty. Here, the record shows the importance of this incident to the penalty determination. The prosecution argued:

> And then, finally, on May 15th, 1997, three months after being incarcerated in the county jail, while Mr. Sivongxxay is being moved to Correctional Officer Bardwell's floor, she finds in his personal property a piece of metal that is five and one-half inches by one inch in width, and she confiscates it as contraband. That is a factor B
> . . . .

(17 SRT 3736.) The prosecutor argued that this incident was consistent with a "history of violence against innocent people" and a "life of victimization of others[.]" (17 SRT 3737.) By introducing and arguing this evidence, the prosecution believed that consideration of this incident would materially strengthen its chances of obtaining a death sentence. (See *People v. Spencer* (1967) 66 Cal.2d 158, 169, fn. 11.)

Then, Mounsaveng's counsel took advantage of the jail incidents to compare the relative characters of the two defendants: "You've heard nothing, Your Honor, about Oday Mounsaveng causing trouble in the jail or having a shank or beating up people or cussing at people or raising hell. . . . So he is not a threat of danger to anyone and to no one in the future." (17 SRT 3676.) He continued, "granted [Mounsaveng] tried to escape, [but] as he

sits here now, he is no threat to anybody in the future. He's no threat to jail staff." (17 SRT 3691-3692.) Thus, Mounsaveng used the incident to show relative culpability and future dangerousness (including a failure to adjust to confinement). [21]

Where jurors are the sentencers in a capital case, it is usually not known what importance, if any, they gave to factor (b) or any aggravating evidence. (See *Sochor v. Florida* (1992) 504 U.S. 527, 538.) In this case, the importance of the evidence to the sentencer is known because the trial court was the sentencer and it gave its reasons for the sentence. The court relied on:

> The incidents in the jail following Mr. Sivongxxay's arrest have been considered; threats to correctional officers after discipline was meted out or explained; the presence of a shank, *which under jail rules was a weapon*, and as an inmate can be considered by the Court as including a threat of violence.

(17 RT 3577-3758, italics added.) As noted above, the italicized portion of the court's statement has no evidentiary support. And, the statement shows the court's view that appellant's history of violence was important to its imposition of the death penalty. Appellant's putative possession of a stabbing instrument in jail had a significant impact on the penalty determination. (See *People v. Jurado* (2006) 38 Cal.4th 72, 139 [finding no prejudice because of the unlikelihood that the weapon had a "significant impact upon" the sentencing determination].)

It is no answer to say, as the trial court did here, that it would consider the circumstances as affecting the weight of the evidence in aggravation. (16

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21. Negative jail incidents inevitably engender the sentencer to considerations of a defendant's future dangerousness: whether he would pose an undue danger to his jailers or fellow prisoners, and could lead a useful life behind bars if sentenced to life imprisonment. (See *Kelly v. South Carolina* (2002) 534 U.S. 246, 253 [escape attempts and possession of a shank places future dangerousness in issue].)

SRT 3407.) The trial court's duty was foundational: whether possession of the item violated a penal statute and posed a threat of violence. (See *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25 (plur. opn.).)

Appellant does not deny that the aggravating evidence here was strong: in particular, the number of robberies and victims, the evidence of domestic violence, and the shooting of the owner during a struggle. [22] This Court has held that the strength of the aggravation or the heinousness of the crime, as compared to the mitigation, can render an error such as this harmless. (E.g., *People v. Moore* (2011) 51 Cal.4th 1104, 1138; *People v. Lancaster* (2007) 41 Cal.4th 50, 188-189; *People v. Combs* (2004) 34 Cal.4th 821, 860-861.) That conclusion cannot be reached here, however. The trial court's sentencing shows that the capital crime was not the predominant reason for its decision. (17 SRT 3757-3758.) The court focused on all of the crimes, including those under factors (b) and (c), the number of victims, the pattern of ongoing violent conduct and possession of firearms, the overall brutality of appellant's actions, and his readiness to meet force with violence. (17 SRT 3756-3759.) It also focused on appellant's jail incidents, including the possession of a shank while in custody, and the inevitable inferences of future dangerousness and a failure to adjust to confinement that arise therefrom. In these circumstances, the strength of the aggravation or the heinousness of the capital crime is insufficient to show beyond a reasonable doubt that the error did not contribute to the verdict.

By impermissibly injecting an inadmissible element into the sentencer's

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22. There is mitigation in the record, including: appellant grew up in a war zone, in a poor family, was conscripted into the army in his early teens, was uneducated, and may have been chemically dependent during the crime. (17 SRT 3634-3636; 16 RT 3472, 3522-3523 [Keonhothy testimony]; 13 SRT 2601-2602, 2608 [appellant's confession that prior to the robbery, "He had been "given a lot of cocaine and he could hardly think"].)

deliberation (see *California v. Ramos* (1983) 463 U.S. 992, 1012), the error placed a thumb on death's side of the process (see *Sochor v. Florida* (1992) 504 U.S. 527, 532). Reversal of the death sentence is required.

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3. THE TRIAL COURT'S ERRONEOUS CONSIDERATON IN AGGRAVATION OF APPELLANT'S PUTATIVE THREAT TO A CORRECTIONAL OFFICER CONTRIBUTED TO THE VERDICT AND REQUIRES REVERSAL OF THE DEATH SENTENCE

A. Background

Appellant was arrested on February 12, 1997, and incarcerated in the Fresno County Jail. The prosecution's notice of aggravation alleged that on March 9, 1997, he "got into a physical altercation" with another inmate, resulting in a cut to the inmate's chin. (3 CT 787.) The notice also alleged that on March 9, while being interviewed about the altercation, appellant became hostile and threatened a correctional officer by saying, "I see you all the time on the streets, I'll remember you." (3 CT 787-788.)

At trial, the court ruled that "[t]he fight in itself probably is not admissible" without an eyewitness. (16 SRT 3286-3287.) [23] The prosecutor argued, however, that the alleged threat was admissible under section 190.3, factor (b) as a criminal threat of violence. (16 SRT 3283-3284, 3735-3736.) Appellant objected to the consideration of the alleged conduct under factor (b). (15 SRT 3179; 16 SRT 3281-3282, 3287-3288.) The court ruled that, subject to appellant's objection, "I'll probably just hear that and see whether it amounts to a threat in my mind." (16 SRT 3287-3288.)

The correctional officer, Eulalio Gomez, testified that he was working at the Fresno jail on March 9, 1997, and investigated an altercation between appellant and another inmate. (16 SRT 3110-3411.) He determined that appellant was the aggressor. He also determined that appellant was a threat to

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23. The witnesses -- Officers Fuentez-Green and Mike Grieco -- were never called to testify. (16 SRT 3404-3405; 17 SRT 3571.) But the record shows nothing more than a commonplace altercation between inmates, resulting in a cut lip and bruised fingers. (16 SRT 3283.) No shank or weapon was involved.

the staff and inmates, and should be placed in isolation. (16 SRT 3412, 3425.) Isolation meant that appellant would be locked alone in a cell for 24 hours a day, let out every other day for a 30-minute shower. (16 SRT 3415.) When Gomez informed appellant of his "reclassification," appellant, who was changing into a different colored jumpsuit, became physically and verbally "hostile." (16 SRT 3413, 3418.) Physically, he clenched his fists and assumed a combative stance. [24] Verbally, he yelled several times: "I see you all the time on the streets, I'll remember you." Gomez deemed this a threat and gave appellant a "rules violation" for the statement. (16 SRT 3413, 3421.) He did not know whether appellant had been found guilty of the rules violation. (16 SRT 3424.)

On cross-examination, defense counsel brought out that appellant did not hit, kick or spit on Officer Gomez; nor did he say, "I'll kill you" or threaten bodily harm. Further, Gomez did not ask appellant what he meant by his statement. (16 SRT 3417-3416, 3422.) The meaning of "I see you all the time on the streets, I'll remember you" is not patent. [25]

Gomez maintained, however, that the incident was a threat. In part, his opinion was based on appellant's body language: a combative stance, clenched fists, the proximity, and the fact that appellant was yelling angrily. (16 SRT 3413, 3421.) The judge assumed Gomez to mean that appellant appeared angry and hostile. (16 SRT 3413, 3421.)

But Gomez's other point was that, based on his experience, he knew when he had been threatened: "In our position as a correctional officer, umm, any time a person or inmate threatens you, that's considered something

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24. Appellant is not necessarily a physically imposing figure, at 5' 4" and 145 pounds. (15 SRT 3123; Exh 121, p. 22.)

25. Gomez did not speak Lao and does not appear to have had an interpreter present during the incident. Appellant's English is not good, as Gomez conceded. (16 SRT 3416.) At trial, appellant required an interpreter.

that's considered a threat." (16 SRT 3417; see also 16 SRT 3414, 3420.) Gomez's experience cannot be gainsaid. But his statement is a tautology, and still leaves open the question of whether appellant made a clear threat of violence as a matter of law.

As a result, for the two years that appellant was in jail, both before and during trial, he was locked alone in his cell, 24 hours a day. (16 SRT 3415-3416; 2 CT 787-788.)

B. The Trial Court Erred in Considering This Incident in Aggravation Under Section 190.3, Factor (b)

Section 190.3, factor (b) permits the introduction at the penalty phase of evidence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.) Section 190.3 separately provides that "no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." The purpose of factor (b) is to show the defendant's propensity for violence. (*People v. Melton* (1988) 44 Cal.3d 713, 764.) Its purpose is not to place "all conceivably relevant 'bad character' evidence" before the sentencer. (*People v. Balderas* (1985) 41 Cal.3d 144, 202, fn. 29.)

As set forth in Argument 2, *ante*, whether conduct violates a penal statute and poses a threat of violence under factor (b) are legal questions. (*People v. Taylor* (2010) 48 Cal.4th 574, 656; *People v. Howard* (2008) 42 Cal.4th 1000, 1027-1028.) The question whether the acts occurred is a factual matter for the sentencer. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720.) For purposes of this appeal, appellant is not challenging the trial court's conclusion that appellant committed the conduct described by Deputy Gomez. The questions on appeal are whether that conduct demonstrated the

violation of a penal statute, and whether it involved an express or implied threat of force or violence. Those are legal questions, and must be reviewed de novo.

The prosecutor here alleged that appellant's conduct violated section 69, which prohibits deterring executive officers in the performance of their duties:

> Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable . . . .

(17 SRT 3736.) The statute encompasses two separate offenses with different elements: one, attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; and, two, actually resisting by force or violence an officer in the performance of his or her duty. (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) The two ways of violating section 69 have been referred to as "attempting to deter" and "actually resisting an officer." (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 255.) Here, there was no allegation that appellant actually resisted an officer by force; thus, this case deals with the first offense, attempting to deter. [26]

In *In re Manuel G.*, *supra*, 16 Cal.4th 805, this Court made clear that "[t]he central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely

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26. There are a welter of statutes apart from section 69 that may apply to threats: section 71 [threatening public officials]; section 76 [threatening certain public officials]; section 217.1 [assault on a public official]; section 240 [assault]; section 241.1 [assault on a custodial officer]; section 422 [criminal threats]. Each of these crimes has different elements, as the pattern jury instructions will attest. The prosecution here relied solely on section 69.

the means by which the attempt is made." (*Id.* at p. 815.) The threats must be used in an attempt to deter or prevent the officer from performing his duty. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154; *People v. Hines* (1997) 15 Cal.4th 997, 1060-1061; CALCRIM No. 2651.) Further, the threat must be an attempt to deter either the officer's *immediate or future* performance of his duty: section 69 "does not reach threats made only in response to or in retaliation for an officer's past performance of his or her duties." (*In re Manuel G., supra*, at p. 817 & fn. 6.)

Appellant's statement bears scant resemblance to those cases that have been held to violate section 69 (or other criminal threat statutes), which typically involve an unmistakable threat of great violence:

> "'Me and my home boys are going to start killing you and your friends,' and 'I'm tired of you guys fucking with us, and you better watch out, we're going to start knocking you guys off.'" (*In re Manuel G, supra*, 16 Cal.4th 805, 819.)
>
> "'I am going to kill you. This is a threat. You're dead.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1058-1060.)
>
> "'I'm going to get the gas chamber and before I leave here, I'm going to take out a deputy.'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1115.)
>
> A letter written by the defendant threatening to kill the prosecutor, the judge, and others if he lost the case. (*People v. Hamilton* (2009) 45 Cal.4th 863, 934-936.)
>
> "'We'll get your house. We'll get your cars. You can't be with your family twenty-four hours a day[.]'" (*In re M.L.B* (1980) 110 Cal.App.3d 501, 503-504.) [27]

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27. Statements which would otherwise be inadmissible as a threat of violence may be admissible if they are part of a violent criminal incident, such as an assault or violent escape. (E.g., *People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134 [statements part of an escape]; *People v. Welch* (1999) 20 Cal.4th 701, 759 [statement part of an assault on the deputy].) Further, a threat to kill a deputy is admissible on the issue of intent when the defendant subsequently

Footnote continued on next page . . .

What these cases have in common is an unequivocal threat to do great violence to the officer. In this case, by contrast, appellant said: "I see you all the time on the streets, I'll remember you." There was no unequivocal threat to kill or harm, and there was no attempt to deter the officer from his duties. In fact, the statement appears to have been made in retaliation for Gomez's past performance of his duties: reclassifying appellant to solitary confinement. Section 69, however does not reach such threats (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 817, fn. 6.)

It is instructive to view appellant's conduct in light of those cases involving threats where this Court found *Boyd* error [28] or respondent conceded error. In *People v. Silva* (1988) 45 Cal.3d 604, the defendant threatened to kill the first police officer who entered his cell if he was not permitted to visit with his wife. The Attorney General conceded error, but argued that it was harmless. This Court agreed, concluding that the jury probably considered the threat "no more than heated frustration from being deprived of visits by his wife." (*Id.* at p. 636.) In *People v. Rodrigues* (1994) 8 Cal.4th 1060, the defendant verbally abused a correctional officer and threatened to "kick [his] ass" when the officer sought to have him removed from his food serving assignment. (*Id.* at p. 1169.) The Attorney General did not argue that the incident was admissible under factor (b), but rather that its admission was harmless. (*Id.* at p. 1170.) In *People v. Coleman* (1988) 46 Cal.3d 749, when a correctional officer tried to take a hair sample in jail, the defendant stated:

> I showed much more mercy on him than he would have showed on me if he had had me in a similar situation, and if the day comes or

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kills a police officer. (*People v. Cruz* (2008) 44 Cal.4th 636, 671.) None of these situations applies here.

28. *People v. Boyd* (1985) 38 Cal.3d 762, 773, held that under California law, nonstatutory evidence in aggravation is inadmissible in the prosecution's case-in-chief, and "not entitled to any weight in the penalty determination."

> the day will come, that he has me in that same situation, that I can rest assured that he will not show the mercy on me that I showed on him."

(*Id.* at p. 788 & fn. 32.) This Court noted that it was "not clear that the statement constituted criminal activity or the express or implied threat of force or violence." (*Id.* at pp. 787-788.)

These cases demonstrate that equivocal statements of an intent to do harm do not qualify as a criminal threat under section 190.3, factor (b). Here, the statement was equivocal. As in *Coleman*, it is far from clear that the statements constituted an implied threat of force or violence.

Thus, the court erred in considering appellant's reaction to Gomez's announcement that he would be placed in isolation -- an emotional outburst of anger and hostility -- as an actual crime involving the threat of violence. The incident was inadmissible under factor (b) as a reason to sentence appellant to death.

C. The Error Violated Appellant's Rights Under State and Federal Law

The trial court's consideration of the alleged threat as aggravation violated the statutory scheme by which this state implements capital punishment: "No evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (§ 190.3; see also § 190.3, factor (b).) The evidence presented here was nonstatutory aggravation, inadmissible under California law, and "not entitled to any weight in the penalty determination." (*People v. Boyd* (1985) 38 Cal.3d 762, 773.)

The trial court's error also violated appellant's right to a reliable and individualized penalty determination under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.) Because

death is qualitatively different from any other kind of punishment, both the state and federal Constitutions require a heightened degree of reliability in the factfinding procedures that lead to a death sentence (see *Ford v. Wainwright* (1986) 477 U.S. 399, 411), and "in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn. of Stewart, Powell, and Stevens, JJ.); *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135). Here, the trial court's consideration of inadmissible evidence in aggravation skewed the weighing process in favor of death, resulting in a diminution of the reliability of the process, and vitiating the court's determination that death was the appropriate sentence. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532 [vacating a death sentence because the trial court considered a factor in aggravation unsupported by the evidence]; cf. *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 ["If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here].)

Further, the court's consideration in aggravation of evidence not within the statutory scheme violated appellant's right to due process under the state and federal Constitutions. A defendant has "a legitimate interest in the character of the procedure which leads to the imposition of sentence." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 (plur. opn.).) Here, section 190.3 created a legitimate expectation that the trial court would follow that section and not consider inadmissible evidence in making its life or death determination. The trial court's failure to do so violated due process. (See *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301; *People v. Webster* (1991) 54 Cal.3d 411, 439 ["We recognize that due process concerns may arise when the state arbitrarily withholds a nonconstitutional right provided by its laws"].)

With regard to the federal law claims -- the Eighth Amendment and

Due Process Clause violations -- counsel for appellant did not object on those bases at trial. However, as set forth in Argument 2, *ante*, this Court has reiterated that when a defendant fails to articulate constitutional arguments at trial that are then advanced on appeal, they are not necessarily forfeited. (*People v. Lewis* (2006) 39 Cal.4th 970, 990, fn. 5.) Here, the federal law claims do not invoke facts or legal standards different from those the trial court itself was asked to apply: the admissibility of the evidence in aggravation under factor (b). The trial court's error simply had the additional legal consequence of violating the Constitution. The constitutional claims are cognizable.

Even if an objection were required, this Court "may consider for the first time on appeal a pure question of law which is presented by undisputed facts." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) As argued above, the issues here are questions of law. Further, a defendant may raise for the first time on appeal "a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) The right not to be sentenced to death on the basis of inadmissible evidence is a fundamental constitutional right.

Finally, the qualitative difference of death from all other punishments requires a correspondingly greater degree of reliability in the factfinding procedures that lead to a death sentence, and in the degree of scrutiny of the capital sentencing determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 417-418; *California v. Ramos* (1983) 463 U.S. 992, 998-999.) A ruling that these claims are forfeited would be inconsistent with those bedrock principles.

D. <u>The Error Requires Reversal of the Death Sentence</u>

Federal law error requires the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As noted in Argument 2, this Court has stated that the review of state law error at the penalty phase of a capital case is the same "in substance and effect" as the *Chapman* test. (*People v. Nelson* (2011) 51 Cal.4th

198, 218, fn. 15.) Under any test, the error here requires reversal of the death judgment because the incident clearly contributed to the verdict.

Evidence of threats to correctional officers can weigh heavily in the sentencer's determination of penalty. The closing arguments show why this is true. The prosecution argued:

> Gomez is investigating that fight at the jail . . . and he told him that the consequences of his behavior was going to be reclassification into isolation, Mr. Sivongxxay responded to that officer with a threat of violence. ¶ The officer testified that the threat was so hostile that the officer concluded it to be real and dangerous to both he and his co-workers . . . .

(17 SRT 3735-3736.) The incident was consistent, in the prosecutor's view, with a "history of violence against innocent people" and a "life of victimization of others[.]" (17 SRT 3737.)

As with Argument 2, Mounsaveng's counsel took advantage of the jail incidents to compare the relative characters of the two defendants: "You've heard nothing, Your Honor, about Oday Mounsaveng causing trouble in the jail or having a shank or beating up people or cussing at people or raising hell. . . . So he is not a threat of danger to anyone and to no one in the future" (17 SRT 3676.) He continued, "granted [Mounsaveng] tried to escape, that as he sits here now, he is no threat to anybody in the future. He's no threat to jail staff." (17 SRT 3691-3692.)

The prosecution and the codefendant used the jail incidents for two reasons. First, the prosecutor used it to show a history of violence and a life of victimization. Second, the codefendant used it to show relative culpability and future dangerousness (including a failure to adjust to confinement). [29] Each of these is powerful aggravation. This incident was used to make a case

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29. As noted in Argument 2, *ante*, negative jail incidents inevitably engender the sentencer to considerations of a defendant's future dangerousness and institutional adjustment.

for death and thereby contributed to the verdict.

Further, the trial court was the sentencer and gave its reasons for the sentence. Among those reasons were the jail incidents:

> The incidents in the jail following Mr. Sivongxxay's arrest have been considered; threats to correctional officers after discipline was meted out or explained; the presence of a shank, which under jail rules was a weapon, and as an inmate can be considered by the Court as including a threat of violence.

(17 SRT 3577-3758.) The court also concluded that appellant actions, including the jail incidents, showed a life-long pattern of violence and victimization. (17 SRT 3756.) [30] The court's sentencing reasons demonstrate the salience of the jail incidents to its conclusion that death was the appropriate sentence.

As noted in Argument 2, appellant does not deny that the aggravating evidence here was strong, and that this Court has held that the strength of the aggravation or the heinousness of the crime, as compared to the mitigation, can render an error such as this harmless. (E.g., *People v. Combs* (2004) 34 Cal.4th 821, 860-861; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1170; *People v. Silva* (1988) 45 Cal.3d 604, 636.) [31] That conclusion cannot be reached here, however. The trial court's sentencing reasons show that the capital crime was not the predominant reason for its decision to sentence appellant to death. (17 SRT 3756-3759.) The court focused on all of the crimes, including those under factors (b) and (c), and the overall brutality of appellant's actions. It also

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30. The court's reference to appellant's "life-long" pattern of violence is hyperbolic. Appellant's first crime (unauthorized use of a vehicle) occurred in 1991, when he was twenty-six years old. He was in prison from 1993 to early 1996. His last crime occurred in 1996, when he was thirty-two years old. His "life-long pattern" lasted six years.

31. The mitigation in the record on appeal is set forth in Argument 2.

focused on appellant's jail incidents, including the threat to a correctional officer, and the inevitable inferences of future dangerousness and a failure to adjust to confinement that arise therefrom. In these circumstances, the strength of the aggravation cannot eliminate the possibility that the court would have decided appellant's fate differently had this evidence not been considered.

By impermissibly injecting an inadmissible element into the sentencer's deliberation (see *California v. Ramos*, *supra*, 463 U.S. at p. 1012), the error placed a thumb on death's side of the process (see *Sochor v. Florida* (1992) 504 U.S. 527, 532 [vacating a death sentence because the trial court considered a factor in aggravation unsupported by the evidence]). Reversal of the death sentence is required.

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4. THE DEATH SENTENCE MUST BE REVERSED BECAUSE APPELLANT'S NONVIOLENT WALKAWAY ESCAPE FROM A PRISON CAMP IN WASHINGTON STATE NINE MONTHS BEFORE THE CAPITAL CRIME WAS INADMISSIBLE UNDER ANY SENTENCING FACTOR, AND ITS ERRONEOUS CONSIDERATION BY THE TRIAL COURT CONTRIBUTED TO THE VERDICT

A. Background

The prosecution's notice of aggravation alleged that appellant had escaped from Coyote Ridge Prison in Washington State "seven months [*sic*] before the first charged crime was committed," and that the escape was admissible as a *circumstance of the capital crime* under section 190.3, factor (a). (3 CT 781.)

At trial, the escape was first mentioned by appellant's counsel at the guilt phase in the following context. The codefendant, supported by testimony from his common-law wife, Kathy Sengphet, raised a duress defense, alleging that appellant threatened him on several occasions into participating in the crimes. (14 SRT 2782, 2798, 2801-2802 [Sengphet]; 14 SRT 2876-2877, 2892, 2903 [Mounsaveng].) To rebut that testimony, counsel for appellant asked Sengphet whether she knew that appellant had been in prison during two of those occasions, and "did not escape until March, 1996?" (14 RT 2833-2834; see also 17 SRT 3652-3653, 3662.) The first part of that question was relevant to whether appellant was incarcerated when the threats were alleged to have occurred. The mention of the escape was unnecessary as it merely represented, in the trial court's words, "[t]erminating the incarceration." (17 SRT 3666.) [32]

At the end of the guilt phase, appellant's counsel offered into evidence

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32. Mounsaveng's counsel apparently recognized this: in questioning his client, he brought out that appellant had been in prison through February 1996, but did not mention the escape. (14 SRT 2925-2926.)

Exhibit 121, 33 pages of police, prison, court, deportation, and other records from appellant's conviction for robbery in Washington State. One page of that exhibit -- page 28 -- showed the appellant was incarcerated during the alleged threats. A number of other pages related to the nonviolent walkaway escape. (Exh. 121, pp. 19, 21-24, 32.)

The escape records reflect that appellant and another inmate were at Coyote Ridge Prison, outside a small town in rural, eastern Washington. They were last seen around 8:20 p.m. on February 28, 1996. An organized search was conducted two hours later, with no results. The next day, a flyer was sent out by a local town police department. No property was damaged during the escape. (Exh. 121, pp. 19, 22.) [33]

Exhibit 121 was received in evidence in its entirety. (15 SRT 3079-3080.) During his guilt phase closing argument, counsel for appellant again mentioned the escape to show that appellant had been incarcerated when the alleged threats to Mounsaveng occurred. (15 SRT 3118.)

The prosecution, in its penalty phase opening statement, reiterated that the People would be offering the escape under section 190.3, factor (a), as a circumstance of the crime. (15 SRT 3171-3172) Appellant's counsel did not object. At the penalty phase, the prosecution introduced additional exhibits relating to the Washington State conviction, but none of those mentioned the escape. (Exhs. 142-144; 17 SRT 3694-3697.) During her cross-examination of appellant, the prosecutor did not ask about the escape. (17 SRT 3637-3639.) Thus, the sole evidence of appellant's escape was Exhibit 121, the exhibit introduced by appellant's counsel during the guilt phase.

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33. At sentencing, the trial court accepted that appellant's escape was a nonviolent: "I'm assuming it was a walkaway from the evidence that we know about it, being from a camp." (17 SRT 3757.)

B. The Claim Should Be Addressed on the Merits

Appellant's counsel mentioned the escape, introduced the exhibit that contained the documents showing the escape, and did not object to the prosecution's use of that evidence under factor (a), as a circumstance of the crime. This Court has found similar claims to be forfeited under these circumstances. (E.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1235; *People v. Johnson* (1992) 3 Cal.4th 1183, 1243.)

However, this Court should address the merits here because whether the nonviolent walkaway escape was admissible under factor (a), or any factor, is a pure question of law pertinent to a proper disposition of the case. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-18; *People v. Hines* (1997) 15 Cal.4th 997, 1061.) Further, the relevant facts are in writing (the documents in Exhibit 121) and are undisputed. The exact nature of the escape is known from those documents. The only thing not known is why appellant escaped. No one asked. [34] Finally, addressing the merits would contribute to the reliability of the death sentence. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

For these reasons, appellant respectfully requests this Court to address this claim on the merits.

C. The Trial Court Erred in Considering the Nonviolent Walkaway Escape in Aggravation

Before addressing why the nonviolent escape was inadmissible under factor (a), the basis proffered by the prosecution, appellant argues that it was inadmissible under any other sentencing factor.

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34. Although unmentioned by appellant's counsel, the deportation records in Exhibit 121 show that appellant was nearing the end of that sentence and was to be deported to Laos after serving the sentence. (Exh. 121, pp. 16, 31; 17 SRT 3639.) At the penalty phase, appellant testified: "If stay in Laos, Communist kill my family in Laos." (17 SRT 3634-3636.)

First, evidence of a defendant's nonviolent escape is not admissible in aggravation under factor (b) of section 190.3. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1334-1335.) Factor (b) requires an express or implied threat to use force or violence before conduct is admissible in aggravation, and not all escapes meet that requirement. (See *People v. Sarbers* (1992) 7 Cal.App.4th 1336, 1340 ["escape comprehends a multitude of sins"].) This rule has been adhered to by this Court for decades, and is based on the plain language of factor (b), which requires the express or implied threat to use force or violence for admissibility. (*People v. Boyd* (1985) 38 Cal.3d 762, 776-777; *People v. Lancaster* (2007) 41 Cal.4th 50, 93 [possession of handcuff keys]; *People v. Burgener* (2003) 29 Cal.4th 833, 873 [trial court rules, and prosecutor agrees, that nonviolent escapes were not admissible under section 190.3]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1231-1232 [Assuming, without deciding, that the trial court erred in admitting a nonviolent escape]; *People v. Howard* (1988) 44 Cal.3d 375, 427-428 [possession of handcuff keys]; *People v. Lopez* (1971) 6 Cal.3d 45, 52 [escapes are not necessarily inherently dangerous].) The rule is also underpinned by the Eighth Amendment mandate that the sentencing decision in a capital case be based on an individualized assessment of the person and the offense. (See *Lockett v. Ohio* (1978) 438 US 586, 604-605 (plur. opn.); *Zant v. Stephens* (1983) 462 U.S. 862, 900 (conc. opn. of Rehnquist, J.) [the sentencer "makes a unique, individualized judgment regarding the punishment that a particular person deserves"].) In making that assessment, the sentencer must rely on the actual events in the defendant's life, not upon abstract generalities about escapes. (See *People v. Mason* (1991) 52 Cal.3d 909, 955.) In other words, any inference the sentencer makes in this context must be based on the defendant's own life and actions.

In this case, there was no actual or threatened use of force or violence during or after the escape, and there was no property damage. (Exh. 121, pp. 19, 22.) Appellant simply walked away from a farm camp at night. The trial

court accepted that appellant's conduct amounted to a nonviolent "walkaway." (17 SRT 3757.) Given these facts, the incident was not admissible as prior violent conduct under factor (b).[35]

Nor was the incident admissible under section 190.3, factor (c): there was no evidence that appellant had been convicted of an escape. (See *People v. Lang* (1989) 49 Cal.3d 991, 1038 [factor (c) applies to prior convictions].)

The question, then, is whether evidence of the nonviolent escape was admissible under section 190.3, factor (a), as a circumstance of the offense. This Court has defined factor (a) to encompass not only the immediate and spatial circumstances of the crime, but also that which surrounds materially, morally, or logically the crime. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) In *People v. Tuilaepa* (1992) 4 Cal.4th 569, this Court concluded that factor (a) "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability." (*Id.* at p. 595.) In *People v. Bacigalupo* (1993) 6 Cal.4th 457, this Court concluded that factor (a) "uses clearly understandable terms to designate" the circumstances of the crime for the sentencer's consideration. (*Id.* at p. 478.)

The prosecutor here argued that two of this Court's capital cases permit the introduction of the escape incident under factor (a), as part of the circumstances of the crime: *People v. Turner* (1990) 50 Cal.3d 668, and *People v. Johnson* (1992) 3 Cal.4th 1183. (16 SRT 3370.)

In *Turner*, the defendant had been incarcerated for prior felony offenses, and committed the capital murder *within months* after his most recent release. The prosecution argued that these incidents were admissible as circumstances of the capital crime under factor (a). This Court rejected the

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35. The fact that the prosecution offered the evidence under factor (a) suggests that it viewed the incident as inadmissible under factor (b).

defendant's claim that the incidents were not listed as aggravating factors under section 190.3: the fact that the capital murder occurred *soon after* the defendant's release from custody suggested "defendant's unwillingness to learn from prior punishment," and was proper. (*People v. Turner*, *supra*, 50 Cal.3d at pp. 713-714.) *Johnson* is similar. There, the defendant claimed error in the admission of evidence that he had spent five years in prison for a manslaughter conviction, and that the crimes for which he was convicted in the capital case occurred *six days after* his release from prison. After concluding that the claim was forfeited, this Court addressed the merits and found no error because the facts "support[ ] the inference that incarceration had failed to change his violent character." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1243, internal citations omitted.) The same result was reached in *People v. Wader* (1993) 5 Cal.4th 610, a case involving a defendant's automatic application for modification of penalty. (§ 190.4, subd. (e).) The trial court relied on the fact that the defendant had served prior prison terms and was on parole *shortly before* the capital offense occurred. This Court quoted *Turner* in finding no error: "defendant's recent release from prison is a circumstance of the capital crime under section 190.3, factor (a) which is logically relevant to penalty, since it suggests that defendant was unswayed from criminal conduct by his recent incarceration." (*Id.* at pp. 667-668.)

Turner, *Johnson*, and *Wader* stand for the proposition that a defendant's release from custody shortly before committing a capital crime is admissible as a circumstance of the crime. In each case, the fact that the release from custody occurred relatively close in time to the capital crime provided the connection between the escape and the capital crime required by the commonly understood terms of factor (a).

Here, that fact is missing. The nonviolent walkaway was simply unrelated to the circumstances of the capital crime. It occurred nine months before that crime, in rural Washington State, far from the future locale of the

capital crime. This should be sufficient to distinguish *Turner*, *Johnson*, and *Wader*.

There is another reason why this incident should not be admissible under factor (a). Twenty years ago, Justice Kennard warned against defining factor (a) so broadly that it encompassed the other factors listed in section 190.3: "the factor for the 'circumstances of the crime' should be given a narrow meaning if a broader meaning would make other items superfluous." (*People v. Fierro* (1991) 1 Cal.4th 173, 263 (conc. & disn. opn. of Kennard, J.).) That admonition came true here. Although the escape was inadmissible under factors (b) and (c), the trial court admitted it under factor (a). After admitting it under that factor, however, the court considered the incident in terms sounding more like factors (b) and (c) than the "circumstances of the crime":

> the continuing pattern argued by the Prosecutor, including weapons, offenses committed while he was on escape status as a previously convicted felon, are by case law admissible because of the threat of violence shown by that.

(17 SRT 3757.) Apart from the fact that there was no evidence that the escape was violent, the court's reasoning applies to the purpose behind factor (b) -- to show a defendant's past propensity for violence -- not factor (a). (See *People v. Melton* (1988) 44 Cal.3d 713, 764.) The Court continued:

> I'm not considering any circumstances of his escape itself. I'm assuming it was a walkaway from the evidence that we know about it, being from a camp. ¶ But as a convicted felon on escape status, his continued acts of violence, including possession of firearms on multiple occasions, show a continuing pattern of ongoing violent conduct and criminality.

(17 SRT 3757.) That reasoning -- a felon on escape status and a continuing pattern of criminal activity -- encompasses the rationale for factors (b) and (c). (See *Melton*, *supra*, at p. 636 [factor (c) evidence shows that "the capital offense was the culmination of habitual criminality--that it was undeterred by the community's previous criminal sanctions"].)

In effect, the court distorted the commonly understood terms of factor

(a) to allow in evidence that was inadmissible under factors (b) and (c), thus rendering those factors superfluous. The opposite possibility -- that the trial court considered the incident under factors (a) and (b) -- avails nothing. Such double counting is prohibited. (*People v. Miranda* (1987) 44 Cal.3d 57, 105-106.)

This Court cautioned in *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, that the sentencing factors in section 190.3 must not inject into the individualized sentencing determination the possibility of randomness or bias in favor of the death penalty. (*Id.* at 477.) Here, the nonviolent escape evidence plainly did so. The incident was inadmissible under factors (b) and (c), yet it was shoehorned into evidence under factor (a). That distortion of the sentencing factors injected bias in favor of death into the sentencing decision. The trial court erred in considering this incident in aggravation. [36]

D. The Error Violated Appellant's Rights Under State and Federal Law

The evidence of the nonviolent, walkaway escape and the inferences drawn therefrom were not admissible under any sentencing factor. Such nonstatutory aggravation is inadmissible under California law, and "not entitled to any weight in the penalty determination." (*People v. Boyd*, *supra*, 38 Cal.3d at p. 773.) Its consideration as aggravation by the trial court violated the statutory scheme by which this state implements capital punishment.

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36. The escape was not admissible under any other possible ground: i.e., to rebut testimony that appellant was a good confinement risk. (E.g., *People v. Crew* (2003) 31 Cal.4th 822, 854.) Appellant presented no such testimony. Nor was the incident necessary to the material issues at the guilt phase. (E.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1168.) Exhibit 121 was relevant at the guilt phase solely to show the dates of incarceration, not the date of escape. Finally, the evidence was not admissible to rebut evidence concerning defendant's character. (E.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.) That was not an important factor in appellant's case for life.

The trial court's error also violated appellant's right to an individualized reliable penalty determination under the Eighth and Fourteenth Amendments, and the parallel provisions of the California Constitution. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.) Because death is qualitatively different from any other kind of punishment, both the state and federal Constitutions require a heightened degree of reliability in the factfinding procedures that lead to a death sentence (see *Ford v. Wainwright* (1986) 477 U.S. 399, 411), and "in the determination that death is the appropriate punishment in a specific case" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn. of Stewart, Powell, and Stevens, JJ.); *People v. Horton* (1995) 11 Cal.4th 1068, 1134-1135). Here, the trial court's consideration in aggravation of inadmissible evidence skewed the weighing process in favor of death, resulting in a diminution of the reliability of the process and vitiating the court's determination that death was the appropriate sentence. (See *Sochor v. Florida* (1992) 504 U.S. 527, 532 [vacating a death penalty because the trial court considered a factor in aggravation unsupported by the evidence]; cf. *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 ["If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here].)

Further, the court's consideration in aggravation of evidence not within the statutory death penalty scheme violated appellant's right to due process under the state and federal Constitutions. A defendant has "a legitimate interest in the character of the procedure which leads to the imposition of sentence." (*Gardner v. Florida* (1977) 430 U.S. 349, 358 (plur. opn.).) Section 190.3 created a legitimate expectation that the trial court would follow that section and not consider inadmissible evidence in aggravation in making its life or death determination. (See *People v. Boyd* (1985) 38 Cal.3d 762, 776-777; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) By failing to abide

by the statutory commands of section 190.3, the trial court violated appellant's right to due process.

Further, although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), its application here renders that factor vague and overbroad. A state must ensure that the capital sentencing process "is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Id.* at p. 973.) An aggravating factor must have a common-sense core of meaning that the sentencer is capable of understanding. (*Id.* at p. 975.) Here, as applied, the common-sense and core meaning of factor (a) -- the circumstances of the crime -- has been distorted to the point where it ceases to guard against randomness: the trial court found that conduct that occurred nine months before the capital crime and in a different state was a "circumstance of the crime." Such "a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process[.]" (*Id.* at p. 974.)

E. The Death Sentence Must Be Reversed

Federal law error requires the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As noted in Argument 2, this Court has stated that the review of state law error at the penalty phase of a capital case is the same "in substance and effect" as the *Chapman* test. (*People v. Nelson* (2011) 51 Cal.4th 198, 218, fn. 15.) Under any test, the error here requires reversal of the death judgment because the incident clearly contributed to the verdict.

This Court has recognized the aggravating power of escape evidence: "erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty." (*People v. Gallego* (1990) 52 Cal.3d 115, 196; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) That power did not go unnoticed by the attorneys here.

In its penalty phase closing argument, the prosecution reminded the court that the escape occurred five months before the first charged robbery. (17 SRT 3730.) The escape demonstrated, she argued, appellant's "lack of willingness to learn from his prior punishment, and show[ed] his incarceration did not change his violent character[.]" (17 SRT 3730) She referred to his escape status four other times when discussing the aggravation. (17 SRT 3732, 3733, 3734.)

The codefendant took advantage of the incident to compare the relative characters of the two defendants: "granted [Mounsaveng] tried to escape, [but] as he sits here now, he is no threat to anybody in the future. He's no threat to jail staff." (17 SRT 3691-3692.) In this way, he drew inferences from the escape by arguing that it was relevant to future dangerousness and an inability to adjust to prison life. [37]

The record here also demonstrates that the escape incident weighed heavily in the trial court's determination that death was appropriate:

> the continuing pattern argued by the Prosecutor, including weapons, offenses committed while he was on escape status as a previously convicted felon, are by case law admissible because of the threat of violence shown by that.

(17 SRT 3757.) The Court continued: "As a convicted felon on escape status, his continued acts of violence, including possession of firearms on multiple occasions, show a continuing pattern of ongoing violent conduct and criminality." (17 SRT 3757.) At the section 190.3, subdivision (e) hearing, the court reiterated the importance of the escape to its conclusion. (17 SRT

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37. Mounsaveng's attempted escape after his arrest was clearly violent, as it resulted in his being shot in the back and paralyzed. The trial court considered that violent escape in mitigation, while treating appellant's nonviolent escape as aggravation. (17 SRT 3755 [the court notes that it considered in mitigation "the injuries, paralysis and physical condition of Mr. Mounsaveng"].)

3778.)

As argued in Arguments 2 and 3, this Court cannot conclude that the strength of the aggravation rendered the error harmless. [38] The trial court's sentencing shows that it focused on all of the crimes, including those under factors (b) and (c), the number of victims, the pattern of ongoing violent conduct and possession of firearms, the brutality of appellant's actions, and his readiness to meet force with violence. (17 SRT 3756-3759.)

Given the court's view that appellant's escape status was a substantial factor in its imposition of the death penalty, the error contributed to the verdict and was not harmless. Reversal of the death sentence is required.

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38. As has been noted, there is mitigation in the record on appeal.

5. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

Many features of California's capital-sentencing scheme violate both the United States Constitution and international law. This Court has consistently rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

Here, the sentencer was the trial court, not a jury. But the court "is presumed to have been aware of and followed the applicable law" (*In re Julian R.* (2009) 47 Cal.4th 487, 499; see also *People v. Scott* (1997) 15 Cal.4th 1188, 1221; *People v. Diaz* (1992) 3 Cal.4th 495, 567), including the pattern jury instructions and decisions from this Court.

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Section 190.2 Is Impermissibly Vague and Overbroad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) A state is required to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v.*

Stephens (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained several dozen special circumstances. It is difficult for a perpetrator of first degree murder in California not to be eligible for the death penalty.

Across-the-board eligibility for the death penalty fails to account for the differing degrees of culpability attendant to different types of murder, fails to identify the few cases in which the death penalty might be appropriate, and enhances the possibility that sentences will be imposed arbitrarily without regard for the blameworthiness of the defendant or his act. Further, it fails to provide legislative guidelines governing the selection of death eligible defendants. Section 190.2 is vague and overbroad.

In particular, the felony-murder special circumstance, the sole special circumstance found true here, fails adequately to narrow the pool of defendants eligible for the death penalty. There is no difference between felony murder first degree murder and the felony-murder special circumstance, for Eighth Amendment purposes. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstance is as broad as felony murder first degree murder].)

Additionally, because the substantive felony murder offense, the special circumstance, and the circumstances of the offense (§ 190.3, factor (a)) are duplicative, a death judgment that is based on such factors, as here, violates the Fifth Amendment's prohibition against double jeopardy, applicable to the states through the Fourteenth Amendment. (See *Benton v. Maryland* (1969) 395 U.S. 784, 793-794.) Further, this multiple use of facts in a capital case felony murder is particularly death-biased because after a first degree murder conviction and special circumstance finding, the sentencer is required to double or triple-count or weigh the same felony and murder under factor (a), contrary to the Eighth and Fourteenth Amendments. (See *Stringer v. Black*

(1992) 503 U. S. 222, 234-236.) Thus, the use of a felony-murder special-circumstance finding as an aggravating factor subjected appellant to a greater likelihood of being sentenced to death than a defendant against whom some other special circumstance allegation were found true. This Court has held otherwise. (*People v. Gates* (1987) 43 Cal.3d 1168, 1188-1190; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946.) This Court should reconsider those conclusions.

This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Myles* (2012) 53 Cal.4th 1181, 1224-1225; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider that conclusion and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. Section 190.3, Factor (a) Is Vague and Overbroad, Both on Its Face and as Applied Here

Section 190.3, factor (a), directs the sentencer to consider in aggravation the "circumstances of the crime." This Court has defined factor (a) to encompass not only the immediate and spatial circumstances of the crime, but also that which surrounds materially, morally, or logically the crime. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.)

Prosecutors throughout California have argued that the sentencer could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any meaningful limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "circumstances of the crime" has been applied in such a wanton and arbitrary manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the sentencer to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) Further, the unadorned factor (a) serves no narrowing function whatsoever. As noted above, the particular facts in the record already delivered appellant to the penalty phase; factor (a) adds nothing. As the Supreme Court explained in *Maynard*, *supra*, 486 U.S. at p. 363:

> [We have] plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death Penalty.

Further, factor (a) improperly permitted the sentencer to consider the same facts in aggravation multiple times. The failure of the trial court to limit the use of these facts in any way allowed consideration of the same fact multiple times in violation of appellant's right to due process and equal protection. By allowing such double-counting, the "circumstances of the crime" aggravating factor licensed indiscriminate imposition of the death penalty upon no other basis than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply those facts, to warrant the imposition of the death

penalty." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 363.)

Because it is fatally ambiguous, fails to direct the discretion of the jury, fails to perform any narrowing function, and leads to unreviewable arbitrary and capricious results, factor (a) violates the Eighth Amendment.

This Court has repeatedly rejected the claim that permitting the sentencer to consider the "circumstances of the crime" within the meaning of section 190.3 is vague and overbroad, and results in the arbitrary and capricious imposition of the death penalty. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges this Court to reconsider those holdings.

C. Section 190.3, Factor (b), Both on its Face and as Applied Here, Violates the Firth, Sixth, Eighth And Fourteenth Amendments of the United States Constitution

In addition to the claims made in Arguments 2 and 3, *ante*, appellant argues that the admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 279-281.) Admission of the unadjudicated prior criminal activity also denied appellant the rights to a fair and speedy trial by an impartial and unanimous jury, to effective assistance of counsel, to present a complete defense including the effective confrontation of witnesses under the Fifth, Sixth and Fourteenth Amendments, and to equal protection of the law under the Fourteenth Amendment.

Factor (b), on its face and as interpreted by this Court, is an open-ended aggravating factor that fosters arbitrary and capricious application of the death penalty, and thus violates the Eighth Amendment requirement that the procedures used to impose the death penalty must make a rational

distinction "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted factor (b) in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be more rigorous than those provided non-capital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor), this Court has turned this mandate on its head, singling out capital defendants for less procedural protection than is afforded to other criminal defendants. For example, this Court has ruled that in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); the sentencer may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and the trial court is not required to enumerate the other crimes the jury should consider, or to instruct on the elements of those crimes (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207). This Court has also ruled that 1) unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under factor (b), while felony convictions, even for violent crimes, rendered after the capital homicide are not (*People v. Morales* (1989) 48 Cal.3d 527, 567), and 2) a threat of violence is admissible if, by happenstance, the words are uttered in a state where such threats are a criminal offense (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261). This Court has also held that juvenile conduct is admissible under factor (b) (*People v. Burton* (1989) 48 Cal.3d 843, 862), as are offenses dismissed pursuant to a plea bargain (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659). In sum, this Court has treated death differently, by

lowering rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same sentencer for the penalty-phase adjudication of other-crimes evidence deprives a defendant of an impartial and unbiased sentencer and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital sentencing statute, the sentencer may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such an offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585), [39] and the sentencer must give the determination whether such an offense has been proved the exact same level of deliberation and impartiality as would have been required in a separate criminal trial; when a state provides for capital sentencing by a sentencer, the due process clause of the Fourteenth Amendment requires that sentencer to be impartial. [40] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) [conviction cannot stand where state procedures deprived defendant of an impartial jury]; *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d

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39. The United States Supreme Court has not decided whether the federal Constitution requires the presumption of innocence to attach to other-crimes evidence introduced at the penalty phase of a capital trial. (*Delo v. Lashley* (1993) 507 U.S. 272, 279.)

40. The United States Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v Washington* (1984) 466 U.S. 668, 686-687; *Estelle v. Smith* (1981) 451 U.S. 454, 463 [privilege against self-incrimination and right to counsel apply at penalty phase]; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.) Similarly, due process protections apply to a capital sentencing proceeding. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

201, 202.)

In appellant's case, the sentencer charged with making an impartial, and therefore reliable, assessment of his guilt of the previously unadjudicated offenses was the same person who had just convicted him of capital murder. It would seem self-evident that a person who has found a defendant guilty of capital murder cannot be impartial in considering whether similar but unrelated violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).) A finding of guilt by such a biased factfinder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3d Cir. 1977) 551 F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Further, because California does not allow the use of unadjudicated offenses in non-capital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It also violated appellant's Fourteenth Amendment right to due process because the State applies its law in an arbitrary and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

A series of decisions by the United States Supreme Court clearly indicate that the existence of any aggravating factors relied upon to impose a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged

criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Consideration of this evidence thus violates the rights to due process of law, to trial by jury, and to a reliable capital sentencing determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

This Court has rejected the argument that allowing consideration of unadjudicated criminal activity under factor (b) is unconstitutional or renders a death sentence unreliable. (*People v. Hartsch* (2010) 49 Cal.4th 472, 515; *People v. Morrison* (2004) 34 Cal.4th 698, 729.) Appellant requests this Court to reconsider its conclusions.

D. Section 190.3, Factors (d) and (h) Erect Unconstitutional Barriers to the Sentencer's Consideration of Mitigation

The restrictive adjectives -- "extreme" and "substantial" -- used in the list of potential mitigating factors, and in particular factors (d) and (h), are unduly vague and overbroad, and unconstitutionally acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) This Court has rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

Moreover, the statutes direction to the sentencer to consider "whether or not" certain mitigating factors were present impermissibly invited the sentencer to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. Further, the words "the offense was committed while" pose a substantial and unacceptable risk that the sentencer will not consider such evidence "if it did not influence the actual commission of the crime." (But see *People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Gray* (2005) 37 Cal.4th 168, 236; *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) Appellant requests this Court to reconsider its conclusions.

E. Factor (i) Violates Restrictions Against Vagueness, Arbitrariness And Unreliability Under the Eighth and Fourteenth Amendments

The penalty sentencer was informed that it could weigh "the age of the defendant at the time of the crime." (§ 190.3, factor (i).) The very fact that factor (i) can be considered by a sentencer to be aggravating or mitigating shows that it is fundamentally ambiguous. It gives the jury no guidance whatsoever, and performs no narrowing function whatsoever. It is also susceptible to random application by sentencers.

This Court's construction of factor (i) has rendered it more vague and arbitrary than it might otherwise be on its face. Rather than providing a narrowing definition, the Court has construed factor (i) broadly as "a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." (*People v. Lucky* (1988) 45 Cal.3d 259, 302.) Appellant requests this Court to reconsider that conclusion.

F. Factor (k) Is Unconstitutionally Vague

Section 190.3, subdivision (k) is unconstitutionally vague because it fails to provide guidance to the sentencer on how to distinguish a death-worthy case from one that is not, and fails to guide the sentencer's discretion in deciding the appropriate penalty. In addition, empirical research demonstrates that there is no instruction about factor (k) that is sufficient to properly guide a sentencer's discretion. Accordingly this Court's opinion in *People v. Mendoza* (2000) 24 Cal.4th 130, 192, was incorrectly decided and should be reconsidered

G. Relative Culpability Is Mitigating Evidence and Should Have Been Considered by the Sentencer

This Court has held that relative culpability between defendants charged with the same incident is not relevant to the sentencing determination. (See *People v. Maury* (2003) 30 Cal.4th 342, 441-442.) Appellant

requests this Court to reconsider that holding because the relative culpability of codefendants is a well-recognized mitigating circumstance. (See *Parker v. Dugger*, *supra*, 498 U.S. at p. 314; *Rupe v. Wood* (9th Cir. 1997) 93 F.3d 1434, 1441.)

H. The Death Penalty Statute Fails to Set Forth the Appropriate Burden of Proof for the Aggravating Factors and the Ultimate Decision

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality and (now) prior convictions. (See *People v. Williams* (2010) 49 Cal.4th 405, 458-459; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1998) 16 Cal.4th 1223, 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's sentencer was not required to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. The trial court merely stated, "Regarding Mr. Sivongxxay, as unpleasant as it is, I find the death sentence to be justified and appropriate." (17 SRT 3759.)

Apprendi v. New Jersey, *supra*, 530 U.S. at p. 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona*, *supra*, 536 U.S. at p. 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's sentencer had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and, (3) that the

aggravating factors were so substantial as to make death an appropriate punishment. (17 SRT 3755 [court states that it is following CALJIC No. 8.88].) Because these additional findings were required before the sentencer could impose the death sentence, *Ring* and its progeny require that each of these findings be made beyond a reasonable doubt.

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* and its progeny (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595) or findings beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider these holdings so that California's death penalty scheme will comport with the principles set forth in the *Apprendi* line of cases.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by the Due Process Clause and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment or the Eighth Amendment requires that the sentencer be instructed that it must decide beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that this Court reconsider its holding. Without a standard identifying that death had to be the appropriate penalty beyond a reasonable doubt, and that the aggravating factors outweigh the mitigating factors, this Court can have no confidence in the reliability of the death verdict.

2. Some Burden of Proof is Required, or the Trial Court Should Have Expressly Recognized That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's sentencer should have followed the law that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (E.g., *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Appellant is entitled to have his sentencer follow law that comports with the federal Constitution and thus urges the court to reconsider its decisions concluding otherwise.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such a requirement, there is the possibility that the sentencer would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

I. The Penalty Determination Turned on Impermissibly Vague and Ambiguous Instructions and Standards

1. The Phrase "So Substantial" and the Term "Warrants" Are Impermissibly Vague and Broad

The question of whether to impose the death penalty upon appellant hinged on whether the sentencer was persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (17 SRT 3755 [court states that it is following CALJIC No. 8.88].) The phrase "so substantial" and the term "warrants" are impermissibly vague and broad, and do not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.) Indeed, the trial court here stated only that I find the death sentence to be justified and appropriate." (17 SRT 3759.)

This Court has found that the use of this these terms does not render the instruction constitutionally deficient. (*People v. Boyette* (2002) 29 Cal.4th 381, 465; *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant requests this Court to reconsider that conclusion.

2. The Law Does Not Make Clear that the Ultimate Question Is Whether Death Is the Appropriate Penalty

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to the sentencer; rather it instructs that the sentencer may return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307),

the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, the sentencer finds death to be "warranted" when it finds the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, California law violates the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) Appellant urges this Court to reconsider that decision.

3. Section 190.3 Fails to Guide the Sentencer's Discretion

Section 190.3 fail to pass constitutional scrutiny, both facially and as applied, when measured against the Eighth and Fourteenth Amendments' prohibitions against vagueness and arbitrariness, and the requirement of guided discretion. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 192; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429 (plur. opn.); *Stringer v. Black*, *supra*, 503 U.S. at pp. 234-236.) Both on its face and in the context of appellant's case, section 190.3's factors provided the sentencer with the same unguided, limitless, unreviewable discretion which is constitutionally inadequate. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 295; *id.*, at pp. 309-310.)

The factors listed in section 190.3 fail to guide or limit the sentencer's discretion, create a pro-death bias, create the impermissible risk that vaguely-defined factors would result in the arbitrary selection of appellant for execution, and afford no meaningful basis on which this Court may review the sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The combined effect of all the factors renders the entire scheme unconstitutional. Section 190.3's failure to provide proper guidance also violates appellant's rights under state law, thereby implicating his federal right to due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) This is particularly true in view of the heightened level of due process and reliability

required in capital cases pursuant to the Eighth and Fourteenth Amendments. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414.)

This Court has concluded otherwise. (*People v. Myles*, *supra*, 53 Cal.4th at pp. 1222-1223.) Appellant requests this Court to reconsider that conclusion.

4. The Instructions Did Not Inform the Sentencer That a Life Sentence Is Mandatory if the Aggravating Factors Do Not Outweigh the Mitigating Ones

A capital sentencer who finds that death is not an appropriate punishment is required to return a sentence of life without the possibility of parole. (§ 190.3; see *People v. Brown* (1985) 40 Cal.3d 512, 540-542, & fn. 13.) The sentencer is also required to return a life verdict if it finds that the factors in aggravation do not outweigh those in mitigation. (See § 190.3; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) The sentencing instruction followed by the trial court in this case was flawed because it did not include a clear statement of those principles.

Although this Court has previously held that CALJIC No. 8.88 is valid even though it fails to advise the sentencer concerning these principles (see *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan*, *supra*, 53 Cal.3d at p. 978), those holdings should be reconsidered. *Duncan* reasoned that, because the instruction directs the jurors to impose the death penalty only if they find that the aggravating circumstances outweigh the mitigating circumstances, it is unnecessary "to additionally advise [them] of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (*Id.* at p. 978; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1243.)

However, *Duncan* cited no authority for that position, and appellant submits that it conflicts with numerous opinions disapproving instructions which emphasize the prosecution's theory of the case while minimizing or ignoring the theory of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v.*

Mata (1955) 133 Cal.App.2d 18, 21; see also *Reagan v. United States* (1895) 157 U.S. 301, 310.) [41]

In other words, contrary to *Duncan*'s apparent assumption, the law does not rely on the sentencer to infer a rule from the statement of its opposite. The instruction at issue here stated only the conditions under which a death verdict could be returned, and not those under which a life verdict was required.

Because it failed to inform the sentencer of the specific mandate of section 190.3, CALJIC No. 8.88 arbitrarily deprived appellant of a right created by state law and thus violated his Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, emphasis in original.)

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41. There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*Id.* at p. 473, fn. 6; see also *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary," there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal-discovery rights, as a matter of due process the same principle should apply to jury instructions.

5. The Sentencer Should Have Applied a Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, although the stakes are much higher at the penalty phase, there is no statutory requirement that the sentencer be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272, 279 ["We have not considered previously whether a presumption that the defendant is innocent of other crimes attaches at the sentencing phase"].)

The trial court's failure to assume that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases. Appellant requests this Court to reconsider its conclusion in this regard.

J. Failing to Require the Sentencer to Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's sentencer was not required to make any explicit written findings concerning aggravation, mitigation, the weight of each, and the ultimate decision during the penalty phase of the trial. The trial court here gave an oral statement of reasons for its decision that was memorialized in the court's minutes. (17 SRT 3754-3759; CT 986-987; see § 1167.) However, it did not make clear the weight given to each of the aggravating and mitigating circumstances, how it weighed the factors, or how it arrived at its decision.

The failure to require written or other specific findings deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed, and his Fourteenth Amendment right to equal protection of the law. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) The fact that a capital-sentencing decision is "normative" (See *People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral," does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. (See *People v. Jackson* (1980) 28 Cal.3d 264, 352-355 (disn. opn. of Bird, C.J.); Tanner, *Va. Code Ann. § 19.2-264.5* (2004) 17 Cap. Def. J. 275, 277-278.)

This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges this Court to reconsider its decisions on the necessity of written findings.

K. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed,

i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require inter-case proportionality review in capital cases.

L. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the equal protection clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt. (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.) In a capital case, there is no burden of proof at all, and the sentencer need not provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider its ruling.

M. California's Use of the Death Penalty as a Regular Form of Punishment Violates International Law and the Eighth Amendment

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or evolving standards of decency (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People*

v. Ghent (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment, as well as decisions of the United States Supreme Court citing international law in prohibiting the imposition of capital punishment under various circumstances (see *Roper v. Simmons* (2005) 543 U.S. 551, 554 [prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," citing the Brief for European Union as Amicus Curiae]), appellant urges this Court to reconsider its previous decisions.

Even if the death penalty as a whole does not violate international law, appellant submits that his trial violated specific provisions applicable to his trial. These rights include the right to an impartial tribunal, which demands that each of the decision-makers be unbiased. (*Collins v. Jamaica* (1991) IIHRL 51, Communication No. 240/1987 [impartial juries]; see also International Covenant on Civil and Political Rights [ICCPR] (June 8, 1992) 999 U.N.T.S. 171, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].)) It also encompasses standards that require prosecutors to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system." (Guidelines on the Role of Prosecutors, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990).) Finally, international law encompasses a right to a fair trial that includes specific rights but is broader than any one provision of national or international law. (Article 10 of the Universal Declaration; Article 14(1) of the ICCPR; Article 6(1) of the European Convention; Article XXVI of the American Declaration; and, Article 8 of the American Convention.)

Here, among other violations, appellant's right to a fair trial was violated by the trial court's ruling regarding appellant's putative waiver of a right to a jury (Arg. 1), and its consideration of inadmissible incidents under factor (b) (Args. 2-3).

Appellant submits that the individual and combined effect of each claim raised in this case violated his right to a fair trial under international standards, and therefore this Court should reverse the judgment in this case.

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CONCLUSION

For all of the reasons stated above, the convictions and death sentence in this case must be reversed.

DATED: August 2, 2012.

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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 32,500 words.

DATED: August 2, 2012.

DOUGLAS WARD
Senior Deputy State Public Defender

Attorney for Appellant
VAENE SIVONGXXAY

DECLARATION OF SERVICE

Re: People v. VAENE SIVONGXXAY, No. S078895

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. A true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Mr. Lewis A. Martinez
Department of Justice
Office of the Attorney General
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Each said envelope was then, on August 2, 2012, sealed and deposited in the United States Mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on August 2, 2012, at Oakland, California.

Neva Wandersee