IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner and Respondent, vs. STEPHEN EDWARD HAJEK and LOI TAN VO, Defendants and Appellants.	**CAPITAL CASE** No. S049626 (Santa Clara County Superior Court No. 148113)

APPELLANT LOI TAN VO'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of California
County of Santa Clara

The Honorable Judge Daniel E. Creed

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code §1239.)[1] The appeal is taken from a judgment which finally disposes of all issues between the parties.

INTRODUCTION

Appellant Loi Tan Vo was convicted of capital charges and sentenced to death despite a lack of evidence that he committed the homicide or intended to kill, in a trial riddled with unfairness. Vo was forced to a joint trial with a co-defendant against whom there was far more extensive evidence – of planning, of motive, that he had blood upon his person, that he brought a weapon to the scene, of admissions of culpability, of threats against witnesses, and that he planned to present a false defense based on mental illness – despite the fact that much of the evidence would have been inadmissible in a separate trial of Vo, and despite irreconcilable defenses demanding a separate trial. The co-defendant's multiple out-of-court statements were used against appellant Vo, in violation of Vo's right to confront and cross-examine. Even the co-defendant's mental defense was used by the prosecution to paint Vo as a particularly sadistic killer.

The evidence was insufficient to support the charges and special circumstances of which Vo was convicted, but the prosecution successfully employed a secret weapon: it was permitted to present evidence of an uncharged (and unproven) conspiracy of exceptional breadth, without any foundational finding that the conspiracy ever existed.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Neither was there any judicial finding about the scope of the conspiracy, nor limitations on the evidence so introduced, nor was the jury required to find such a conspiracy beyond a reasonable doubt before using that evidence in whatever manner it chose. Thus, the ephemeral uncharged allegation of a "conspiracy" became a surrogate for actual proof of the charges, and individual determinations of culpability for those charges.

These and many other significant constitutional errors addressed in this brief would be bad enough, individually (not to mention jointly), to require a new trial for appellant Vo. But behind the scenes, the trial record reveals a shocking and unique set of interlocking errors that eviscerated appellant Vo's ability to defend against these capital charges. Initially, the trial court wrongly refused to appoint second counsel in this exceedingly complex and high-stakes case, then refused to replace second counsel when she was medically unable to continue representation, and finally appointed another lawyer just four days before trial started. Second, the trial court wrongly refused to grant Vo continuances to permit counsel to complete preparation, because the other parties were ready; these denials occurred when second counsel had to withdraw, when the substitute second counsel was appointed on the eve of trial, and again when counsel was unprepared to defend at penalty phase. Third, appellant Vo's ability to defend at both guilt and penalty phases was irreparably damaged by the county's refusal to pay counsel and for necessary costs, because the Office of Conflicts Administration ran out of money – its funds were depleted by a different multiple-defendant case being tried in the county at the

same time – meaning that appellant Vo's counsel were unable to pay their home mortgages or office rent, that investigators and experts could not be paid, that necessary work could not be completed to defend appellant Vo at trial, and counsel were subjected to the anxiety of financial crisis even as they sought to save their client's life. If there is another California capital case in which such impediments to a fair trial are memorialized in the trial record, appellant is not aware of it.

The penalty phase of appellant's trial suffered from all of the improper evidence admitted and used against Vo during the guilt phase, from his counsel's inability to prepare and present mitigation evidence (a social history report from an expert who had gone unpaid, for example, was presented only at the motion for new trial), and more. The co-defendant's mental health expert testified that the co-defendant denied committing the murder, representing another out-of-court statement which appellant Vo was not allowed to confront, even though it directly inculpated him. A final, devastating blow to fairness occurred in the jury room, and struck like a bolt of lightning: jurors sentenced Vo to death only after they believed they heard something never presented at trial, nor heard by anyone else (including the prosecutor and the police officer who testified concerning the tape recording at issue, in which the only audible portions were statements by the co-defendant) – supposed admissions by Vo that he was culpable. Three jurors testified to what they thought they heard. The trial court had not caused the court reporter to transcribe the tape, and refused to listen to the tape and make a finding as to whether any

such admission existed. Surely, it offends all notions of justice that a defendant was allowed to be sentenced to death because of non-existent evidence.

For all of the reasons set forth in this brief, this Court must reverse the judgment below. Appellant Vo's capital trial was utterly lacking in protections to ensure the reliability of the outcome. In a civilized society operating under the rule of law, these failures cannot be tolerated in a capital case.

STATEMENT OF THE CASE

On January 22, 1991, a felony complaint (Vol. 4, CT 946-955) was filed in Santa Clara County Municipal Court, alleging that Stephen Edward Hajek (co-defendant) and Loi Tan Vo (appellant) committed the following crimes on or about January 18, 1991:

> **Count 1**: First degree murder of Su Hung. Co-defendant Hajek was alleged to have used a deadly weapon (BB gun, later amended to "pellet gun). Appellant was alleged to have used a knife. Both were charged with special circumstances of lying in wait, burglary murder, robbery-murder, and torture-murder. (Vol. 4, CT 946-947.)
>
> **Count 2**: Attempted first degree murder of Cary Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).
>
> **Count 3**: Attempted first degree murder of Alice Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).
>
> **Count 4**: Attempted first degree murder of Chi Ching "Tony" Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).
>
> **Count 5**: Attempted first degree murder of Ellen Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as

to appellant).

Count 6: Kidnapping of Cary Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).

Count 7: False imprisonment of Cary Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).

Count 8: False imprisonment of Alice Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).

Count 9: False imprisonment of Chi Ching "Tony" Wang. Deadly weapon enhancements were also alleged (pellet gun as to co-defendant Hajek, and knife as to appellant).

Count 10: Robbery of Su Hung. Cash was allegedly taken from her.

Count 11: Burglary of 5871 Silver Leaf Road, San Jose, with the intent to commit theft, murder, robbery, and false imprisonment.

Count 12: Burglary of a bedroom at 5871 Silver Leaf Road, San Jose, with the intent to commit murder.

A preliminary hearing was held from June 3 through June 18, 1991. (Vol. 1- 4, CT 1-944, minute orders at Vol. 4, CT 956-.) At the conclusion of the preliminary hearing, the court found insufficient evidence of the lying-in-wait and robbery-murder special circumstances and the charge of first degree burglary in Count 12, and otherwise bound appellant and co-defendant Hajek over for trial in the Superior Court. (Vol. 4, CT 944.)

On July 1, 1991, Information No. 148113 was filed in Santa Clara Superior Court (Vol. 4, CT 978-989), alleging that Stephen Edward Hajek (co-defendant) and Loi Tan Vo (appellant) committed the following crimes on or about January 18, 1991:

Count 1: Murder of Su Hung (PC §187). An enhancement was alleged as to co-

defendant Hajek, use of a pellet gun (PC § 12022(a) and PC § 1203.06). Appellant was alleged to have used a knife (PC § 12022(b). Both were charged with special circumstances of lying in wait (PC § 190.2(a)(15)), burglary murder (PC § 190.2(a)(17), PC § 460), robbery-murder (PC § 190.2(a)(17), PC §§ 211 and 212.5), and torture (PC § 190.2(a)(18)).

Count 2: Attempted murder of Cary Wang (PC § 664/187). Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge (PC § 1203(e)(2).

Count 3: Attempted murder of Alice Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 4: Attempted murder of Chi Ching "Tony" Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 5: Attempted murder of Ellen Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 6: Kidnapping of Cary Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 7: False imprisonment of Cary Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 8: False imprisonment of Alice Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 9: False imprisonment of Chi Ching "Tony" Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 10: Robbery of Su Hung. Cash was allegedly taken from her.

Count 11: Burglary of 5871 Silver Leaf Road, San Jose, with the intent to commit theft, murder, robbery, and false imprisonment. It was further alleged that probation may not be granted as to this charge.

Count 12: As to co-defendant Hajek only, dissuading a witness, Cary Wang, from testifying by means of threats between May 1, 1991 and May 31, 1991 (PC § 136.1(C)(1). (Vol. 4, CT 978-988.)

In the information, the People also requested disclosure of witnesses, reports or statements related to witnesses, and any real evidence. (Vol. 4, CT 989.)

On September 9, 1991, a minute order notes, "People are demanding death penalty." (Vol. 4, CT 1001-1002.) No formal notice was filed at that time, however.[2]

On November 15, 1991, appellant Vo's counsel filed a Request for Hearing as to the Denials of Request for Second Attorney, stating that counsel had twice presented declarations to the trial court seeking appointment of a second attorney pursuant to PC § 987 (d) and *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434. Appellant's counsel argued that a second attorney was necessary to prepare for trial and present the defense, "based upon the facts and circumstances of this case." (Vol. 4, Vol. 4, CT 1003-1004;

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[2] The Notice of Prosecution's Penalty Phase Evidence pursuant to Penal Code § 190.3 was not filed by the prosecution until February 6, 1995. (Vol. 6, CT 1578-1579.)

11/20/91, RT 3-21[3].) That motion was denied. (11/20/91, RT 16-20.)

The prosecutor made an Informal Request for Defendant's Discovery in a letter dated January 8, 1992, requesting information on witnesses to be called, and any real evidence to be offered at trial. (Vol. 4, CT 1088.) This was followed by the People's Motion for Discovery, filed March 5, 1992. (Vol. 4, CT 1083-1090.) Co-defendant Hajek responded to the discovery motion on March 3, 1992, arguing that discovery violates rights under the California and federal constitutions, and that the California Supreme Court decision in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356 was wrongly decided.[4] (Vol. 4, CT 1060-1082; see also, Vol. 4, CT 1095.) On March 27, 1992, discovery was granted to the prosecution (Vol. 5, CT 1101), and an order signed. (Vol. 5, CT 1099-1100.)

The state sought a search warrant to search appellant's jail cell, stating in the Affidavit in Support of Search Warrant prepared by William Clark, dated April 24, 1992, that a confidential informant had provided information that appellant had in his cell some letters from co-defendant Hajek. (Vol. 5, CT 1109-1118.) A warrant permitting the

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[3] The sealed transcript of this *in camera* proceeding is duplicated at Vol. 4, CT 1023-1052.

[4] Co-defendant Hajek's counsel argued, *inter alia*, that prosecution discovery violates the constitutional privilege against self-incrimination; violates due process by failing to ensure true reciprocal discovery from the prosecution; violates the right to silence and constitutional protection against self-incrimination; that the Sixth Amendment right to counsel precludes prosecution discovery; and that the work product doctrine also bars prosecution discovery. (Vol. 4, CT 1061-1062.)

search of appellant's jail cell was authorized on April 24, 1992, specifying seizure of all documents from Vo's co-defendant Hajek, and correspondence to or from McRobin Vo. (Vol. 5, CT 1107-1108.) Because the documents sought might be mixed with confidential materials, on April 29, 1992, the trial court ordered that Mark H. Pierce be appointed as the special master for the court. (Vol. 5, CT 1119.) On May 21, 1992, a Return to Search Warrant was filed. (Vol. 5, CT 1120.)

On June 8, 1992, a Search Warrant was sought and obtained, permitting a search of co-defendant Hajek's cell at the Santa Clara County Jail. The warrant specified all documents written by Hajek OR from Hajek's co-defendant Vo; correspondence to or from McRobin Vo describing his participation or planning of the homicide[5]; documents dealing with Norman H. Leung, aka "Bucket"[6]; and documents listing the names and addresses of witnesses, particularly Tevya Moriarty or the Wang family (Vol. 5, CT 1142-1143), and was supported by an Affidavit in Support of Search Warrant. (Vol. 5, CT 1144-1151.)

On June 11, 1992, the trial court signed an order directing that Mark H. Pierce be appointed as the special master for the court, in the matter of the search warrant issued for the search of Hajek's cell. (Vol. 5, CT 1154.) A Return to Search Warrant was filed on

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[5] McRobin Vo, appellant's brother, was not charged with conspiracy or any other crime.

[6] Norman "Bucket" Leung was not charged with conspiracy or any other crime in connection with this case.

June 24, 1992; the affiant was Sgt. Edward A. Escobar (#1582). (Vol. 5, CT 1152.) Exhibit A to the return states that certain items were seized (Vol. 5, CT 1121); a more specific return concerning the search of Hajek's cell was not filed until five months later, on October 25, 1992. (Vol. 6, CT 1382-1383.)

Meanwhile, on June 8, 1992, the District Attorney filed a Notice of Motion to Amend Information (Vol. 5, CT 1126-1127), supported by a Declaration of Deputy District Attorney Peter Waite (Vol. 5, CT 1128-1132) and a Memorandum of Points and Authorities. (Vol. 5, CT 1133-1139.) A Proposed Amended Information No. 148113 was filed June 26, 1992. (Vol. 5, CT 1157-1168.) At appearances on June 26, July 17 and August 14, 1992, the hearing on the Motion to Amend was continued; at the latter two appearances, appellant's trial counsel was absent, and counsel for the co-defendant (the Public Defender's Office) purported to represent appellant's interests. (Vol. 5, CT 1169, 1304.)

Appellant's counsel filed a Notice of Motion to Dismiss Information (Penal Code Section 995) on July 30, 1992 (Vol. 5, CT 1173), supported by Points and Authorities in Support of Motion to Dismiss Pursuant to Penal Code Section 995. (Vol. 5, CT 1174-1186.) Counsel for co-defendant Hajek also filed a Notice of Motion and Motion to Dismiss Pursuant to Penal Code § 995 and Response to District Attorney's Motion to Amend the Information; Memorandum of Points and Authorities, on the same date. (Vol. 5, CT 1187- 1225.) Among the grounds raised were insufficiency of the evidence as to

various counts and special circumstances alleged: the lying in wait special circumstance; the burglary-murder special circumstance; robbery and the robbery-murder special circumstance; the torture special circumstance; the kidnapping-murder special circumstance; attempted murder of various family members of the victim; kidnapping of Cary Wang; the use of a firearm enhancement allegation; and as to Hajek, the use of a deadly weapon enhancement allegation (as to a knife). (See, Vol. 5, CT 1194-1195.)

The prosecutor filed a Response to Defendants' PC §995 Motions on August 15, 1992. (Vol. 5, CT 1305-1330.) On August 26, 1992, co-defendant Hajek filed Defendant's Final Response to Prosecutor's Points and Authorities in re: 995 Motion and Motion to Amend the Information (Vol. 5, CT 1332-1341), and appellant's counsel filed Points and Authorities by Loi Tan Vo in Support of Motion to Dismiss Pursuant to Penal Code Section 995, Submitted in Response to Prosecution's Points and Authorities, incorporating authorities submitted by co-defendant Hajek. (Vol. 5, CT 1342-1347.)

On August 28, 1992, a hearing was held on both the prosecution's motion to amend the information and on the defendants' motions to dismiss. (Vol. 5, CT 1348-1350.) The trial court granted the motion to dismiss as follows:

(1) The lying in wait special circumstance, as to both defendants.

(2) The burglary-murder special circumstance;

(3) The robbery-murder special circumstance;

(4) As to defendant Vo, the PC § 12022(b) enhancement (use of a knife), as to Counts 3, 4, 5, 6, and 9.

(5) As to co-defendant Hajek, the PC § 12022(a) enhancement (use of a firearm), as to Counts 2, 5, and 7. (Vol. 5, CT 1349.)

The trial court also granted the District Attorney's motion to amend as follows:

(1) As to count 1, an enhancement under PC § 12022(b).

(2) Count 10 may be amended by adding the words "ATM card" (an item allegedly stolen), and the words "and the Wang family" (as additional persons who were robbed). (Vol. 5, CT 1349-1350.)

The District Attorney filed a Notice of Appeal on September 10, 1992, regarding dismissal of special circumstance allegations, and denial in part of motion to amend information. (Vol. 5, CT 1351-1352.) That same day, the District Attorney filed a Notice to Prepare Clerk's Transcript (Vol. 5, CT 1353-1355), and a Notice to Prepare Reporter's Transcript. (Vol. 5, CT 1356-1360.) A Notice to Court Reporters Re: Appeals was filed by the Clerk of Court on September 11, 1992. (Vol. 5, CT 1361.) A Notice of Filing Notice of Appeal was sent to parties and the Court of Appeal by the Clerk of Court, on September 16, 1992 (Vol. 5, CT 1362.) On October 6, 1992, a Notice of Completion of Clerk's Transcript and Reporter's Transcript was filed by the Clerk of Court. (Vol. 5, CT 1377.) Five Volumes of Clerk's Transcript and one volume of Reporter's Transcript were received. (Vol. 5, CT 1378.)

Although the appeal was pending, on September 23, 1992, the District Attorney filed a First Amended Information (Vol. 5, CT 1366-1374), alleging the following:

Count 1: Murder of Su Hung (PC §187). An enhancement was alleged as to co-defendant Hajek, use of a pellet gun (PC § 12022(a) and PC § 1203.06). Appellant and Hajek were both alleged to have used a knife (PC § 12022(b). Both were

charged with the special circumstance murder with torture (PC § 190.2(a)(18)).

Count 2: Attempted murder of Cary Wang (PC § 664/187). An enhancement was also alleged as to appellant, the use of a knife.

Count 3: Attempted murder of Alice Wang. An enhancement was also alleged as to co-defendant Hajek, use of a pellet gun.

Count 4: Attempted murder of Chi Ching "Tony" Wang. An enhancement was also alleged as to co-defendant Hajek, use of a pellet gun.

Count 5: Attempted murder of Ellen Wang.

Count 6: Kidnapping of Cary Wang.

Count 7: False imprisonment of Cary Wang. An enhancement was also alleged as to appellant, the use of a knife.

Count 8: False imprisonment of Alice Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant.

Count 9: False imprisonment of Chi Ching "Tony" Wang. An enhancement was also alleged as to co-defendant Hajek, use of a pellet gun.

Count 10: Robbery of Su Hung. Cash and an ATM card were allegedly taken from her.

Count 11: Burglary of 5871 Silver Leaf Road, San Jose, with the intent to commit theft, murder, robbery, and false imprisonment. It was further alleged that probation may not be granted as to this charge.

Count 12: As to co-defendant Hajek only, dissuading a witness, Cary Wang, from testifying by means of threats between May 1, 1991 and May 31, 1991 (PC § 136.1(C)(1). (Vol. 5, CT 1366-1374.)

On December 17, 1992, counsel for co-defendant Hajek filed a Notice of Motion and Motion to Compel Discovery and Memorandum of Points and Authorities, seeking

disclosure of names and addresses of witnesses for the prosecution; all statements of defendants; all relevant real evidence; existence of felony convictions of witnesses; statements of witnesses and reports, including results of scientific tests; exculpatory evidence. (Vol. 6, CT 1388-1390.) The motion was supported by counsel's declaration (Vol. 6, CT 1391-1392) and a Memorandum of Points and Authorities in Support of Motion for Discovery (Vol. 6, CT 1393-1394), as well as a copy of the Informal Discovery Request, dated March 2, 1992. (Vol. 6, CT 1395-1397.) On December 30, 1992, appellant's trial counsel also sought discovery, filing a Notice of Joinder in Motion for Discovery. (Vol. 6, CT 1398.) The motions for discovery were granted on January 29, 1993, with compliance due by March 5, 1993. (Vol. 6, CT 1401-1402.) Co-defendant Hajek's counsel prepared an order regarding discovery, which was signed and filed. (Vol. 6, CT 1403-1405.)

On April 28, 1993, co-defendant Hajek filed a Forensic Evaluation Compensation Claim Form seeking compensation for an expert, James R. Missett, M.D., who was appointed December 19, 1991, examined Hajek on February 19, 1992, reviewed 500 pages of materials, and made an oral report to Hajek's counsel Mary Greenwood on April 27, 1993. (Vol. 6, CT 1414.) It was thus evident from the court files that co-defendant Hajek was considering an extensive defense based on mental health issues.

The Court of Appeal issued its unpublished decision on October 29, 1993. The opinion concluded that the evidence supports the contention that the defendants

committed murder during the course of burglary and robbery and while lying in wait. Accordingly, that portion of the order granting the motion to dismiss was reversed. (Vol. 6, CT 1422-1438.) The Remittitur issued by the Clerk, Sixth District Court of Appeal, on December 30, 1993. (Vol. 6, CT 1421.) On January 11, 1994, the People filed a Notice of Hearing After Filing Remittitur, stating the intention to reinstate the specified special circumstances. (Vol. 6, CT 1439.)

An amended Information was filed by the District Attorney on March 2, 1994. (Vol. 6, CT 1442-1453.) It alleged as follows[7]:

> **Count 1**: Murder of Su Hung (PC §187). An enhancement was alleged as to co-defendant Hajek, use of a pellet gun (PC § 12022(a) and PC § 1203.06). Appellant and Hajek were both alleged to have used a knife (PC § 12022(b). It was further alleged that probation may not be granted as to this charge. *First Special Circumstance:* murder by lying in wait ; *Second Special Circumstance:* burglary murder (PC § 190.2(a)(17), PC § 460); *Third Special Circumstance:* robbery-murder (PC § 190.2(a)(17), PC §§ 211 and 212.5); *Fourth Special Circumstance:* murder with torture (PC § 190.2(a)(18)).
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> **Count 2**: Attempted murder of Cary Wang (PC § 664/187). An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.
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> **Count 3**: Attempted murder of Alice Wang.An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.
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> **Count 4**: Attempted murder of Chi Ching "Tony" Wang. An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also

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[7] Counts 1 through 11 allegedly occurred on the same day, January 18, 1991.

alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.

Count 5: Attempted murder of Ellen Wang. An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.

Count 6: Kidnapping of Cary Wang. An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.

Count 7: False imprisonment of Cary Wang. An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.

Count 8: False imprisonment of Alice Wang. Deadly weapon enhancements were also alleged: use of a pellet gun as to co-defendant Hajek, and a knife as to appellant. It was further alleged that probation may not be granted as to this charge.

Count 9: False imprisonment of Chi Ching "Tony" Wang. An enhancement was alleged as to co-defendant Hajek, use of a pellet gun. An enhancement was also alleged as to appellant, the use of a knife. It was further alleged that probation may not be granted as to this charge.

Count 10: Robbery of Su Hung. Cash and an ATM card were allegedly taken from her.

Count 11: Burglary of 5871 Silver Leaf Road, San Jose, with the intent to commit theft, murder, robbery, and false imprisonment. It was further alleged that probation may not be granted as to this charge.

Count 12: As to co-defendant Hajek only, dissuading a witness, Cary Wang, from testifying by means of threats between May 1, 1991 and May 31, 1991 (PC § 136.1(C)(1). (Vol. 6, CT 1442-1453.)

On March 2, 1994, it was noted that no further arraignment was necessary, and

both defendants entered denials of the special circumstance allegations. (Vol. 6, CT 1454-1455.)

On December 13, 1994, the People filed a Notice of Motion and Motion for Discovery with Points and Authorities and Declaration in Support, seeking disclosure of names and addresses of witnesses intended to be called; relevant written or recorded statements, or reports of witness statements; expert reports; and real evidence intended to be offered. (Vol. 6, CT 1495-1506.)

At a hearing on December 16, 1994 (Vol. 6, CT 1508), appellant's trial counsel presented a letter from Adam Rosenblatt, M.D. concerning Marianne Bachers, appellant's second counsel, stating that she "is completely disabled from work because of severe fatigue, insomnia, and impaired concentration: the etiology of which is not entirely clear at this time." Dr. Rosenblatt further stated that Ms. Bachers would need to be out of work for at least 2 months, and possibly longer. (Vol. 6, CT 1507.) Appellant's lead trial counsel, Mr. Blackman, stated that he would not be ready for trial on January 16, 1995. Co-defendant Hajek and the People opposed appellant's motion for continuance, and the motion was deemed premature by the trial court. The People's motion for discovery was set for January 6, 1995, over appellant's objection. (Vol. 6, CT 1508.)

In anticipation of the hearing on discovery requested by the prosecution, co-defendant Hajek's counsel provided a letter dated January 3, 1995, noting her "stated constitutional and statutory objections," and providing to the prosecution co-defendant

Hajek's jail medical and psychiatric records, juvenile probation and court records, Monte Villa records, adoption information, and portions of his Florida foster care and adoption file. Counsel for the co-defendant also provided transcripts she prepared of police tapes, and named anticipated witnesses for Hajek's defense. She did not provide the reports of witness Dr. Minagawa, as she planned to seek protective orders regarding them. Hajek's counsel further requested that certain reports be reviewed in camera, and requested discovery of rebuttal evidence. (Vol. 6, CT 1509-1511.) No similar response was filed at that time on behalf of appellant.

On January 6, 1994, a hearing was held on the prosecutor's discovery motion. Co-defendant Hajek objected to the discovery order, but indicated he would comply. Compliance was ordered before jury selection. The Court informed counsel that "unless reports are turned over, the witness will not be called." Appellant's counsel informed the trial court that he was "not ready, there being no *Keenan* counsel available." Although appellant's counsel stated he would comply with discovery, he had "nothing to offer." (Vol. 6, CT 1512-1513.)

With trial fast approaching, on January 17, 1995, counsel for co-defendant Hajek filed several pretrial motions: (1) *Defendant Hajek's Motion No. 1: Objections to Prosecution Discovery of Defense Penalty Phase Evidence* (Vol. 6, CT 1517-1520); (2) *Defendant Hajek's Motion No. 2: Motion to Exclude Evidence of Charges on Which the Defendant was Acquitted* (Vol. 6, CT 1521-1524); and (3) *Defendant Hajek's Motion No.*

3: Motion to Read Jurors Script re Trial Proceedings[8]. (Vol. 6, CT 1525-1534.)

That same day, appellant's counsel filed Motions in Limine (Vol. 6, CT 1535-1542), including (1) *Motion for Severance*, based on co-defendant Hajek's statements, and antagonistic defenses of the co-defendants (Vol. 6, CT 1536-1540); (2) *Motion to Preclude Admission of Grisly Photographs* (Vol. 6, CT 1540); (3) *Motion to Preclude Death Penalty*, which included a request for discovery the District Attorney's charging practices, alleged that imposition of a capital sentence on appellant would be arbitrary under *Furman v. Georgia* (1972) 408 U.S. 238; and further complained that such a sentence would be disproportionate (Vol. 6, CT 1540-1541); (4) *Search of Jail Cell*, alleging lack of specificity in search warrant (Vol. 6, CT 1531-1542); and (5) *Uncharged Offenses,* addressing a prior robbery of which the defendants had been found not guilty. (Vol. 6, CT 1542.)

Also on January 17, 1995, the District Attorney filed Points and Authorities in Support of a Court Ordered Psychiatric Examination of co-defendant Hajek, who had indicated an intention to present evidence of his mental condition at guilt and/or penalty phase, having been examined by Dr. Rahn Minagawa. The motion noted that appellant Vo had disclosed no witnesses for penalty, but appellant's trial counsel had "discussed the potential of presenting evidence of Defendant Vo's mental state at the time of the crime

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[8] This motion provided a proposed script to be read to jurors during the determination of hardship excuses.

as a factor in mitigation." (Vol. 6, CT 1543-1545.)

An *in camera* hearing was held on January 17, 1995, as to appellant's motion for continuance; that motion was denied. (1/17/95, RT 41-67; Vol. 6, CT 1546.)

Co-defendant Hajek's objections to discovery were also addressed *in camera* on January 17, 1995. (Vol. 6, CT 1546.) In open court, co-defendant Hajek's motion for a protective order regarding his expert, Dr. Missett, was granted. Other motions were considered. Appellant's motion for severance was orally joined by co-defendant Hajek, and submitted. (Vol. 6, CT 1547-1548.)

Co-defendant Hajek filed additional motions on January 18, 1995, including: Defendant Hajek's Motion No. 4: Opposition to DA Motion for Psych Exam of Defendant[9] (Vol. 6, CT 1549-1554); and Defendant Hajek's Motion No. 6: Motion for Application of Witt Standard for Jury Voir Dire, urging that liberal questioning should be allowed, to determine juror attitudes. (Vol. 6, CT 1555-1558.)

Appellant's motion for severance was argued on January 18, 1995, and submitted. His motion that the People articulate which grisly photos they intended to use was deferred. Appellant's motion to preclude a death sentence was joined by co-defendant Hajek, submitted on the preliminary hearing transcript, opposed by the People, and

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[9] Hajek argued that a prosecution psychiatric examination would violate his 5th Amendment right against self-incrimination, and 6th Amendment right to counsel; and that the DA's motion was the product of an unconstitutional discovery scheme under PC § 1054.3. (Vol. 6, CT 1549-1554.)

submitted. Co-defendant Hajek joined in appellant's motion for discovery of the District Attorney's charging practices, but no ruling issued. The trial court ruled that as to appellant, no reference could be made to an alleged prior robbery; the ruling on co-defendant Hajek was deferred pending the trial court's examination of witness Moriarty's testimony. At that time, the trial court ruled that Hajek's expert Minegawa was not obliged to speak with counsel for appellant or to the People. (Vol. 6, CT 1559-1560.)

On January 19, 1995, the trial court informed counsel that a questionnaire had to be ready by January 25, and if one was not agreed upon, all questioning of jurors would be done by the trial court. (Vol. 6, CT 1564.) No agreement had yet been reached on the questionnaires. (Vol. 6, CT 1566.)[10] Jurors would be advised that the trial was of a capital case and would last six to seven weeks. Two alternates would be selected, but the trial court agreed to consider counsel's motion for 3-4 alternates. The trial court intend to pre-instruct the jury. (Vol. 6, CT 1564-5.) Jurors would be evaluated for cause challenges using the standard in *Wainwright v. Witt* (1985) 469 U.S. 412. (Vol. 6, CT 1565.)

A number of other matters were also addressed on January 19, 1995. The trial court granted appellant's motion that all material released by the special master be brought to court for a hearing on the search warrant. (Vol. 6, CT 1564.) The District

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[10] The Juror Questionnaire was filed on February 7, 1995 (Vol. 6, CT 1585-1611), and approved by the trial court. (Vol. 6, CT 1619-1646.)

Attorney was ordered to prepare a notice of evidence in aggravation. (Vol. 6, CT 1565.) The trial court announced it would not be bound by *in limine* rulings, and granted appellant's motion that objections be deemed made by both defendants unless otherwise stated. (Vol. 6, CT 1565.) The People's motion for a psychiatric examination of co-defendant Hajek was denied. (Vol. 6, CT 1565.) Appellant's motion for severance was also denied. (Vol. 6, CT 1565.)

Also on January 19, 1995, co-defendant Hajek objected to introduction of DNA and electrophoretic evidence, and the People stated DNA evidence would not be used. Appellant's counsel stated that appellant intended to offer such evidence himself, and the court ruled that the evidence is exculpatory as to appellant. (Vol. 6, CT 1566.)

Following discussion of the search of appellant's cell on January 19, 1995 (Vol. 6, CT 1565-6), the prosecutor filed an Opposition to Defendant Vo's Motion to Suppress Evidence Seized Pursuant to Search Warrant on February 6, 1995. (Vol. 6, CT 1570-1576.)

On February 6, 1995, just days before the start of trial, a Notice of Prosecution's Penalty Phase Evidence. Penal Code § 190.3 , dated January 24, 1995, was filed. (Vol. 6, CT 1579.) No proof of service appears in the record. The notice stated that each guilt phase witness might be recalled, as well as police officers who interviewed the defendants (to testify to the lack of mitigating mental state conditions under PC § 190.3 (d) and (h). (Vol. 6, CT 1578-1579.) In addition, the People noticed an intent to introduce

the following:

1. Each member of the Wang family, regarding victim impact. Pre-death photographs of victim will be offered. (Vol. 6, CT 1578.)

2. San Jose officer Daid Silva, regarding the arrest of Hajek in another incident on January 1, 1991, for possession of a stolen vehicle and loaded shotgun. (Vol. 6, CT 1578.)

3. Off. Luu Pham, Sgt. Ed Escobar, Sgt. John Lax, and DA investigator Bill Clark, to testify as to foundation for "seizure of documents written by defendants Vo and Hajek from their jail cells and residences." All documents which "involve the express or implied threat to use force or violence" will be offered. (Vol. 6, CT 1578.) [11]

4. DOC officer Barikmo and Sgt. Padget, regarding contacts with defendants in jail, "including threats by defendants to harm people and also the seizure of such written statements." (Vol. 6, CT 1578.)[12]

5. Dr. Angelo Ozoa, Coroner, regarding the victim's pain and suffering. (Vol. 6, CT 1579.)

6. McRobin Vo, Norman Leung, Lori Nguyen, Ngoc Nguy, Sindy Luc, regarding "their personal knowledge of the defendants up to the time of the crime in this case. They can describe factors under Penal Code § 190.3(a), (d), (f), (g), (h)." (Vol. 6, CT 1579.)[13]

7. FBI special agent William Heilman III, regarding handwriting identification of documents written by defendants. (Vol. 6, CT 1579.)

On February 6, 1995, additional motions in limine were filed by appellant's

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[11] The notice did not specify what documents would be offered against each defendant.

[12] The notice did not specify statements, or which defendant particular statements would be offered against.

[13] McRobin Vo is appellant's brother. The remaining witnesses were friends or acquaintances. The notice did not specify aggravating facts to which these witnesses might testify.

counsel: (1) *Motion Respecting Hajek's Statements to Tevya Moriarty*, noting that the motion for severance had been denied, and requesting clarification (Vol. 6, CT 1580-1581)[14]; and (2) *Motion to Preclude Admission of Statements by Vo*, stating that appellant requested a lawyer once advised of his constitutional rights during interrogation on January 19, 1991, but officers continued questioning him nonetheless. (Vol. 6, CT 1581-1582.) The motions were heard that day; the motion regarding statements of witness Moriarty was denied, and a hearing on the motion to suppress appellant's statements was recessed to permit the trial court to review the interview. (Vol. 6, CT 1583-4.) On February 7, 1995, the custodial interrogation of appellant was excluded on *Miranda*[15] grounds. (Vol. 6, CT 1615.)

Co-defendant Hajek's objection to disclosure of his expert's report was overruled on February 6, 1995, and his motion to have the report returned was denied. The hearing on co-defendant Hajek's *Kelly-Frye*[16] objections to scientific tests was continued. (Vol. 6, CT 1584.)

On February 7, 1995, co-defendant Hajek filed Defendant Hajek's Motion No. 7: Objections to Specific Evidence. (Vol. 6, CT 1612-1614), objecting to admission of the

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[14] Moriarty's statement to police and preliminary hearing transcript attribute comments to Hajek in the singular; however one police report summarizes her statement using the plural "they." Counsel requested that references in the plural be excluded.

[15] *Miranda v. Arizona* (1966) 384 U.S. 436.

[16] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (1923) 293 F.1013.

following:

1. Letters allegedly written by Hajek and found in Vo's cell, on grounds of lack of foundation and irrelevance. (Vol. 6, CT 1612.)

2. Papers and letters seized from Hajek's cell, arguing lack of foundation and irrelevance. (Vol. 6, CT 1613.)

3. The incident and conviction involving Hajek's possession of a stolen van and loaded shotgun, on grounds this is inadmissible bad character evidence, and irrelevant. (Vol. 6, CT 1613.)

4. Witness Moriarty's statements regarding Hajek's alleged robbery of a Seven-Eleven store, and regarding the stolen van and shotgun, arguing this is inadmissible bad character evidence and irrelevant. (Vol. 6, CT 1613.)

5. Hajek requested that the trial court rule on admissibility of photographs prior to opening statements. (Vol. 6, CT 1613.)

6. Evidence regarding co-defendant Hajek's alleged destruction of jail property, on grounds it is inadmissible bad character evidence and irrelevant. (Vol. 6, CT 1613.)

7. The *Tarasoff*[17] warning following Hajek's alleged threats against witness Tevya Moriarty, on grounds it is irrelevant and inadmissible under Evidence Code § 352. (Vol. 6, CT 1613.)

8. Hajek's alleged violation of a Municipal Court order prohibiting contact with unauthorized persons, on grounds it is irrelevant and inadmissible under Evidence Code § 352. (Vol. 6, CT 1613.)

9. Hajek's alleged threat to the Wang family, arguing there was no foundation to show Hajek wrote the letter, and that it was irrelevant and inadmissible under Evidence Code § 352. (Vol. 6, CT 1614.)

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[17] *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 held that mental health professionals have a duty to protect persons threatened with harm by their patients, despite professional obligations to maintain confidentiality.

10. A tape of a purported conversation between Vo and Hajek, arguing that it is inadmissible under Evidence Code § 352, irrelevant, and inaudible. Hajek also objects to use of a transcript prepared by DA as inaccurate. (Vol. 6, CT 1614.)

Co-defendant Hajek's Motion No. 7 was heard on March 28, 1995, two days before opening statements. The search warrants were ruled valid, and papers from appellant's cell were to be handled on a piece-by-piece basis. Evidence of the stolen van and loaded shotgun are admissible, as are the matters concerning witness Moriarty and the threat to the Wang family. The taped conversation between the co-defendants was ruled admissible, but the misleading transcript will not be admitted. The People conceded that the alleged violation of a Municipal Court order is not admissible. (Vol. 7, CT 1689.)

On February 7, 1995, the trial court held a hearing regarding the search of appellant's cell; the motion to suppress argued and submitted. (Vol. 6, CT 1615-1616.) The jury questionnaire and trial schedule were discussed, the Clerk was to order 2 panels of 60 prospective jurors, for morning and afternoon, on three days the following week. (Vol. 6, CT 1615-1616.) Co-defendant Hajek's motion regarding blood evidence was heard, criminalist Ridolfi was examined, and the evidence was ruled admissible. (Vol. 6, CT 1616.)

Objections of both defendants to photographs J-1 thru J-7, J-19, J-22 were heard and the matter submitted on February 7, 1995. (Vol. 6, CT 1616.) The next day, the photographs were ruled admissible. (Vol. 6, CT 1617.) Appellant's motion to preclude the death penalty remained submitted, and the case was continued to February 14, 1995,

for preliminary jury qualification. (Vol. 6, CT 1617.)

Appellant's *Keenan* counsel, Jeane DeKelver, was appointed to assist with his defense on February 10, 1995. (Vol. 10, CT 2741.)

Jury selection began on February 14, 1995 with a hearing "to time qualify prospective jurors," have them complete questionnaire, and schedule dates for individual questioning. The trial court read the information. The first panel was sworn by the clerk, and heard instructions regarding the presumption of innocence and reasonable doubt. Jurors were instructed to complete questionnaires, return them to the clerk, and obtain an appointment for individual questioning. A second panel went through the same process in the afternoon. (Vol. 6, CT 1646-1647.) Hearings with additional panels of prospective jurors were held on February 15, 1995 (Vol. 6, CT 1648-1649) and February 16, 1995 (Vol. 6, CT 1650-1651). The case was continued to February 21, 1995, for individual questioning of jurors. (Vol. 6, CT 1651.)

On February 21, 1995, jury selection was continued as the judge was attending a funeral, and prospective juror appointments were rescheduled. (Vol. 6, CT 1652.) Individual questioning of prospective jurors was held from February 22, 1995 through March 9, 1995. (Vol. 6, CT 1654-1668.) On March 10, 1995, seventy additional prospective jurors were assembled; the trial court read the information and briefly instructed the panel. The panel was affirmed by the clerk, jurors were questioned regarding hardship excuses were taken, and those not excused filled out questionnaires

and were given dates for individual interviews. (Vol. 6, CT 1669.) Additional individual questioning of prospective jurors took place from March 13 through March 28, 1995. (Vol. 6- 7, CT 1671-1689.)

The trial court ruled on February 22, 1995, that separate juries would not be selected for guilt and penalty phases. (Vol. 6, CT 1654.) On March 9, 1995, the trial court ruled that each defendant would receive 20 peremptory challenges, and the People could exercise 40 peremptory challenges. (Vol. 6, CT 1668.) On March 28, counsel stipulated that the scrambled jury list would be made available to them, jury selection was discussed, and as noted previously, the trial court ruled on co-defendant Hajek's Motion No. 7. (Vol. 7, CT 1689.)

Jurors were selected and sworn on March 29, 1995: (1) Christine M. Gong; (2) Ronald E. Eadie; (3) Alice S. Miller; (4) Linda F. Frahm; (5) Vivian A. Tillman; (6) Charles M. Martin; (7) Charles E. Ernst; (8) Pete Rowland; (9) Maureen A. Monahan; (10) Ned A. Nuttall; (11) Lorraine L. Candelaria; and (12) Lori S. Peterson. Four alternates were also selected and sworn: Kathleen J. Williams, Glena B. Allen, Peter R. Benson, Richard DeLaRosa. (Vol. 7, CT 1690-1691.)

Trial began on March 30, 1995, with appellant's second counsel, Jeane DeKelver, appearing before the jury for the first time. (Vol. 7, CT 1692.) The trial court admonished the jury (Vol. 13, RT 2983), read the information (Vol. 13, RT 2986), and gave preliminary instructions. (Vol. 13, RT 2995-3002.) The prosecutor, Peter Waite, gave his

opening statement (Vol. 13, RT 3003-3024). Appellant objected to the prosecutor's argument that the People need only prove beyond a reasonable doubt the elements of the crimes charged, but the objection was overruled. (Vol. 13, RT 3004.) Public Defender Mary Greenwood gave an opening statement for co-defendant Hajek (Vol. 13, RT 3025-3039), and appellant's trial counsel, James W. Blackman, also gave his opening statement. (Vol. 13, RT 3040-3046).

Evidence was taken beginning on April 3, 1995, with prosecution witnesses Ellen Wang and Cary Wang; a Mandarin interpreter was sworn to interpret for Cary Wang. (Vol. 7, CT 1696.) Cary Wang continued to testify on April 5, 1995. (Vol. 7, CT 1698-1699.)

On April 6, 1995, Juror No. 8, Pete Rowland, was excused for hardship and replaced by Richard DeLaRosa. (Vol. 7, CT 1700.) Testimony was taken from prosecution witnesses Alice Wang, Sgt. David Harrison, Jackie Huynh, and Tina Huynh. (Vol. 7, CT 1700-1701.)

On April 10, 1995, Juror No. 7, Charles Ernst, was excused for hardship over the objections of counsel, and was replaced by juror Kathleen J. Williams. (Vol. 7, CT 1702.) Prosecution witnesses Off. William Santos, Off. Jennifer Dotzler, and appellant's brother McRobin Vo testified. (Vol. 7, CT 1702-1703.) The prosecution case continued on April 11, 1995, with additional testimony of McRobin Vo, criminalist Douglas Ridolfi, and Tevya Moriarty. (Vol. 7, CT 1704-1705.)

Prosescution witness Brian Wraxall testified on April 12, 1995 (Vol. 7, CT 1706); following a hearing pursuant to Evidence Code § 402, his evidence was ruled admissible. (Vol. 7, CT 1707.) Witness Norman Leung was advised of his right to counsel, and waived that right. (Vol. 7, CT 1707.) Juror number 10 reported that his car was vandalized, and was examined outside the presence of other jurors. (Vol. 7, CT 1706.)

The testimony of Tevya Moriarty continued on April 13, 1995. Off. Raymond Wendling and Sgt. Walter Robinson testified, and Exhibit 53 (a tape recording made January 19, 1995) was played for the jury over appellant's objection; by stipulation, this recording was not transcribed by the court reporter. (Vol. 7, CT 1722.) Chi Ching (Tony) Wang testified with the assistance of a Mandarin interpreter. (Vol. 7, CT 1723.) On April 17, 1995, prosecution witnesses Norman Leung and Dr. Angelo Ozoa testifed, and the prior testimony of James Allen Anderson was read by DDA Steven Fein, by stipulation. (Vol. 7, CT 1724-1725.) Witness Lori Nguyen testified for the prosecution on April 18, 1995, and a hearing on admission of exhibits was held outside the presence of the jury. (Vol. 7, CT 1726-1727.)

Defendant Hajek's Motion to Dismiss Under Penal Code Section 1118.1 was filed on April 19, 1995 (Vol. 7, CT 1741-1756)[18], as was appellant's Motion to Dismiss

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[18] Co-defendant Hajek's motion asserted there was insufficient evidence to support the lying in wait special circumstance; insufficient evidence to support the torture special circumstance; insufficient evidence of burglary-murder and robbery-murder special circumstances; insufficient evidence of attempted murder in the first degree of Cary Wang, Alice Wang, Tony Wang, and Ellen Wang; and that under the 8th

Special Circumstance Allegations and Counts of the Information Pursuant to Penal Code § 1118.1. (Vol. 7, CT 1757-1775.)[19] That day, the People were ordered to respond to the motions by April 24, 1995, and the admissibility of various exhibits was argued and decided. (Vol. 7, CT 1776.)[20] The motions to dismiss were argued and submitted on April 24, 1995. (Vol. 7, CT 1792.)

The prosecution case-in-chief resumed and was completed on April 20, 1995. Stipulations were offered: (1) Exhibit 54, a letter to Cary Wang, was found to contain the palm print of co-defendant Hajek; (2) The autopsy photograph described by Dr. Ozoa of of the victim; (3) Exhibits 57-79 were seized from appellant's cell by search warrant; Exhibits 80, 94, and 95 were seized from appellant's apartment by search warrant; Exhibit 84 was seized from co-defendant Hajek's cell. (Vol. 7, CT 1790.)

Co-defendant Hajek began presenting his defense on April 20, 1995, calling Linda

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Amendment, these alleged special cricumstances do not "provide a rational basis for distinguishing between murders which should compel death eligibility and those which should not." (Vol. 7, CT 1741-1756.)

[19] Appellant's motion asserted that there was insufficient evidence to establish the special circumstance of lying in wait; insufficient evidence of burglary-murder and robbery-murder special circumstances; insufficient evidence to support the torture special circumstance; that all special circumstances must be dismissed because the evidence failed to show appellant killed or intended to kill, or that he had a reckless indifference to human life as a major participant in a robbery or burglary; insufficient evidence of attempted murder in the first degree of Alice, Cary, Tony and Ellen Wang; and insufficient evidence to establish kidnapping of Cary Wang.

[20] Exhibits 64, a portion of 65, 72, 73, 78, 80 were received as to both defendants; Exhibit 84 received as to Hajek only; and Exhibits 94 and 95 as to appellant Vo only. (Vol. 7, CT 1776.)

Hajek, Off. David Fazo, and Sally Shaver Lowell. (Vol. 7, CT 1790-1791.) Sally Shaver Lowell and Dr. James J. Griffin testified on April 24, 1995 (Vol. 7, CT 1792); John A. Hennessey and Dr. Dean Freedlander testified on behalf of Hajek on April 26, 1995 (Vol. 7, CT 1793); and Dr. Rahn Yukio Minagawa testified on April 27, 1995. (Vol. 7, CT 1795.) By stipulation, the jurors were told that Florida records reflect facts concerning co-defendant Hajek's abandonment as an infant, foster care, and placements for adoption. (Vol. 7, CT 1794-1795.) Dr. Minagawa completed his testimony on May 1, 1995, and co-defendant Hajek rested. (Vol. 7, CT 1807.)

On April 26, 1995, in *in camera* proceedings before the trial judge, appellant Vo's counsel complained that they were unable to prepare properly for the penalty phase because requests for necessary funding had been disapproved. (4/26/95, RT 4519-4528.) On April 27, 1995, appellant's counsel revisited the non-payment of second counsel, submitting under seal a letter from the conflicts coordinator. (4/27/95, RT 4632-4634.) Payment concerns continued. Another hearing was necessary on May 10, 1995, since neither counsel had been paid. (5/10/95, RT 5603.)

Ruling on the motions to dismiss on April 27, 1995, the trial court stated it intended to dismiss the special circumstance allegations of robbery-murder, burglary-murder, and torture. The trial court declined to dismiss the lying in wait special circumstance, on the theory that the defendants were lying in wait for Ellen Wang. (Vol. 7, CT 1795-1796.) Co-defendant Hajek moved and the trial court agreed on May 1,

1995, to defer the ruling on the motions. (Vol. 7, CT 1807.) The motion was finally decided on May 4, 1995, with the trial court striking the robbery-murder and burglary-murder special circumstances, finding the torture and lying in wait special circumstances appropriate for the jury to decide, and declining to dismiss the attempted murder charges. (Vol. 7, CT 1815.)

Appellant Vo began his defense presentation on May 1, 1995, calling witnesses Sylvia Kuo Yang, James Eric O'Brien, and Douglas Vander Esch. (Vol. 7, CT 1807-1808.) The People moved to exclude witnesses not previously disclosed, and for sanctions, and the motion was submitted. (Vol. 7, CT 1807.) Co-defendant Hajek also objected to admission of photographs to be submitted on appellant's behalf, complaining of non-compliance with discovery as to a witness. (Vol. 7, CT 1808.)

Discovery issues reached a boil the following day, May 2, 1995. Co-defendant Hajek moved for discovery of expert Dr. Berg's handwritten notes and was joined by the People. The trial court ordered that appellant turn over the notes, or Dr. Berg would not testify, stating that appellant's counsel had failed to comply with discovery in good faith. Appellant's trial counsel, James Blackman, declared a conflict of interest and moved to be relieved; the trial court denied the motion. (Vol. 7, CT 1809.) Witness Douglas Vander Esch completed his testimony, and appellant took the stand. (Vol. 7, CT. 1809-1810.)

Also on May 2, 1995, juror Charles Martin sent the trial court a note, to which the court responded in open court. (Vol. 7, CT 1810.) The note inquired about the time frame

for deliberations, whether jurors could review evidence, when the jury could get a "transcript of the charges," and how long a possible penalty trial would take. (Vol. 7, CT 1811.)

Appellant's testimony resumed on May 3, 1995. In lieu of recalling Sgt. Escobar to impeach testimony of Linda Hajek, a stipulation was offered concerning statements she made previously. All parties rested. (Vol. 7, CT 1812-1813.)

The jury was instructed on May 8, 1995. (Vol. 7, CT 1816.) A total of 106 jury instructions are set forth in the Clerk's Transcript at Vol. 8, CT 1958 through 2078. The number, length, and complexity of the instructions was certainly affected by the number of charges and special allegations, the fact that the co-defendants were tried together, and the prosecution's conspiracy theory.[21]

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[21] Because there was more than one defendant, the jury was instructed that it must decide separately whether each defendant was guilty or not guilty. (Vol. 8, CT 1975.) It was not instructed specifically what evidence was admissible about which defendant, or for what charges or allegations. (See, Vol. 8, CT 2057 regarding evidence admitted only against one defendant, which does not specify any particular evidence; and Vol. 8, CT 2059 regarding evidence admitted for a limited purpose.)

The jury was instructed that an aider and abetter is culpable as a principal (Vol. 8, CT 2004-2005, 2062), that a union of conduct and a particular mental state is necessary for conviction of alleged crimes (e.g., Vol. 8, CT 2007-2009, 2023,), and about the mental states necessary for various crimes and special allegations (e.g., Vol. 8, CT 2010-2013, 2016-2018, 2020-2021, 2028-2029, 2031-2033, 2035-2036, 2038, 2040, 2042, 2043, 2046-2048, 2053, 2054).

Instructions 21 through 29, 51 (Vol. 8, CT 1981-1990) address the uncharged conspiracy theory, but not the quantum of proof necessary to find a conspiracy. Instructions 90 through 94 address accomplices. (Vol. 8, CT 2062-2066.)

Some instructions related only to co-defendant Hajek's mental state defenses (Vol. 8, CT 2037, Vol. 8, CT 2060), and to Hajek's conduct alone (Vol. 8, CT 2049, 2051-

The People's opening argument was given on May 8, 1995. (Vol. 7, CT 1816.) Arguments were made on behalf of co-defendant Hajek and appellant on May 9, 1995. (Vol. 7, CT 1817.) The People's closing argument was made on May 10, 1995, and final instructions were given to the jury. The jury retired to deliberate at 1:43 p.m., and alternate jurors were placed on telephone standby. (Vol. 7, CT 1818.) At 2:03 p.m., the jury requested various items (Vol. 7, CT 1820), which were supplied. (Vol. 7, CT 1819.) The jury took its evening recess at 4:30 p.m. (Vol. 7, CT 1819.)

On May 10, 1995, appellant's lead and second counsel had an in camera hearing with the trial court and the Conflicts Administrator after the jury began deliberations. (Vol. 7, CT 1819; 5/10/95, RT 5603-8.)

Jury deliberations resumed on May 11, 1995. Two notes were received from the jury that day. (Vol. 7, CT 1821.) One requested that the jury instructions be 3-hole punched so they could be placed in a binder supplied by a juror (Vol. 7, CT 1822), and this request was granted. (Vol. 7, CT 1821.) The other request was for a transcript of Exhibit 53, the tape of the defendants at the police station; the request noted that a transcript was referenced in testimony of Off. Robinson.[22] (Vol. 7, CT 1823.) The trial

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2052, 2061). Some instructions – in particular, one about a statement of intent made by a defendant before the crime (Vol. 8, CT 2056) and one about statements made after the crime (Vol. 8, CT 2058) – appear to apply only to Hajek, but were not accompanied by a limiting instruction.

[22] The People's transcript of this tape was ruled unreliable and inadmissible. (Vol. 7, CT 1689.) The court reporter did not transcribe this tape when it was played for the jury. (Vol. 7, CT 1722.)

court responded to this request by merely advising the jury that, "The transcript was not received in evidence." (Vol. 7, CT 1824.)

An additional *in camera* proceeding was held with appellant, his counsel, the conflicts administrator, and the trial court on May 16, 1995, concerning the non-payment of trial counsel. (5/16/95, RT 5609-5617.) The trial court again stated its intention to proceed immediately to penalty phase if special circumstances were found true, that the jury had been told the case would take only 6 to 8 weeks, and that "we're really going to have problems if you're not able to proceed." (5/16/95, RT 5611.) Jury deliberations continued on May 16, 1995. (Vol. 7, CT 1826.) The jury again sent a note to the trial judge, asking about the relationship between an aider/abettor or co-conspirator and the requirement for the special circumstances that a defendant "intentionally" killed the victim. (Vol. 7, CT 1825.)[23] After informally discussing a response with counsel that day (Vol. 7, CT 1826), and again on May 17, 1995, the trial court read Instruction 59 again, and informed them that the special circumstances do not apply if no intent to kill is found. (Vol. 7, CT 1829.)

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[23] The note reads:

> (p. 57) ¶ 3 under Special Circumstances: If a 'defendant' is determined to be an 'aider and abettor' or a 'co-conspirator' does he then become: '(The) (A) defendant on page 59, item # 1 which reads: **#1. (The) (A) defendant intentionally killed the victim.**

(Vol. 7, CT 1825; emphasis supplied in original by enclosing language bolded here in a box.)

Another note from the jury on May 17, 1995 asked the court to explain the meanings of PC §§12022.5 (a), 12022 (b) and 1206, or in the alternative, that jurors be provided with a copy of the Penal Code. (Vol. 8, RT 1827-1828.) The trial court responded that "12022.5 (a) is the armed and did use a firearm section – Inst. # 79"; "1203.06 PC is a sentencing section and should not concern the jury"; "12022 b is an armed with a dangerous weapon (Inst. # 78)." (Vol. 7, CT 1827.) The court further advised the jury it "may not have a copy of the Penal Code." (Vol. 7, CT 1827.)

Again on May 18, 1995, the jury sent two more notes to the trial court. (Vol. 7, CT 1831.) The first note stated that a reference to "transportation" in Instruction # 68 did not make sense to them. (Vol. 7, CT 1832.) The trial court responded that he had neglected to cross out that portion of the instruction. (Vol. 7, CT 1833.) The second note stated that juror Williams might have a conflict with her work schedule that would "impact her ability to serve as juror after June 2, 1995." (Vol. 7, CT 1834.)

On May 22, 1995, the jury informed the court that it had reached a verdict (Vol. 8, CT 2097, 2114), verdicts were read, and the jury was polled. (Vol. 8, CT 2114.) Both defendants were found guilty of all charges, and the special circumstance and enhancement allegations were found true. (Vol. 8, CT 2098-2113.) Juror Williams, of whose potential hardship in serving after June 2, 1995 the court had been informed (Vol. 7, CT 1834), was questioned and was not excused from service at the penalty phase. Jurors were instructed to return on June 6, 1995, for penalty phase proceedings. (Vol. 8,

CT 2114-2115.)

On May 22, 1995, appellant filed a Supplement to Defendant Loi Vo's Motion *In Limine*: Motion to Preclude the Death Penalty. (Vol. 8, CT 2079-2096.) The motion argued that application of a death sentence to appellant would be arbitrary (citing *Furman v. Georgia* (1972) 408 U.S. 238, 254-256 and other authorities), and requested judicial notice of recent cases involving 14 other defendants from Santa Clara County in which capital punishment was not sought. (Vol. 8, CT 2079-2087.) The motion further argued that the then-recent "Three Strikes" legislation (PC § 667 (c)) superceded and rendered California's capital punishment scheme unconstitutional, relying in part on *Enmund v. Florida* (1982) 458 U.S. 782. (Vol. 8, CT 2084-2095.)

On June 5, 1995, appellant Vo filed a Motion to Restrict Prosecution to Evidence in Their §190.3 Notice Filed February 1995 and a Request for *Phillips* [24] Hearing. (Vol. 8, CT 2132-2139.)[25] Appellant's Motion to Enforce Penal Code § 190.3 Provision

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[24] *People v. Phillips* (1985) 41 Cal. 29 suggests that a hearing outside the presence of the jury, similar to an Evidence Code § 402 hearing, may be advisable to determine admissibility of aggravating evidence.

[25] Appellant's motion noted informal efforts to clarify the evidence in aggravation the prosecutor would seek to introduce against appellant. Initially, the prosecutor represented that he would only introduce the circumstances of the crime. (Vol. 8, CT 2133.) He then verbally stated that he would call Ellen Wang to testify about victim impact, introduce a photograph of the victim, present a letter seized from appellant's home (Exhibit 96), and present evidence concerning a razor blade found in appellant's jail cell. (Vol. 8, CT 2133.) Appellant contended that the prosecutor had failed to comply with his obligation under *People v. Matthews* (1989) 209 Cal.App.3d 155 to provide specific and timely notice of the evidence in aggravation.

This motion argued that the prosecutor is limited at penalty phase to the

Prohibiting Presenting Prior Criminal Activity for Which Loi Vo Has Been Acquitted was filed the same day (Vol. 8, CT 2141), as were the following: a Motion to Exclude Argument Regarding Lack of Remorse (Vol. 8, CT 2142-2146), a Motion to Deem Defendant's Age as a Mitigating Factor or Neutral Factor (Vol. 8, CT 2147-2152), a Motion to Prohibit Prosecutor from Arguing That Sympathy Should Not Be Considered by the Jury (Vol. 8, CT 2153-2157), a Motion to Limit Evidence of Victim Impact During Penalty Phase (Vol. 8, CT 2158-2164), a Motion to Prohibit the Absence of Mitigation As Constituting Aggravation (Vol. 8, CT 2165-2169), a Motion to Restrict the Scope of the Prosecutor's Penalty Phase Argument[26] (Vol. 8, Vol. 8, CT 2170-

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aggravating evidence noticed under PC § 190.3, that the prosecution is prohibited from presenting evidence irrelevant to the sentencing factors of PC § 190.3, and that a hearing must be held to address admissibility of evidence the prosecution seeks to admit in aggravation.

[26] Appellant's motion to restrict the scope of the prosecutor's argument set forth constitutional concerns (Vol. 8, CT 2172-2177), and objected to various categories of argument: (1) urging jurors to ignore factors constitutionally mandated to be considered; (2) constitutionally impermissible arguments, including (a) personal opinions of the prosecutor, (b) personal characteristics of the victim, (c) that the prosecutor seeks death rarely, (d) dilution of jury responsibility, (e) implying criminals are coddled by constitutional protections, (f) cost of LWOP, (g) enlisting jurors as soldiers in a war on crime, (h) classing the defendant as "the criminal element," (h) urging that mercy is an inappropriate consideration, (i) urging that he selected the case as "one of the worst," (j) arguing he would sleep well if the defendant was executed, (k) arguing the jury is only the latest in a line of decisionmakers, (l) suggesting the possibility of future parole, (m) manipulating or misstating the evidence, (n) implicating the rights of the accused, such as the right to counsel, (o) arguing that LWOP would let the defendant live off taxpayers, (p) arguing a jury's mistakes will be corrected on review, (q) suggesting self-defense as a reason for imposing a death sentence, (r) appealing to passion and prejudice, (s) vouching for the appropriateness of death, or suggesting there are additional facts outside the record, (t) implying defense counsel has fabricated evidence, or otherwise disparaging

2200).

Appellant also filed a Notice of Joinder by Defendant Loi Vo in Co-Defendant's Penalty Phase Motions. (Vol. 8, CT 2140.) Defendant Hajek's Motion to Exclude or Limit Evidence in Aggravation was also filed on June 5, 1995. (Vol. 8, CT 2118-2125.)[27] In addition, Defendant Hajek's Motion to Restrict Improper Prosecution Argument was filed that same day. (Vol. 8, CT 2126-2131.)[28] The People's Brief Regarding Penalty

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counsel, (u) arguing that defense counsel does not believe his client's defense, (v) arguing deterrence, (w) urging jurors to infer lack of remorse from the exercise of constitutional rights, (x) misleading jurors as to the weighing process, (y) arguing the potential for escape of the defendant, (z) arguing the governor's commutation power, (aa) urging jurors to send a message to the judicial system, (bb) arguing the judge would determine the sentence, (cc) arguing that the prosecutor would take the blame if the defendant was wrongly convicted, (dd) arguing for a death sentence so the defendant would not kill again, and (ee) arguing police officers would be aggrieved if a death sentence was not returned. (Vol. 8, CT 2178-2190.)

The motion also asserted the limits of statutory factors in aggravation (Vol. 8, CT 2190-2196), that argument concerning non-statutory factors is improper (Vol. 8, CT 2196-2197), and that an immediate curative instruction is required for improper argument (Vol. 8, CT 2197-2199).

[27] The motion to limit evidence in aggravation objected to introduction of victim impact evidence (Vol. 8, CT 2119-2121), introduction of other purported violent activity under PC § 190.3(b) (Vol. 8, CT 2121-2123), and the use of rebuttal evidence because it has not been noticed nor discovery provided. (Vol. 8, CT 2123-2125.)

[28] The motion to restrict improper argument addressed the following errors: (1) argument that the absence of mitigation is aggravation (Vol. 8, CT 2127-2128); (2) lessening the burden on the jury (Vol. 8, CT 2128); (3) the cost of incarceration (Vol. 8, CT 2128); (4) the death penalty as a deterrent (Vol. 8, CT 2128-2129); (5) retribution and community vengeance (Vol. 8, CT 2129); (6) lack of remorse (Vol. 8, CT 2129); (7) future dangerousness (Vol. 8, CT 2129-2130); (8) that death is mandated, or mechanical counting (Vol. 8, CT 2130); (9) factor K evidence as aggravation (Vol. 8, CT 2130).

Phase Evidence was filed June 5, 1995 (Vol. 8, CT 2202-2207)[29], as was its Response to Defendant Vo's Motion to Preclude the Death Penalty. (Vol. 8, CT 2208-2209.)[30] On June 5, 1995, hearings were held on motions prior to the penalty phase. (Vol. 8, CT 2210.)

Also on June 5, 1995, appellant's *in camera Marsden* motion was denied, and a motion for continuance by appellant's counsel was denied. (Vol. 8, CT 2210; 6/5/95, RT 5650-5671.) Counsel stressed that "we are not in fact adequately prepared." (6/5/95, RT 5666.) In the afternoon of June 5, 1995, further *in camera* proceedings were held before the trial court. (6/5/95, RT 5705.) Appellant and his counsel were referred to Judge Hastings for further *in camera* proceedings (Vol. 8, CT 2211), which were scheduled for June 7, 1995. (Vol. 8, CT 2212; see 6/5/95, RT 5705-5707.)

In open proceedings on June 5, 1995, the trial court ruled that victim impact evidence from Ellen Wang concerning monetary losses and emotional impact would be admitted, but reference to a grandfather in Taiwan was excluded. A photograph of the victim would be admitted. Evidence of appellant's alleged possession of a razor blade was excluded. As to co-defendant Hajek's stolen vehicle and shotgun possession

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[29] The People argued that (1) victim impact evidence is proper, (2) co-defendant Hajek had committed violent acts as a juvenile, (3) that Hajek's prior possession of weapons and a razor blade found in appellant's cell were violent criminal acts and admissible. (Vol. 8, CT 2202-2207.)

[30] The prosecutor asserted the appropriateness of prosecution discretion in charging decisions, and asserted that the capital scheme remains valid following adoption of the "Three Strikes" law. (Vol. 8, CT 2208-2209.)

charges, only the fact of conviction was admissible; Hajek's juvenile activities and possession of nunchucks were excluded. The offense of which appellant was acquitted was found inadmissible. (Vol. 8, CT 2210.) The prosecution agreed not to argue that jurors should not consider sympathy. (Vol. 8, CT 2210-2211.) Decision on inapplicable mitigating circumstances was deferred. The motion to preclude the death penalty was denied. (Vol. 8, CT 2211.)

The penalty phase began on June 6, 1995, with opening statements by the People and co-defendant Hajek; opening statement on behalf of appellant Vo was reserved. Ellen Wang testified for the People, and the People rested. Witness June Fountain was called to testify on behalf of co-defendant Hajek. (Vol. 8, CT 2213.) On June 7, 1995, Witnesses Rahn Minegawa, Robert Hajek, and Linda Hajek testified on behalf of co-defendant Hajek. (Vol. 8, CT 2215-2216.)

On June 7, 1995, Judge Hastings denied a motion to disqualify himself from hearing a PC § 987 motion and ruled on the motion. (Vol. 8, CT 2217; 6/7/095, RT 1-43.) Additional proceedings were held that afternoon. (6/7/95, RT 5866-68.)

In open court on June 7, appellant's counsel advised that his witnesses would be ready Monday, June 12, 1995. (Vol. 8, CT 2215.) Appellant Vo's motion for mistrial as to the penalty phase was denied, as was his motion for severance. (Vol. 8, CT 2215.) Co-defendant Hajek's motion for mistrial and motion to strike were denied. (Vol. 8, CT 2216.) On June 8, 1995, Linton Moore testified on behalf of co-defendant Hajek, and

Hajek rested. (Vol. 9, CT 2384.)

Juror Bensen's employer provided a letter to the trial court stating that his absence had caused a hardship at his job, that the company could no longer compensate his extended leave, and that this created a hardship for the juror. (Vol. 9, CT 2382-2383.) The juror's hardship was discussed informally on June 8, 1995 (Vol. 9, CT 2384) On June 12, 1995, the juror's request to be excused was denied. (Vol. 9, CT 2400.)

Appellant's penalty phase defense commenced on June 12, 1995. His counsel gave an opening statement, and called the following witnesses to testify briefly: Duane Talbert, Timothy Stoesser, Darren Snell, Michael Parker, Lauren Dennehy, Robert Poi Eng, Frances Paragon-Arias, Carlene Ann Rose, Tamara Sinclair Gonzales, Timothy John Sullivan, Timothy Dennehy, Yolanda Emerson, Patricia Accorinti, Paul W. Ender, Rudolf Frank, Frances Nieman, and Nora Mozzotti. (Vol. 9, CT 2400-2401.) Co-defendant Hajek's motion for a mistrial was denied.[31] (Vol. 9, CT 2400.)

On June 13, 1995, appellant's penalty phase presentation continued with the brief testimony of witnesses: Billy N. McDonald, Laura Leticia Valtierra, Jeff Huan Nguyen, Amy Tan, Hiep T. Luong, Lt. David Wittum, and Capt. Scott Sutherland. (Vol. 9, CT 2459-2460.) Witness James W.L. Park also testified. The People moved for discovery of his raw materials; in camera review was denied, and the materials ordered turned over for

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[31] Co-defendant Hajek's attorney argued that the "good character" presentation, together with appellant's objections to evidence presented on behalf of Hajek, prevented an individualized assessment of the appropriate penalty. (Vol. 24, RT 6019-6020.)

review. Hajek objected to Park's testimony, and his motion to limit this evidence to appellant was granted. (Vol. 9, CT 2459-2460.)

The trial court requested working copies of jury instructions to be provided on June 14, 1995. (Vol. 9, CT 2460-2461.)[32] Appellant filed forty-six proposed instructions; the packet was marked "rejected" by the trial court, and most individual instructions were marked "refused" and signed by the judge. (Vol. 10, CT 2478-2523.)

Appellant's penalty defense continued on June 14, 1995, with the testimony of Gregory Dalcher, Than Vic Vo (assisted by a Vietnamese interpreter), Dexster Vo, Janet Brown, Sparkman Vo, and Dr. Hien Duc Do. (Vol. 10, CT 2614-2615.) On June 15, 1995, testimony was taken on appellant's behalf from Thi Kieudo Vo (assisted by a Vietnamese interpreter) and Kieugnan Vo. (Vol. 10, CT 2616.) Appellant Vo rested. (Vol. 10, CT 2617.) Judicial notice was taken of co-defendant Hajek's prior conviction for auto theft and possession of a firearm, and exhibits were received in evidence. (Vol. 10, CT 2616-2617.) Jury instructions were discussed and objections noted. (Vol. 10, CT 2617.)

On June 20, 1995, the jury was given penalty phase instructions. (Vol. 10, CT

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[32] The People's Requested Instructions are at Vol. 9, CT 2462-2477. Co-defendant Hajek's requested instructions are at Vol. 10, CT 2524-2536; most of those duplicated requests by the prosecution, but a pinpoint instruction identifying mitigating factors in his background was refused. (Vol. 10, CT 2524.)

2618; Vol. 10, CT 2629-2663.)[33] Arguments were made on behalf of the People, co-defendant Hajek, and appellant Vo. The jury retired to deliberate, and alternate jurors were placed on telephone standby. (Vol. 10, CT 2618.) The jury wrote a note requesting a "log of evidence" (Vol. 10, CT 2619), and an exhibit list with items not received deleted was provided to them. (Vol. 10, CT 2618.)[34] The jury also requested that the instructions be 3-hole punched, and that masking tape be provided. (Vol. 10, CT 2621.)

Jury deliberations continued on June 21, 1995. (Vol. 10, CT 2622.) A note was received from the jury late that day, requesting clarification of instructions: whether a unanimous decision was necessary for a sentence of life imprisonment without parole.

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[33] The jury was instructed that in making the penalty determination, it could consider sympathy and like considerations (Vol. 10, CT 2641); however, the instruction did not limit these to sympathy for the defendant.

Although different factors applied to the cases in mitigation and aggravation as to each defendant, the jury was instructed on all of the sentencing factors under PC § 190.3, including inapplicable factors. (Vol. 10, CT 2643.) Clarification was provided as to use of only three factors; the jury was instructed it could consider the circumstances of the crime, the presence or absence of prior felony convictions, and age as either aggravation or mitigation. (Vol. 10, CT 2648.)

The jury was instructed that the word "defendant" applies equally to each unless instructed otherwise. (Vol. 10, CT 2640.) Although the jury was instructed to decide the question of penalty separately for each defendant (Vol. 10, CT 2646, 2651), it was not instructed that the evidence introduced in aggravation or mitigation as to one defendant must not be considered in deciding the appropriate punishment for the other defendant. In fact, the jury was instructed to consider all of the evidence, arguments, and sentencing factors. (Vol. 10, CT 2654.) Some evidence was admitted as to co-defendant Hajek only, and the jury was instructed to consider this as aggravating evidence only if it was proven beyond a reasonable doubt (Vol. 10, CT 2653); however, its use was not limited to Hajek only.

[34] An exact copy of the exhibit list provided to the jury could not be located by the Clerk of Court. (Vol. 10, CT 2653.)

(Vol. 10, CT 2623.) On June 22, 1995, "Court and counsel meet informally to discuss the written request." (Vol. 10, CT 2625.) Deliberations continued on June 26, 1995 (Vol. 10, CT 2626), and the trial court responded to the inquiry of June 21: "You must be unanimous no matter what the decision you make." (Vol. 10, CT 2624.)

Deliberations continued on June 27, 1995 (Vol. 10, CT 2627), and the jury requested a cassette player and Exhibit 53[35] (Vol. 10, CT 2628), which were provided. (Vol. 10, CT 2627.) On June 28, 1995, the jury concluded its deliberations (Vol. 10, CT 2666), rendering verdicts of death for co-defendant Hajek (Vol. 10, CT 2664) and appellant Vo. (Vol. 10, CT 2665.) The jury was polled (Vol. 10, CT 2666), and co-defendant Hajek (Vol. 8, CT 2116) and appellant Vo (Vol. 8, CT 2117) were referred to the Adult Probation Department for sentencing reports.

On or about August 1, 1995, the trial court sent a letter to jurors[36], and responses were later received from jurors and lodged under seal. Vol. 10, CT 2694-2629.)

Appellant Vo's Motion to Reduce Death Verdict to the Penalty of Life Imprisonment Without the Possibility of Parole (Penal Code §190.4(e); §1181(7)) was filed on August 16, 1995. (Vol. 10, CT 2730-2740.)[37] This motion was supported by the

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[35] Exhibit 53 was the tape of a conversation between the defendants. During guilt phase deliberations, the jury had requested a transcript of this tape, and was informed that no transcript was in evidence. (Vol. 7, CT 1823.)

[36] A copy of the letter sent by the trial court to jurors could not be located by the Clerk of Court. (Vol. 10, CT 2653.)

[37] Appellant argued that: (1) the trial court is required to weigh the evidence and make an independent determination whether death is the appropriate sentence; (2) the trial

Declaration of Jeane DeKelver, appellant's second counsel, relating conversations with several jurors after the penalty phase (the first also attended by the prosecutor and an investigator for the Public Defender, and the second also attended by counsel for co-defendant Hajek). (Vol. 10, CT 2741-2744.)[38]

Appellant's Motion for New Trial was also filed on or about August 20, 1995, arguing the verdict was contrary to law and the evidence (PC § 1181(6)) and pointing to various errors throughout the trial: (1) insufficient evidence to support the torture special circumstance; (2) insufficient evidence to support the lying in wait special circumstance; (3) admission of letters written by co-defendant Hajek, over objection of appellant Vo; (4) denial of the severance motion despite inconsistent defenses, and the admission of evidence applicable only to one defendant; (5) admission of co-defendant Hajek's

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court has the power to reduce the jury's verdict in its role as a thirteenth juror; stating the reasons why the evidence presented at guilt and penalty phase militate against a death sentence; (3) the application of the death penalty should be narrowed to only execute the worst of the worst. (Vol. 10, CT 2730-2740.)

[38] Jurors Eadie, Delarosa, Miller, Frahm, and Candelaria discussed the deliberations after the verdict. The jurors believed that on the tape (Exhibit 53), they heard appellant Vo state several times, "we're murderers." They repeatedly said the tape made a difference in the penalty verdict. Neither the prosecutor nor any defense counsel heard this statement on the tape. One juror asked if the sentence could be commuted, and that she felt it should be commuted. Another juror, Ron Eadie, related that he refused to testify at a penalty phase on behalf of a friend charged with murder.

Three jurors (Miller, Frahm, and Candelaria) later met with defense counsel and stated that they believed appellant Vo said on the tape, "we killed her;" one juror stated that appellant would not have been convicted without the tape. These jurors also stated that they "assumed" co-defendant Hajek had told appellant Vo about his conversation with witness Tevya Moriarty the night before the murder. (Vol. 10, CT 2741-2744.)

statement to witness Moriarty the night before the homicide, over objection of appellant Vo; (6) admission of a tape recording of a conversation between the defendants, despite such poor quality that substantial portions were inaudible, permitting the jury to speculate and base its verdict on unreliable evidence; (7) excusal over objection of prospective juror Ernst, and the refusal to excuse juror Williams for employment hardship; (8) denial of continuance requests, requiring counsel to defend when he was not prepared to go forward; and (9) payment issues that caused counsel to be unprepared at trial, prevented counsel from preparing and presenting additional evidence for sentencing, and prevented full investigation of matters concerning jury deliberations; all resulting in an unfair trial for appellant Vo. (Vol. 10, CT 2764-2772.) This motion was also supported by a Declaration of James W. Blackman Respecting Juror Interview. (Vol. 10, CT 2773-2774.)[39]

On August 18, 1995, co-defendant Hajek filed a Motion for New Trial. (Vol. 10, CT 2752-2755.)[40] This motion was supported by the Declaration of Brenda Wilson, a

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[39] Appellant's lead counsel interviewed juror Eadie at his home on August 1, 1995. The jury did not conclude which defendant was responsible for what behavior, and did not concern itself with "intent to kill" since one or both must have been involved in the killing. A number of jurors placed great weight on the taped conversation between the defendants, and their perception that appellant Vo made admissions that he and co-defendant Hajek had killed the victim. (Vol. 10, CT 2773-2774.)

[40] Co-defendant Hajek argued that a new trial should be granted because the death verdict is contrary to the law and evidence, and the jury considered improperly admitted evidence; co-defendant Hajek reiterated earlier objections to admission of Exhibit 53 including that its inaudibility would confuse and mislead the jury. In addition, Hajek asserted that the jury was improperly instructed on the elements of lying in wait. (Vol. 10,

paralegal who attended an interview with three jurors on August 10, 1995. (Vol. 10, CT 2756-2757.)[41] Filed that same day was Defendant Hajek's Motion that the Death Penalty Violates the Eighth Amendment, based on co-defendant's mental illness, bipolar disease.. (Vol. 10, CT 2759-2760.) Additionally, Defendant Hajek's Motion Under Section 190.4 argues that his death sentence should be modified based on the trial court's duty to independently weigh the evidence, and Hajek's mental illness.. (Vol. 10, CT 2761-2763.)

The People's Opposition to Motion for New Trial or Modification of Death Penalty Verdicts, dated August 24, 1995, contends (1) there is no competent evidence concerning the jurors upon which to grant a new trial, and (2) the verdict should not be modified because of (a) the circumstances of the crime, (b) the taped conversation between the defendants, (3) the defendants' letters, specifically co-defendant Hajek's bragging about crime and his threat to kill the Wang family, (4) the impact of the crime on the Wang family. (Vol. 11, CT 2777-2783.)

On or about October 6, 1995, appellant Vo filed a Supplement to Motion to Preclude Death Penalty, which consisted of the Declaration of Vincent N. Schiraldi, M.S.W., Respecting Disparity Motion. (Vol. 11, CT 2790-2820.) Mr. Schiraldi

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CT 2753-2754.)

[41] The declaration of Brenda Wilson recounts an interview with three jurors on August 10, 1995. All jurors stated that the most influential piece of evidence supporting the death verdict against co-defendant Hajek was a taped conversation between the co-defendants. Jurors spent two to three days trying to decipher the tape, and each reported they had heard each defendant say "we killed her." One juror would not have returned a death verdict absent the statements, "we killed her." (Vol. 10, CT 2756-2757.)

summarized the investigation conducted, noting a number of mitigating factors relating to the offense and to appellant's background, and contrasting these findings with others against whom the death penalty is sought. (See, e.g., Vol. 11, CT 2817-2819.) Appellant also filed Objections to Report of Probation Officer[42], correcting factual errors and controverting certain conclusions in that report. (Vol. 11, CT 2821-2825.) Deputy Probation Officer Laura Andrade prepared a memorandum concerning these matters, which was filed October 13, 1995. (Vol. 11, CT 2880-2881.)

On October 12, 1995, the trial court heard appellant Vo's motion to preclude the death penalty, joined by co-defendant Hajek, and it was denied. Appellant Vo's motion for new trial based on issues regarding Exhibit 53, joined by co-defendant Hajek, was heard; jurors Miller and Frahm were sworn and examined, the motion was argued, and submitted. Motions for new trial based on denial of severance, special circumstance issues, admission of letters of the defendants, and the tape recording were denied. (Vol. 11, CT 2827-2828.) The trial court read a statement concerning the sentencing factors (set forth at Vol. 11, CT 2829-2837), and denied the motions to modify the verdicts. (Vol. 11, CT 2828.) Trial exhibits were ordered preserved, whether or not they were admitted to evidence. (Vol. 11, CT 2828, 2838.)

On October 18, 1995, appellant Vo was sentenced to death. (Vol. 11, CT 2900-

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[42] The Report of Probation Officer concerning appellant Vo appears in the record at Vol. 11, CT-2879. The Probation Report concerning co-defendant Hajek is at Vol. 11, CT 2839 et seq.

2911, Commitment Judgement of Death.)[43] He was also sentenced to four concurrent life terms for the attempted murder counts, consecutive to an 8 year sentence for robbery, plus 1 year for the weapons enhancements. (Vol. 11, CT 2913-2914.) Appellant's death sentence was stayed pending automatic appeal. (Vol. 11, CT 2913.) Co-defendant Hajek was also sentenced to death that day, (Vol. 11, CT 2882-2894), with similar sentences for the other crimes and weapons enhancements, and an additional 3 years for dissuading a witness. (Vol. 11, CT 2895-2898.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Case in Chief at Guilt Phase

a. Hajek and the Incident on January 14, 1991

The prosecution alleged that the homicide was precipitated by a fight involving several girls, including Ellen Wang, and co-defendant Hajek.

Jacee Huynh recalls a fight between Lori Nguyen and Tina Huyhh on January 14, 1991, between 4:00 and 5:00 p.m.. She was with Ellen Wang, Ngoc Nguy, Thuy Dang, Tina, and Tina's friend Rachel. As they walked by Lori and Steve Hajek, who were eating ice cream, she thinks Ngoc talked to Steve. (Jacee Huynh, Vol. 13, RT 3390.) **Ellen Wang** recalled they were walking around the mall when they saw Hajek and Lori eating

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[43] The minute order for sentencing proceedings on October 18, 1995, could not be located by the Clerk of Court. (Vol. 10, CT 2653.)

ice cream. (Ellen Wang, Vol. 13, RT 3079.)

Ten minutes later, Ellen and her friends were walking home, and Hajek and Lori stopped next to them in a white van. (Ellen Wang, Vol. 13, RT 3088; Jacee Huynh, Vol. 14, RT 3391-92.) Ellen had never previously seen Hajek; she described Lori and Tina as friends. Tina said something to Lori, but Ellen couldn't really hear what was said. (Ellen Wang, Vol. 13, RT 3085-3086.) **Tina Huynh**, however, testified that Lori was "dogging" them, giving them dirty looks, and whispering to Hajek. Tina called Lori a bitch. (Tina Huynh, Vol. 14, RT 3401, 3403.) Tina asked Lori what she was looking at, and Lori said something like "I could look at anybody I want to, bitch." Lori and Tina fought, and Jacee joined in to pull them apart. (Jacee Huynh, Vol. 14, RT 3392-94; Ellen Wang, Vol. 13, RT 3090; Tina Huynh, Vol. 14, RT 3403.)

Ellen came to pull Jacee and Lori apart, noticed the van was stolen, and yelled that the van was "picked." (Ellen Wang, Vol. 13, RT 3093.) Several of them were yelling it was a stolen car, which made Hajek nervous. (Tina Huynh, Vol. 14, RT 3403.) After Ellen yelled, Hajek got out of the van, picked Ellen up, and threw her into some bushes. Hajek and Lori returned to van and drove off. (Ellen Wang, Vol. 13, RT 3093.) Ellen called him an asshole, and Ngoc told Hajek it was a girl thing and he shouldn't get involved. (Jacee Huynh, Vol. 14, RT 3394-96.) It is fair to say that the fight started simply because these girls didn't like each other. (Vol. 13, RT 3133.) Ellen "cussed" at Hajek, but didn't threaten him. (Ellen Wang, Vol. 13, RT 3095.)

A series of telephone conversations followed the fight. Tina Huynh believes one of her friends made an anonymous phone call to police to report the stolen car, and the police said it was too late to do anything about it. (Vol. 14, RT 3407.) Ellen was not present when anonymous phone call to police was made. (Vol. 14, RT 3409.) Tina also talked to Hajek that night about why they hated Lori. She does not recall him making any threats that night, and thought the whole incident was over. (Tina Huynh, Vol. 14, RT 3408.)

Ngoc called Lori to ask her to call Jacee so they could discuss the incident. Hajek returned the call and sounded normal, and Jacee also talked to Lori, and they decided not to speak. (Jacee Huynh, Vol. 14, RT 3398-99.) Ngoc also called Ellen Wang, stating Hajek wanted her to give him a call and providing the number. Ellen called that night and asked if he had a problem with her. (Ellen Wang, Vol. 13, RT 3099.)[44] Ellen and Hajek swore at each other, then hung up. (Ellen Wang, Vol. 13, RT 3099-3100.) Ellen admits she asked if Hajek wanted to "start shit" with her. (Vol. 13, RT 3144.)

Ellen Wang testified that after that call, she did not try to contact Hajek, and she had no further contact with him. (Ellen Wang, Vol. 13, RT 3151.) She forgot about the incident, and testified she did not tell her mother or report it to anyone except her grandmother. (Ellen Wang, Vol. 13, RT 3098, 3103.) However, her mother Cary Wan

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[44] An interview report from 1991states that the message from Ngoc was she should call Hajek if she had a problem with him. Ellen Wang denied having a problem with Hajek. (Ellen Wang, Vol. 13, RT 3143.)

testified that Ellen had told her about the fight, and she saw scratches on Ellen's neck. (Cary Wang, Vol. 13, RT 3176.)

Lori Nguyen had formerly been best friends with Ellen Wang, but they stopped speaking in 10th grade. (Vol. 17, RT 4021, 4023.) On January 14, Lori was eating ice cream with Hajek (Vol. 17, RT 4026) when Ellen, Jacee, Ngoc, Tina and some of their friends came over. Ellen asked if she had called them the "b" word, and she said no. (Vol. 17, RT 4027-29.) The girls then walked off; she and Hajek left in the van to avoid any confrontation. (Vol. 17, RT 4030.) As they waited in traffic, Tina opened the passenger door (Vol. 17, RT 4031), accused the witness of "dogging" her, and they fought. (Vol. 17, RT 4033.)[45] They punched, scratched, and pulled hair for less than a minute. (Vol. 17, RT 4034.) Jacee jumped in, pulled Tina off, and fought Lori briefly; then Ellen attacked her, punching her head. (Vol. 17, RT 4035.) Hajek pulled Ellen off, but she jumped in again; when Ellen yelled that it was a picked car[46], she and Hajek drove off. (Vol. 17, RT 4037.) She went with Hajek to his parents' house. (Vol. 17, RT 4038.) They listened to music, and he tried to calm her down. (Vol. 17, RT 4039.) He got some crank calls. (Vol. 17, RT 4041.)

After Hajek and Vo were arrested, Ms. Nguyen falsely told the police that Hajek

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[45] "Dogging" means giving a mean look, according to Lori Nguyen. (Vol. 17, RT 4034.)

[46] Nguyen denied knowing it was a stolen van until then (Vol. 17, RT 4042), and she did not report it stolen to the police. (Vol. 17, RT 4045.)

drove away from the fight in Vo's blue car. (Vol. 17, RT 4047.) Ellen was in a gang called the Eagles, and she threatened to kill or "get" Hajek. (Vol. 17, RT 4061.) Hajek and Ellen were screaming on the telephone, and he threatened to "get" Ellen, too. (Vol. 17, RT 4062.) Hajek never said he would kill Ellen's family, and never said he was going to have appellant Vo help him. (Vol. 17, RT 4065.) Hajek was upset because Ellen kept crank calling him. (Vol. 17, RT 4066.)

b. Hajek's Call to Tevya Moriarty

Over the objection of appellant Vo's counsel concerning the admissibility of this evidence as to Vo (Vol. 15, RT 3636), **Tevya Moriarty** testified about a telephone call from Hajek the night before the homicide.

Moriarty worked at Home Express while attending Prospect High School, where she met co-defendant Hajek during summer of 1990. Hajek was a cashier, and they were on friendly terms; he called her two or three times. (Vol. 15, RT 3637-40.) These were informal teenaged conversations. (Vol. 15, RT 3640.) Moriarty had trained Hajek for about three weeks, and never had any problems with him. (Vol. 15, RT 3641.) She never saw signs of mood swings or anything out of the ordinary. (Vol. 15, RT 3644.)

On January 17, 1991, at 8:15 p.m., Hajek called and they spoke until about 8:50. (Vol. 15, RT 3637.) After some small talk, he told her about a girl he was seeing, and about the fight at the mall. He described a group of girls as the aggressors, and said he had pushed one of the girls to get her away from his friend. (Vol. 15, RT 3646.) Hajek

said about twenty girls were fighting with the girl he was with, and the girl he pushed told him that he should have kept his nose out of their business. (Vol. 15, RT 3648.)

Moriarty recalls little detail, but Hajek told her he wanted to get back at the girl who picked the fight. He said he was going to break into the girl's house, kill her family, and kill her last. (Vol. 15, RT 3649-52.) Moriarty was "thrown for a loop," and afraid of making him angry. (Vol. 15, RT 3653.) Hajek was going to make it look like a robbery, but she does not recall him mentioning weapons or how they would be killed. (Vol. 15, RT 3655.) Hajek spoke in terms of "I," not "we;" she had the impression three people would be involved, but cannot firmly recall the conversation. (Vol. 15, RT 3665-66.)[47] Moriarty told her parents but did not call the police; she saw a news broadcast about the Hung homicide and told her parents she knew who did that; she called the police the following Sunday. (Vol. 15, RT 3668.)

Hajek didn't like going to his parents' house; they locked the dog in the bathroom, out of fear that he would sacrifice it. Hajek had talked about Ozzie Osborne, but she did not recall any relevance to the dog. (Vol. 15, RT 3666.)

On *cross-examination by counsel for Hajek*, Moriarty stated she was comfortable working with Hajek, and he spent more time with female employees. (Vol. 15, RT 3669.)

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[47] On cross-examination by appellant Vo's counsel, she reiterated that Hajek only spoke of himself participating in any killing, no one else. (Vol. 15, RT 3684.) Further examination by Hajek's counsel elicited her firm recollection that Hajek said, "I am going to kill them." (Vol. 15, RT 3684.)

Male employees avoided him because he was strange looking; the girls were more sympathetic. He tried too hard to be friendly by giving people gifts. (Vol. 15, RT 3672.) Moriarty thought he was weird because of his interest in comics and how he looked. (Vol. 15, RT 3673-4.) In an interview, she described him as having a crazy glow. (Vol. 15, RT 3675.)

The phone call on January 17 was different from others: he was happy, upbeat, "blabbering," and she thought he drank or smoked marijuana because he sounded peculiar. (Vol. 15, RT 3677-9.) Hajek first asked her to be his Valentine; then he asked if she would still like him if he did something bad; then he talked about the fight and his plan for getting back. (Vol. 15, RT 3680.) Ozzie Osborne music was playing in the background. Hajek said he was going to make the crime look like a robbery, not that he was going to commit a robbery. (Vol. 15, RT 3682-3.)

c. Events Surrounding the Homicide, January 18, 1991

Prosecution witness **Norman Leung**[48] testified that he knew Hajek, Vo, and Lori Nguyen. (Vol. 16, RT 3912.) He had known Hajek for over three years by 1991, but rarely saw Vo. (Vol. 16, RT 3921.) Leung did not recall being asked by Hajek to go with him and Vo to Ellen Wang's house to get revenge (Vol. 16, RT 3927, 3928, 3930), or being asked to help commit a murder. (Vol. 16, RT 3930.)

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[48] According to the prosecution's uncharged conspiracy theory, Norman Leung was an uncharged co-conspirator.

Appellant's brother **McRobin Vo** was called by the prosecution, and he testified that he saw appellant sleeping in their apartment on morning of the incident. He recalls that his brother, appellant Vo, left between 7:00 and 8:00 a.m., with co-defendant Hajek. (Vol. 15, RT 3528-9) Appellant sounded tired, and just said he was going out. (Vol. 14, RT 3530.)

Alice Wang was born on June 19, 1980, and was fourteen when she testified at trial; she had been 10 or 11 when she testified at the preliminary hearing. (Vol. 14, RT 3268, 3332.) At the time of trial, she had little independent memory of the events of that day. (Vol. 14, RT 3279, 3283.)

Alice speaks Mandarin and English. On Friday, January 18, 1991, she was home because it was a teacher in-service day. Two men came to the house that day about 10:15 a.m.; they had a sweater with them, and they asked for Ellen. (Vol. 14, RT 3270.) Vo asked for Ellen, learned she was not there, and they left a paper bag with clothes in it, returning sometime later to write a note.[49] (Vol. 14, RT 3274-3277.) Alice returned to the family room, where she was watching television. (Vol. 14, RT 3337-38.) Alice's grandmother, Su Hung, was cooking in the kitchen. Hajek had a gun and pointed it at

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[49] At trial, Alice could not recall who asked for Ellen, or how many times they came to the door. Her recollection was refreshed by her initial police interview, which stated the men walked in, uninvited. (Vol. 14, RT 3274-3277.) The interview stated Vo asked for Ellen both times, asked to write the note, and wrote the note. (Vol. 14, RT 3336-37, 3279.) At the preliminary hearing, she testified that she invited the men in to write the note. (Vol. 14, RT 3364.)

Alice, but at no point did anyone hit her or hurt her. (Vol. 14, RT 3280.) The men asked Alice to get her grandmother. They took turns talking. (Vol. 14, RT 3283.) Vo told Alice to sit on the stairs. When Alice had to go to the bathroom, Vo told her to take her grandmother along; Alice saw that Hajek had a gun. (Vol. 14, RT 3339 .) Alice went to the bathroom with her grandmother. (Vol. 14, RT 3283.) When they came out, Hajek had put the gun in his waistband, and Alice did not see the gun again until the very end, when she went to see who was knocking at the door. (Vol. 14, RT 3340-41.)

After she went to the bathroom, Alice's grandmother was then tied up, and she was taken upstairs by Vo; Alice and Hajek stayed downstairs watching cartoons.[50] (Vol. 14, RT 3285-89.) Su Hung was blindfolded with a red towel and was scared. (Vol. 14, RT 3301.) Later, they all went upstairs; Vo untied her grandmother's hands.[51] (Vol. 14, RT 3343-45; Vol. 14, RT 3365.) Alice stayed with her grandmother while Vo and Hajek talked outside the bedroom (Vol. 14, RT 3345), and then Alice went with Hajek to watch cartoons; Vo did not come down right away. (Vol. 14, RT 3345-47.) Vo was acting normal when he came downstairs. (Vol. 14, RT 3290.) At some point, Alice went upstairs to the bathroom, and both Hajek and Vo told her to stay in there; she came out

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[50] At trial, Alice could not recall who tied her grandmother; her recollection was extensively refreshed by preliminary hearing transcripts. (Vol. 14, RT 3285-89; Vol. 14, RT 3342.)

[51] Alice stated in her interview with police and testified at the preliminary hearing that scissors were used to cut the rope, although she also testified Vo used a knife. She could not recall which was correct, but agreed on cross-examination that her report to police that scissors were used was accurate. (Vol. 14, RT 3343-45; Vol. 14, RT 3365.)

when they told her to. (Vol. 14, RT 3291; Vol. 14, RT 3348-49.) Vo took her downstairs, and she watched cartoons with him for a while; Hajek came downstairs about ten minutes later. (Vol. 14, RT 3293-4 .) The men went upstairs at times, but she was not left alone for the rest of the day (Vol. 14, RT 3366, 3350-51); Alice was unsure who went upstairs when, or how many times. (Vol. 14, RT 3356.)

Alice's mother Cary Wang called, and the men told Alice to answer the phone and speak English. (Vol. 14, RT 3295-7.) Alice told the men her mother was coming home, and they told her to just sit on the couch. (Vol. 14, RT 3298.) Vo left the room, and at trial she could not recall if he had a weapon.[52] (Vol. 14, RT 3298.) Vo hid in the bathroom, and pulled a knife on Cary Wang when she came in. (Vol. 14, RT 3353.) Vo told Alice to try to calm her mother down when she came in. Alice thinks Vo put one hand around her mother's mouth, and he held a knife with the other hand. (Vol. 14, RT 3299-3301.) Vo put the knife back in the holder (Vol. 14, RT 3362), and her mother went to lie on the couch because she didn't feel well. (Vol. 14, RT 3303.)

Alice went upstairs with one of the men to check on Su Hung; Hung was lying on her bed, not blindfolded, holding a Chinese newspaper over her face and moving slightly. (Vol. 14, RT 3305, 3366, 3367.) Alice told her mother what she had seen. (Vol. 14, RT

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[52] A preliminary hearing transcript indicated that she had earlier testified that Vo got a knife from the kitchen and went into the downstairs bathroom. (Vol. 14, RT 3298.)

3368.) This was before her mother and Vo left. (Vol. 14, RT 3353.)[53] Alice went to the bathroom to change out of her pajamas. (Vol. 14, RT 3308.) Her mother made three or four telephone calls, speaking both in English and Chinese. (Vol. 14, RT 3310.)

Alice's mother left with Vo to go to Ellen's school. (Vol. 14, RT 3310-11.) Alice played cards and watched television with Hajek while her mother and Vo were out. (Vol. 14, RT 3312, 3356-57.) Alice was alone with Hajek for about 10 minutes before her father Tony Wang came home. (Vol. 14, RT 3360.)[54] In a police interview, Alice said Hajek never went upstairs while her mother was gone, and did not leave her alone. (Vol. 14, RT 3358-9.) When Alice's father came in, Alice told him not to be scared, and mentioned the gun. Her father played cards with Hajek. (Vol. 14, RT 3314.)

After Cary Wang returned, Cary asked to see the grandmother but was not allowed to. (Vol. 14, RT 3315.) Her father went upstairs at some point; according to a transcript, Vo tied him up and took him upstairs.[55] (Vol. 14, RT 3315.) Her mother was on the couch, and Alice was comforting her. (Vol. 14, RT 3315.) Alice briefly checked on her grandmother, and saw her asleep; Hajek told her to tell her parents that her grandmother

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[53] Alice later testified that she went up a second time after father was home, and her grandmother looked like she was sleeping. (Vol. 14, RT 3369-70.) However, she also testified on cross-examination by Hajek's lawyer that she recalled seeing her grandmother with a newspaper after both her parents were home. (Vol. 14, RT 3355.)

[54] In a police interview used to refresh her recollection, Alice had said Hajek never went upstairs while her mother was gone, and did not leave Alice alone. (Vol. 14, RT 3358-59.)

[55] Alice did not recall if it was possible Hajek took her father upstairs. (Vol. 14, RT 3318,)

was all right. (Vol. 14, RT 3369-70.) Someone knocked at the door, and Hajek pulled out a gun and told her to answer the door. Alice looked and saw it was the police, then ran to the garage door and saw her mother and lots of police. (Vol. 14, RT 3320.)

Cary Wang is the mother of Ellen and Alice Wang, and daughter of the victim, Su Hung. Cary testified through an interpreter. On Friday, January 18, 1991, she took her daughter Ellen to school, cleaned up at home, and left for work around 9:00 a.m. (Vol. 13, RT 3160.) Alice had no school that day, and Cary planned to return to take her mother and Alice to lunch and a hair salon. She returned home between 11:30 and 12:00, parked her car in the garage and left it running, and saw Alice sitting on sofa with a young white man, about 18 years old. An Asian man came out of the restroom, holding a knife. (Vol. 13, RT 3160-1; Vol. 14, RT 3421.) The Asian man, appellant Vo, covered Cary Wang's mouth, held a knife in the other hand, and told her not to scream; he said they were looking for her elder daughter. He did not touch her neck, clothing, or hair with the knife. She testified that he said that if she screamed, he would kill her whole family.[56] (Vol. 13, RT 3161, 3217, 3241-42.)

Alice told Cary Wang if she did not scream, he would not hurt them. Vo put the knife down.[57] (Vol. 13, RT 3161-3.) Alice said the men were Ellen's friends. (Vol. 13,

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[56] On cross-examination by appellant Vo's counsel, Mrs. Wang acknowledged that Vo actually said he would not hurt her if she did not scream. (Vol. 13, RT 3248.)

[57] Mrs. Wang clarified that Vo took the knife into the kitchen, but she did not recall where he put it. Vol. 13, RT 3187.) On cross-examination by appellant Vo's counsel, she agreed that she testified at the preliminary hearing that he put the knife back

RT 3248.) Both men wore gloves. (Vol. 13, RT 3164-5.) Alice told her they had guns. (Vol. 13, RT 3167.) Hajek said he had 2 guns, but she never saw a gun that day. (Vol. 13, RT 3167, 3257.) Hajek said he would kill her family if she called the police. (Vol. 13, RT 3199-3201.) Cary Wang was never asked for money or jewelry; neither Vo nor Hajek ever hit her or Alice, nor did they attempt to tie them up. Mrs. Wang never saw Hajek and Vo go upstairs at the same time. (Vol. 13, RT 3257-8.)

Sitting at the dining room table, Cary Wang spoke to Vo and Hajek. She told them she had children and she would help them, and she offered money. Vo said that he was looking for her daughter, that she had some arguments with his relative at school. (Vol. 13, RT 3165-66.) Mrs. Wang apologized and offered to talk with her daughter herself. (Vol. 13, RT 3175-6.)

Cary Wang asked them to let her check her mother, who had high blood pressure. (Vol. 13, RT 3168.) First, Hajek went up by himself (Vol. 13, RT 3169), and when he returned, he said her mother was reading the newspaper. (Vol. 13, RT 3171-2.) The second time, Alice accompanied Hajek. (Vol. 13, RT 3169, 3170, 3173.) Alice said she had seen Su Hung reading a newspaper (Vol. 13, RT 3249) or sleeping; Alice went up twice that day. (Vol. 13, RT 3232, 3234.) Vo went upstairs several times. (Vol. 13, RT 3234.)

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in the knife block and she never saw him later in the day with a knife. (Vol. 13, RT 3241-42.)

Other than the knife Vo held to her neck, and the knife Hajek used to cut the rope, Cary Wang never saw a knife in either defendant's hands. She did not see anything being washed in the kitchen, and did not hear water running in the kitchen sink. (Vol. 13, RT 3223.) She heard no sounds from upstairs. (Vol. 13, RT 3225.)

Cary Wang asked to use the phone to cancel some appointments; instead, she called her husband at work. (Vol. 13, RT 3179-80.) Her call to her husband did not make sense; she told him she needed to cancel an appointment, and he surmised that she wanted him to come home. (Vol. 13, RT 3185.) Mrs. Wang also called Sofia Kuo at her office, hinting there was a family emergency like one that had happened earlier; Mrs. Wang was referring to a burglary. (Vol. 13, RT 3186.)

After Cary Wang had been home about one hour, Vo wanted Cary to pick Ellen up at school so he could teach her a lesson.[58] (Vol. 13, RT 3166. 3175.) Vo wore gloves when they went to find Ellen.[59] (Vol. 13, RT 3183.) Mrs. Wang drove to the school, and Vo was a passenger; he said he had a gun, but she never saw it. (Vol. 13, RT 3189.) She was worried, but not afraid of him. (Vol. 13, RT 3256.) Mrs. Wang and Vo went to the

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[58] On cross-examination by counsel for appellant Vo, Mrs. Wang acknowledged that at the preliminary hearing she had testified that she asked one of the men to go to the school with her to pick up Ellen, because "I was trying to separate the two of them so when my husband came home, it would be easier for him to handle one person." (Vol. 13, RT 3250.)

[59] At the preliminary hearing, Cary Wang testified that Vo had taken his gloves off once and put them on again. (Vol. 13, RT 3251.)

school office and learned Ellen was not in school. Cary Wang never saw Vo with a knife during this trip. (Vol. 13, RT 3189-90.)

After they left the school, Mrs. Wang told Vo she needed to bring emergency airline tickets to her office, and he agreed to go there with her. At the office, she saw Sofia and Paul; she told Paul in Taiwanese to call the police. (Vol. 13, RT 3190-91.) Vo stood at the door, but he neither said nor did anything. (Vol. 13, RT 3259.) She returned home with Vo; on the way, Vo asked her to call home on her car phone. (Vol. 13, RT 3191.) Vo talked on the phone, then told her to park in the garage. (Vol. 13, RT 3192.)

They arrived about 2:00, and she saw her husband playing cards with Hajek. (Vol. 13, RT 3193.) She and her husband offered money and valuables if the two men would let them go, but the men did not accept, and Vo said her husband needed to be tied up. (Vol. 13, RT 3194, 3226, 3252.) Hajek tied her husband, and used a small knife to cut the rope. (Vol. 13, RT 3197-8, 3222, 3255.) After Hajek tied up her husband, he came downstairs and told Vo that Mr. Wang wanted to talk to him. Vo went upstairs had Alice get her water and took two Tylenols, and lay down on the couch. (Vol. 13, RT 3194-5, 3235.)

Mrs. Wang identified bottles of corn oil and cash found in a shopping bag. (Vol. 13, RT 3209.) Su Hung had 30,000 Taiwan dollars, and 1,000 U.S. dollars. (Vol. 13, RT 3211, 3246-7.) Mrs. Wang also identified a threatening letter that she received before the preliminary hearing, which she gave to police. (Vol. 13, RT 3212.)

Tony Wang, whose Chinese name is Chi Chiang Wang, also testified via a Mandarin interpreter. (Vol. 16, RT 3847.) On January 18, 1991, he left for work at 5 a.m., and received a call from his wife around noon, asking him to go home to pick up an airline ticket. She sounded strange. (Vol. 16, RT 3848-49.) He first went to her office, where he was told that she had just been there with someone and had left. (Vol. 16, RT 3849-50.) Mr. Wang then went home, he believes about 1:30, and saw co-defendant Hajek playing cards with Alice. (Vol. 16, RT 3850-51.) Alice told Mr. Wang he couldn't use the telephone or go upstairs, and that Hajek had a gun, although Mr. Wang did not see a gun. Alice said another man went with his wife Cary Wang to the school, to look for Ellen. (Vol. 16, RT 3851-52.)

Hajek said he had "some troubles" with Mr. Wang's daughter, and that he wanted to scare her; Mr. Wang told Hajek there were no problems they could not solve. (Vol. 16, RT 3853.) Hajek said his girlfriend had a fight with Ellen. (Vol. 16, RT 3856.)[60] Hajek and Mr. Wang played cards; Hajek wore gloves and kept one hand in his pocket. (Vol. 16, RT 3854.) Alice said his mother-in-law Su Hung was upstairs, asleep. (Vol. 16, RT 3855.) Cary called once and talked to Mr. Wang, and Hajek took another telephone call. Cary then returned with appellant Vo. (Vol. 16, RT 3857.)

Mr. Wang asked what the men wanted, and offered money or an apology from

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[60] According to Mr. Wang's preliminary hearing testimony, Vo said his cousin had been beaten up by Ellen. (Vol. 16, RT 3862.)

Ellen. One of them said they did not want to hurt them, but wanted to scare Ellen. (Vol. 16, RT 3858.)[61] Cary Wang also offered jewelry to settle the problem. (Vol. 16, RT 3863.) Each of the men went upstairs separately, but Mr. Wang could not recall how many times or how long they stayed. (Vol. 16, RT 3859.) At Cary Wang's request, one of the men went upstairs with Alice, and she reported that her grandmother was reading the newspaper. (Vol. 16, RT 3860-61.)

The men told Tony Wang to sit on the couch, and his hands were tied behind his back; he testified at the preliminary hearing that the Vietnamese man tied him. (Vol. 16, RT 3863-64.) Mr. Wang was tied about one half hour after Cary Wang returned home. (Vol. 16, RT 3870.) Hajek took Mr. Wang upstairs to a bedroom other than the one occupied by Su Hung, and tied his feet to the bedpost; Hajek told Mr. Wang not to scream, or he would kill him. Mr. Wang was afraid and could not move off the bed. (Vol. 16, RT 3865-66.) Appellant Vo came into the room, bringing a metal chair. (Vol. 16, RT 3867.)

Mr. Wang heard someone knock on the door, then heard people running, and heard his wife tell Alice to run. (Vol. 16, RT 3869.) The police came and untied him. (Vol. 16, RT 3872.) **Ellen Wang** testified that she was not in school on January 18,1991; she had ditched school to be with friends. When she went to the home of her friends Jacee and

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[61] Mr. Wang told the police that evening that Vo said they did not want to hurt anyone. (Vol. 16, RT 3894.)

Tina, she received a message from her mother not to come home because there were two guys looking for her.[62] (Vol. 13, RT 3104, 3146-7.) Ellen went home anyway, to see what was going on. When she arrived, she saw police cars. (Vol. 13, RT 3104-5.) She asked the race of the two men, but does not recall telling police, "I will kill those fuckers." (Vol. 13, RT 3105-06, 3149.)

She had left items on her bed that morning; some items were moved, but her stereo was not moved, her television was in its place and no money was missing. (Vol. 13, RT 3116, 3122.) Items in her parents' bedroom and Alice's room were moved, but were essentially as they had appeared when she left that morning. (Vol. 13, RT 3127.) She was not aware of the bag in the laundry room containing oil. (Vol. 13, RT 3153.)

When Ellen was taken to the police station, she gave then a hard time, did not cooperate, and refused to be photographed. (Vol. 13, RT 3107.) She was not allowed to make a phone call, and asked to speak to a lawyer. (Vol. 13, RT 3150.) Ellen saw Hajek at the police station and he gave her "a really, really dirty look." (Vol. 13, RT 3109.)

Ellen Wang identified a letter sent to her family around the time of the preliminary hearing. The letter, signed "Shoga, Man of Power," was addressed to Cary Wang; it stated: "Dear Bitch, show up in court and you will die just like your grandma." (Vol. 13, RT 3115.) Ellen never saw appellant Vo before the trial, and never heard of him before. (Vol. 13, RT 3103, 3155.)

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[62] Cary Wang's testimony did not mention that she made this call.

d. Police Intervention: Arrest and Aftermath

Raymond Wendling, retired by the time of trial, had been a patrol officer on January 18, 1991, and he was the first officer to arrive on the scene. Cary Wang ran out the garage door after Wendling knocked at the front door. (Vol. 16, RT 3793.) Officer Anderson arrived as she ran out, and Wendling sent Anderson to the back yard. (Vol. 16, RT 3795.) Wendling obtained his shotgun from his patrol car; he saw a black-haired person peek outside and then retreat; Anderson detained this person, identified as Hajek. A handgun near Hajek turned out to be a pellet gun, which was retrieved. (Vol. 16, RT 3796-3798.) On Hajek's person were a screwdriver, a Citibank card in the name of Lee, a pair of dice, and no identification; Hajek was wearing gloves. (Vol. 16, RT 3799-3801.)

James Anderson arrived about 3:00, after Wendling, and as he arrived the garage door was opening; a woman ran out, then a young girl. (Vol. 16, RT 3988-89.) Anderson went to the rear, and saw Hajek leave through a sliding glass door, holding a handgun. Hajek was wearing a black leather jacket and green pants. Anderson shouted, and Hajek stopped, put his hands in the air, and tossed the gun. (Vol. 16, RT 3995; Vol. 15, RT 3777.) Hajek shouted "It's a pellet gun" as he dropped it, and he also said "Robby" was still in the house. Wendling shouted for Rob to come out of the house. In less than a minute, Vo left the house again, but ran back in when Harrison yelled "Police, stop." (Vol. 16, RT 4002.)

David Harrison, a San Jose police sergeant, responded to a call at 2:56 p.m. to

5871 Silver Leaf Road. (Vol. 14, RT 3371.) When he arrived at the Wang home around 3:03 p.m., he saw Officer Wendling in front of the garage door, and heard on the police radio that Officer Anderson was at the rear of the residence. (Vol. 14, RT 3373.) He heard Anderson yelling for someone to drop the gun; other officers arrived. (Vol. 14, RT 3375.) Appellant Vo came running out the laundry room door, and Harrison told him to stop.[63] Vo started to run back, but stumbled and fell; he was then arrested. (Vol. 14, RT 3375-6.) Anderson saw Harrison pointing a shotgun at an open doorway, and saw Vo attempting to push himself off the floor; he handcuffed Vo with Officer Schmidt's handcuffs. (Vol. 16, RT 4004.)

Harrison and Schmidt entered the house, found Tony Wang upstairs, and released him. (RT 3376-7.) They entered Su Hung's bedroom, saw the comforter pulled off to the end of the bed, and left the room. Soon thereafter, Schmidt announced he had found another victim. (Vol. 14, RT 3378.) Su Hung was on the floor; she had been covered by bedding and not seen earlier. (Vol. 14, RT 3379.)

Christopher Passeau was a patrol officer who arrived at the scene about 3:58 p.m., and was assigned to do traffic control. (Vol. 14, RT 3416.) At about 7:30 p.m., he was asked to conduct a canvass for cars, and he found a white Toyota mini-van parked just west of Silver Leaf. (Vol. 14, RT 3416.) It was impossible to see the van from the

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[63] According to Anderson's preliminary hearing testimony, read by stipulation at trial, Vo followed Hajek out the sliding glass door at the rear of the house. (Vol. 16, RT 3999.)

Wang home. The vehicle was impounded. (Vol. 14, RT 3418.)

William Santos was a San Jose police officer assigned to collect and preserve evidence. (Vol. 14, RT 3420.) From Hajek, he obtained a black leather jacket with possible blood stains at the bottom (Vol. 14, RT 3424-25) and a pair of vinyl gloves, the left of which was blood-stained. (Vol. 14, RT 3427.) He spoke with both defendants; appellant Vo gave the name Larry Lai. (Vol. 14, RT 3430.)

Walter Robinson was a homicide detective on January 18, 1991, partnered with Ed Escobar; they were the lead detectives in this case. (Vol. 16, RT 3803.) They responded to the scene between 4:00 and 4:30, and spent one to one and a half hours there. (Vol. 16, RT 3808.) Robinson interviewed co-defendant Hajek before putting him in a room with appellant Vo. (Vol. 16, RT 3811.) Hajek and Vo were unaware there was a microphone in the room, and also unaware that earlier interviews with them were tape-recorded. (Vol. 16, RT 3813.) The sound quality of the tape is poor (Vol. 16, RT 3815), but portions are identifiable as being spoken by co-defendant Hajek. Robinson testified that only Hajek is audible on the tape. (Vol. 16, RT 3818, 3844.)

Co-defendant Hajek was interviewed in two stages. Robinson recalled that Hajek was lucid, sometimes light-hearted, not intoxicated or delusional. (Vol. 16, RT 3823-24.) Both interviews with Hajek took place before the recorded conversation between Hajek and Vo. (Vol. 16, RT 3829-30.) Hajek admitted being in the house, but he did not confess. (Vol. 16, RT 3835.)

e. **Forensic Evidence**

Jennifer Dotzler was responsible for investigating the physical evidence in he case. (RT 3435-37.) She arrived at the Wang home just after 4:00 p.m. on January 18, 1991. (Vol. 14, RT 3439.) She collected an air pellet gun from the trunk of Welding's patrol car (Vol. 14, RT 3440); it was damaged (Vol. 14, RT 3442) and inoperable. (Vol. 14, RT 3508-10.)

In a paper bag in the laundry room, there were five bottles of cooking oil and $278 cash, which was processed for fingerprints. (Vol. 14, RT 3444, 3445-46.) A note was found nearby, under a stroller, stating, "Here is the turtleneck, Rob, call 729-0812, at 9:00 p.m.

I need my CD." (Vol. 14, RT 3448.) Black knit gloves were on the kitchen table, and rope was found on the family room sofa. (Vol. 14, RT 3451.)

Rope was also recovered from the morgue; it had been around the victim's neck. (Vol. 14, RT 3453.) Dotzler collected knives from the sink, with no apparent blood stains; knives in the holder were dry and unremarkable. (Vol. 14, RT 3455-57.) Towels were dry and had no stains. (Vol. 14, RT 3435.)

A Macy's bag she examined contained a blue turtleneck, 25 compact discs, 4 floppy disks, a pair of scissors, a clock radio, 18 cassette tapes, a Nintendo Game Boy, a Sony Diskman, and a roll of quaters. (Vol. 14, RT 3459.) Scissors were on the floor of the master bedroom, and rope was on the bed. (Vol. 14, RT 3461.) A stereo tuner was found

on Alice's bed. (Vol. 14, RT 3462.)

Su Hung's body was towards the foot of the bed, and lying perpendicular to it. Hung was on her back, leaning towards her left side, and her hands were tied behind her. (Vol. 14, RT 3462-63, 3466, 3468.) Her clothing was collected (Vol. 14, RT 3464), as well as a hand towel which had been around her neck and chin; there was a rope around her neck above the wound. (Vol. 14, RT 3466.) When Dotzler arrived, Hung's body was not cold to touch, and rigor mortis had not set in. (Vol. 14, RT 3467-68.)

In a later search of the white mini-van, she found two knives, a plastic grip for the pistol, a damaged ignition, long dark hair, and glove packaging. (Vol. 14, RT 3472-74.) Evidence taken from Hajek's person after arrest included a Citicard, two dice, and a screwdriver. (Vol. 14, RT 3476.) Hajek's gloves tested presumptively positive test for blood. (Vol. 14, RT 3413, 3515.) After Vo's arrest, evidence found on his person was: a set of keys, a Bic lighter, sunglasses, chewing gum, and a screwdriver. (Vol. 14, RT 3477.) Blood samples were also taken from both defendants. (Vol. 14, RT 3478.)

Cary Wang's purse was found, intact, in her car. (Vol. 14, RT 3483.) There were no signs of disturbance when the witness entered the house (Vol. 14, RT 3487), although the house was not tidy. (Vol. 14, RT 3494, 3496, 3499.)

Douglas Ridolfi was a criminalist with the Santa Clara county crime lab. (Vol. 15, RT 3570-4.) He prepared a written report concerning evidence in this case on May 24, 1991. (Vol. 15, RT 3575.) Co-defendant Hajek's left glove tested positive for human

blood. (Vol. 15, RT 3579, 3582.) There was not enough blood to learn the ABO type of the blood, but a subtype (different from both Hajek and Vo, but possibly from the victim) was found. (Vol. 15, RT 3586-8, 3633.) There was also a blood stain on co-defendant Hajek's leather jacket. (Vol. 15, RT 3588.) No blood stains were found on appellant Vo's clothing. (Vol. 15, RT 3589-90, 3628.)

A large kitchen knife tested presumptively positive for blood, but the witness could not tell if it was human blood, nor if it was fresh. (Vol. 15, RT 3590-91.) Samples were sent to an independent laboratory for DNA testing. (Vol. 15, RT 3593.)

Brian Wraxall is a forensic serologist. (Vol. 15, RT 3727.) He received blood samples from Hajek, Vo, and Hu Sung, and a pair of gloves. Blood was detected on the left glove, with two stains on the palm and one on the wrist. (Vol. 15, RT 3732-3734.) The blood did not come from Hajek or Vo, but could have come from Su Hung. (Vol. 15, RT 3737, 3738.) One out of 570 people in the general population would have the three blood markers that Su Hung had. (Vol. 15, RT 3755, 3773-74.)

Dr. Angelo Ozoa, the chief medical examiner for Santa Clara County (Vol. 16, RT 3947), testified concerning the autopsy. He described clothing worn by Su Hung, a band around both wrists, cord around her neck, and a towel covering part of her neck. (Vol. 16, RT 3950.) Her body measured 61 inches and weighed 87 pounds. Time of death was very hard to tell from available information. (Vol. 16, RT 3952.)

There were two major injuries to the neck: first a ligature had been applied

(leaving an indentation and petechial hemorrhages to her eyes, indicating pressure around the neck) (Vol. 16, RT 3954-55), and the second wound was a cut or slash through the windpipe, 3.5 inches in length and .75 inches deep. (Vol. 16, RT 3955.) The victim also had a stab wound on the left shoulder, five very superficial wounds on the left side of her chest, two superficial cuts near the neck wound, and a week-old bruise on her hip. (Vol. 16, RT 3957-58.) There was also a small contusion on her chin, and her jade bracelet had been broken. (Vol. 16, RT 3960.)

The cause of death was strangulation followed by the incision wound on her neck. (Vol. 16, RT 3961.) The stab wound to her shoulder also occurred while she was alive. (Vol. 16, RT 3963) Dr. Ozoa could not speculate as to how much time elapsed between the cut and her death. Nevertheless, he did not believe she had choked on her own blood. (Vol. 16, RT 3966, 3968.) He explained that various factors may affect the time from strangulation to death (Vol. 16, RT 3970), nor could he speculate about any pain the victim might have felt because she may have been unconscious, and pain, moreover, is subjective. (Vol. 16, RT 3971.)

2. Co-Defendant Hajek's Defense to Guilt

Co-defendant Hajek presented extensive evidence, via both lay and expert witnesses, concerning his background and mental health, in support of his mental state defenses to guilt. He was abandoned and in foster care in his early years. (Vol. 19, RT 4637-4678.) His adoptive mother, Linda Hajek, described Hajek's adoption, early

difficulties, and his problems with anger and getting into trouble during adolescence. (Vol. 18, RT 4203-4335.)

Hajek's juvenile probation officer, Sally (Shaver) Lowell, described Hajek's juvenile offenses (possession of nunchucks, indecent exposure, driving a stolen car, possessing a stolen bank card, and assault), apparent mental health problems, and psychiatric hospitalization. (Vol. 18, RT 4345-4454.) James Griffin, Ph.D, tested and treated Hajek as a juvenile; Griffin had recommended that Hajek be hospitalized. (Vol. 18, RT 4456-4507.) John Hennessey, a social worker at Monte Villa Hospital, described Hajek's hospitalization in 1989-90. (Vol. 19, RT 4520-4554.) Dean Friedlander, M.D. treated co-defendant Hajek at Monte Villa Hospital, prescribing lithium for symptoms of mood disorder. (Vol. 19, RT 4557-4630.)

Rahn Minagawa, Ph.D., was retained by Hajek as an expert trial witness. (Vol. 19-20, RT 4638-4910.) He conducted psychological testing, reviewed background materials, and interviewed Hajek several times, concluding that at the time of the offense, Hajek suffered from cyclothymic disorder and a borderline personality disorder with antisocial traits. (Vol. 19, RT 4655.)

3. Defendant Vo's Defense to Guilt

Defendant Vo disputed the prosecution's version of events, as well as Dr. Minagawa's implied accusation that Vo had killed Ms. Hung. Vo's defense was presented via his own testimony, as well as that of a witness at Cary Wang's office.

Sylvia Kuo Yang, a self-employed tax preparer, shared office space with Cary Wang for about one and one half years. (Vol. 20, RT 4913.) Yang had received a call from Cary Wang at about 1:00 or 1:30 p.m. on January 18, and saw her about one half hour later at the office, accompanied by an Asian teenager. (Vol. 20, RT 4916.) The young man was calm, and she thought he was Ellen's boyfriend. (Vol. 20, RT 4919.) Mrs. Wang was looking for something in her desk for no more than five minutes (Vol. 20, RT 4917), and then the two went across the hall. (Vol. 20, RT 4920.)

On cross-examination, Ms. Yang testified that in response to what Mrs. Wang told the people across the hall, office personnel called the police. (Vol. 20, RT 4921.)

Appellant **Loi Vo** testified in his own defense at the guilt phase. His direct testimony was brief, covering only eleven pages of transcript. (Vol. 20, RT 4981-92.) He was cross-examined extensively by not only the District Attorney (Vol. 20- 21, RT 4993-5116), but also by counsel for co-defendant Hajek. (Vol. 21, RT 5197-5252.)

Appellant Loi Tan Vo was born on March 6, 1972, and was 23 years old when he testified at trial. (Vol. 20, RT 4981.) He did not see co-defendant Steve Hajek on the night before January 18, 1991. (Vol. 20, RT 4981.) Hajek went to Vo's apartment on the morning of the 18th at about 7 a.m. while Vo was asleep; Vo's brother Dexter woke Vo up. (Vol. 20, RT 4981.) Hajek told Vo he wanted to go with Vo to meet Ellen, whose last name Vo did not know at the time. (Vol. 20, RT 4983.)

Vo and Hajek first went to Hajek's house for about thirty minutes; they saw Mrs.

Hajek there. (Vol. 20, RT 4983.) Next they went to a drug store to drop off a roll of film; then they went to Yerba Buena High School to meet Ellen, but they did not find her there. (Vol. 20, RT 4983.) Next, they went to the Wang house, rang the bell, and Alice answered the door; Alice claimed Ellen wasn't home, but they did not believe her. (Vol. 20, RT 4984.) They left, and then returned to the Wang house with a turtleneck and a thermal shirt for Ellen, hoping Alice would bring Ellen to the door. Hajek gave Alice the shirts, and Vo wrote a note. (Vol. 20, RT 4984-5.) While they were in the house, Alice answered the phone, and said her mother would be coming home; about 15 minutes later, Alice's mother arrived. (Vol. 20, RT 4986.)

Hajek and Vo had gone to the house that day because Hajek had a problem with Ellen and the two were supposed to talk to her. Vo was just tagging along, planning to intervene if Ellen's friends were there and the confrontation became hostile. (Vol. 20, RT 4987.) Hajek wanted to tell Ellen to leave him alone. Hajek made no reference to killing Ellen, and made no reference to threatening or harming any other members of Ellen's family. (Vol. 20, RT 4987-8, 4992.)

When Hajek and Vo first arrived at the house, Su Hung was in the kitchen. Vo tied her up and took her upstairs, because Hung seemed angry. It was a stupid thing to do, but Vo did it so things wouldn't get out of hand. Alice, Hajek, Vo and Su Hung all went upstairs, and Su Hung was left to lie on her bed. (Vol. 20, RT 4991.) Appellant denied killing Su Hung, intending she or anyone else be killed, or participating in the killing in

any way. (Vol. 20, RT 4992.)

Cary Wang entered the house through the garage entrance, and came into the dining room. Appellant Vo stated he pulled a knife out to scare her, but he just flashed the knife. He was behind Mrs. Wang, put his hand over her mouth, and told her no one would be hurt if she did not scream. (Vol. 20, RT 4988.) Cary Wang was frightened, and appellant Vo felt bad because he didn't mean to scare her that much. Vo put the knife back in the holder, showing her that it was back in place, so Mrs. Wang would not be scared anymore. (Vol. 20, RT 4988-9.)

Cary Wang had the idea to go to Ellen's school to look for her, and Vo agreed to go with her; but Ellen was not at school. (Vol. 20, RT 4989.) Cary asked to go to her office to pick up some tickets, and they did so, then returned to the house. (Vol. 20, RT 4989-90.)

On cross-examination by the prosecutor, Vo testified that he had met Hajek during his senior year of high school; that it was between January and May of 1990, before Vo went to boot camp in the summer of 1990. (Vol. 20, RT 5012-13.) At first, Vo didn't like Hajek; they became friends after Vo attended boot camp, and close friends by January, 1991. (Vol. 20, RT 5014-5.) Vo did not have a best friend, but was also good friends with Norman Leung, Hai Nguyen, Billy McDonald, someone named Chris, and others. (Vol. 20, RT 5015-6.) Vo used Hajek's adoptive father as a job reference, visited the Hajek home two or three times per week, and thought they liked him. (Vol.

20, RT 5016-7.) Vo was not aware of Hajek's mental history, although he thought Hajek was weird. (Vol. 20, RT 5018.)

Vo met Norman Leung in 1989, but by early 1991, he and Hajek were not hanging around with Leung because Leung was on restriction. (Vol. 20, RT 5019.) Vo was also good friends with Lori Nguyen. (Vol. 20, RT 5020.) Their group of friends broke up in late 1990, but in January, 1991, Vo spent time with Hajek and Lori. (Vol. 20, RT 5020.) Vo denied having romantic feelings about Lori. (Vol. 20, RT 5024.) Vo lived near Norman, and was aware that Norman and Hajek were arrested on January 1, 1991. (Vol. 20, RT 5026.) Vo kept a diary (exhibit 80). (Vol. 20, RT 4993.) The diary entry for January 1, 1991, noted that two "brothers" were caught and he was spared; Vo admitted that he was supposed to have gone along with them that night. (Vol. 20, RT 5027.)

Vo recalled an incident with Lori Nguyen and a group of girls; he does not know the date, but he went to Hajek's the night that happened. (Vol. 20, RT 5030.) Hajek and Lori were in Hajek's bedroom, listening to music, and both told him about the incident: they were eating ice cream, got into a van, and there was a verbal exchange with Tina and Jacee. That escalated into fight between Tina and Lori, with Jacee joining in, and someone yelled that the van was stolen. Hajek got out of van and threw Ellen into a bush. (Vol. 20, RT 5030-2.) Hajek was angry at Ellen for bringing attention to the fact that the van was stolen. (Vol. 20, RT 5034.) While Vo was at Hajek's that night, Hajek received a series of phone calls that were crank calls. (Vol. 20, RT 5034.) Hajek believed the calls

were coming from Ellen, and Hajek was swearing, but he made no threats. (Vol. 20, RT 5035, 5037.) Vo drove himself home, dropping Lori off on his way. Lori was angry, but she did not say much about Ellen; the fight was between her, Jackie and Tina. (Vol. 20, RT 5037.)

Between Monday and Friday, Hajek referred to Ellen, and said he was still getting crank calls at odd hours of the night. (Vol. 20, RT 5038.) Vo never met Ellen, never spoke to her, and didn't know where she lived. (Vol. 20, RT 5041.) Hajek never said how he learned where Ellen lived. (Vol. 20, RT 5041.) Hajek simply showed up at Vo's house at 7 a.m. on Friday; they had not discussed this the night before. (Vol. 20, RT 5042.)

Vo kept letters from Hajek in his cell because there was information that Vo needed to get from Hajek. (Vol. 20, RT 5043.) Vo does not trust his safety in protective custody. (Vol. 20, RT 5044.) When Vo went with Hajek on January 18, it was not for the purpose of murder. (Vol. 20, RT 5045.) Vo does not like Hajek, blames him for his arrest, and is innocent of this crime. (Vol. 20, RT 5045.) Vo denied asking Norman Leung to go along with them. (Vol. 20, RT 5047.) Hajek was mistaken when he wrote in a letter that they had asked Bucket to go with them. Vo kept the letters in order to give them to his attorney, but had not turned them over to the attorney when they were seized by the guards. (Vol. 20, RT 5049.)

Vo knew that Hajek was strange, but didn't know he was bipolar or had undergone

mental health treatment. (Vol. 20, RT 5052.) Hajek went out of his way to befriend Vo, and was usually upbeat, but sometimes depressed. (Vol. 20, RT 5053.)

Vo did not expect to see Hajek on the morning of January 18, 1991. Hajek asked him to go talk to Ellen. (Vol. 20, RT 5056.) Vo had come home late and he did not want to go, but then Vo left, with Hajek driving the stolen white van. (Vol. 20, RT 5057-8.) Vo is unsure where he got the gloves since his family shares everything; he wore gloves because it was winter, and the van was stolen. (Vol. 20, RT 5059-61.) They arrived at Hajek's house at about 7:30, and saw Mrs. Hajek as they were leaving. (Vol. 20, RT 5063.) Hajek told his mother that they were going to look for jobs. (Vol. 20, RT 5076.) They were in Hajek's room under 30 minutes, and Hajek said he was supposed to meet Ellen to stop the crank calls. (Vol. 20, RT 5064.) Vo was asked to go along because Ellen had friends in a Vietnamese gang called the Eagles. (Vol. 20, RT 5064-5.) Hajek was afraid of this gang, and Hajek did not want to meet Ellen alone. (Vol. 20, RT 5068.) Vo did not even know Ellen, and did not plan to commit any crimes with Hajek that morning. (Vol. 20, RT 5073.)

Appellant Vo stated that Su Hung was shorter than he (Vo is 5'4"), not muscular, and she looked about 70 years old. (Vol. 20, RT 4993.) Vo does not speak Chinese, and Hung did not speak English. (Vol. 20, RT 4994.) When he and co-defendant Hajek entered the house, Hung seemed confused, and then angry. (Vol. 20, RT 4994-6, 5097.) Hung was not happy. (Vol. 20, RT 4998.) She was tense, and maybe afraid. (Vol. 20, RT

5000-5001.)

Appellant Vo and co-defendant Hajek were wearing gloves because they were in a stolen car, and it never dawned on Vo to take the gloves off once he entered the house. (Vol. 20, RT 5002.) Hajek drove the car. (Vol. 20, RT 5003.) Appellant denied wearing gloves so he would not leave fingerprints in the house, and stated he did not keep them on the whole time he was in the Wang house. (Vol. 20, RT 5004.)

When Vo was looking at Su Hung, Hajek was standing close by, pointing a gun at her; pointing the gun was not a part of a plan. (Vol. 20, RT 4993.) Vo knew Hajek had a pellet gun; it was inoperable, but they didn't tell anyone in the Wang house. (Vol. 20, RT 5005-6.) Vo stated, "The whole situation was unpleasant, sir... it just developed. It wasn't like planned the night before or anything like that." (Vol. 20, RT 5008.) After Hajek pointed the gun, Alice wanted to go to the bathroom, so she and Hung did so. (Vol. 20, RT 5009.)

Vo takes responsibility for his acts, such as holding Cary Wang briefly near her throat. He meant to block her exit. (Vol. 20, RT 5075.) There was no plan; it developed and he made a really bad judgment call, but "I didn't see anything, any great harm coming." (Vol. 20, RT 5075.) He denied a plan to rob the Wangs, and states they were to meet Ellen at school. (Vol. 20, RT 5079.) They waited in the school parking lot for maybe an hour (Vol. 20, RT 5080), and Vo had the impression that they were supposed to meet Ellen at a certain place. (Vol. 20, RT 5081.)

Hajek usually carried the pellet gun around; it was for prevention, and it didn't work. (Vol. 20, RT 5082.) Hajek assumed that if Ellen wasn't at school, she must be at home. (Vol. 20, RT 5085.) They arrived at her house about 10:00 or 10:30, and did not know what to expect; there was no plan to take the family hostage. (Vol. 20, RT 5086.) When Alice first came to the door and said Ellen wasn't there, they thought she was looking back at Ellen (Vol. 20, RT 5087), but she was watching TV. They lied to get into the house. Vo was just going along with Hajek, and did not give it much consideration. (Vol. 20, RT 5087.) After Alice said Ellen was not home, Hajek decided to tell Alice they had a sweatshirt to give to Ellen; it was the sweatshirt Vo wore. (Vol. 20, RT 5088-9.) Vo thought of writing the note, which got them into the house. (Vol. 20, RT 5093, 5094.) Once in the house, they found that Ellen in fact wasn't there. (Vol. 20, RT 5092.) Vo did not intend to kill Ellen, and did not even know her. (Vol. 20, RT 5093.) Vo only wanted to tell her to leave Hajek alone. (Vol. 20, RT 5094.) He thought Hajek might slap Ellen, to get her off his back, but that was not planned. (Vol. 20, RT 5095-96, 5098.)

After Alice took the note, Hajek told her the two of them were staying in the house; Hajek took out the pellet gun and told Alice to do what they said and nobody would get hurt. That bothered Vo, but he didn't expect this murder to happen. (Vol. 20, RT 5098-99, 5101-2.) Su Hung was angry, and Vo was afraid of her; Hung had authority because of her age. (Vol. 20, RT 5102-03.) Alice needed to use the bathroom, so she and her grandmother went to the bathroom. (Vol. 20, RT 5105.) After they returned, Vo tied

Su Hung up. (Vol. 21, RT 5112.) They were intimidated by her instead of the other way around, and thought she might run to the phone. (Vol. 21, RT 5113-14.) Vo believed he had asked Alice to get the rope but was not sure, and he denied giving most of the orders that day. (Vol. 21, RT 5115, 5118.)

At first Vo felt he "was tagging along and it wasn't my problem. As time went on I was getting irritable. I wanted to leave. Hajek said, no. We had to stay there." Cary and Tony Wang talked with Vo, and Hajek spent more time with Alice. (Vol. 21, RT 5116.) Vo could not leave because he had not driven there; Vo also did not know the grandmother, Su Hung, was dead until shortly before the police arrived. (Vol. 21, RT 5117.)

Vo tied Su Hung, and cut the rope with a pair of scissors. She and Alice went back in the bathroom so Vo and Hajek could talk. (Vol. 21, RT 5118.) They decided to put Hung on her bed because she looked fatigued. (Vol. 21, RT 5120-22.) All four of them went upstairs. Then Vo also tied Hung's feet, but untied them before Cary Wang arrived because Hung was cooperating, and he tied her hands more comfortably. (Vol. 21, RT 5123-24.) He cannot explain why she was blindfolded, stating "there's no righteous reason for it, sir." (Vol. 21, RT 5126-27.)

Vo removed Hung's blindfold when he went upstairs to check on her. (Vol. 21, RT 5128.) After Su Hung was brought upstairs, Vo checked the room for a phone and weapons. Vo went downstairs, and Hajek came back up. (Vol. 21, RT 5130.) Vo only remained alone

with Hung for five minutes. (Vol. 21, RT 5132.)

Alice and Hajek came back upstairs, and Alice was in the bathroom while Vo and Hajek talked. (Vol. 20, RT 4993.) Vo and Hajek talked about disconnecting the phone and checking for guns or alarms. Vo searched downstairs for 15 or 20 minutes, then found Hajek in Ellen's room, looking at a photo album. (Vol. 21, RT 5133-5.) Hajek wanted to stay upstairs, so Vo took Alice from the bathroom and went downstairs with her. Vo and Alice watched cartoons, and Hajek came downstairs after 10 minutes. Hajek kept saying that Ellen would be home soon (Vol. 21, RT 5137-9.)

Cary Wang called at about 11:45; before she called, Vo checked on Su Hung and untied her feet, and Hajek went upstairs twice for ten minutes each time. (Vol. 21, RT 5140.) Vo heard nothing when Hajek went upstairs, and Hajek reported that Su Hung was okay. It never occurred to Vo that Hajek might be stealing things. (Vol. 21, RT 5142.) Vo never heard Hajek rummaging through drawers, nor did Vo do so; Vo never took any money. (Vol. 21, RT 5189.) Vo has no idea how $278 in cash wound up in bags in the laundry room. (Vol. 21, RT 5190.)

When Cary Wang called, Alice answered the phone; no one threatened her or told her what to say. (Vol. 21, RT 5143.) Vo and Hajek decided that once Cary Wang came home, she wouldn't be able to leave the house until Ellen came back. (Vol. 21, RT 5145.) When Cary came in, Hajek and Alice were to calm her down, and Vo would stop her if she went back to the garage. (Vol. 21, RT 5146.) Vo had a knife (Vol. 21, RT 5149),

but it was for display and he never intended to cut Mrs. Wang. (Vol. 21, RT 5149.) When Cary entered the house, she and Alice talked in shrill, excited tones and Vo panicked. He used bad judgment, and put his hand over Mrs. Wang's mouth so she would not scream. Vo denied threatening to kill the family (Vol. 21, RT 5150), and denied that Hajek made a threat to kill the family. (Vol. 21, RT 5153.)

Cary Wang was upset and cried that day. Vo denied putting the knife to Cary's throat, stating he just flashed it, and she was mistaken. (Vol. 21, RT 5128.) It was bad judgment to flash the knife; Mrs. Wang was very nice. (Vol. 21, RT 5154.) Vo apologized to Cary Wang, and put the knife back. (Vol. 21, RT 5155.) Mrs. Wang was then seated on the couch with Alice, and she was concerned about her mother. Hajek volunteered to go upstairs, and he said Su Hung was asleep. Alice later went upstairs to check. (Vol. 21, RT 5157-8.) Vo denied that Su Hung was already dead, and Vo denied knowing about her death until after it happened. (Vol. 21, RT 5158.) Cary Wang said her mom had a heart condition, and Hajek told Mrs. Wang to call an ambulance if needed; but she may not have understood Hajek because of her language problem. (Vol. 21, RT 5158-9.)

After Hajek came down, they all sat at the dining room table, and Vo told Mrs. Wang there was a problem with Ellen. (Vol. 21, RT 5160.) Later, Vo lied and told Mrs. Wang that Ellen had beaten up his cousin at school; by that time Vo realized Ellen might not be coming home, and he wanted to leave. (Vol. 21, RT 5160-1.)

It was Cary Wang's idea to go to the school to look for Ellen. Vo believed that he and Mrs. Wang had an understanding; they passed two police cars, nothing happened. (Vol. 21, RT 5163.) Vo denied kidnaping Mrs. Wang, and said he had never told her that he had a gun. (Vol. 21, RT 5165.) Vo kept an eye on Mrs. Wang at her office, but had no reason to think she would tell people to call the police. (Vol. 21, RT 5166-7.) Vo made two phone calls: (1) to tell Hajek that Ellen was not at school, and (2) after seeing police cars. (Vol. 21, RT 5167.) When they returned to the Wang house after 2:00, Tony Wang was sitting with Alice and Hajek. Vo told Hajek he was frustrated, and Hajek asked Vo to stay. The four adults talked. (Vol. 21, RT 5168-9.) Tony Wang offered apologies and money; when Mr. Wang offered to punish Ellen, Vo wanted to leave, but Hajek wanted to stay. (Vol. 21, RT 5169.) The conversation was going nowhere, and they felt something bad could happen, so Vo thought of tying up Tony Wang. (Vol. 21, RT 5171.) Hajek took Mr. Wang upstairs, and then Mr. Wang asked to speak to Vo. (Vol. 21, RT 5172.)

Before Vo went upstairs, Hajek told him that Su Hung had been killed. (Vol. 21, RT 5172.) Vo wanted to leave and told Hajek that this had gone on too long; it was then that Hajek told him of Su Hung's death. Vo went to speak to Tony, and looked in the grandmother's room on the way. (Vol. 21, RT 5172-3.) Vo was shocked since this was not supposed to happen. Vo talked to Tony Wang, then gagged him. (Vol. 21, RT 5173, 5176.) He was in shock and trying to think; nevertheless, he did not leave before the police arrived. (Vol. 21, RT 5177, 5182.) Two minutes after seeing Mr. Wang, the

police arrived; Vo was afraid and confused; he made a mistake in giving a false name to the police. (Vol. 21, RT 5177-78.) Vo ran downstairs; Hajek said police were everywhere, and Hajek whipped out his pellet gun. Vo followed him through the back door, then ran back into house in a panic, tripping as he went into the laundry room. (Vol. 21, RT 5189-90.) Vo was afraid and needed someone to talk to, to help him decide what to do. (Vol. 21, RT 5184.)

Vo took his gloves off inside the house because it got hot; he put them back on when he went out with Cary Wang. (Vol. 21, RT 5185.) Vo admitted to false imprisonment of Cary Wang in the home, and stated he was wrong to do that. Vo denied any plan to kill anyone; he maintained that things just happened and there was no plan. (Vol. 21, RT 5187.)

After their arrest, quite a bit later, Vo and Hajek were in a room together at the police station, at about 3 a.m.; he did not recall what they talked about. At the time, Vo was stunned and numb. Vo did not remember Hajek talking about twinkie defense, and denied encouraging him to pursue such a defense. (Vol. 21, RT 5194.)

On cross-examination by counsel for co-defendant Hajek, appellant Vo testified that he had become friends with Hajek and Lori Nguyen in the Autumn of 1990. (Vol. 21, RT 5197.) Hajek was a fanatic about Japanese animation, and interested in being Asian. Vo knew that Hajek had been hospitalized, probably related to mental problems, but not in a mental hospital. (Vol. 21, RT 5199-5200.) Vo thought Hajek was weird and

odd, but didn't think it was serious. (Vol. 21, RT 5201.)

Vo's only motivation for going along on January 18 was to back up Hajek, and he categorically denied that he was there for Lori Nguyen. Hajek wrote a letter claiming that they had done this for Lori, but Vo disagreed, stating Hajek was blaming everybody Hajek knew at the time. (Vol. 21, RT 5203-4.) During the fall of 1990, Vo thought Lori had some affection for him, but she said they were just friends. (Vol. 21, RT 5197.) Vo testified that at the time of trial, he was very upset with Lori. (Vol. 21, RT 5208.) Lori was not his motivation for going to the Wang home; rather, he went to support Hajek. (Vol. 21, RT 5211.) When Vo told the Wangs that Ellen had had a fight with his "cousin," it was a made-up story because he had decided it was time to leave the Wang's house, and "put this on something else." (Vol. 21, RT 5212.) Vo was questioned on cross-examination about letters from Lori to Vo while Vo was in custody, with some professing undying love. (Vol. 21, RT 5214.)

In boot camp, Vo received basic infantry training; he was not trained to tie people with rope. (Vol. 21, RT 5214.) By January, 1991, Vo's unit was on standby; he believes that the next step would have been activation and training for Desert Storm. (Vol. 21, RT 5215.)

When Vo went to the Wang residence, Vo had no knowledge of any plan to kill anyone there; Hajek said nothing. Vo feels responsible because he inadvertently gave Hajek the chance to do this. (Vol. 21, RT 5216.) It was not Vo's idea to hold the family

hostage; that part just developed that day. (Vol. 21, RT 5217.) Vo's gloves came from his apartment; Hajek also had gloves, and there was a lot of trash in the van. (Vol. 21, RT 5220.) It was Hajek who spoke with Alice at the door when they first arrived. (Vol. 21, RT 5221.) Vo made a bad impression on Alice, and Hajek really made up to her. Vo tied Su Hung, but he did not recall the exact technique. (Vol. 21, RT 5224.)

Vo denied that he killed Su Hung when he was upstairs. (Vol. 21, RT 5227-28, 5236-7.) The Wang family was mistaken in testimony if they said that Vo was giving the orders. Cary and Alice Wang misstated the events when they said that Vo held a knife to Mrs. Wang's throat; he just flashed it. (Vol. 21, RT 5229.) Vo admitted hiding and confronting Cary Wang, and instructing her to use English on the telephone, but he allowed her to make the calls. Vo denied threatening the family, but maybe Hajek did. (Vol. 21, RT 5230.) Vo negotiated with the Wangs because they spoke to him, not to Hajek. Cary Wang was held at the house, but she was free to move around there. (Vol. 21, RT 5231.) Vo denies telling Cary Wang that he had a gun when they were out driving. Hajek tied up Tony Wang. (Vol. 21, RT 5232.)

Vo does not know when Hajek killed Su Hung. (Vol. 21, RT 5237.) Vo last saw her alive when he checked before Cary Wang arrived. (Vol. 21, RT 5238.)

Vo was shocked, numb, and dazed when he was arrested and taken to the police station. (Vol. 21, RT 5240.) He acknowledged that although Hajek was talking and laughing on the tape, Vo was often whispering; he usually has a low voice. (Vol. 21, RT

5241.) Vo did not confront Hajek that night with how Hajek could have done this (Vol. 21, RT 5243), and on the tape Vo acknowledged he would be going away for a long period of time. (Vol. 21, RT 5244.) After the arrest, Vo did become angry with Hajek, feeling it was Hajek's fault. Vo had no intent to kill the elderly Su Hung. (Vol. 21, RT 5246.) Vo tried to collect letters from Hajek to give them to his lawyer. (Vol. 21, RT 5248-9.) Vo is guilty of false imprisonment; but he is not guilty of murder. (Vol. 21, RT 5246-7.) Hajek's counsel described Vo as appearing angry; he responded that he was offended at being called a killer. (Vol. 21, RT 5247.)

On redirect examination, appellant Vo testified that he went to the Wangs' house because Ellen was crank calling Hajek, and they were going to tell Ellen off. Things just got out of hand there. (Vol. 21, RT 5252.) Things never got so out of hand that Vo developed an intention to kill any member of the Wang family. Hajek told him Su Hung had died; Vo played no role whatsoever in her killing. (Vol. 21, RT 5253.)

B. Penalty Phase

1. Evidence in Aggravation

Ellen Wang was the only witness called by the prosecution at penalty phase. Her testimony concerned the effect of Su Hung's death on the Wang family. Ellen Wang was born in Taiwan in 1975, and cared for by her grandmother, Su Hung, until she was about 5 years old. Her mother, Cary Wang, had a lot of business and was very busy. (Vol. 23, RT 5717.)

Ellen came to U.S. at age 8. She called her grandmother at least once a week, and Su Hung visited the family in the United States at least once a year. (Vol. 23, RT 5718.) In 1991, their relationship was still very close, and her grandmother meant a lot to her. Su Hung's visits lasted from 3 to 6 months. In 1990-91, Su Hung was 73, and had a little bit of high blood pressure, but otherwise was active. She took morning walks and did housework, and the Wang family traveled with Su Hung. Alice Wang was not as close to Su Hung as Ellen was. (Vol. 23, RT 5719-20.)

Su Hung had five other children, all living in Taiwan, and about 14 grandchildren. She liked to travel, shop, play mah-jong with friends, and watch movies. Being in the United States was a vacation for her. (Vol. 23, RT 5720-21.)

Ellen first learned her grandmother had been murdered when the police informed her. She couldn't believe it. Cary Wang was quiet and sad. Ellen returned to the house on Silver Leaf about a week and a half later, just to get her things. Her family never lived in that house again, because of the bad memories. (Vol. 23, RT 5722.) The Wang family lived in a hotel for about a month, until they rented another house. Ellen didn't return to school for about two or three months. The family went back to Taiwan for a while. Cary Wang wanted her girls right next to her. (Vol. 23, RT 5723.) Mrs. Wang was afraid of everything, and did not want any family members out of her sight. (Vol. 23, RT 5724.)

Ellen was sad and angry, and to this day feels as if the events were her fault, because she had been in the fight with Lori. (Vol. 23, RT 5724.) Her sister, Alice, has

Rahn Minagawa, a clinical psychologist who previously testified as an expert at the guilt phase, confirmed Fountain's impression that Hajek's behaviors and regression are symptoms of trauma. (Vol. 23, RT 5827.) Early events including abandonment by his biological mother, multiple placements, and loss of safety and stability created risk in his future development. (Vol. 23, RT 5829-34.)

The Hajeks tried to provide a stable environment (Vol. 23, RT 5839), and as a child, Hajek appeared to be a normal, healthy youngster during the latency period (ages 5 to 12); but signs of early trauma re-emerge during adolescence, when developmental tasks turn to forming identity and building relationships. (Vol. 23, RT 5840-43.) Co-defendant Hajek was emotionally abused as an infant, and the effects of such abuse can be as severe as those of physical abuse. (Vol. 23, RT 5845.)

Hajek's borderline personality disorder resulted from past trauma. (Vol. 23, RT 5847.) Had Hajek not developed a mood disorder as well, the outcome would have been very different. (Vol. 23, RT 5849.) At the time of the murder, Hajek was still an adolescent. Hajek's mood disorder is treatable with medication and talking therapy (Vol. 23, RT 5855), but has progressed from cyclothemic disorder to full bipolar disorder, requiring medication. The jail doctors also diagnosed Hajek as bipolar, although they did not have access to the same amount of information as Minagawa. (Vol. 23, RT 5857-59, 5861.) Dr. Friedlander also believed that bipolar is the correct diagnosis for Hajek's present condition.

Mood disorders are medical disorders, and the illness is worse if it begins in adolescence, as the symptoms are more transient, intense, and extreme. (Vol. 23, RT 5870-71.) As Hajek's disease has progressed, his medication levels have increased. (Vol. 23, RT 5875.) Indications that Hajek was suffering from from a mood disorder at the time of the murder include lack of sleep, motor agitation, his telephone conversation with Moriarty, paranoid delusions, and behavior in jail after his arrest. (Vol. 23, RT 5880.) Hajek had paranoid delusions related to Ellen Wang, his trial counsel, and as reflected in letters he sent to appellant Vo. (Vol. 23, RT 5883.) The bipolar disorder and personality disorder are not excuses for the murder, but they did influence Hajek at the time of the crimes. (Vol. 23, RT 5884.)

On cross-examination, Dr. Minagawa stated he had reviewed all available records, interviewed Hajek seven times, and spoken with his parents. (Vol. 23, RT 5889.) In these interviews, Hajek denied killing the victim (Vol. 23, RT 5891); the court noted that evidence of Hajek's denial was received against Hajek only. (Vol. 23, RT 5893.)

In an examination described by Hajek's lawyer as lasting one hour (Vol. 23, RT 5927), the prosecutor pressed Dr. Minagawa repeatedly on the topic of "sadism." See, e.g., (Vol. 23, RT 5894, 5896, 5898, 5900, 5901, 5903, 5907, 5915, 5917, 5919, 5926; see also re-cross-examination at Vol. 23, RT 5937-38.). Dr. Minagawa regarded sadistic traits as falling under the diagnosis of antisocial personality disorder. (Vol. 23, RT 5895.) Repeated questions about sexual sadism see, e.g., (Vol. 23, RT 5907, 5915) resulted in

sustained objections to the prosecutor's questions. (Vol. 23, RT 5915, 5916.) The witness explained there is no diagnosis for sadism per se. (Vol. 23, RT 5921.) The prosecutor then pursued questions about Satanism and "evil," and Dr. Minegawa stated he had not asked Hajek about that. (Vol. 23, RT 5919, 5920.) Dr. Minigawa is not aware of studies citing a relationship between being a foster child and later becoming a murderer, nor aware of any studies showing the percentage of bipolar patients who are murderers. (Vol. 23, RT 5922-23.) There is little scientific research on what the prosecutor termed sadistic murderers. (Vol. 23, RT 5926.)

On re-direct examination, Dr. Minagawa reiterated that sadism itself is not a diagnosis; sexual sadism is a diagnosis, but Hajek does not fit the criteria for the disorder. (Vol. 23, RT 5927-28, 5931.) Sadistic tendencies fit under antisocial traits, and are part of the borderline personality disorder. (Vol. 23, RT 5929.) When Hajek denied the killing, it was not clear he was lying. (Vol. 23, RT 5933.) The witness was not hired to determine the killer. There were no sadistic acts in Hajek's history, and Hajek's statements in letters and other materials were made while Hajek was not medicated. (Vol. 23, RT 5934 .) There is no evidence of antisocial or sadistic behavior during periods when Hajek received medication. (Vol. 23, RT 5935.)

On cross-examination by appellant Vo's attorney, Dr. Minagawa admitted that antisocial traits mean Hajek has a tendency to not tell the truth all the time, and that Hajek had lied or minimized responsibility in the past. (Vol. 23, RT 5939-40.)

Robert Hajek, the father of co-defendant Hajek, testified that he visited his son in jail every week for 4.5 years. He saw a change in that time (Vol. 23, RT 5941), with Hajek becoming more mature and stable, and developing an interest in religion and other things. (Vol. 23, RT 5942 .) The visits took place through a glass shield. He visited to give his son support. (Vol. 23, RT 5943.) It would tear his heart out for his son to receive the death penalty. (Vol. 23, RT 5944.)

On cross-examination by the prosecutor, Mr. Hajek stated that as parents, he and his wife tried to teach Hajek right from wrong. Hajek's mental state is much better on medication. (Vol. 23, RT 5945.) On redirect examination, Mr. Hajek stated he would continue seeing his son despite the conviction, because he loves him. (Vol. 23, RT 5947.)

Linda Hajek, the mother of co-defendant Hajek, testified that she also visited her son weekly for 4.5 years "because he is part of us." (Vol. 23, RT 5948.) Hajek has changed during that time, becoming more mature, more sedate, not so hyper, and interesting to talk with. He has shown concern for her. If he were to be executed, she would die too. (Vol. 23, RT 5949.)

Linton Moore, a middle school teacher and minister (Vol. 23, RT 5961), was co-defendant Hajek's sixth grade teacher. He recalled Hajek as a little slow academically, a loner, but respectful. Moore once saw Hajek as a teenager, late one night at a restaurant; on learning Hajek had no place to stay that night, he and his wife took him home. (Vol. 23, RT 5962.) Moore visited Hajek in jail twice after his arrest. (Vol. 23, RT 5963.) The

first visit was years ago and superficial, but during a visit after the guilty verdict, Hajek was introspective and more mature, expressing remorse for traumatizing Alice. (Vol. 23, RT 5964-65.)

On cross-examination, Mr. Moore stated that he and Hajek had not discussed the trial during the first visit, and agreed that Hajek had expressed remorse after he was convicted. He did not specifically express remorse for the killing. (Vol. 23, RT 5966.) In the second visit, Hajek had stated that he now understood the family had been very fearful, which Hajek could not see at the time of the events. (Vol. 23, RT 5967.)

3. Defendant Vo's Mitigating Evidence

Appellant Vo's counsel presented some mitigating evidence of his background and positive institutional adjustment. He advised the jury in opening statement that the background information would show appellant Vo had experienced "life stresses" and cultural factors, but explained that no psychologist would be called on Vo's behalf. (Vol. 24, RT 5973.) Most of the lay witnesses were friends or teachers. Some family members, correctional officers, and a prison expert also testified. Finally, information on Vietnamese immigration and culture was presented via a sociologist.

Several witnesses had served in the National Guard with appellant Vo. **Dwayne Talburt**, in the Army, testified about being in the National Guard with Vo, whom he had known since 1987. (Vol. 24, RT 5974-5976.) They attended basic training together in June, 1989. (Vol. 24, RT 5979.) He described Vo as friendly, outgoing, with a good

sense of humor and pride in his uniform, and very supportive of friends; but he also described Vo as someone who could be coerced into doing things for friends that he should not have done. (Vol. 24, RT 5979-5980.) **David Whittum** was in the National Guard from 1985 to 1991. Vo was a private in his platoon for a few months ending in September, 1990, performing his duties in a satisfactory way. (Vol. 24, RT 6184.) **Scott Sutherland**, a National Guard officer on active duty, testified that he had previously been assigned to a national guard unit in San Jose to train men for fighting and supervise their welfare. Vo was under his command for 6-12 months, in about 1990. (Vol. 24, RT 6186-87.) Recruits go through 16 week training process: 8 weeks of basic training, usually at Fort Benning, Georgia, and 8 weeks of advanced individual training. (Vol. 24, RT 6188.) Vo performed his military service in a satisfactory fashion (Vol. 24, RT 6190.).

A number of correctional officers testified to Vo's good behavior and trustee status in jail, including: **Timothy Stoesser** (Vol. 24, RT 5985-5993); **Darin Snell** (Vol. 24, RT 5995-8); **Michael Parker** (Vol. 24, RT 5999-6002); **Lauren Dennehy** (Vol. 24, RT 6003-6005); **Robert Eng** (Vol. 24, RT 6021); **Timothy Dennehy** (Vol. 24, RT 6023); **Yolanda Emerson** (Vol. 24, RT 6025). The prosecutor cross-examined some officers about a fight that allegedly involved appellant (Vol. 24, RT 5991, 6001), which witness Parker described as an unprovoked attack by others on Vo. (Vol. 24, RT 6001.)

An art instructor, **Frances Paragon-Arias**, described working with appellant at the county jail, and in her opinion he was enthusiastic, motivated and positive. (Vol. 24, RT

6008-6013.) **Greg Dalcher,** a self-employed software engineering consultant, testified that he had taught appellant Loi Vo for 3 ½ years in Santa Clara County Jail, as volunteer with the inmate literacy program. For the first three years, Dalcher saw Vo about 5 hours per week; at the time of Dalcher's testimony, he saw Vo once a week for 2 hours, one on one. (Vol. 25, RT 6193.) Vo's skills were far more advanced than most of Dalcher's students. Dalcher has taught algebra, geometry, trig and some calculus to Vo, as well as advanced grammar and vocabulary. (Vol. 25, RT 6196, 6200.) During their studies, Vo had been very dedicated, never refused a teacher visit, and always did his homework. In Dalcher's opinion, Vo is a quite positive, stable person. Vo did not receive special privileges by participating in the literacy program; in fact, the tutoring diminished Vo's time out of his cell. (Vol. 25, RT 6197.) Dalcher considers Vo a friend, and always looks forward to seeing him. (Vol. 25, RT 6199.)

James Park, a licensed clinical psychologist, had retired from the California Department of Corrections after 43 years in adult prisons (31 years with CDC); at the time of his testimony, he worked part-time as prison consultant. His positions with CDC included chief psychologist of the system, chief classification officer, associate warden, administrative director of death row, deputy warden in charge of planning a maximum security prison, chief of planning for CDC, and assistant director for policy. (Vol. 24, RT 6137.)

Park was qualified as an expert witness. (Vol. 24, RT 6142.)

Park was provided with Vo's jail classification record, an official statement describing the offense, and some social history background. (Vol. 24, RT 6142.) The official jail record was of the greatest importance in forming an opinion regarding Vo's jail adjustment.

Park relied on the CDC's objective point scale classification, which cannot be manipulated. (Vol. 24, RT 6143.) The point classification system was developed in the early 1980's because the previous system of multiple interviews and recommendations didn't work well. Length of sentence carries the heaviest weight on this scale; LWOP. carries 56 points, and inmates go to a Level IV prison. Age is second most important factor, and third is behavior in previous incarcerations. (Vol. 24, RT 6144.) A prisoner with a high school diploma, useful work, who was stable in outside society, and has no problems in jail, is predictably going to make a good adjustment in prison. Using this scale has remarkably reduced prison problems. (Vol. 24, RT 6146.)

Park described in detail the extensive security features of Level IV prisons. (Vol. 24, RT 6147-67.) He explained that it is possible, but very difficult, for someone sentenced to life without parole to be placed in a Level III prison at some point; they must earn favorable points, have an enthusiastic staff recommendation, be endorsed by the site warden, and then the state board has to review the case. (Vol. 24, RT 6168.)

Park opined that appellant Vo would be a nonviolent prisoner, able to do productive and useful work. Vo would not be a significant hazard to security of the

prison, and he represented a zero hazard to the community. Parks assessment was based on the classification, not his own opinion. Vo had a high school diploma, held a job, and was successful in his military obligations. The one slightly negative factor in the calculus was his age of 24; prisoners who have had problems before tend to settle down at age 25. In Vo's case, this single deficit was counter-balanced by jail records showing that he had been a very good prisoner. (Vol. 24, RT 6170.)

The one jail incident which occasioned a report, where Vo was involved in a fight and received a broken nose, would have been classified in the prison system as an assault in which Vo was the victim. The jail's disposition of the incident was a warning, not a lockup, and Vo did not lose any privileges. (Vol. 24, RT 6171.) The fact that Vo submitted written requests in jail, and went through available channels, shows a level of maturity. The fact that Vo was in a protective custody unit did not alter Park's opinion. The Asian population in California state prisons is "very tiny," about 5%, and Park does not know how that will affect Vo, although he seems to be able to get along with all kinds of people. (Vol. 24, RT 6172.) If Park were to bet money, he'd bet that Vo would do pretty well in prison. (Vol. 24, RT 6174.)

On cross-examination by the prosecutor, Park agreed that younger prisoners tend to cause more problems, and that violence exists in prisons. (Vol. 24, RT 6174.) There is a high level of violence at Pelican Bay, and some prisoners are able to obtain drugs and weapons. (Vol. 24, RT 6175.) Although Park had not interviewed Vo, he knew from

Vo's objective jail behavior that Vo would have similar behavior in prison, and thus it is highly probable Vo would make a good prison adjustment. (Vol. 24, RT 6176.) If Level IV prisoners do not have to work, but if they don't, they do not get some privileges. If a prisoner doesn't

work, he can still watch TV, listen to the radio, buy books, subscribe to magazines, go to the canteen, and buy snack foods. Park was not entirely sure if LWOP prisoners could get overnight visits with their family, but believed they could. (Vol. 24, RT 6177.) Park's fee is $75 per hour, and $50 per hour for travel, and his fee in this case was probably $800-900. (Vol. 24, RT 6179.)

Co-defendant Hajek's lawyer elicited testimony about the treatment of mental illness in prison. Prison doctors closely evaluate medical records and recommendations, and if they decide a prisoner requires medication, he will get it. Prisoners have a limited right to refuse, and if a prisoner refuses medication, and in the opinion of prison medical staff is a danger to himself or others, prison medical staff will get a court order requiring medication; such an order is pretty rare. (Vol. 24, RT 6180.)

On re-direct, Park testified he was quite certain that Vo would be eager to work in prison; in fact, one of Vo's grievances was that he was temporarily taken off of work status in jail. It would be very difficult for Vo to spend the rest of his life in prison, in a cell about the size of a bathroom, with another person. Some people feel that letting prisoners buy candy bars is pampering them, but a prison cannot be run strictly with guns

and fear and force. Such treatment is used, but incentives are necessary for people to kind of live their days out. The canteen is a minor embellishment on what is really a very, very harsh life. (Vol. 24, RT 6182.)

Some of Vo's high school teachers also testified. **Patricia Accorinti** taught Vo photography; he was eager to learn, conscientious, and they had a close relationship. (Vol. 24, RT 6028-6032.) Vo confided in Accorinti that his father was abusive to his mother, Vo wanted to protect her, and he once had to leave home for a while after trying to protect his mother during a fight between the parents. (Vol. 24, RT 6032-33.) Vo would eat candy bars at school because he was not eating at home. (Vol. 24, RT 6033.) Vo avoided conflicts, got along well with others, and helped her with projects. (Vol. 24, RT 6033-34.) **Paul Ender** supervised the yearbook staff in 1989-90, and worked closely with Vo, a staff photographer. Vo worked hard, got along well with others, and handled the stress of deadlines well. (Vol. 24, RT 6040.) **Rudolf Franke**, another photography teacher, also worked with Vo on the yearbook staff, and testified that Vo got along with others, handled deadline stress well, did what he was asked and more, and that he was more of a leader than a follower most of the time. (Vol. 24, RT 6044-46.) He had the impression that Vo's father was strict. (Vol. 24, RT 6048.)

Francis Nieman had taught appellant Vo German for 3 years, and recalled Vo's active participation in the German Club. German is a hard language and Vo was a "C" student, but he had good social skills, got along well, was active and gregarious with a

good sense of humor. (Vol. 24, RT 6050-52.) Nieman had the impression that Vo's parents were strict and traditional, and that Vo had trouble meeting their academic expectations, particularly given his social life. (Vol. 24, RT 6055.) Vo was not confrontational and did not display a temper. (Vol. 24, RT 6055.)

Nora Mazotti, a school counselor at Independence High School, testified that she had seen Vo quite a bit during his senior year, and she was trying to keep him in school at that time; his home life was unstable and his father was abusive. (Vol. 24, RT 6056-58.) Vo's grades dropped at the end of his junior year, and again senior year, and his cumulative GPA was 2.46. (Vol. 24, RT 6059.) For senior year, he transferred to Huntington Beach, but returned to San Jose with only one month of school left. (Vol. 24, RT 6061.) On October 16, 1989, Mazotti prepared a report about suspected child abuse. (Vol. 24, RT 6061.) Appellant Vo had reported that he saw his younger sister (kindergarten age) being kicked by their father. When Vo tried to intervene, his father slapped Vo and tried to hit Vo with his fists; Vo defended himself. On January 8, 1990, there was another report of child abuse; Vo's father confronted Vo and an argument ensued; the father shoved and punched Vo, and threatened to throw a chair at him. (Vol. 24, RT 6064.) On cross examination, the witness explained she was required to report the abuse to child protective services, but at the time of her testimony she did not recall seeing injuries on Vo. Vo reported to Mazotti that his sister had called the police about one of the incidents. (Vol. 24, RT 6066.)

Several friends of appellant Vo also testified. **Billy McDonald**, an E-4 specialist in the United States Army who was taking a special forces medical course at Fort Sam Houston (Vol. 24, RT 6073), testified that he met Loi Vo his freshman year of high school, in German class, and they became as close as brothers for three years, until McDonald left home at age 16 due to his own problems. (Vol. 24, RT 6076.) Vo was an average student, but he loved photography. (Vol. 24, RT 6078.) Vo was a good, creative artist. (Vol. 24, RT 6085.) Vo's parents were strict, and he did not get along with his father because his father physically fought Vo; Vo did not like to stay home. (Vol. 24, RT 6079.) When witness McDonald was suicidal, Vo put aside his own troubles and tried to talk McDonald out of it; McDonald was then hospitalized, and Vo let others know so they could support him. (Vol. 24, RT 6081-6082.) He stated, "If it wasn't for Loi, I'd probably be dead right now." (Vol. 24, RT 6082.) Vo was non-violent, got along with everyone, and never let anyone down. (Vol. 24, RT 6083.)

On cross-examination, witness McDonald stated that Vo was trying to flunk out in his junior year, but passed his classes anyway; Vo did that because he was trying to stay in school longer, because school was his only release from home. (Vol. 24, RT 6085, 6093.) Vo came from Vietnam as a child, and lived for a while in Southern California. (Vol. 24, RT 6088.) Vo did not really get in any trouble in high school, although Vo was once suspended. (Vol. 24, RT 6090.) If Vo had been in a fight, that would not change McDonald's opinion that Vo is non-violent since once in a lifetime everyone will get in a

fight, especially on the east side of San Jose. (Vol. 24, RT 6090-91.) Vo was not involved with gangs. (Vol. 24, RT 6092.)

Laura Valtierra testified she has been Vo's best friend since freshman year of high school. Vo was always there for her, even from jail. (Vol. 24, RT 6096.) She knew Vo had problems at home and did not have much of a relationship with his family, but he didn't like to talk about it much. Vo had a great sense of humor, but she believed it disguised his inner sadness. (Vol. 24, RT 6099.) Vo is very sweet and friendly, and was never a fighter. (Vol. 24, RT 6103.)

Jeff Nguyen, a senior accountant/financial analyst for fiber optics company, had known Vo since they were sophomores at Independence High School. They were close friends, partly due to shared ethnicity and history; both felt displaced, not really Caucasian or Vietnamese. (Vol. 24, RT 6105-6106.) Vo is trustworthy, and as honest as you can get. Lots of his friends were "hard-core honors" students, but Vo couldn't keep up. (Vol. 24, RT 6106.) There were Vietnamese gangs in high school, but Vo did not participate in them at all. (Vol. 24, RT 6108.) Nguyen knew Vo had problems with his. Vo would stay at school to escape. (Vol. 24, RT 6116.) Vo didn't complain much about the situation at home, and it bothered him to talk about it. (Vol. 24, RT 6119.) Vo continues to contribute to the witness's life even now. (Vol. 24, RT 6109.)

Amy Tam testified that she met appellant Vo when they were high school sophomores taking physics, and the instructor had asked her to tutor Vo; she later tutored

him in American government and economics, senior year. (Vol. 24, RT 6123.) Physics class was a tough college prep class. (Vol. 24, RT 6133.) Senior year, Tan was told to talk to a counselor because she was a victim of child abuse; at the counseling office, she saw a social worker, and learned the worker was also there to talk to Vo about an incident in which Vo's father had kicked someone. (Vol. 24, RT 6125.) Vo was not doing well in school his junior year, and he went into the military sometime the next summer. Tam believes that Vo's problems that year had to do with his home life. (Vol. 24, RT 6128.) After Vo's arrest, Tam tried to see him once a week until she left for the military, where she is presently a medical specialist going through nursing course in the Army Reserve. (Vol. 24, RT 6127.)

Hiep Luong testified that he had known Vo since 7th grade; went to middle and high school with him, and maintained contact after high school. (Vol. 24, RT 6134.) He was shocked when he found out Vo had been arrested. Vo was very personable, people liked him, and he got along well with teachers. Vo is one of the most loyal people witness knows. (Vol. 24, RT 6134.)

Some members of appellant Vo's family testified concerning his family history and earlier life. **Tan Viet Vo**, appellant's father, testified through a Vietnamese interpreter that after he was naturalized, he changed his first name to Joseph. (Vol. 25, RT 6204.) Loi is the son he valued most among his eight children: four sons and four daughters, ranging in age from 10 to 30, with four born in Vietnam and four born here. Mr. Vo's

children are: Kieu Ngan, Loc (Dexster), Phat (McRobin), Loi, Sparkman, Kieu Mong, Kieu Ngan, and Kieu Phuong. (Vol. 25, RT 6204.) Tan Viet was born in northern Vietnam, 1930, a Catholic; after the Geneva agreement of 1954, he followed a Catholic bishop to southern Vietnam to escape the Communists. Mr. Vo stated that he went to law school, taught English at various levels in Vietnam, and worked for agencies assisting disabled Catholic veterans. He married in 1963 while working for the government, and supported his family from 1965-1975 working for an American agency. (Vol. 25, RT 6206.)

In 1975, the family was forced to leave Vietnam so he would not be killed by the Communists. He had 30 minutes to leave with his wife, four children, mother and two siblings; they went first to Guam, then to Fort Chaffee, Arkansas. (Vol. 25, RT 6209.) The Sparkman family sponsored the Vo family when they lived in a trailer in Portland, Tennessee, waiting for work in the Sparkman fireworks plant. Mr. Vo wanted to get into farming, but changed his mind and enrolled as full-time student at Western Kentucky University. (Vol. 25, RT 6211.) Ultimately, the family came to California because the winters were cold in Kentucky; they moved first to Huntington Beach where they had relatives, and then to San Jose. Mr. Vo worked part time in city hall, for the police department, and

in the security unit of a school, including crossing guard work. (Vol. 25, RT 6214.) Mr. Vo stated that in the twenty years since he has lived in the United States, the "scale has

been in balance," as advised by his psychiatrist, and his family was happy one. (Vol. 25, RT 6216.)

When asked to describe his discipline style, Mr. Vo stated there are three points in the way he treats his family: (1), Catholicism, (2) study, and (3) obey your parents, obey the law, be a loving person towards any human being, help the elderly. He told his children he would disown them if they did not obey, but stated he has never needed to discipline his children. (Vol. 25, RT 6217-18.) On cross-examination by the prosecutor, Mr. Vo denied physically fighting with his son Loi, and claimed they wrestled for exercise. He would have punished his children with a stick in Vietnam, but understands that it is different in this country, so he did not do so here. (Vol. 25, RT 6219.)

Dexster Vo testified that he was born in Saigon in 1967. His mother was from the south, which is very conservative, and she did not get along with his father's family, from the north. (Vol. 25, RT 6221.) Dexster recalled leaving Vietnam in a chaotic, frustrating rush a week before the fall of Saigon, throwing everything together, with police checking passes, and people waiting outside to get in. In Guam, they were stuffed into a warehouse with a lot of people, with everybody trying to get nourishment and supplies, and then moving to an old military barrack with not enough to eat and no showers. The family then went to Fort Chaffee, Arkansas. (Vol. 25, RT 6223.)

Living conditions were a little better in Arkansas, although it was a boot camp setting and stressful for the adults. They then moved to Tennessee with a sponsor, Mr.

Sparkman, and lived in one of his trailers. Later, the family moved to Kentucky, aided by the Mennonites. The children were raised Catholic, although their motherwas Buddhist before her marriage. Their father lacked farming skills. The family moved to Bowling Green, the father couldn't stand the cold and they moved again to California.

The father tried to better himself, fought with their mother over time he spent on schooling. The family moved in with the father's mother and siblings in Santa Ana, and then moved to a two-bedroom apartment in Huntington Beach for awhile, and finally to San Jose. Their house was very small and old, and the children slept wherever they could. Later, they found a three bedroom condo. Dexster joined the military for nearly 3 years, beginning in 1987. While he was away, the family returned to Orange County, but the business opportunity with an uncle did not work out. Business failed. (Vol. 25, RT 6227-35.)

Dexster returned from the military and moved in with a sister; their parents then moved in with them. Their father works part-time as crossing guard, and part-time as security guard. (Vol. 25, RT 6236.) The father is old-custom Vietnamese, very strict, and they clashed a lot; he wanted to limit how "American" the children were. He disciplined the children by refusing to talk, and also by whipping them with his belt as they lay on the floor. The mother got frustrated and threw things, "spontaneously" disciplining the children. (Vol. 25, RT 6237.) The parents fought every few months, with criticism escalating to throwing things; it was loud and traumatic, and Dexster still resents those

times. (Vol. 25, RT 6240.) He believes the fighting affected Loi in same way. The father disciplined everybody with a belt, and sometimes kicked; as he grew more frustrated, he became more violent. (Vol. 25, RT 6242.) Although he encouraged the children to stay in school, be positive, he also told them they were good for nothing. Appellant Loi Vo closed out the environment and hid his feelings; they all tried to stay away from home as much as possible. Dexster felt responsible for his brothers and sisters; when he went to military, that role fell to Loi. (Vol. 25, RT 6245.)

In Orange County, when Dexster was about twelve, his parents had a bad fight; his mother had gotten a job, and his father felt she was cheating on him. They threw things around, and then his mother pulled a knife out of the kitchen drawer. The children and their father huddled in a room with the door closed, and Dexster was told to climb out a window and call for help. The police came, and their mother attempted to hurt herself; the children were taken to their grandmother's house. (Vol. 25, RT 6247.) The parents also slapped the childrens' faces and buttocks, and called them names. Dexster went into military partly to escape, and partly because he believed it was his obligation to enter the military. (Vol. 25, RT 6251.)

On cross-examination by the prosecutor, Dexster testified that he was presently employed by the California Department of Corrections; McRobin worked security; the older sister worked as a nurse assistant; Sparkman worked for Stanford Hospital and was going to school; and the youngest three girls were in school. (Vol. 25, RT 6253.) He

agreed that the parents did not intend cruelty when they disciplined the children, and they wanted them to be good people; the siblings knew right and wrong to a certain extent. (Vol. 25, RT 6255.) Between fights, they functioned as a family; the children never had broken bones as a result of punishment. (Vol. 25, RT 6257.) All the Vo children were raised Catholic. Loi was more Americanized than the others. (Vol. 25, RT 6258.) During Loi's last two years of high school, he clashed with his father and moved to Los Angeles, then moved back. (Vol. 25, RT 6260.) Dexster agreed that Vietnamese respect and take care of elders; Loi was brought up to respect his grandparents. (Vol. 25, RT 6261.)

Sparkman Vo was born in 1976 in Russellville, Kentucky. He has three younger sisters, and was currently working at Stanford Hospital. (Vol. 25, RT 6280.) Their parents started to fight about the time Sparkman started kindergarten. They screamed, banged on the wall, and threw things; the children would leave the room when fights started. They argued every day, and had really big fights were about three times a month. It made him feel scared and mad. Neighbors would come. None of the kids wanted to be around, because they got violent. (Vol. 25, RT 6281-83.) Their father would spank him, hit him with a belt or whatever was around, and lecture him for hours afterwards. He seemed to punish Loi every day. He would pull on his ears, hard enough that his eyes would start tearing. (Vol. 25, RT 6283.)

Janet Brown was a teacher for 30 years in Huntington Beach, and she taught appellant Loi Vo in 1978-79, in a first grade bilingual Vietnamese class. Loi was a special

little boy in her class, starved for attention, and he wanted desperately to please. Her husband, who had been in Vietnam, also became quite attached to Loi; he was like the son they never had, and they even took him on a family trip one summer. (Vol. 25, RT 6266.) Loi was always very helpful to her in her classroom, very self-directed; at first, he stuttered a lot, but he tried really hard to learn and speak English. (Vol. 25, RT 6270.)

In the Spring of 1980, early one Saturday morning, Ms. Brown received a phone call from Joseph Vo, asking her to talk to his wife, who was crazy. Brown and her husband went to the Vo house; Mrs. Vo was crying, saying her husband had taken the children. Looking around the house, Ms. Brown saw knife marks all over everything, on the walls and a door. Mrs. Vo swallowed something like iodine, and the paramedics were called. (Vol. 25, RT 6271.) Joseph Vo returned and was very embarrassed; he refused to ride in the ambulance. Mrs. Vo's stomach was pumped, and she was sent for psychiatric examination. The problem began when Mr. Vo recorded a conversation between Mrs. Vo and a co-worker, thinking she was being unfaithful, which she denied. The apartment was badly damaged; it looked like it had been vandalized. (Vol. 25, RT 6272.)

On cross-examination by the prosecution, Ms. Brown testified that the children were much more stressed than in other Vietnamese families. She did not report abuse, but believes there was mental abuse and that Mr. Vo was very controlling. (Vol. 25, RT 6275.) On redirect examination, she noted that the father demanded perfection in Loi's school work, and that Loi be given lots of homework. (Vol. 25, RT 6277.)

Hien Duc Do, an assistant professor in Social Science Department at San Jose State University specializing in the Vietnamese-American community, presented his qualifications as an expert (Vol. 25, RT 6286-89), which were accepted by the trial court. (Vol. 25, RT 6290.) He explained that there have been two waves of Vietnamese immigration to United States: 1975-1978, and 1978 up to the present. (Vol. 25, RT 6292.) In the first wave were primarily high-ranking officials who had worked for the U.S. government in some way, and left Vietnam for fear of persecution and imprisonment. The second wave consisted of boat people, who left on homemade vessels without much planning. The Vo family was in the first wave.

Immigrants leaving Vietnam in the first wave experienced various stresses. Vietnamese men, traditionally the heads of household, experienced a loss of social status. Dispersal policies which relocated families all over the United States meant the loss of the support system which had existed in Vietnam and even in the refugee camps. Menial and low-paying jobs meant a loss of security and status. (Vol. 25, RT 6295, 6297.) Refugee women had to work also, and were often able to find jobs more easily than the men, creating further tensions. (Vol. 25, RT 6297.) These women were still expected to care for the children and household, but they had some financial independence for the first time. Domestic violence, drinking, picking fights, or placing high demands on children were all consequences of these stresses. (Vol. 25, RT 6299.)

Children learned English quickly and became interpreters for parents, decreasing

the authority of parents and increasing tension even more. While children were expected to be assertive in school, the opposite was true at home. (Vol. 25, RT 6301.) In Vietnam, it is common for parents to whip children, but that is considered child abuse in the United States. Vietnamese parents were suddenly unable to determine what methods of discipline to use. (Vol. 25, RT 6302.)

The Vo family followed a typical pattern; the best job Mr. Vo could find was as an assembly technician, but Mrs. Vo was able to find some stable jobs to support the family. (Vol. 25, RT 6303.) Mr. Vo became very frustrated, losing social status in and outside the family. Additionally, as eldest son in his own family, Mr. Vo was under tremendous pressure to take care of his mother and siblings. (Vol. 25, RT 6304.) Both parents had difficulty learning English, which compounded their feelings of being lost. (Vol. 25, RT 6305.)

With only one half hour to leave Vietnam, Mr. Vo did not have time to put his affairs in order; it was traumatic to arrive in the United States with four children and no work. Mr. Vo's testimony showed he is a very proud man, and despite all obstacles he has tried to see rosier side of life. Guam and the army camps were in fact very traumatic: they were crowded, food was unfamiliar, there were long lines, and bathrooms were very public. (Vol. 25, RT 6306.) The testimony Do had heard from family members testifying that morning was consistent with the stresses attached to immigration of Vietnamese to United States in mid-1970's. (Vol. 25, RT 6311.)

On cross-examination, the expert witness was asked if it is common for immigrant children to become murderers. (Vol. 25, RT 6311.) He testified that gangs may be typical of later immigrants, but notes there are different kinds of gangs. It is common for immigrant Vietnamese families to value education. (Vol. 25, RT 6312.) The witness did not interview appellant Loi Vo, and is just testifying to general conditions. (Vol. 25, RT 6313.)

Mrs. Kieu Vo, Loi Vo's mother, testified through an interpreter. She raised Loi and her seven other children to the best of her ability. (Vol. 25, RT 6323.) She identified various photographs for the jury (Vol. 25, RT 6327-28), and Loi's school records and awards. Loi's academic records were excellent when he was younger. (Vol. 25, RT 6330.) Mrs. Vo explained that she loves her son very much, and will continue to love him. He has been a very good son to her. She would die if he received the death penalty. (Vol. 25, RT 6331.)

On cross-examination, Mrs. Vo testified that she first learned that Loi had been arrested and was in jail only towards the end of 1994. During the time they lost contact, her husband moved somewhere, and Loi moved somewhere else. (Vol. 25, RT 6332.) When he was growing up, Mrs. Vo taught Loi to love and honor his grandparents. (Vol. 25, RT 6334.)

On redirect examination, she explained that she learned only belatedly about Loi's arrest because his siblings didn't want to let the parents know. Loi Vo called home, but

did not say he was in jail. Loi did not tell her earlier about the arrest because he didn't want to sadden his parents. (Vol. 25, RT 6334.)

Kieu Ngan Vo, age 30, testified that she is the oldest sister of Loi Vo. She described Loi Vo as helpful around the house, caring for younger siblings, telling jokes and bringing friends over. She explained that she and Loi depend on each other. Even though he was presently in jail, Loi continued to play an important role in the lives of all his siblings. (Vol. 25, RT 6336.) If Loi were to receive the death penalty, it would be devastating, a big open wound for the whole family. (Vol. 25, RT 6339.) Following this testimony, the defense rested. (Vol. 25, RT 6340.)

ARGUMENT

ARGUMENTS JOINED FROM APPELLANT HAJEK'S OPENING BRIEF

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts the following arguments from Appellant Hajek's Opening Brief on Appeal:

III THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE AND LYING-IN-WAIT FIRST DEGREE MURDER

IV THE EVIDENCE WAS INSUFFICIENT TO SUPPORT EITHER FIRST DEGREE TORTURE MURDER OR THE TORTURE SPECIAL CIRCUMSTANCE

V APPELLANT'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED BECAUSE LIABILITY CANNOT BE BASED ON AN UNCHARGED CONSPIRACY

VI THE TRIAL COURT ERRED IN ALLOWING THE ISSUE OF FIRST DEGREE FELONY MURDER BASED ON BURGLARY TO BE DECIDED BY THE JURY

VII THE TRIAL COURT ERRED IN DYING APPELLANT'S MOTION, PURSUANT TO PENAL CODE SECTION 1118.1, TO DISMISS THE ATTEMPTED MURDER CHARGES

XIII THE TRIAL JUDGE ERRED IN DENYING DEFENSE OBJECTIONS TO HOPELESSLY CONFUSING INSTRUCTIONS IN THE GUILT PHASE OF TRIAL

XIV THE TORTURE SPECIAL CIRCUMSTANCE INSTRUCTION GIVEN AT APPELLANT'S TRIAL WAS CONTRADICTORY, CONFUSING AND UNCONSTITUTIONAL

XVI THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INCOMPLETE AND CONFUSING INSTRUCTIONS ON CONSPIRACY

XVIII INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED ON MOTIVE ALONE

XIX THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

XXI THE INSTRUCTIONS IN THIS CASE IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

XXII THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

APPELLANT VO'S GUILT PHASE ARGUMENTS

1. THE TRIAL COURT UNREASONABLY REFUSED TO SEVER THE TRIALS OF APPELLANT VO AND HIS CO-DEFENDANT, WHOSE DEFENSES WERE INCONSISTENT.

Appellant Vo was denied a fair trial and a reasonable opportunity to defend because his motions for severance were improperly denied, and he was tried together with co-defendant Hajek. Vo moved for severance in a timely manner, and on multiple additional occasions when it was clear that this action was necessary to preserve his constitutional rights to due process and confrontation. Nevertheless, his efforts were repeatedly rebuffed by the trial court.

There was compelling evidence that Hajek was guilty of capital murder. Hajek had a grudge against Ellen Wang arising from a physical altercation earlier in the week, and crank telephone calls Hajek had received later that week. The night before the crime, Hajek announced a plot to an acquaintance, a plan to take a family hostage and kill them one by one. Hajek enlisted appellant Vo the morning of the offense to talk to Ms. Wang. Hajek alone carried a weapon. Blood was found on Hajek's clothing after the offense; none was found on appellant. Unlike appellant, Hajek had a criminal history. Following their arrest, Hajek made self-incriminating statements, wrote incriminating letters, and threatened the family of the homicide victim.

Had appellant Vo enjoyed a separate and fair trial, much of the evidence that the jury heard and considered in convicting Vo would not have been admitted. There was no

evidence Vo was aware of Hajek's plan to kill anyone. There was no evidence that Vo himself committed the murder or intended that anyone be killed. Hajek's statements would have been irrelevant and/or could not have been used against Vo absent the opportunity for Vo to confront and cross-examine Hajek. Hajek's extensive criminal and psychiatric history would have been irrelevant. Hajek's threat against the victim's family would have been inadmissible against Vo and not heard by Vo's jury. Jurors' expectations of defense mental health evidence at the guilt phase would not have been raised by the presentation of Hajek's history.

Had a penalty trial been necessary, the critical determination of whether appellant Vo should live or die would not have been tainted irreparably by Hajek's bad acts, or through guilt-by-association with Hajek. Further, Vo would not have suffered the extreme prejudice of his penalty phase jury hearing hearsay evidence that Hajek denied the killing,[64] which suggested that Vo delivered the fatal blows – a contention that Vo could not confront and cross-examine at its source, and which could not have been admitted at a separate trial.

The joint trial permitted the prosecution the enormous strategic windfall of marshaling inflammatory and irrelevant information against appellant Vo, transforming

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[64] Hajek's denial of the homicide was, in context, an accusation that Vo committed the killing, by the only other alleged assailant present. The two of them were caught at the scene, and there was no evidence whatsoever that a third person was present. Moreover, the evidence indicated only one killer.

an insubstantial case against a non-killer with no criminal record into one that resulted in a death sentence. Rather than deciding appellant Vo's guilt or innocence solely on the admissible evidence, the prosecutor used an uncharged conspiracy theory, the horrors of co-defendant Hajek's behavior, and liberal doses of conjecture to paint appellant Vo with the same brush – a feat that would have been impossible in a separate trial.

Although co-defendant Hajek also urges the denial of severance as a ground for reversal, he and appellant Vo had such adverse defenses that their positions are fundamentally divergent. Whereas Hajek's counsel was able to cross-examine appellant Vo during Vo's testimony, Vo did not have the same opportunity. He could not examine Hajek despite the admission of numerous incriminating statements made by Hajek outside court.

It is the trial court's duty to ensure that the defendant receives a fair trial. The trial court abused its discretion in refusing to sever the co-defendants for trial.

A. Severance is Required When a Defendant May be Prejudiced by the Inconsistent Defense of a Co-Defendant, Admission of Evidence Relevant to the Co-Defendant Only, and the Danger of Prejudicial Association.

1. Procedural History

On January 17, 1995, appellant Vo filed Motions in Limine (Vol. 6, CT 1535 et seq.), which included a motion for severance of his trial from that of co-defendant Hajek.

(Vol. 6, CT 1536-1540.)[65] Appellant Vo initially noted that:

> These motions are based on the unique facts of this particular case: the age of the defendants, the fact that Vo had no motive to kill or injure the elderly victim, the fact that the evidence did not show the specific circumstances of the killing, the fact that the evidence did not show the specific identity of the killer, the fact that the evidence did not show exclusive access by Vo to the victim, the fact that blood was located on Hajek's glove and sleeve, but no blood was located on Vo, the fact that no murder weapon was found. (Vol. 6, CT 1535-1536.)

Appellant Vo offered two reasons why severance was necessary and required: [1] that Hajek had made statements to various individuals which directly or indirectly incriminated appellant Vo (Vol. 6, CT 1536-1538), and [2] that the defenses to be offered by appellant Vo and co-defendant Hajek were antagonistic and conflicting. (Vol. 6, CT 1538-1540.)

Hajek's statements permeated the prosecution's case. The severance motion noted that the night before the incident, Hajek had told witness Tevya Moriarty that he planned to take revenge for a fight between some young women, and he planned to kill the family of one of them the next day. In the same conversation, Hajek admitted other criminal

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[65] Appellant notes that this motion was filed during the period of time he sought appointment of second counsel and a continuance of the trial. Lead counsel had stated that he required the assistance of second counsel for motions as well as to prepare the penalty case. Appellant Vo's ability to fully and compellingly present this motion was gravely compromised by circumstances his counsel was then facing due to trial court errors, as set forth more fully in Argument 2 of this brief. Nonetheless, his counsel presented compelling reasons for severance, and the trial court again abused its discretion in refusing to sever appellant's trial from that of his co-defendant.

activity: a robbery, possession of a stolen vehicle and a shotgun. Hajek later threatened this witness. Hajek also made statements to police officers, including a report that Vo had checked on the victim several times, which suggested that appellant Vo was the last person to see her alive. Hajek also made additional suggestive and self-serving statements. (Vol. 6, CT 1537-1538.) Appellant Vo also argued that,

> [T]here would be no way that the court could instruct a jury in a meaningful way as far as how they're to handle this evidence, that it is attributable only to Mr. Hajek but not Mr. Vo. (Vol. 1, RT 100.)

As appellant Vo's counsel noted, the scenario would be different if the prosecution were not offering the statements of Mr. Hajek. (Vol. 1, RT 106.)

Appellant Vo argued that the use of these statements made by the co-defendant violated the principles of *People v. Aranda* (1965) 63 Cal.2d 518[66] and *Bruton v. United States* (1968) 391 U.S. 123.[67]

> Prejudice results to Vo because he cannot protect himself through the right of cross-examination as to the incriminating effect of Hajek's extrajudicial statements. Consequently, to allow these statements in a joint trial would

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[66] In *People v. Aranda*, *supra*, this Court held that the statement of one co-defendant implicating another cannot be admitted in a joint trial. The trial court has three alternatives: [1] effectively delete any statements that could be used against the co-defendant; [2] sever the trials of the defendants; or [3] exclude the statement entirely. (*People v. Aranda*, supra, 63 Cal.2d at 530-531.)

[67] *Bruton v. United States*, *supra*, 391 U.S. 123 held that admission of a co-defendant's extrajudicial statement violated the defendant's Sixth Amendment right to cross-examine the witnesses against him, even where the jury receives a limiting instruction. The risk is too great that the jury will be unable to disregard the evidence in deciding guilt, despite instructions to do so.

> violate Vo's constitutional rights of cross-examination, confrontation of witnesses and his right to a fair trial. (Vol. 6, CT 1536.)

Severance, appellant urged, was required, also citing: *People v. Massie* (1967) 66 Cal.2d 899[68], and *People v. Turner* (1984) 37 Cal.3d 302.[69] Evidence erroneously admitted, moreover, violates federal constitutional rights. (*Idaho v. Wright* (1990) 497 U.S. 805; 111 L.Ed.2d. 638[70].) (Vol. 6, CT 1536-1537.)

Appellant Vo also argued that severance was required because he and co-defendant Hajek had antagonistic and conflicting defenses.

> The second area of the basis of the severance is antagonistic defenses. And that's where the uniqueness of this particular case comes into play. It really shows a case that each individual will attempt to defend his case presumptively by placing blame on the co-defendant. And that set of antagonistic defenses is significant in and of itself, but is similarly and even more significant when considered in light of the Aranda/Bruton issues that I made reference to. (Vol. 1, RT 101.)

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[68] *People v. Massie*, *supra*, 66 Cal.2d 899, 916-917, held that a trial court must not refuse consideration of reasons advanced in support of a motion for separate trial, but instead must exercise its discretion. This Court stated that a trial court should "separate the trials of codefendants in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*Massie*, at 917; extensive footnotes with citations omitted.)

[69] In *People v. Turner*, *supra*, 37 Cal.3d 302, 312, this Court declined to reverse on the basis of denial of severance, noting that the prosecution did not introduce extrajudicial incriminating statements of one defendant, and that at the time the motion was heard, counsel failed to articulate how the defenses conflicted.

[70] *Idaho v. Wright*, *supra*, 497 U.S. 805 held that the Confrontation Clause is violated by admission of hearsay evidence that does not bear particularized guarantees of trustworthiness. See also, *Crawford v. Washington* (2004) 541 U.S. 46.

Hajek was expected to "attempt to defend this matter based upon psychiatric grounds. Additionally, it can be anticipated that he will continue in his effort to shift the blame onto Vo." (Vol. 6, CT 1538.) Hajek had made statements to the police denying any involvement. (Vol. 1, RT 99.)

> Vo will defend the case based upon the contention that he went to the residence in the company of Hajek for the limited purpose of scaring and intimidating Ellen Wang . . . and will adamantly deny any intention to harm or kill anyone else. Vo's defense will establish that Hajek apparently lost control for psychiatric reasons and killed the victim. (Vol. 6, CT 1538.)

Co-defendant Hajek had already been granted a protective order to preclude use of his psychiatric evidence by either the prosecution or appellant Vo in their cases in chief. However, appellant sought to use this evidence to support the contention that Hajek was the actual killer, and that Hajek acted as he did because of his psychiatric illness. Vo would also seek to present evidence of other instances of Hajek's "acting out of anger, revenge and a loss of psychiatric control," including an incident in the county jail wherein Hajek destroyed property. (Vol. 6, CT 1539.)

Appellant Vo's motion for severance was orally joined by co-defendant Hajek on January 17, 1995. (Vol. 6, CT 1548.) The motion was argued and submitted on January 18, 1995, and denied the next day. (Vol. 6, CT 1559; Vol. 1, RT 95-115.)

Appellant Vo had moved for continuance on December 16, 1994. Co-defendant Hajek and the People opposed appellant's motion for continuance, and the motion was deemed premature by the trial court. (Vol. 6, CT 1508.) An *in camera* hearing was held

on January 17, 1995, as to appellant's motion for continuance; that motion was denied. (Vol. 6, CT 1546.) Clearly, the trial court concluded that judicial efficiency (achieved by joinder of appellant Vo's case with co-defendant Hajek's case for trial) outweighed the compelling reasons that Vo's counsel had advanced for a continuance in order to provide adequate representation for his client. Appellant refers to and incorporates Argument 2, addressing the error in denying a continuance, and other errors of the trial court.

On February 6, 1995, additional motions *in limine* were filed by appellant's counsel, including a Motion Respecting Hajek's Statements to Tevya Moriarty; appellant Vo noted that the motion for severance had been denied, and requested clarification. (Vol. 6, CT 1580-1581.) In court, appellant Vo's counsel requested reconsideration of the denial of severance, and sought to preclude witness Moriarty's statements as to Vo on hearsay grounds. (Vol. 1, RT 229.) Hajek primarily spoke of things "he" planned to do, but some of Moriarty's statements refer to "they," implicating an unnamed other or others, which left appellant Vo unable to confront and cross-examine the source of the information (Vol. 1, RT 229-230), violating Vo's constitutional right of confrontation. (Vol. 1, RT 232.) Both the prosecution and counsel for co-defendant Hajek strenuously objected to redacting Moriarty's statements to limit references to Hajek alone. (Vol. 1, RT 230-232.) The renewed severance motion was also denied. (Vol. 6, CT 1583.)

On June 7, 1995, appellant Vo moved for mistrial as to the penalty phase, and again moved for severance; his motions were denied. (Vol. 8, CT 2215.) During the

cross-examination of Dr. Minagawa, an expert witness called by co-defendant Hajek, the prosecutor elicited testimony that Hajek had denied killing the victim. (Vol. 23, RT 5892.) Appellant Vo's counsel objected and asked to be heard outside the jury's presence; instead, the trial court instructed the jury that the evidence was only received as to Hajek. (Vol. 23, RT 5893.) Outside the presence of the jury, appellant Vo's counsel argued:

> I do not . . . feel that admonition of the court is sufficient to protect my client from the prejudicial effect of this type of testimony in the penalty phase of this particular case based upon the facts of this case. (Vol. 23, RT 5908.)
>
> ***
>
> Additionally I would move the court grant a mistrial as to Mr. Vo's penalty phase for reasons I'll elaborate in a moment, and additionally I would ask the court grant a severance.
>
> Because the concern I have is we're into the Aranda Bruton area that we talked about early on. It frankly comes in a different form and in a different way than I expected early on, so I of course couldn't reach it with my original Aranda Bruton severance motion. (Vol. 23, RT 5909.)
>
> ***
>
> The prosecutor through his – what I think is a very artful – and I don't mean that pejoratively at all – cross-examination, raises through the defense expert called by Mr. Hajek, Mr. Hajek's denial that he's involved in the killing, and then links up with that from the psychologist's perception it is in fact a sadistic killing, because of the way the psychologist has answered the questions. (Vol. 23, RT 5909.)
>
> I understand the court's ruling that this is not admissible as against Mr. Vo, and you've admonished the jury in that particular way. But it's the same kind of admonition the court said in Aranda, and Bruton for that matter, said is inadequate as a matter of law to protect Mr. Vo, for example in this particular case, because there's such a tremendous prejudicial overwash between the linkage of the denial by Mr. Hajek that he did the actual killing, and the fact that the defense psychologist feels that it's sadistic, and Mr. Vo is unable through his right of cross-examination to

> clear that issue and to protect himself with his right of cross-examination. (Vol. 23, RT 5909-5910.)

Appellant Vo's counsel argued that absent the improper joinder, "Mr. Vo would have his penalty phase jury decide his penalty phase fate without having heard this whole collection of information" concerning Hajek and from Hajek's expert, including the extremely inflammatory information from the expert that Hajek stated he did not commit the crime, but that in the expert's opinion it could be considered a sadistic crime. (CT 5910-5911.) Although the prosecutor disingenuously argued that Hajek's denial of guilt did not implicate appellant Vo (Vol. 23, RT 5911-5912), co-defendant Hajek's counsel made it extremely clear that she intended to pursue this theme:

> I'm putting everyone on notice I'm planning to get into that and clear implication of that is Mr. Vo did that. And I think I should be entitled to because otherwise – because the issue of lingering doubt on who the actual killer is, is going to be very pertinent to the penalty phase in this case, mitigator. (Vol. 23, RT 5912.)

Vo's counsel reasoned that Hajek's position clearly demonstrated the need for severance based on inconsistent defenses (Vol. 23, RT 5912); he appropriately described the prejudicial impact as "extraordinar[]y" and "enormous[]." (Vol. 23, RT 5913.) The trial court denied the motions for severance and mistrial without explanation, and permitted Vo to raise a continuing objection. (Vol. 23, RT 5913.)

On June 12, 1995, co-defendant Hajek moved for mistrial on the basis that the co-defendants should have their penalties separately decided. Co-defendant Hajek's counsel

argued that appellant Vo's "good character" presentation, together with appellant's objections to evidence presented on behalf of Hajek, prevented an individualized assessment of the appropriate penalty. (Vol. 24, RT 6019-6020.)

2. The Applicable Law

a. State and Federal Law Governing Joinder and Severance.

California Penal Code, §1098 governs joinder and severance in California state prosecutions. That statute provides in pertinent part:

> When two or more defendants are jointly charged with any public offense, ... they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants.

People v. Massie, *supra*, 66 Cal.2d 899, 916-917, held that a trial court must not refuse consideration of reasons advanced in support of a motion for separate trial, but instead must exercise its discretion. This Court stated:

> [T]he court should separate the trials of codefendants in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, [or] conflicting defenses . . ..

(*Massie*, at 917; footnotes omitted.)

In *Zafrio v. United States* (1993) 506 U.S. 534, 539 [122 L.Ed.2d 317, 325], the United States Supreme Court recognized that co-defendants should be granted separate trials if

> there is a serious risk that a joint trial would compromise a specific trial

> right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. ... Evidence that is probative of a defendant's guilt but technically admissible only against a co-defendant also might present a risk of prejudice. See *Bruton* v. *United States*, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. [citation].

(Id., at p. 539. Emphasis added.)

As the Ninth Circuit has explained,

> the defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States v. Eastwood*, 489 F.2d 818, 822 n.5 (5th Cir. 1973) (quoting *United States v. Robinson*, 139 U.S. App. D.C. 286, 432 F.2d 1348, 1351 (D.C.Cir. 1970)). If the essence of one defendant's defense is contradicted by a co-defendant's defense, then the latter defense can be said to "preempt' the former. *See United States v. Swanson*, 572 F.2d 523, 529 (5th Cir.), *cert. denied*, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978) (no severance required because defense ofc noninvolvement did not "preempt' defense of lack of intent).

(*United States v. Berkowitz* (9th Cir. 1981) 662 F.2d 1127, 1134; see also, *United States v. Gonzales* (9th Cir. 1984) 749 F.2d 1329, 1333 [severance is mandated where acceptance of one party's defense will preclude acquittal of the other defendant].)

Elaborating on the concept of mutually antagonistic defenses, the Ninth Circuit held:

> Prejudice cannot be understood in a vacuum. The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict. Prejudice will exist if the jury is unable to assess the guilt or innocence of each defendant on an individual and independent basis.

(*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1978, 1082.) Without question, the joinder of appellant Vo and his co-defendant Hajek permitted the prosecution to dispense with the requirement of proving guilt on an individual basis, and improperly denied appellant Vo his right to defend on an individual basis. Indeed, there is evidence from post-trial interviews of jurors that jurors believed they did not need to decide who killed the victim, as both defendants were in the house at the time when the victim was killed. (See, Declaration of Jeane DeKelver, at Vol. 10, CT 2744.)

On appeal, review of the trial court's denial of a motion for severance is based upon what was before the trial court at the time of the motion. (*People v. Turner*, *supra*, 37 Cal.3d 302, 312.) The review standard is for abuse of discretion. However, a second level of review is also permitted on appeal. In *People v. Turner* (1984) 37 Cal. 3d 302 (overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104), this Court held that, "[a]fter trial...the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at p. 313; see also *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Pinholster* (1992) 1 Cal.4th 865, 933.)

The irreconcilable defenses of the co-defendants here resulted in a trial lacking in due process of law. Severance should be granted where "[t]he essence or core of the defenses [are] in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." (*United States v. Romanello* (9th Cir. 1984) 726 F.2d 173, 177.)

In this case, a jury could not believe appellant's defense that Hajek killed Su Hung, unless it rejected not only the prosecution's uncharged and wildly expansive conspiracy theory, but also Hajek's defense that appellant was the actual killer. Where the jury is required to believe the guilt of one defendant in a joint trial if they believe the defense of the other, the fundamental right to a fair trial is violated. (*United States v. Gonzales* (llth Cir. 1986) 804 F.2d 691, 695-696.) Severance is compelled where the co-defendants' defenses are "irreconcilable and mutually exclusive." (Ibid.)

One danger of jointly prosecuting co-defendants with inconsistent defenses is that a defendant may face, for all practical purposes, two prosecutors. In this case, the specter of dueling prosecutions may have worked to co-defendant Hajek's advantage by allowing him to vividly raise doubts about who actually committed the killing[71] along with doubts

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[71] Appellant Vo testified in his own defense at guilt phase. His direct testimony was 11 pages (Vol. 20, RT 4981-92). By contrast, the prosecutor' cross-examination took up 123 pages of transcript (Vol. 20, RT 4993-5116). Co-defendant Hajek's counsel cross-examined for 55 pages of transcript (Vol. 21, RT 5197-5252), honing in on her defense theory that Hajek did not commit the murder – a theory not shared by the prosecution.

about Hajek's mental state, but it clearly worked to appellant Vo's disadvantage. Hajek's statements before and after the offense were introduced, as were Hajek's bad acts, and Hajek's psychiatric history. The uncharged conspiracy theory of the prosecutor made all of those things, and more[72], fodder for assuming appellant Vo's guilt, in the face of substantial evidence that co-defendant Hajek was the actual killer, and no evidence that appellant Vo knew of or agreed with Hajek's plans or participated in the killing.

Co-defendant Hajek's defense theory, that appellant Vo was the actual killer, meant that Vo was forced to defend against two substantially different theories of the case: (1) the official prosecution theory (partly noticed and charged in the indictment, and largely consisting of an expansive uncharged conspiracy theory); and (2) another being the product of prepared and insistent counsel for co-defendant Hajek, the actual killer. Co-defendant Hajek had some hope of gaining advantage by this strategy, together with the mental state evidence Hajek introduced. In terms of suggesting appellant Vo's culpability, the prosecution also gained advantage from the assistance of co-defendant

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[72] The prosecution introduced theories that Hajek was of exceptionally bad character, including but not limited to: [1] a story that Hajek's parents hid the family dog when he was home, so the pet would not be tortured; [2] Hajek's participation in other crimes; [3] Hajek's music choices, such as Ozzie Osbourne, which to the prosecutor suggested a devotion to Satanism; [4] Hajek's interest in Japanese animation, delusions about being Asian, and Asian friends, which the prosecutor used to suggest Hajek was a member of an Asian gang; and [5] the theory that Hajek was a sadist, or possibly a sexual sadist.

Hajek's strategy.[73] Appellant not only lacked advantage by comparison, but he was forced through an enormously unfair trial and sentenced to death despite facts that – in circumstances of a fair and separate trial – should and would have shown his guilt only of far less serious offenses.

The admission of evidence pertaining to appellant's co-defendant and not admissible against him at a separate trial violated appellant's due process and jury trial rights. "[A] primary effect of the court's [denial of the severance motion] was to ensure that highly prejudicial and otherwise inadmissible evidence . . . would be before the jury as it decided each count." (*People v. Smallwood* (1986) 42 Cal.3d 415, 428, discussing severance of charges.)

The denial of severance raised the danger that jurors would infer guilt of both because both denied guilt. Indeed, the prosecution's conspiracy theory relied upon the expectation that jurors would make that inference, since absolutely no evidence was introduced by the prosecution to support its conspiracy theory. Conveniently, as set forth more fully in Argument 6, incorporated herein, the conspiracy theory impermissibly

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[73] Co-defendant Hajek's strategy of blaming Vo for the killing did not undercut the prosecution theory of an uncharged conspiracy. Instead, it strengthened the idea that Vo was involved in a conspiracy with Hajek, because the prosecution's case-in-chief could only suggest a conspiracy existed with the thinnest threads of circumstantial evidence. If Vo was the actual killer, as Hajek alone contended, it must have been because of a conspiracy, for appellant Vo had no motive, had announced no plans, did not confess, and there was no physical evidence (such as the blood on Hajek's clothing) to connect Vo to the killing.

lightened the prosecution's burden of proof, allowing appellant Vo to be convicted on capital charges and sentenced to death despite an absence of proof of his individual culpability.

Appellant Vo "received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection." (*United States v. Berkowitz*, *supra*, 662 F.2d 1127, 1132.) Reversal is required under these principles.

b. Capital Cases, Due Process and Severance.

Since this is a capital case in which appellant claims his due process and confrontation rights were violated because of the court's failure to grant his motion to sever, it is not enough for a reviewing court to simply defer to the trial court's exercise of discretion. In a capital case, Penal Code, §1098 must be applied in a manner consistent with Eighth and Fourteenth Amendment requirements. This is so because there are three considerations unique to capital cases, and error in any is of constitutional dimensions.

First, when evidence admitted against a co-defendant is voluminous and extremely inflammatory, there exists a significant danger that the constitutional burden on the government to prove its case beyond a reasonable doubt will be lightened. (*People v. Garceau* (1993) 6 Cal.4th 140; *Zafrio v. United States,* (1993) 506 U.S. 534, 544 (Stevens, J., concurring) ["joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a

reasonable doubt"].)

Second, there is the requirement of heightened reliability of verdicts in capital cases. Thus, in capital cases "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Further, under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, this heightened reliability requirement applies to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638.)

Third, there is the requirement of truly individualized consideration prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) It is only where these conditions are met that the United States Supreme Court has been willing to find that the jury "has treated the defendant as a 'uniquely individual human bein[g]' and ... made a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).)

> Together, these three constitutional concerns demand a much stricter scrutiny of motions for severance in a capital case than is required in a non-capital case. (*People v. Keenan* (1988) 46 Cal. 3d 478, 500 ["Severance motions in capital cases should receive heightened scrutiny for potential

prejudice"].)

Therefore, whether the operative legal provision is Penal Code section 1098 or the rights included within the Eighth Amendment as applied to the states through the Fourteenth Amendment, the danger to be avoided is the same: that the jury will treat the co- defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) Appellant submits it is within this context that the trial court's exercise of discretion in refusing to sever these trials should be evaluated. The essential consideration for the reviewing court in determining whether defendants should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539; *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078: *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511.) "The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict." (*Tootick, supra,* 952 F. 2d at 1082.)

c. <u>Judicial Economy Does Not Outweigh Fundamental Fairness</u>.

The only announced rationale for joint trials in California is judicial economy. (*People v. Keenan, supra,* 46 Cal.3d at p. 501.) While joint trials save time and expense,

"the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441,451-452.)

Moreover, given the extraordinary requirement of individualized consideration and heightened reliability in capital cases, a procedural rule of joinder predicated on judicial economy must be applied very cautiously. Indeed, the United States Supreme Court has made it very clear that its concern for heightened reliability extends not only to sentencing, but to the guilt phase of trial as well. Long before the modern era of capital jurisprudence announced in *Furman v. Georgia* (1972) 408 U.S. 238 (overruled in part by *Gregg v. Georgia* (1976) 428 U.S. 153), the Supreme Court recognized that capital proceedings required special procedural rules and protections not extended to noncapital defendants. For example, in *Powell v. Alabama* (1932) 287 U.S. 45, the Court held that at least some capital defendants had a right to effective appointed counsel thirty years before extending that right to others accused of noncapital felonies. (Compare *Gideon v. Wainwright* (1963) 372 U.S. 335; see also *Bute v. Illinois* (1948) 333 U.S. 640, 674 (no obligation on part of state court to inquire whether noncapital defendant wished to be represented by counsel; contrasting due process right of capital defendant to appointed counsel); *Reid v. Covert* (1957) 354 U.S. 1, 45-46 (Frankfurter, J., concurring) ("It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.")

More recently, recognizing that "[t]he quintessential miscarriage of justice is the

execution of a person who is actually innocent," *Schlup v. Delo* (1995) 115 S.Ct. 851, 866, the current Court also has imposed special procedural requirements on determinations of guilt and innocence in capital cases that it has not imposed in noncapital cases. As Justice Stevens explained in *Beck v. Alabama* (1980) 447 U.S. 625, "we have invalidated procedural rules that tend to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Id.* at 638 (note omitted).)

As the Court subsequently explained, the *Beck* rationale was not limited to the specific issue of an all-or-nothing jury instruction [the precise issue in that case], but represented a more general principle requiring enhanced reliability in guilt phase determinations: "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." (*Spaziano v. Florida* (1984) 468 U.S. 447, 455.) Later cases have reiterated the Supreme Court's belief that the potential danger of executing the "actually innocent," *Schlup,* 115 S.Ct. at 866, requires special guarantees of reliability where the conviction of a capital defendant is at issue. (See, e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (in capital guilt phase "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case"); *Herrera v. Collins* (1993) 506 U.S. 390, 399 ("[i]n capital cases, we have required additional protections because of the nature of the

penalty at stake"); *Gray v. Mississippi* (1987) 481 U.S. 648, 669 (Powell, J., concurring) (declining to find harmless error because "[g]iven our requirement of enhanced reliability in capital cases, I would hesitate to conclude that the composition of the venire 'definitely' would have been the same").

d. Limiting Instructions Do Not Provide Adequate Protection in This Type of Case.

The court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions." (*Greer v. Miller* (1987) 483 U.S. 756, 764, 97 L.Ed.2d 618; 107 S.Ct. 3102.) This presumption, however, is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208, 95 L.Ed.2d 176, 107 S.Ct. 1702.)

As noted in *Old Chief v. United States* (1997) 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574, "[a]lthough ... propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance." (Internal quotation marks omitted.)

Although a great deal of prosecution evidence was relevant and admissible only as

to Hajek[74], the trial court refused to exclude evidence applicable only to Hajek or to provide limiting instructions guiding the jury as to use of evidence. Moreover, witnesses were examined about matters relevant only to Hajek, although ultimately some of the underlying material was not admitted.[75] The highly inflammatory nature of the evidence,

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[74] Co-defendant Hajek and Lori Nguyen had been in an altercation with Ellen Wang and several of Ellen's friends, some days before the homicide. Appellant Vo was not present, and had never met Ellen Wang. This incident was the alleged motive for the capital offense.

Co-defendant Hajek had told Tevya Moriarty the night before the offense that he planned to kill the family of a girl with whom he had had an altercation. There was no evidence that Vo was present or knew about this phone conversation, nor was there any evidence that he joined with Hajek in such a plan.

Co-defendant Hajek made admissions during a secretly-recorded conversation with Vo at the jail, after their arrests. Vo's statements are not audible on the tape.

Co-defendant Hajek threatened to harm the Wang family if they testified at the preliminary hearing.

Co-defendant Hajek made numerous inculpatory statements in letters he wrote, including letters sent to appellant Vo. There is no evidence that Vo made any such statements, or that he adopted the statements of co-defendant Hajek.

Co-defendant Hajek had committed prior crimes, including possession of a stolen vehicle and possession of a shotgun shortly before the capital offense. Vo was not involved in those offenses.

Exhibit 84, photographs of Lori Nguyen found in co-defendant Hajek's cell, was admitted only as to Hajek. (Vol. 17, RT 4182.) The jury was not so instructed.

[75] Exhibit 63 and the first two pages of Exhibit 65, letters written by co-defendant Hajek, were not admitted (Vol. 17, RT 4159, 4163), but the prosecutor had quoted from them and questioned witnesses extensively about them. Although appellant Vo objected to the use of Hajek's extrajudicial statement against him, page 3 of Exhibit 65 was admitted against Vo as well as Hajek.

Appellant's counsel requested that Exhibit 64, a letter written by Hajek, be admitted only against Hajek; it was instead admitted against both defendants. (Vol. 17, RT 4162.)

Exhibits 72 and 73, written by Hajek, were also admitted against Vo, over objection. (Vol. 17, RT 4168, 4171.)

Exhibit 75, containing what the prosecution characterized as Hajek's threat to

as well as the state's reliance on an uncharged conspiracy theory and the trial court's instructional errors, made it impossible for any juror, regardless of their desire to follow the court's instructions, to disregard the evidence introduced against the co-defendant as they deliberated Appellant's guilt. As Justice Jackson trenchantly observed; "[t]he naive presumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440.)

Indeed, in the case of a co-defendant's extrajudicial statement inculpating a defendant, the error cannot be overcome by admonishing the jury, as a matter of law. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.)

B. Severance Was Required in This Case.

Much of the evidence that the jury heard and considered would not have been admitted against appellant Vo, had he been granted the separate trial that was so clearly required in this case, and which counsel requested, repeatedly but in vain. Indeed, some of the most inflammatory and inculpatory evidence presented by the prosecution involved the statements and writings of co-defendant Hajek; as set forth more fully in Argument 7,

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Norman Leung, was not admitted. (Vol. 17, RT 4173.)

Exhibit 78, in which Hajek writes that the crime was committed "for" Lori Nguyen, was admitted over objection. (Vol. 17, RT 4177.) Exhibit 79, billed as a "followup" to Exhibit 78, was excluded (Vol. 17, RT 4178), although its contents had been the subject of examination by the prosecutor.

Exhibit 81, written by Hajek, was excluded as the trial court believed it was something Hajek prepared for his own use in his defense. (Vol. 17, RT 4180.)

appellant Vo was denied the right to cross-examine and confront the source of these statements.

There was no evidence that appellant Vo was aware of Hajek's plan to kill anyone. There was no evidence that Vo himself committed the murder[76] or intended that anyone be killed. Hajek's statements would have been irrelevant and/or could not have been used against Vo absent the opportunity to confront and cross-examine Hajek. Hajek's extensive criminal and psychiatric history would have been irrelevant, except to the extent that it helped demonstrate that the state could not prove appellant Vo's guilt beyond a reasonable doubt. Hajek's threat against the victim's family would have been inadmissible against Vo and not heard by Vo's jury. Jurors' expectations of defense mental health evidence at the guilt phase would not have been raised by the presentation of Hajek's history of symptoms, and the prosecutor would not have been able to argue that Vo was all the more culpable because, in contrast to Hajek, Vo was mentally normal. (Vol. 22, RT 5573.) Hajek's lawyer's sharp cross-examination of guilt phase witnesses, including appellant Vo himself, could not have been used to support the prosecution's argument for guilty verdicts.

Hajek's behavior, prior offenses, statements, and psychiatric defense provided

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[76] Hajek alone had blood on his clothing. Hajek alone had a grudge against a member of the victim's family. Hajek alone had behaved violently and criminally in the past. There was no physical evidence and no other direct evidence suggesting that appellant was the perpetrator of the homicide.

fertile opportunities for the prosecutor to introduce, via questioning of witnesses and argument, an array of inflammatory bad character allegations at the guilt phase suggesting not only had this crime been committed with the worst of intents, but that co-defendant Hajek was rotten to his core, and by association, so was Vo.[77] These allegations, which would have had no part in a separate trial for appellant Vo, included but were not limited to:

> (1) A story that Hajek's parents hid the family dog when he was home, so the dog would not be tortured or sacrificed (Vol. 15, RT 3666; Vol. 17, RT 4089; Vol 18, RT 4250, 4313);
>
> (2) Hajek's participation in other crimes (Vol. 15, RT 3656; Vol. 17, RT 4049; Vol. 18, RT 4305-06, 4308), suggesting he was incorrigible (Vol. 25, RT 6402);
>
> (3) Hajek's music choices, such as Ozzie Osbourne, which to the prosecution suggested a devotion to Satanism (Vol. 15, RT 3666, 3680; Vol. 17, RT 4090, 4121-22; Vol. 19, RT 4787; Vol. 20, RT 4898);
>
> (4) Hajek's interest in Japanese animation, possible delusions about being Asian, and Asian friends (Vol. 15, RT 3667, 3674; Vol. 16, RT 3915, 3922; Vol. 17, RT 4072, 4097-99, 4102, 4105, 4114; Vol. 23, RT 5920), which the prosecutor used to suggest Hajek was or wanted to be a member of an Asian gang (Vol. 21, RT 5408; see also, Vol. 19, RT 4545-46, 4768; Vol. 20, RT 5065, 5068). The prosecutor further suggested via questioning that appellant Vo was himself in a gang, although none of the witnesses offered evidence to that effect (Vol. 24, RT 6092, 6102, 6108; Vol. 25, RT 6312; Vol. 24, RT 6114-15; objections at Vol. 24, RT 6119-22).

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[77] The prosecution's uncharged, unproven, and unbounded theory of conspiracy provided a blank check to the jury, to use anything and everything distasteful about co-defendant Hajek as evidence against Vo. Thus, the taint of this irrelevant evidence was far worse than merely raising juror speculation that Vo might have been as evil as his co-defendant; the jury would have understood its duty as *requiring* consideration of all this evidence against Vo. See Argument 6.

(5) The prosecution theory that Hajek was a sadist, and possibly a sexual sadist (Vol. 13, RT 3014; Vol. 16, RT 3785; Vol. 21, RT 5375, 5407; Vol. 23, RT 5894-95, 5898, 5900-01, 5903, 5907, 5915, 5919, 5937-38; Vol. 25, RT 6402, 6412.) In an effort to deflate this accusation against her client, co-defendant Hajek's counsel argued, without any supporting evidence, that Vo was the actual killer, and sadistic (Vol. 22, RT 5573). Vo's counsel again objected to the joinder of the co-defendants and moved for mistrial, as much of the prosecution's theory of sadism was built during cross-examination of co-defendant Hajek's mental health expert, which infected the jury did not permit Vo an adequate opportunity to rebut the inference. (Vol. 23, RT 5909-5911.)

Had Vo been triald alone, at a penalty trial, had one been necessary, the critical determination of whether appellant Vo should live or die would not have been tainted irreparably by Hajek's bad acts, or guilt-by-association with Hajek. Further, Vo would not have suffered the extreme prejudice of his penalty phase jury hearing hearsay evidence that Hajek denied the killing and instead blamed appellant Vo – a contention that Vo could not confront and cross-examine at its source.

1. Appellant Vo Was Denied Necessary Continuances Because the Trial Court Intended to Proceed With the Co-defendant's Trial, Placing the Convenience of the Court, Jurors, and Other Counsel Above Appellant's Constitutional Rights.

As set forth more fully in Argument 2, incorporated herein, appellant Vo was unprepared to proceed to trial. Because the trials of appellant Vo and co-defendant Hajek were not severed, the trial court unreasonably refused to grant continuances necessary to ensure appellant Vo could receive a fair trial and the effective assistance of his counsel.

Although Vo's counsel explained in detail why a continuance was essential to

protect Vo's fair trial rights, co-defendant Hajek and the prosecution opposed any continuance. The trial court improperly focused its decision on judicial convenience and decided to go ahead because the other parties were ready, ignoring the unusual and extreme circumstances that justified continuance in order to protect appellant Vo's fundamental rights.

As set forth in this argument, the trial court also abused its discretion in refusing to grant severance, although it was abundantly clear that appellant Vo could not receive a fair trial under the circumstances of this case. Appellant was denied a fair trial for no better reason than judicial economy and convenience, and that decision was an abuse of discretion. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.)

2. Each Defendant Contended That the Other Was the Actual Killer, and the Co-defendant's Counsel Functioned as a Second Prosecutor.

Appellant Vo testified personally (Vol. 20, RT 4981-4992) that he had gone with co-defendant Hajek to talk to Ellen Wang so she would stop making crank telephone calls to Hajek. Vo testified that he intended no harm to the victim or other family members (Vol. 20, RT 4987-88), consistent with the proffer his lawyer made in the pretrial motion to sever. (Vol. 6, CT 1536-1540; 1/17/95, RT 41.)

Vo also testified on cross-examination that he was shocked and horrified to discover that Su Hung was dead, when he checked on her shortly before the police arrived. (Vol. 21, RT 5117, 5158, 5173.) Appellant Vo testified that he did not kill the

victim, intend for her to be killed, or know this was co-defendant Hajek's plan. (Vol. 20, RT 4992; Vol. 21, RT 5253.) Vo was upset that the person he thought was a friend, co-defendant Hajek, had gotten him involved in this homicide. (Vol. 20, RT 5044-5045; Vol. 21, RT 5246.)

Co-defendant Hajek did not testify. His defense at guilt phase had two parts: (1) focused cross-examination of witnesses for the prosecution and appellant Vo, aimed at minimizing Hajek's culpability and raising questions about Vo's actions in a manner suggesting Vo had been the killer; and (2) extensive mental health evidence, aimed at defeating the mental states required for conviction of first degree murder and a true finding on the alleged special circumstances.

Hajek's counsel actively functioned as a second prosecutor at the guilt phase of trial. Indeed, in many instances, Hajek's counsel was a more effective prosecutor of appellant Vo than the state's representative, as the co-defendant's counsel had a strong interest in pointing the finger of guilt toward appellant. Co-defendant Hajek's rigorous cross-examination was often aimed at suggesting appellant Vo's guilt. (See, e.g., Vol. 13, RT 3117-19, 3234-37; Vol. 14, RT 3336-39, 3342, 3347, 3434; Vol. 16, RT 3788-89, 3877-78; Vol. 17, RT 4096, 4104, 4111; Vol. 21, RT 5197-5252 [cross-examination of appellant Vo].) Hajek's guilt phase argument also emphasized Vo's alleged guilt repeatedly. (See, e.g., Vol. 22, RT 5427, 5438, 5439, 5450-51, 5467, 5472, 5498.) At the penalty phase, the strategy of accusing Vo of being the murderer was overt: hearsay

evidence was elicited from one of co-defendant Hajek's mental health experts, who reported that Hajek had claimed he was not the killer. (Vol. 23, RT 5892.) Vo was unable to confront and cross-examine Hajek, the source of that statement and many others introduced against Vo at trial.

It is beyond question that each defendant blamed the other for a killing that only one of them committed. The true evidence was that co-defendant Hajek was the actual killer – he had the motive, he announced a plan to another before the offense, he brought a weapon, he alone had blood on his clothing, he had prior offenses, and he had such serious disturbances of thinking and behavior that previously he had been involuntarily hospitalized for the protection of himself and/or others – but joinder allowed the prosecution to mark appellant Vo as a conspirator, and allowed co-defendant Hajek to insinuate that Vo was the killer. Appellant was not tried by the rule of law, nor found guilty by competent evidence; he was tried by smear tactics from both the prosecution and his co-defendant.

3. There Was No Reliable Evidence That Appellant Vo Knew of Hajek's Plan to Harm Members of the Wang Family, But the Denial of Severance and the Uncharged Conspiracy Theory Encouraged Jurors to Conclude Appellant Was Guilty by Association.

The prosecutor contended that many of Hajek's extra-judicial statements introduced at guilt phase were inculpatory as to Vo, at least under his uncharged conspiracy theory. Among those statements were letters written by co-defendant Hajek to

appellant Vo, laying out Hajek's personal ideas. Neither the prosecution nor co-defendant Hajek's defense produced a single letter or any other evidence that appellant Vo concurred with, much less adopted, the notions expressed in writings of his adverse co-defendant. As set forth more fully in Argument 7, appellant Vo has not been afforded the opportunity to confront and cross-examine co-defendant Hajek about any of Hajek's statements or writings.

As set forth more fully in Argument 6, incorporated herein, the prosecutor's uncharged conspiracy theory sought to saddle appellant Vo with all of the bad acts of co-defendant Hajek – those in furtherance of Hajek's plan to harm or kill Ellen Wang's family and others, as well as all of Hajek's alleged bad character traits that the prosecutor could argue flowed from habits, interests, and communications of Hajek.

No witness ever said, nor was there any other proof, that appellant Vo knew of Hajek's plan to harm the Wang family. Co-defendant Hajek's plan itself was brought out through one witness, Tevya Moriarty (Vol. 15, RT 3636 et seq.), whose statements primarily focused on Hajek's intent as expressed in a telephone call the night before. (Vol. 15, RT 3651-52) The prosecutor was allowed to elicit a statement the witness had previously made, that she thought three people would be involved, although she had no present recollection. (Vol. 15, RT 3666.) At the time of her testimony, she recalled Hajek saying "I" will kill them. (Vol. 15, RT 3684.)

The other so-called evidence that a conspiracy existed was that appellant Vo and

co-defendant Hajek were friends. (See, e.g., testimony of Norman Leung [Vol. 16, RT 3912 et seq.]; Lori Nguyen [Vol. 17, RT 4021 et seq.]; McRobin Vo [Vol. 14, RT 3519 et seq.].)

The prosecutor pressed other information to suggest that co-defendant Hajek was nefarious, and that his friendship with appellant Vo was therefore suspect – including such irrelevant matters as a report that Hajek's parents hid the family dog to spare it from ritual sacrifice; that Hajek listened to the music of Ozzie Osbourne[78], and therefore had evil beliefs; and that Hajek had an unusual interest in Japanese animation, suggesting in the prosecutor's overly-fertile mind that co-defendant Hajek was part of an Asian gang.[79]

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[78] Appellant notes that events since his trial punctuate the ludicrousness of the prosecutor's claim that fans of Osbourne's music must necessarily be Satanists. Mr. Osbourne's family participated for several seasons in a "reality" show on television, which was widely regarded as comedic, although it also dealt with serious subjects such as his wife's cancer. The show was so widely popular that when Mr. Osbourne attended the White House Correspondents' Dinner in 2002, the President of the United States reportedly included Osbourne in his lighthearted remarks. (*See*, http://news.bbc.co.uk/1/hi/in_depth/uk/2000/newsmakers/1979877.stm.)

[79] Japanese animation has a significant following in the United States, particularly among younger citizens. (*See*, e.g., http://www.asianweek.com/1999_12_09/ae__anime.html.) The prosecution presented no evidence suggesting that fans of Japanese animation are linked to gang activity.

Co-defendant Hajek's interest was used by the prosecutor nonetheless, for two purposes: (1) to attempt to overcome the mental health evidence presented by Hajek, and (2) to brush aside testimonial evidence that Ellen Wang was thought to be in a gang, by suggesting Hajek was a member of an Asian gang.

All the evidence was that appellant Vo was not in a gang, but being Asian and being a friend of Hajek's was enough to taint him with the prosecution's unfounded smear campaign, which sunk to pathetic and racially-charged suggestions in this instance.

4. Co-defendant Hajek's Extensive Presentation of a Mental State Defense Raised the Unwarranted Expectation That Appellant Would Have Raised Such a Defense If One Were Available.

Co-defendant Hajek presented extensive evidence that he was mentally ill and should not be found guilty of first degree murder or the special circumstances. (*See*, e.g., Vol. 18, RT 4203 et seq. [Hajek's mother, Linda Hajek]; 4336 et seq. [David Fazo, police officer attending an incident in which Hajek displayed disordered behavior]; 4345 et seq. [Sally Lowell, regarding Hajek's early life and adoption]; 4456 et seq. [James Griffin, Ph.D.]; 4520 et seq. [John Hennessey, MFCC, regarding therapy during Hajek's involuntary hospitalization]; 4557 et seq. [Dean Freidlander, M.D., a psychiatrist who formerly treated Hajek]; and 4638 et seq. [Rahn Minagawa, Ph.D., defense consultant for Hajek].)

Appellant Vo, by contrast, presented no mental state defenses at the guilt phase of trial. He endeavored to show that he had not planned or intended homicide or other serious crimes, that he did not know of co-defendant Hajek's plans, and that his involvement was limited.

The prosecutor began his guilt phase closing argument by crediting co-defendant Hajek's lawyer for arguing Hajek was only guilty of second-degree murder, "which avoids all responsibility for any major penalty, is a garden variety, every day average type of murder where there is no plan." (Vol. 22, RT 5554.) The prosecutor promptly attacked that argument as "salesmanship":

> Because in reality, this is a case where two cold-blooded murderers had a plan to kill an entire family of five. Not just those facts alone, but you also have proof positive that they planned it ahead of time and they planned a torture killing. You have defendant's own admissions to Tevya Moriarty[80] establishing that plan, that premeditation ahead of time. She's telling you this is a garden variety murder.

(Vol. 22, RT 5555.) The prosecutor conflated the words and actions of the two defendants, and their defenses, stating they have "that kind of criminal mind . . . *shared by both defendants*, are [sic] not explained by any psychiatric theory or by good lawyering." (Vol. 22, RT 5556; emphasis added.) Appellant Vo never offered a psychiatric theory, but his defenses largely were conflated and lost in the arguments concerning co-defendant Hajek's defenses.

In addition to pitching a case for Vo's guilt based on the ephemeral conspiracy theory, the prosecutor effectively used co-defendant Hajek's mental state defense against appellant Vo. Although most of his remarks were directed at co-defendant Hajek's mental health defense, the prosecutor argued:

> . . . Mr. Vo is responsible. Now Mr. Vo has – there's no evidence of his mental impairment. They are equally going along with this bizarre plan. Mr. Hajek's plan, of course. Mr. Hajek and Mr. Vo are equally premeditating and dealing with this bizarre killing scheme.
>
> If Mr. Hajek is so defective, how do you explain that with Mr. Vo, a normal person. It's not that thinking process of planning and premeditation. What they both share is a sadism, is a cold-blooded killing.

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[80] The prosecutor did not mention that this admission of a plan to Moriarty was from Hajek alone, or that there was no evidence to show Vo even knew of the plan.

(Vol. 22, RT 5573.)

There was no evidence whatsoever of premeditation, planning, torture, murder, or a conspiracy to murder on the part of appellant Vo. There was no evidence introduced, one way or another, about Mr. Vo's mental health; indeed, the prosecutor was well aware that some evidence concerning appellant's mental health was excluded as a discovery sanction, making the "he's normal" argument particularly egregious since the prosecutor had notice this argument might not be true in fact. There was no evidence at all, much less relevant evidence, that appellant Vo had any of the alleged sadistic tendencies, and Vo had no opportunity to rebut the suggestions of sadism that the prosecutor introduced in questioning of co-defendant Hajek's mental health witnesses.

5. Admission of, and Jurors' Consideration of, Hajek's Hearsay Denial of the Killing at the Penalty Phase Deprived Appellant Vo of His Confrontation Rights.

The law is clear: a co-defendant's extrajudicial statement inculpating another defendant may not be used in any way against the other defendant. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123; *People v. Massie*, *supra*, 66 Cal.2d 899, 916-917.)

At the penalty phase, evidence was adduced that co-defendant Hajek had said he did not kill the victim (Vol. 23, RT 5892), leaving no other possibility but appellant Vo as the killer. Appellant Vo could confront none of co-defendant Hajek's extrajudicial statements, but the most noxious of these was Hajek's claim of innocence in the killing –

the equivalent, under these facts, of Hajek pointing to Vo from the witness stand, but without the bother of cross-examination.

6. At the Penalty Phase, Appellant Vo Was Deprived of His Right to an Individualized Sentence, Due to the Presentation and Consideration by the Jury of Evidence Unique to the Co-Defendant.

Appellant Vo was deprived of his right to an individual assessment of his responsibility at the guilt phase of trial. He was furthermore deprived of an individualized sentence, because his entire trial, including his penalty trial, was tainted by the evidence against Hajek and the unsupported allegations that appellant Vo acted in concert with Hajek's alleged plan. Finally, at the penalty phase, the jury was required to consider sentencing for both defendants. The primary prosecution theory remained its uncharged conspiracy theory, and the jury was not instructed that some evidence could only be used in assessing the appropriate sentence for one of the two individual defendants.

Under the Eighth Amendment and its application to the states through the due process clause of the Fourteenth Amendment, there is a requirement of heightened reliability, applicable to both the guilt and sentencing phases of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638.) Jurors are also required to give truly individualized consideration to mitigating factors prior to imposition of a death sentence -- a decision that must possess the "precision that individualized consideration demands," (*Stringer v. Black* (1992) 503 U.S. 222, 231), to ensure that "each defendant in a capital

case [is treated] with that degree of respect due the uniqueness of the individual." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) The jury must treat "the defendant as a 'uniquely individual human bein[g]' and ... [make] a reliable determination that death is the appropriate sentence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 (quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion).)

In this case, the jury was urged throughout trial not to treat the defendants individually, and to accept unreliable evidence and unsupported prosecution argument as reasons for conviction and imposing a death sentence on both. In many ways, Mr. Vo was sentenced to death through an unfortunate association with Hajek, rather than for any findings of culpability on his part, as an individual.

C. Conclusion.

For reasons set forth above, the refusal to sever appellant Vo's trial from that of his clearly culpable co-defendant was an abuse of discretion and appallingly prejudicial, at the guilt phase as well as the penalty phase. This Court and the High Court have long maintained that judicial economy is not a substitute for a fair trial. The guilt of the co-defendant does not prove the guilt of appellant Vo. Presence at the scene of a crime is not evidence of a conspiracy to torture and murder, nor could guilt of those heinous crimes have been inferred by a reasonable jury in a separate trial. The use of the co-defendant's numerous statements without affording the right of confrontation clearly renders Vo's guilty verdict improper and unfair. Reversal is required in this extraordinary case.

2. THE TRIAL COURT UNREASONABLY DEPRIVED APPELLANT VO OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, AND A FAIR TRIAL BY DENYING AND DELAYING THE APPOINTMENT OF SECOND COUNSEL AND FUNDING, AND REFUSING TO CONTINUE THE TRIAL.

A. Introduction.

Appellant Vo's ability to defend against capital charges was unreasonably burdened by three interlocking errors by the trial court: (1) denial of and delay in appointing second counsel to provide necessary assistance in this complex case; (2) a funding system for conflict cases which delegated funding to an office whose resources were left seriously depleted by other cases, which office in turn denied and delayed critical funding for appellant's counsel, investigation, and experts; and (3) the trial court's unreasonable refusal to continue the trial to permit counsel time to prepare.

These errors, each having a devastating impact on counsel's ability to prepare and defend, acted in concert to strip appellant Vo of a fair trial. The necessity for second counsel, adequate and timely funding, and a continuance for counsel to prepare were not capricious or special requests attributable in the least to appellant Vo; these fundamental needs were dictated by the nature of the capital charges brought by the state and circumstances well beyond the control of appellant.

Each error in failing to fulfill these requirements amounts to state interference with a criminal defendant's most basic trial rights: the right to counsel, the right to defend, the right to due process of law, and the right to a fair trial. In this capital case, where

appellant Vo's very life was at stake, he was further deprived of the heightened due process accorded in such cases, and the reliable and individualized sentencing which is constitutionally mandated.

The confluence of these critical errors, as far as appellant is aware, is unique; he has found no similar California capital cases.[81] The appropriate legal analysis, however, is familiar: because the errors (individually and particularly cumulatively) are structural and strike at the heart of the fairness of the trial, reversal is required without a detailed analysis of prejudice.

B. Factual Background.

On November 15, 1991, appellant's counsel filed a Request for Hearing as to the Denials of Request for Second Attorney, stating that counsel had twice presented declarations to the trial court seeking appointment of a second attorney pursuant to PC § 987 (d) and *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434. Judge Hastings noted that the appointment of second counsel is discretionary, and stated his view that "Keenan

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[81] While appellant Vo and co-defendant Hajek share similar complaints about some aspects of the trial procedure, the co-defendant's ability to defend at trial was not similarly impaired. Hajek was represented by the Public Defender's Office, an institutional defender with funding and in-house resources unavailable to appointed conflict counsel. There is no indication in the unsealed record that Hajek requested or required second counsel, that necessary funds were denied because of competing funding obligations of other cases, or that Hajek's counsel was unable to proceed competently absent a continuance. Indeed, it appears that appellant Vo's motions for continuance were denied in part *because* Hajek was ready to proceed, and the trial court was unwilling to sever the cases.

involved a very unique situation," in that there was a "very critical time issue," which was not present in appellant's case since "the matter isn't even set for trial yet." (11/20/91, RT 16.) Vo's motion for appointment of second counsel was denied. (11/20/91, RT 20.)

At a hearing on December 16, 1994 (Vol. 6, CT 1508), appellant's trial counsel presented a letter from Adam Rosenblatt, M.D. concerning Marianne Bachers, appellant's second counsel, stating that she was presently "completely disabled from work because of severe fatigue, insomnia, and impaired concentration: the etiology of which is not entirely clear at this time." Dr. Rosenblatt further stated that Ms. Bachers would need to be out of work for at least 2 months, and possibly longer. (Vol. 6, CT 1507.) Appellant's lead trial counsel, Mr. Blackman, stated that he would not be ready for trial on January 16, 1995. Co-defendant Hajek and the People opposed appellant's motion for continuance, and the motion was deemed premature by the trial court. The People's motion for discovery was set for January 6, 1995, over appellant's objection. (Vol. 6, CT 1508.)

An *in camera* hearing was held on January 17, 1995, as to appellant's motion for continuance; that motion was denied. (Vol. 6, CT 1546.) Appellant's trial counsel stated bluntly that "*the defense is not prepared to proceed,*" and asked that he be sworn to give evidence about the reasons. (1/17/95, RT 41.) Counsel stated that "the facts of the case are peculiar and unique" in that two persons were involved, but Vo's intent was extremely narrow. (1/17/95, RT 41.) Counsel explained that pretrial motions such as severance

were therefore complex, given that the circumstances of the killing were unknown, blood was found only on co-defendant Hajek, the defenses were antagonistic, and legal issues are complex (for example, the application of aider and abettor status to the special circumstances) and required preservation for post-conviction review. (1/17/95, RT 43-45.) Counsel reviewed the history of the case:

> In 1991, the homicide occurred and just over a month later counsel was appointed; a preliminary hearing lasting two weeks was held; the case was bound over (1/17/95, RT 45); counsel had discussions with the prosecution about whether the case would be capitally charged (1/17/95, RT 45-46); counsel requested Keenan counsel and was denied both on the papers and after a hearing (1/17/95, RT 46).
>
> In 1992, discussions continued as to the decision to seek a death verdict; a PC § 995 motion was granted as to three of the four special circumstances charged; and the prosecution appealed, a process that took over a year, during which time counsel did not contemplate a reversal of the lower court ruling and "the death issues and the penalty phase issues . . .were put in suspension. We just didn't do anything," awaiting the appellate decision. (1/17/95, RT 47-48.)
>
> In 1993, while the appeal was pending, the prosecution filed robbery and kidnaping charges in an effort to show "joint activity between Mr. Hajek and Mr. Vo and possibly others in doing some robberies," and counsel represented appellant Vo in that collateral case, which resulted in not guilty verdicts[82] (1/17/95, RT 48-50); and at the end of December, the appellate court reversed the trial court ruling that concerning special circumstances. (1/17/95, RT 48-50.)
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> In 1994, the special circumstance allegations were reinstated in the Superior Court and counsel sought a psychiatric expert. Counsel had been denied Keenan counsel to this point, but was approved in March; it proved difficult to find Keenan

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[82] Appellant Vo and co-defendant Hajek were found not guilty of robbery; appellant Vo was found not guilty of kidnaping; Both were were found guilty of VC § 10851 concerning the vehicle later found nearby the scene of the homicide. (1/17/95, RT 449-50.)

> counsel, but Mary Ann Bachers was eventually appointed. (1/17/95, RT 50-51.) Ms. Bachers began work in May; until the appellate decision reinstating the special circumstances, counsel had viewed the case as much weaker. (1/17/95, RT 52.) Ms. Bachers had expertise in pretrial motions, instructions, and penalty phase investigation. (1/17/95, RT 53.) On December 9, 1995, counsel learned that Ms. Bachers had health problems, which he described as a "mental breakdown." (1/17/95, RT 56.) Although counsel had a guilt phase investigator, Ms. Bachers was conducting interviews of family members and other social history witnesses, and she was to share that information with the expert; counsel delegated the penalty phase development to her. (1/17/95, RT 57-58; 1/17/95, RT 54.) In the latter part of December, counsel contacted the Center for Juvenile and Criminal Justice, and they met the client and were in the process of "putting this information together." (1/17/95, RT 59-60.)

Appellant's counsel noted appellant Vo's complex social history – born in Vietnam, the family moving to refugee camps, etc. (1/17/95, RT 53, 58.) Counsel explained that he had made the decision "to do it sequentially," dealing with the separate robbery charges, waiting to see how the appellate proceeding ended, and then preparing for penalty phase. (1/17/95, RT 54.) Counsel had believed – incorrectly, as it turned out – that the case would be ready for a January 1995 trial date. (1/17/95, RT 55.)

> "Again, if I've been incompetent and if I have not made these decisions right, then the court has a number of powers to deal with me. You can relieve me, you can get rid of me, but my client should not suffer if I have made a wrong decision. I personally don't think I have, but I've responded to a set of circumstances, I've consulted with appropriate individuals, and this is what I did." (1/17/95, RT 59.)

> "So at this point the case is not ready from a penalty perspective. It is not prepared. It is not in fact ready. In order to do a professionally responsible job on the penalty phase of this case, Mr. Vo must be traced from Viet Nam, all the way through to the settlement camps, the support situations in the southern part of the United States where there apparently were issues around intra-family stress, abuse, alcohol abuse on the part of his father.

> There are a number of issues that we are exploring, but it takes time to do this, and it takes the expertise of either Ms. Bachers or CJCJ." (1/17/95, RT 60-61.)

Counsel explained that cultural factors played a role in appellant's family history, and they had to be developed and presented; he noted there were also abuse issues, possible neurological issues that needed to be checked out, and issues of deprivation, as well as guilt phase issues based on the relationship between appellant Vo's background and his involvement in the offense. (1/17/95, RT 61-62.)

> "So it's just not there yet. It is something that is critical and should be explored. It has not been explored to the point it is ready at this point. And I regret that, but I'm working under a certain set of parameters, and I've done it as well as I know how to do, and if I have been derelict, which I don't think I have, it should not go to the detriment of my client. He is the one that faces the death verdict, not me." (1/17/95, RT 62-63.)

Counsel had been attempting to find replacement second counsel, but capital cases were "too stressful," most lawyers "don't want to come to Santa Clara County at all and do these cases," much less under time pressure, and he acknowledged that some possible lawyers "can't drop everything and come here and help me on this case." (1/17/95, RT 63-64.) The case is complex, and many lawyers in the county were "caught up in the Mexican Mafia case." (1/17/95, RT 64-65.) In addition, lawyers were unwilling to take conflicts cases because of difficulties getting authorization and getting paid. (1/17/95, RT 65-66.)

Appellant's trial counsel emphasized that "this matter is not ready, and I believe if

Mr. Vo was required to proceed to trial based upon the state of non-readiness at this point, that he would be deprived of competent counsel and the right to put on a competent defense." (1/17/95, RT 66.) The trial court responded:

> "I have read the transcript of the proceedings on November 20th, 1991, that was heard before Judge Hastings when he denied the request for Keenan counsel. All the arguments you're putting forth are the same arguments you put forth at that time . . .. I don't think this case will every be prepared, Mr. Blackman, and all the information you need for a competent guilt phase and penalty phase investigation is at your fingertips. It can be done. It will be done. Request for continuance denied." (1/17/95, RT 66-67.)

On January 6, 1995, a hearing was held on the prosecutor's discovery motion. Co-defendant Hajek objected to the discovery order, but indicated he would comply. Compliance with the discovery motion was ordered before jury selection. The trial court informed counsel that "unless reports are turned over, the witness will not be called." Appellant's counsel informed the trial court that he was "not ready, there being no *Keenan* counsel available." Although appellant's counsel stated he would comply with discovery, he had "nothing to offer." (Vol. 6, CT 1512-1513.)

Appellant's *Keenan*[83] counsel, Jeane DeKelver, was appointed to assist with his defense on February 10, 1995. (Vol. 10, CT 2741.)

Trial began on March 30, 1995, with appellant's second counsel, Jeane DeKelver, appearing before the jury for the first time. (Vol. 7, CT 1692.)

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[83] *Keenan v. Superior Court* (1982) 31 Cal.3d 424 held that it may be an abuse of discretion for a trial court to refuse to appoint second counsel in a capital case.

On June 5, 1995, appellant's *in camera Marsden*[84] motion was denied,[85] and a motion for continuance by appellant's counsel was denied. (Vol. 9, CT 2210; 6/5/95, RT 5650-5671.) Appellant Vo personally attempted to present the *Marsden* motion, expressing concern that "it is my first time. I'm not very good with presentation." (6/5/95, RT 5650.) Vo stated that "all through trial he doesn't touch base with me what is going on, so seem like there would be thing I tell him and he just like we are on different wavelength." (6/5/95, RT 5650.) He stated that in addition to a lack of communication, appellant wished to recall witnesses Cary Wang and Lori Nguyen; that counsel would not go to the jail to meet with him; and that counsel did not object to the

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[84] *People v. Marsden* (1970) 2 Cal.3d. 118.

[85] Appellant Vo discusses the June 5, 1995 *Marsden* motion in this argument because the transcript of that proceeding illustrates some of the ways that appellant Vo's defense was hamstrung by the absence of *Keenan* counsel to adequately prepare in advance of trial, and by the trial court's refusal to grant a continuance to appellant Vo when his counsel was unprepared to defend at this joint capital trial, as well as some of the overwhelming financial pressures imposed on counsel because investigative funding and attorney fees were withheld by the financially-strapped office of conflict counsel. It is, in the experience of appellant Vo's current counsel, extraordinary to see these multiple burdens upon the ability to defend reflected in a trial transcript.

The fact that these matters are contained in the trial transcript means that the trial court was certainly aware that counsel was unprepared, that the trial preparation was impeded by the unexpected departure of one *Keenan* counsel and late appointment of another, and that trial counsel could not pay for necessary investigation and experts; indeed, trial counsel themselves were not being paid, and appointed counsel was in danger of being evicted from his office and losing his personal home.

It is likely that additional information will be included in a future habeas corpus petition. Even upon the bare trial record, however, appellant Vo asserts that there is a shocking abundance of evidence that these convergent errors deprived him of a fair trial and a fair opportunity to defend in this capital case.

prosecutor's allegations concerning gangs, or make clear appellant was not a member of a gang. (6/5/95, RT 5651-52.) In addition, appellant took the stand to explain certain events, but was not given the opportunity.

> "My opening presentation was vague to a point where it was like a joke. [¶] He told me that don't worry about it, we will cover everything up at the end. That never happened."

(6/5/95, RT 5653.) Appellant stated he is "not very good at communicating," and he was not properly prepared to testify; the questioning from counsel did not permit him to explain the things he wished to explain. (6/5/95, RT 5654.) Appellant continued:

> "Well, it seems to me that ever since when we asked for a continuance and you explained to him, you told him, no, kind of chewed him out, seemed like there seemed to be some animosity between you, Your Honor, and toward my attorney. I feel it affected this trial."

(6/5/95, RT 5655.) The trial court responded:

> "There was animosity between your attorney asking for a continuance in a case four years old and a case assigned to me as a trial department. I felt four years was an adequate amount of time to present the case. I did express displeasure in the fact that counsel did not announce ready to go to trial."

(6/5/95, RT 5655.) Appellant replied:

> "We weren't. We were just, when we're in trial we were putting the trial together. We weren't ready to go. We weren't prepared. There was a little bit of confusion. It wasn't prepared.
>
> "I know it is difficult to understand because this is a four years case (sic), and I don't know why . . .. I don't understand why we weren't prepared. It was difficult for me to understand that too."

(6/5/95, RT 5655.) Appellant also complained that his counsel had not objected when appellant was being badgered on cross-examination by the District Attorney, to the extent that once counsel for co-defendant Hajek objected on Vo's behalf. (6/5/95, RT 5656.)

Appellant's counsel supported his client's motion, expressing surprise at the jury's guilt phase verdicts and findings of guilt. (6/5/95, RT 5657.) The trial court expressed extreme displeasure in counsel's lack of preparation:

> "It's beyond my comprehension why after four years this case is not ready to proceed. I know you had *Keenan* counsel problems, but there's a real question whether a *Keenan* counsel is really appropriate in this case."

(6/5/95, RT 5658.) In the trial court's view, the case was "very straightforward," but trial counsel contended that the complexity of the case "comes from the inner relationship between the facts and the law." (6/5/95, RT 5658.) The trial court stated:

> "The fact it takes four years to get this case ready for trial I think is just horrendous. This case is not that difficult, and I'm of the firm belief had I not pushed this case out to trial it never would be ready for trial." (6/5/95, RT 5659.)

Trial counsel explained that during the pendency of the case, there were appellate proceedings; separate robbery charges were filed and proceeded to trial; that *Keenan* counsel was requested early in the case and denied, then *Keenan* counsel had been appointed the previous May but had to withdraw, leaving counsel within 30 days of trial "in a position where the penalty phase is just not at all prepared." (6/5/95, RT 5659-60.)

> "And it may be that I'm a fool, and it may be that I did not do a good job on

this case, but I don't believe that whatever I did wrong should be attributed to Mr. Vo, particularly in the context of the catastrophic potential consequences in this case.. . .. [¶] . . . I think what Mr. Vo has seen and what Mr. Vo has talked about is symptomatic of what I believe is lack of preparation in this case, and again I may be wrong and I may be open to criticism because I have not in fact got the case prepared, but it is not through inaction on my part. Because I've tried very hard to put this case together and represent this young man.

"I have felt since a problem developed with Ms. Bachers an extraordinary time pressure, because I'm in a situation where I'm set to pick a jury in January, and my penalty phase is destroyed. I have no penalty phase. Because I've relied on Ms. Bachers to bring that along because that was consistent with her skills, as I've previously explained to the court.

"So we're in the case. I've got CJCJ up and running. They're moving as quickly as they can move but it turns out to be a very time consuming process.

"I'm involved with picking a jury. We're doing jove [sic] voir dire, doing motions and all the rest, and I'm also trying to do the penalty phase at the same time.

"It wasn't until we got farther into the trial that Ms. DeKelver agreed to do the job as Keenan counsel, and her assistance has been extremely valuable in the case, but we're playing catch up in this case and the catch up is that I put all the eggs in the Bachers' basket to get things done and it wasn't done. Maybe I'm a fool to do that, but that's what I did.

"We get into trial and we end up with a number of complicated issues, and we end up with financial issues that were extraordinary. [¶] . . . I'm working on a case that is taking all of my time, so I cannot go out into the marketplace and get new cases to financially take care of my personal economic situation. [¶] I think Ms. Dekelver is in the same position. We've been paid once but they owe us again.

"In this case the first time since I've been in private practice where my rent has been late. It is the first case where I have not been able to pay the experts. The experts remain unpaid at this time.

> "The reason why I share this information with you is not to complain about it but to indicate I'm in a case, I'm being pushed by the trial judge to get prepared, but I'm worried about whether I lose my house, I'm worried about whether I get kicked out of my office, and I'm worried about whether the experts that I'm relying on are going to get paid."

(6/5/95, RT 5660-62.) The funding for CJCJ had been authorized five weeks previously, but

> "Carleen Arlidge [the conflicts administrator] told me last Tuesday it had come on her desk, it had not been paid and she wasn't able to explain it, and I had to go back to my experts and say the judge has ordered we be prepared and go forward with this but I don't know where the payment is."

(6/5/95, RT 5662.) Counsel stated that he was trying to prepare, and he understood he could not simply go on strike in his position. But,

> "It causes a chill, causes an impairment. Maybe if I was a better lawyer I could deal with it all. But I've got the trial process, the legal process, I've got my own personal economic issues, I've got the economic issues around the experts and I'm having a hard time balancing it all."

(6/5/95, RT 5663.) Appellant's trial counsel reiterated: "I do not in fact believe that we are prepared for the penalty phase, that we have not had – and again, I don't believe it is a fault of a laziness or lack of application, but we are not ready." (6/5/95, RT 5664.) Motions were not in the shape they should be, and did not incorporate well a number of recent California Supreme Court decisions. Trial counsel had not had an opportunity to talk personally with witnesses he contemplated presenting, and they had "not had a chance to deal with the instructions" for the penalty phase. (6/5/95, RT 5665.)

"When you look at all these factors, I've got experts that haven't been paid, we haven't been paid, we're trying to get this together, but if you take all these factors together, on top of the stress of the case, on top of the fact that everyone I know of who has anything to do with this case is extremely tired, we are not in fact adequately prepared."

(6/5/95, RT 5666.)

The trial court strenuously stated its displeasure, at both counsel and at the county:

"Mr. Blackman, this case has been in preparation for four years. There is not going to be a continuance. We are going to go forward with the penalty phase of this case.

"It irritates me to no end that the county has not paid for the experts, has not paid counsel. I just think, you know, this is deja vu all over again, whether it is state action that interferes with the adequate preparation of a case I guess is something for the appellate court to decide. But we've been fighting these financial issues with conflicts cases the entire 15 years I've been on the bench. It is just something beyond the court's control . . .."

(6/5/95, RT 5666.) Appellant's counsel responded:

"Well, I understand that, and understand the frustration that the court must feel, but I have a level of frustration and a level of fear and a level of the feeling of inadequacy, because that's just one of the things that has gone into the mix. Everybody says, well, you've had the case for a long time, you should be prepared. But at this point I'm on the threshold of a penalty phase and these people have not been paid."

(6/5/95, RT 5666-67.)

"And it affects – I'm sorry to say that it does, but I'm not – I do not have the financial resources to paper around it and figure I'll get paid sometime so I'll deal with it and it causes me a lot of stress, and it is stress on top of all the other things I take for granted in a sophisticated, complicated murder case that has a certain level of stress that I've learned how to deal with. But you get all the other stresses on top of that and the stress on top of that that comes from representing a young man who is the age of my son who the jury over here may choose to execute, and that adds a collection of stresses

> that may impair with my ability to get this case to a state of preparedness . . . ."

(6/5/95, RT 5667.) The trial court denied the *Marsden* motion, stating, "We have a jury, a jury that has heard the guilt phase. They're prepared to come in tomorrow to hear the penalty phase and we are going to proceed. (6/5/95, RT 5667.)

Appellant's trial counsel next moved for a reasonable continuance to "become adequately prepared for the penalty phase," which motion was denied. (6/5/95, RT 5668.) The trial court commented that counsel should have "brought a motion in front of the supervising judge to compel payment from the county," and counsel informed the court that the conflicts program had advised him to do something different, representing "that it was working out through other mechanisms and forces that I don't purport to understand . . . ." (6/5/95, RT 5668.) Informed that non-payment was also affecting other lawyers in trial, the trial court again expressed grave concern, stating ". . .this issue kind of really bothers me, because this really goes to a constitutional dimension." (6/5/95, RT 5668.) The other lawyers were involved in the Nuestra Familia case, pending before Judge Murphy, of which the trial court took judicial notice. (6/5/95, RT 5669.) Trial counsel stated he understood the trial court's order, and that he would be held in contempt if he did not go forward as ordered, but he again stressed, "this case is not ready at this time." (6/5/95, RT 5670.) His request that the trial court appoint another lawyer to advise appellant concerning "additional things that should be done" to protect his rights; that

motion, too, was denied. (6/5/95, RT 5671.)

In the afternoon of June 5, 1995, further in camera proceedings were held before the trial court. (6/5/95, RT 5705.) Appellant and his counsel were referred to Judge Hastings for further *in camera* proceedings (Vol. 8, CT 2211), which were scheduled for June 7, 1995. (Vol. 8, CT 2212.) The trial court stated that the supervising judge, Judge Komar, had been consulted, and trial counsel was ordered to appear before the PC §987 judge, Judge Hastings, to obtain approval for expert fees, and also "for an audit of your billings as to over the four years as to why you are not prepared to proceed." (6/5/95, RT 5705.) Trial counsel objected:

> "I believe that he [Judge Hastings] is personally biased against me and personally dislikes me. I believe that he has personal beliefs in this whole subject matter that make it inappropriate and I believe he is in a conflict of interest position because he is the so-called 987 judge but is also on the board of directors of the Conflicts Administration Program. So I do not believe that I would receive or that my client would receive a fair hearing in that department and would ask that you send me somewhere else."

(6/5/95, RT 5705-6.) The trial court stated the assignment came from Judge Komar, whom he had consulted about the morning's hearing:

> "I am concerned about the state of the record as it was left this morning. That's the reason why I took the matter up with Judge Komar and I want a full hearing on all issues. I am not the appropriate judge to conduct that hearing, and I asked Judge Komar to make the assignment."

(6/5/95, RT 5706.) Although trial counsel was in the midst of penalty phase preparation of witnesses (6/5/95, RT 5707), the trial court suggested he proceed with speed to Judge

Hastings' court: "You better do it as of yesterday . . . ." (6/5/95, RT 5707.)

On June 7, 1995, Judge Hastings denied a motion to disqualify himself from hearing a PC § 987 motion and ruled on the motion. (Vol. 8, CT 2217.) Counsel moved for disqualification on the grounds that: (1) he believed Judge Hastings had "exhibited significant personal dislike for me personally" (6/7/95, RT 2)[86]; (2) that the judge had "set views on the issues of 987 money" substantially impairing his ability to exercise appropriate discretion, indicated by his "complete unwillingness to be open to the expenditure of 987 funds" (6/7/95, RT 2-3); and (3) the judge had a conflict of interest as he sits on the board of directors of the Conflicts Administration Program, which "is under significant pressure by the County of Santa Clara to cut expenses." (6/7/95, RT 6.) Judge Hastings denied personal bias[87]; he asserted the second complaint "doesn't have merit" and only reflects trial counsel's dissatisfaction with his rulings (6/7/95, RT 5-6); and he claimed that "you don't understand the concept of the Conflicts Administration Program of Santa Clara County."[88] (6/7/95, RT 7.) The request for disqualification was denied.

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[86] The 6/7/95, RT at 1-43 is duplicated at Vol. 9- 10, CT 2414-2458.

[87] Trial counsel gave two examples of rulings in appellant's case: Judge Hastings' denial of funding for a polygraph expert despite a federal ruling permitting use of such evidence, and his ruling early in the case denying appointment of Keenan counsel. Judge Hastings stated that challenges to the constitutionality of California's exclusion of polygraph evidence should be raised in the trial court, and that counsel could have but did not take a writ on the denial of Keenan counsel. (6/7/95, RT 3-5.)

[88] Judge Hastings explained that the court appoints counsel; it is the County's responsibility to provide funds; and neither the trial court nor the Conflict Program has anything to do with the budget, which is set by the County. "If in fact that budget is exceeded, the county pays it; they have no choice, it's constitutionally mandated." (6/7/95, RT 7.)

(6/7/95, RT 8.)

Judge Hastings stated that the trial judge "is very concerned with the status of the readiness of the case," and that the Conflicts Administrator had requested that Judge Hastings hold a hearing.[89] The purpose of the hearing was to "determine whether or not the expenditure of public monies has been justified by a showing that they are reasonable and necessary expenditures of public monies." (6/7/95, RT 8.) Trial counsel began by expressing confusion because a $4,300 bill for Dr. Berg, submitted April 28, 1995, had been authorized by the court, but had not been paid by "the conflicts administration and the court . . . ." (6/7/95, RT 11.) The court explained that counsel appointed through the Conflicts Program are not paid by the court, but by the Conflicts Program. (6/7/95, RT 11-12.) Judge Hastings advised counsel to "Bring it up with him (Judge Creed), because I'm not involved in it, I'm not involved in these payments." (6/7/95, RT 11.) Trial counsel explained he had done so, and was sent to Judge Hastings, "so I'm being put between two Superior Court judges." (6/7/95, RT 12.) Judge Hastings responded: "I can't assist you, counsel, because I'm not involved in the payment of these claims," and noted that Dr. Berg and CJCJ had been paid some sums of money. (6/7/95, RT 12.)

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[89] Previous transcripts did not reflect that the Conflicts Administrator wished a hearing to be held. As noted, many of the financial difficulties counsel experienced were because of apparent cuts in requested (and approved) funding by the Conflicts Program itself, internal delays with the Conflicts Program processing claims; the insolvency of the Conflicts Program due to expenditures in other cases; and problems with payment by the County, which the Conflicts Program undertook to resolve its own way, advising counsel not to pursue court orders for payment.

As to Dr. Berg, Judge Hastings stated, "Conflicts indicates there's a balance owing of zero," which trial counsel denied. (6/7/95, RT 13.) Counsel have requested an additional $6,000 for Dr. Berg to consult and prepare, interview the client again, receive reports from CJCJ about extensive witness interviews[90], and testify for an estimated court day. (6/7/95, RT 15-19.) Judge Hastings opined that the law does not require capital defense counsel to interview "everybody who has had contact with the defendant in his life time" (6/7/95, RT 17-18), and authorized $2,575 for Dr. Berg. (6/7/95, RT 20.)

Judge Hastings asserted that CJCJ had been paid $15,500 previously, and an additional $10,000 was sought. (6/7/95, RT 20-21.) Counsel clarified that only $7,500 had been paid, and that the lack of payment was having "a significant hampering, disabling effect on my ability to go forward and represent this young man in a death penalty case." Asked what witnesses remained to be interviewed, counsel submitted additional memoranda under seal about what remained to be done. (6/7/95, RT 21.)

Trial counsel billings to date included 442 in-court hours and 692 out-of-court hours[91], with approximately $10,000 in bills outstanding; counsel noted that due to a previous trial, "We started to really prepare the case for trial in November of last year." (6/7/95 Vol. 1, RT 14.) Since February, trial counsel had been in trial constantly in

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[90] Counsel stated that they did not have time to put all these interviews (of some 80 witnesses) into written form, so were proceeding with preparations by holding conferences with Dr. Berg and CJCJ. (6/7/95, RT 16-17.) Counsel estimated this aspect of preparation would entail approximately 10 hours of time. (6/7/95, RT 18.)

[91] These figures were for the duration of the case, which began four years before trial, according to the Conflicts Administrator. (6/7/95, RT 26.)

appellant's case. (6/7/95, RT 15.)

The controller of Conflicts Administration, Ms. Cardinet, stated that the payments for Dr. Berg and CJCJ were probably in the mail. (6/7/95, RT 23.) Trial counsel stated that he had been dealing with Ms. Arlidge of Conflicts Administration, "and there's some delay in the process that goes on in the conflicts operation that means that these bills have not been paid, and it has had a serious effect on my ability to go forward with this case." (6/7/95, RT 24.) Asked about the effect on his preparation, trial counsel referred to the June 5, 1995 hearing with the trial judge, Judge Creed, and explained: "Okay. I'm in the process of attempting to put this case together properly. My bills have not been paid . . . ." This has affected counsel's ability to represent appellant "because when my personal first trust deed mortgage goes into default, that causes me some stress. Same with Ms. DeKelver." (6/7/95, RT 24-25.)

> "On the last bill it was delayed for a substantial period of time, I was not able to pay my house note on time. Because of the delay involved in my last conflicts billing, I was two weeks late for the first time in the 23 years that I've been in private practice, late in my office rent. All of these have been explored with Ms. Arlidge and all of them have been explored with Judge Creed. That's why there is a significant degree of frustration in that I'm supposed to be doing certain things legally to represent this young man, and I do not have the financial support of the Conflicts Adminstration. And I protested that to Judge Creed, and he said, well, we'll do everything we can do. But there's this continual delay." (6/7/95, RT 26.)

Judge Hastings stated he could only rule on what had been submitted for this hearing, and he had not reviewed materials submitted that day. Appellant's trial counsel argued that

"it's all in the context of a continuing process because we have been ordered to continue the preparation . . . ." Counsel's pending declaration incorporated other declarations, and other material from CJCJ and investigator McClellan describe what has been done and what remains. None of the work is duplicative, and the pending request for authorization of $20,075 to complete the work expected to be done is necessary. (6/7/95, RT 29-30.) Judge Hastings observed that $8,000 had already been paid to CJCJ and that counsel's requests contained the same "theme" as previous requests (6/7/95, RT 31); Judge Hastings flatly rejected counsel's representation that he needed to re-interview witnesses he expected to present because it is a death penalty case:

> "In a penalty phase the direction and import of the examination, as you should know, and do know, I'm sure, is much different than in a guilt phase. There really isn't a big contested issue of fact. This is mitigation, character witnesses, members of family who get on the stand, look at the jury; and you say, will you tell the jury as to why you think your brother, your son, your daughter should live and not be executed? So you don't really have to interview on factual issues preparing for cross examination because it's a penalty phase. [§] But the public doesn't expect these witnesses will be interviewed two and three times . . . . The public doesn't have to pay for that and the public shouldn't have to pay for that, and the public won't pay for that.
>
> "So if they've been interviewed, so be it; you, as a lawyer, make a decision, read their interviews, get an input as to whether Mr. Vo wants them. Ask Mr. Vo, do you want this person to tell this jury why you should live and not die; it's his case, it's his life. Put the witness on or don't put the witness on. But no reason to interview the person two or three times because the issue is very simple: why should he live and not die." (6/7/95, RT 33-34.)

Trial counsel mentioned a number of witnesses yet to be interviewed; in some instances,

Judge Hastings permitted discreet periods of interview time (one hour, one half hour); as to appellant Vo's family, the judge flatly stated, "I'm not going to allow that," based on the assumptions that appellant was in touch with them and that "Mr. Vo can make that decision" whether to call them. (6/7/95, RT 34-38.) Judge Hastings authorized $357.50 of the requested $20,075. (6/7/95, RT 38.)

Trial counsel explained that some witnesses covered by the request for authorization had already been interviewed, and Judge Hastings stated "That's not before me then;" he refused to rule, and ordered counsel to take those expenses up with the Conflicts Program. (6/7/95, RT 39-39.) Trial counsel explained he had been ordered by the trial court to be prepared for penalty phase, and therefore work had continued (6/7/95, RT 39-40), and Judge Hastings stated:

> "No, that's not before the court. What's before the court is your declaration asking for authorization of monies for work to be expended. I can't understand how you can stand there and tell me that even though the work has been done you can't continue to represent Mr. Vo, even though the work has been done. What you're talking about really is submitting to conflicts an after-the-fact request for monies for work performed; that doesn't come before me, that goes to conflicts. . . . . So you're authorized 357 dollars and 50 cents."

(6/7/95, RT 40-41.) Judge Hastings additionally authorized Vincent Schiraldi of CJCJ, anticipated as an expert witness, to expend 7 hours preparing and testifying. (6/7/95, RT 41.)

Later that afternoon, before the trial court, trial counsel explained in another *in*

camera proceeding that approximately $800 had been approved for CJCJ to complete their work (of $10,000 in additional work contemplated and requested), and that Judge Hastings "took the position the balance of the $20,000 was not before him because that was for work that had been completed." (6/7/95, RT 5866-67.)

> "The problem with this whole scenario and reason why I'm sharing it with you, is that Judge Hastings' order effectively leaves CJCJ without a remedy, and puts CJCJ into a beuraucratic quagmire because no judge – he won't deal with it because it's not work to be done in the future, and conflicts, I don't know what they'll do. These people have performed services in good faith based upon the court's order that we be prepared and the indications that had been made on the record as to the fact they would be paid."

(6/7/95, RT 5867-68.) The trial court stated that "Probably the remedy is at the conclusion of the case that maybe we should have conflicts in, find out what their position is and what they're going to do." (6/7/95, RT 5868.)[92] While the trial court noted Judge Hastings' view that "987 is just a perspective," and trial counsel stated he was "out in the cold between two Superior Court Judges," the trial court declined "to hear it while the matter is pending." (6/7/95, RT 5868.)

Appellant's Motion for New Trial was also filed on or about August 20, 1995, arguing, inter alia, that the trial court erred in denial of continuance requests, requiring counsel to defend when he was not prepared to go forward; and raising payment issues that caused counsel to be unprepared at trial, prevented counsel from preparing and

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[92] Vincent Schiraldi of CJCJ in fact did not testify at the penalty phase. A report from him was submitted in support of the new trial motion (Vol. 11, CT 2790 et seq.), demonstrating some of the evidence he could have presented, had his work been funded.

presenting additional evidence for sentencing, and prevented full investigation of matters concerning jury deliberations; all resulting in an unfair trial for appellant Vo. (Vol. 10, CT 2764-2772.)

On or about October 6, 1995, appellant Vo filed a Supplement to Motion to Preclude Death Penalty, which consisted of the Declaration of Vincent N. Schiraldi, M.S.W., Respecting Disparity Motion. (Vol. 11, CT 2790-2820.) Mr. Schiraldi summarized the investigation conducted, noting a number of mitigating factors relating to the offense and to appellant's background, and contrasting these findings with others against whom the death penalty is sought. (See, e.g., Vol. 11, CT 2817-2819.)

C. Legal Foundations.

Gideon v. Wainwright (1963) 372 U.S. 335, established that indigent criminal defendants have a right to counsel to aid and assist them in defending against charges, under the Sixth Amendment right to counsel and the Fourteenth Amendment due process clause, which requires the states to provide those guarantees of the Bill of Rights essential to a fair trial.

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

(*Gideon v. Wainwright*, *supra*, 372 U.S. at 344.) The provision of counsel is critical to the fairness of a criminal trial:

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

(*Strickland v. Washington* (1984) 466 U.S. 668, 685.) The High Court recognizes the critical role of counsel in ensuring a fair trial:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

(*Ibid.*)

Strickland, *supra*, clarified that counsel's assistance must be within the scope of prevailing professional norms, and reversal is required if a defendant is prejudiced by his counsel's acts and/or omissions; that is, if there is a reasonable probability of a different outcome absent counsel's performance below the standard of care. (*Id.*, at 687.) The companion case to *Strickland*, *United States v. Cronic* (1984) 466 U.S. 648, further confirmed that the right to counsel encompasses the right to effective assistance of counsel. However, *Cronic* notes that in some cases the deficiencies are so fundamental and pervasive in their likely effects that prejudice may be presumed.

> Circumstances of that magnitude may be present on some occasions when

> although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.

(*United States v. Cronic*, *supra*, 466 U.S. 648, 659-660.) Appellant contends that this is such a case, because the trial court's errors affected counsel's ability to adequately represent and defend him at both the guilt and penalty phases.

In California, the constitutional mandate that counsel be provided to capital defendants is codified in Penal Code § 987. Noting the factual and legal complexity of many homicide cases, particularly where capital punishment is sought, this Court held that it is an abuse of discretion for a trial court to deny the appointment of second counsel in capital cases where counsel has demonstrated the need for second counsel. (*Keenan v. Superior Court* (1982) 31 Cal. 3d 424.)

> [T]he [trial] court declared that a criminal attorney should be capable of defending a capital case without the assistance of a second lawyer. But this view fails to take into account the showing made by Schwartzbach of the reasons why a second attorney is justified under the facts of this particular case, e.g., the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pretrial motions, as to some of which review would be sought in the event of adverse rulings. [Fn. omitted.] Thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

(Ibid, at 433-434.) Appellant was denied the appointment of second counsel early in the case. Later-appointed second counsel was forced by illness to withdraw, and replacement second counsel was not appointed until literally the eve of trial. As discussed further

below, this was indeed a case in which second counsel was necessary to aid in the preparation for trial, and the trial court's refusal to timely appoint second counsel grossly burdened his counsels' ability to adequately and timely prepare to defend. The denial of appellant Vo's entitlement under state law to second counsel, moreover, violated his federal due process guarantee. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

The United States Supreme Court has also recognized the critical role of other resources reasonably required by counsel to prepare a defense. *Ake v. Oklahoma* (1985) 470 U.S. 68 clarified that indigent defendants are also entitled under the due process clause to funding for investigation and expert assistance, to develop evidence relevant to issues in their cases.

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

(Id., at 76.) The Court explained its rationale, which is rooted in the importance of a functioning adversarial system to our fundamental expectations of justice:

> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the

> Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross* v. *Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt* v. *North Carolina*, 404 U.S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

(Id., at 77.) The Court in *Ake* stressed the importance of providing necessary defense funding not only to the adversary system as a whole, but in particular to the liberty interests of the individual defendant:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

(Id., at 78.)

Under state law, trial counsel had access to necessary funding pursuant to Penal Code § 987.9, which provides in pertinent part:

> § 987.9. Funds for investigators and experts for indigent defendants in capital cases or in cases involving second degree murder following prior prison term for murder
>
> (a) In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an

> application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

Pursuant to local practice, however, funding in cases represented by conflict counsel was administered by the Conflicts Administrator. In appellant's case, the Office of the Conflicts Administrator itself had a conflict of interest because of the press and expense of other cases, which made funds unavailable to appellant. The denial and unconscionable delay of funding to which appellant Vo was entitled under state law violated, in turn, his federal due process rights. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Fundamental and personal trial rights, including the right to counsel, due process of law, and the guarantee of a fair trial, are compromised if counsel is burdened by a conflict of interest. The conflict of interest of the Conflicts Administrator, in turn, resulted in a conflict of interest for appellant Vo's own appointed counsel, because counsel were placed in a position of choosing between their own interests, such as avoiding default on their home mortgages, and the interests of their client, whose case required funding so that defenses could be investigated, developed, and presented.

The United States Supreme Court has long held that reversal is required where trial counsel has an actual conflict of interest. (*Holloway v. Arkansas* (1978) 435 U.S. 475).

In appellant Vo's case, trial counsel did in fact bring to the trial court's attention the conflict of interest arising from denial of funding and delay of funds, which prevented him from timely and fully preparing for trial, and which counsel himself asserted was preventing him from providing constitutionally adequate performance.

When counsel must choose between ignoring the needs of his client's case, or personally funding them, counsel has a conflict of interest. (*People v. Bonin* (1989) 47 Cal.3d 808, 835.)

> Conflict of interest broadly embraces all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third party or by his own interests.

(Ibid.) See also, *Government of Virgin Islands v. Zepp* (3d Cir. 1984) 748 F.3d 125, 135 ["personal interests of counsel that were 'inconsistent, diverse, or otherwise discordant' with those of his client and which affected the exercise of his professional judgement on behalf of his client"]. California law differs from federal law in that it does not require an actual conflict of interest; a potential conflict of sufficient seriousness is cause for reversal. (*Maxwell v. Superior Court of Los Angeles* (1982) 30 Cal.3d 606, 612.)

Unlike the prosecutor, which has behind it the power and resources of the state, appellant Vo was obliged to rely on the trial court for the means to pursue investigation and consultation with experts, in order to prepare and defend against the capital charges and against the death sentence sought by the state. The trial court failed in its obligation to ensure counsel the tools of litigation that would enable a vigorous defense, which is

essential to the adversarial system of justice. Forcing trial counsel to defend as he labored under a conflict of interest requires reversal. As this Court has observed, the right to unconflicted representation

> . . . is "fundamental" (*Cuyler* v. *Sullivan, supra*, 446 U.S. at p. 343 [64 L.Ed.2d at p. 343]) and "is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" (*Holloway* v. *Arkansas, supra*, 435 U.S. at p. 489 [55 L.Ed.2d at p. 437], quoting *Chapman* v. *California* (1967) 386 U.S. 18, 23 [17 L.Ed.2d 705, 710, 87 S.Ct. 824, 24 A.L.R.3d 1065]; accord, *Cuyler* v. *Sullivan, supra*, at p. 349 [64 L.Ed.2d at p. 347]; *Rose* v. *Clark* (1986) 478 U.S. 570, 577-578 [92 L.Ed.2d 460, 470, 106 S.Ct. 3101].)

(*People v. Bonin*, *supra*, 47 Cal.3d 808, 834-835.)

Appellant Vo was also in a substantially less favorable position to rally resources than his co-defendant, who was represented by the Santa Clara County Public Defender's Office. Institutional defenders, particularly in populous counties, have available other staff attorneys for assistance and consultation, as well as substantial support services: they generally have both staff investigators and budgets for investigation and consultation with experts. The greater efficiency (both in terms of administration and in terms of providing quality representation) of having trained, professionally staffed public defender offices is no doubt the reason that such offices are generally preferred over ad hoc systems of appointing defense counsel. Conflict defense systems have sprung up in more populous areas because public defenders often have conflicts of interests: for example, as in Vo's case, there may be co-defendants, or the office may already represent prosecution witnesses. Such systems are likely an effort to bring more efficiency – at least, more

administrative efficiency – to cases where conflict counsel must be appointed.

In appellant Vo's case, the record demonstrates that the conflict defense system was not designed to provide legal and investigative support directly, and it actively thwarted counsel's efforts to adequately represent his client. His co-defendant, by contrast, was not similarly burdened. The denial of adequate and timely resources to defend at this capital trial deprived appellant Vo of his right to equal protection of law. Unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Clause (see, *Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530-532) and Article 1, § 7(b) and Article IV, § 16(a) of the California Constitution. It also violates the Eighth Amendment and Article 1, § 17 of the California Constitution. As the United States Supreme Court held in connection with voting rights – fundamental rights, to be sure, but paling in comparison to the right to defend against capital charges – when a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Bush v. Gore*, *supra*, 531 U.S. at p. 532.) There was no rational basis for denying appellant Vo the basic tools necessary to prepare and present his defense, including adequate time, counsel, and funding to meet the state's case.

Because this is a capital case, the Eighth Amendment's concern for the reliability of the judgment has also been defeated by the errors addressed in this argument. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430

U.S. 349, 357-358; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

D. Appellant's Right to Second Counsel Was Unreasonably Abridged by the Trial Court.

The information charging capital murder and special circumstances, multiple counts of multiple murder and false imprisonment, kidnaping, robbery, burglary, and deadly weapons enhancements was filed on July 1, 1991. Having twice failed to secure the appointment of second counsel in proceedings that the trial court failed to report,[93] on November 15, 1991, trial counsel filed a Request for Hearing as to the Denials of Requests for Second Attorney. (Vol. 4, CT 1003-1004.) A hearing was held on November 20, 1991 (11/20/91, RT 3-21), and the motion was denied. (11/20/91, RT 20.)

Following an interlocutory appeal by the prosecution, counsel again sought appointment of second counsel. Counsel's motions and the court's actions are again not fully reflected in the trial record, but counsel later stated that second counsel was approved in March 1994, that it was difficult to find second counsel, and that Marianne Bachers began work in May 1994. (1/17/95, RT 50-52.) Lead counsel delegated the preparation of penalty phase defenses to Ms. Bachers. (1/17/95, RT 57-58, 54.) On December 9, 1994, counsel learned that Ms. Bachers suffered heath problems he described as a mental breakdown. (1/17/95, RT 56.) Counsel explained that he was

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[93] The trial court's failure to ensure that all proceedings in this capital case were reported, as required by law, is addressed in Argument 21. In this instance, the original requests were returned to counsel, rather than being maintained in the court files. (11/20/91, RT 3.)

looking for replacement second counsel, but for various reasons – including time pressure, the complexity of the case, the fact that qualified prospects had caseloads, that many local lawyers were involved in a complex "Mexican Mafia" case, and the known difficulties that conflict counsel had experienced in getting paid – appellant's counsel had been unable to secure a lawyer to serve in that capacity. (1/17/95, RT 63-66.) Counsel's motion for continuance on January 17, 1995 was denied. (Vol. 6, CT 1546.)

Appellant's *Keenan* counsel, Jeane DeKelver, was appointed to assist with his defense on February 10, 1995 (Vol. 10, CT 2741), just days before his trial began on February 14, 1995. (Vol. 6, CT 1646.)

1. Petitioner Was Entitled to Second Counsel to Aid in Defense of Complex Capital Charges.

On November 15, 1991, appellant's counsel filed a Request for Hearing as to the Denials of Request for Second Attorney, stating that counsel had twice presented declarations to the trial court seeking appointment of a second attorney pursuant to PC § 987 (d) and *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 434. Appellant's counsel argued that a second attorney was necessary to prepare for trial and present the defense, "based upon the facts and circumstances of this case." (Vol. 5, CT 1003-1004; 11/20/91, RT 3-21[94].)

Appellant's counsel was sworn and testified before Judge Hastings that he had

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[94] The sealed transcript of this *in camera* proceeding is duplicated at Vol. 4, CT 1023-1052.

previously filed two declarations in support of the appointment of second counsel; both requests were denied, and the original declarations returned to him. (11/20/91, RT 3.) Trial counsel argued that in appellant's case, special circumstances had been filed (robbery, burglary, lying in wait); that attempted murder, kidnaping, and other charges had been brought; and that the factual and legal complexity of the case called for appointment of second counsel under *Keenan v. Superior Court*. (11/20/91, RT 5-6, 14.) Trial counsel further noted that the preliminary hearing took two weeks; the facts of the case were confusing and vague; two separate individuals were charged; and the evidence did not clearly show which defendant killed the elderly victim, nor was a weapon found. (11/20/91, RT 6-7.)

Trial counsel had identified at least 40 witnesses who needed to be interviewed, a number of whom do not speak English; counsel pointed to the difficulty of conducting adequate interviews with Vietnamese-speaking witnesses. (11/20/91, RT 7-8.) In addition, trial counsel contemplated a complex motion under PC § 995 concerning the sufficiency of the special circumstances, other motions concerning evidentiary matters, a complex motion to sever the trials of the co-defendants, and other motions. (11/20/91, RT 8-9, 13, 11-12.) Counsel contemplated expert consultation concerning blood typing, noting that blood had been found on co-defendant Hajek's clothing; and he anticipated conflicting defenses concerning the blood evidence. (11/20/91, RT 9.)

Should capital punishment be sought, counsel contemplated a complicated and

time-consuming investigation of appellant's background, given that he was born in Vietnam and his family lived as refugees in various locations, and that some family members live out of the area. (11/20/91, RT 10.) An assessment of appellant's mental state would be necessary, and trial counsel contemplated requiring expert assistance concerning the expected evidence of co-defendant Hajek's psychiatric history. (11/20/91, RT 11.) In addition, discovery indicated that the prosecution believed appellant was involved with a gang and in robberies, matters also requiring investigation. (11/20/91, RT 12-13.)

Judge Hastings noted that the appointment of second counsel is discretionary, and stated his view that "Keenan involved a very unique situation," in that there was a "very critical time issue," which was not present in appellant's case since "the matter isn't even set for trial yet." (11/20/91, RT 16.) The judge viewed counsel's assertions about the complexity of the case as "totally conclusionary," and stated that it was inappropriate to expend public money to have a second lawyer assist with a PC § 995 motion or a severance motion. (11/20/91, RT 17-18.) The fact that numerous witnesses needed to be interviewed, the issues concerning blood evidence and admissibility of evidence, and the client's background, he opined, do not justify appointment of second counsel "where there are no time parameter problems." (11/20/91, RT 18-19.) "There's no reason to have two lawyers involved" in the process of penalty phase investigation. The motion for appointment of second counsel was denied. (11/20/91, RT 20.)

Keenan v. Superior Court (1982) 31 Cal. 3d 424, held that the trial court abused its discretion in denying a capital defendant in a factually and legally complex case the appointment of second counsel.

> [Penal Code] Section 987, subdivision (b), provides that "[i]n a capital case, . . . [i]f the defendant is unable to employ counsel, the court shall assign counsel to defend him." That section, together with other provisions for court-appointed counsel (see §§ 987.2-987.8), provides ample authority for appointment of an additional attorney shown to be necessary for defense of a capital case. To avoid undue disclosure of defense strategy, defendant is entitled to the application, by analogy, of section 987.9's provisions for confidentiality to the making and hearing of the motion for such appointment. [Citation omitted.] The appointment is not an absolute right, however, and the decision as to whether an additional attorney should be appointed remains within the sound discretion of the trial court.
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> That discretion, of course, must be "guided by legal principles and policies appropriate to the particular matter at issue." (*People* v. *Russel* (1968) 69 Cal.2d 187, 195 [70 Cal. Rptr. 210, 443 P.2d 794]; *Bullis* v. *Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815 [148 Cal. Rptr. 22, 582 P.2d 109, 7 A.L.R.4th 642].) The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. (*Gardner* v. *Florida* (1977) 430 U.S. 349, 357 [51 L. Ed. 2d 393, 401-402, 97 S. Ct. 1197]; Gregg v. *Georgia* (1976) 428 U.S. 153, 187 [49 L. Ed. 2d 859, 882-883, 96 S. Ct. 2909].) Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (*United States* v. *See* (9th Cir. 1974) 505 F.2d 845, 853, fn. 13; *Powell* v. *Alabama, supra* , 287 U.S. at p. 71 [77 L. Ed. at pp. 171-172].)

(*Id.*, at 430-431.) In addition to noting legislative recognition that capital defendants may require greater protections than are normally afforded non-capital defendants (*Id.*, at 431), this Court stated:

> Another factor the trial court must weigh in exercising its discretion is the importance this court has attached to pretrial preparation in providing a criminal defendant effective legal assistance. Part of counsel's responsibility to a client is to become thoroughly familiar with the factual and legal circumstances of the case prior to trial. (*People* v. *Frierson* (1979) 25 Cal.3d 142, 163 [158 Cal. Rptr. 281, 599 P.2d 587]; *People* v. *Pope* (1979) 23 Cal.3d 412, 424-425 [152 Cal. Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1]; see also, 1 ABA Standards for Crim. Justice (2d ed. 1980) The Defense Function, p. 4-42.) "Representation of an accused murderer is a mammoth responsibility." (*In re Hall* (1981) 30 Cal.3d 408, 434 [179 Cal. Rptr. 223, 637 P.2d 690].) In a murder prosecution that is factually and legally complex, the task of effectively preparing for trial places a substantial burden on the defense attorney. This is particularly true of a capital case, since the possibility of a death penalty raises additional factual and legal issues. This burden may be lightened by employment of investigators and experts, but the ultimate responsibility for coordinating the investigation and assimilating the results must remain with an attorney sensitive to the potential legal issues involved. Because many of the tasks involved in preparation for trial cannot be delegated to nonattorneys, the court cannot assume that authorization of funds for an investigator makes appointment of a second attorney unnecessary. Rather, in assessing the need for another attorney the court must focus on the complexity of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution.

(*Id.*, at 431-432.)

In support of his motion for the appointment of second counsel, Ms. Keenan's lawyer stated by declaration detailed reasons why second counsel was needed. These included, as in Vo's case, the factual and legal complexity of the case, numerous witnesses to be interviewed, anticipated scientific and psychiatric evidence at trial, additional non-capital charges then pending against the client, the difficulty of simultaneously preparing for guilt and penalty phases, the substantially different nature of a penalty phase defense from the usual guilt defense, the need for attorney supervision of

investigative efforts, the need to prepare and file numerous pretrial motions, and the fact that trial was set to begin shortly. (*Keenan*, at 432-433.) The trial court decided that an attorney working alone should be able to perform the necessary tasks, and denied the motion. (Id., at 433-434.) This reviewing Court disagreed, determining that, "These reasons are inadequate as a matter of law to justify denial of defendant's motion." (Id., at p. 434.)

Appellant's situation was analogous in need, but different in timing. Appellant's counsel moved for the appointment of second counsel long before trial, permitting the trial court sufficient opportunity to assess the complexity of the issues. (*People v. Wright* (1990) 52 Cal.3d 367.) Counsel made a detailed factual showing of the need for second counsel, and renewed the request repeatedly, both in 1991 and, as demonstrated below, at times closer to trial. (*People v. Staten* (2000) 24 Cal.4th 434.)

The factual showing that trial counsel made in November, 1991, was more than sufficient to trigger the trial court's duty to exercise its discretion to protect the defendant's right to counsel and ability to defend. Counsel adequately explained the extraordinary complexity of this client's case, involving multiple non-capital charges and special circumstance allegations in addition to the capital charge, numerous witnesses, a co-defendant with divergent interests, scientific and psychiatric issues requiring investigation and expert assistance, the need for numerous pretrial motions, and the unusually complex penalty investigation required by the client's unique personal and

family history. (Vol. 4, CT 1003-1004; 11/20/91, RT 3-21[95].)

It is apparent that the trial court focused inappropriately on a single, minor circumstance in the *Keenan* case, that *Keenan* was set for trial just seven weeks after the request. In fact, the timing of trial is mentioned by this Court's opinion in *Keenan* almost as an aside, and timing played little role in the Court's reasoning. The critical concern of this Court was with protecting the rights of the accused in a complex capital case, particularly in light of the fact that the defendant's very life hung in the balance. As Vo's request was no different, the trial court erred in denying appellant Vo's several early motions for second counsel, depriving appellant of legal assistance that he required to prepare to defend against the charges and against a death sentence.

2. When Second Counsel Became Incapacitated Shortly Before Trial, the Trial Court Unreasonably Refused a Continuance.

Appellant's case was procedurally unusual, because on August 28, 1992, the trial court granted in part the defendants' motions to dismiss pursuant to Penal Code § 995, dismissing three alleged special circumstances (lying in wait, burglary-murder, and robbery-murder) as well as various weapons enhancements. (Vol. 5, CT 1349.) On September 10, 1992, the District Attorney filed a Notice of Appeal. (Vol. 5, CT 1351-1352.) The Court of Appeal issued its unpublished decision on October 29, 1993. (Vol. 6, CT 1422-1438.) During the pendency of the appeal, there was little activity in the trial

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[95] The sealed transcript of this *in camera* proceeding is duplicated at Vol. 4, CT 1023-1052.

court. An amended Information was filed by the District Attorney on March 2, 1994. (Vol. 6, CT 1442-1453.)

Appellant Vo's counsel again requested the appointment of second counsel once the case became active again in 1994. The trial record is incomplete and does not contain an appointment order, but trial counsel later represented the following in *in camera* proceedings: In 1994, the special circumstance allegations were reinstated in the Superior Court and counsel sought a psychiatric expert. Counsel had been denied *Keenan* counsel to this point, but his motion was approved in March; it proved difficult to find *Keenan* counsel, but Mary Ann Bachers was eventually appointed. (1/17/95, RT 50-51.) Ms. Bachers began work in May; until the appellate decision reinstating the special circumstances, counsel had viewed the case as much weaker. (1/17/95, RT 52.) Ms. Bachers had expertise in pretrial motions, instructions, and penalty phase investigation. (1/17/95, RT 53.) On December 9, 1994, counsel learned that Ms. Bachers had health problems, which he described as a "mental breakdown." (1/17/95, RT 56.) Although counsel had a guilt phase investigator, Ms. Bachers was conducting interviews of family members and other social history witnesses, and she was to share that information with the expert; counsel delegated the penalty phase development to her. (1/17/95, RT 57-58; 1/17/95, RT 54.)

At a hearing on December 16, 1994 (Vol. 6, CT 1508), appellant's trial counsel presented a letter from Adam Rosenblatt, M.D. concerning Marianne Bachers, appellant's

second counsel, stating that she "is completely disabled from work because of severe fatigue, insomnia, and impaired concentration: the etiology of which is not entirely clear at this time." Dr. Rosenblatt further stated that Ms. Bachers would need to be out of work for at least 2 months, and possibly longer. (Vol. 6, CT 1507.) Appellant's lead trial counsel, Mr. Blackman, stated that he would not be ready for trial on January 16, 1995. Co-defendant Hajek and the People opposed appellant's motion for continuance, and the motion was deemed premature by the trial court. The People's motion for discovery was set for January 6, 1995, over appellant's objection. (Vol. 6, CT 1508.)

Trial counsel reiterated that he was unable to proceed to trial due to the absence of second counsel on January 6, 1995 (Vol. 6, CT 1512) and January 17, 1995. (Vol. 6, CT 1546.) As set forth more fully in the following subpart of this argument, substitute co-counsel was only appointed on February 10, 1995 (Vol. 10, CT 2741), immediately before trial began on February 14, 1995 (Vol. 6, CT 1646), and her first appearance before the jury was on March 30, 1995, after the jury was seated. (Vol. 7, CT 1692.)

Trial counsel was initially denied second counsel despite three requests early in the process. Only after his client had been in custody for some two and a half years was the motion for second counsel granted, and that co-counsel was forced to discontinue her representation due to illness, shortly before trial was scheduled, and with the extensive tasks delegated to her left incomplete. As set forth more fully below in section F of this argument, incorporated herein, the absence of second counsel for most of the case and

unexpected departure of late-appointed second counsel were among the reasons counsel was not prepared to adequately represent appellant Vo when his case proceeded to trial, and a reason that a reasonable continuance should have been granted.

3. The Appointment of Second Counsel on the Eve of Trial Precluded Adequate Preparation.

Appellant's *Keenan*[96] counsel, Jeane DeKelver, was appointed on the eve of trial. She obviously needed time to acquaint herself with the prosecution's case and potential defenses to guilt and penalty; four days was not sufficient time in advance of trial to develop trial strategy and file pretrial motions before jury selection began. She did not appear in court until the presentation of evidence began.

The trial court was unconcerned with the lack of preparation. The judge's view was that the case might not be complex enough to merit second counsel[97], and his real concern was that the case had begun four years earlier – not with the state of preparation or the reasons counsel advanced as to why a continuance was necessary. "It's beyond my comprehension why after four years this case is not ready to proceed. . . ." (6/5/95, RT 5658.)

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[96] *Keenan v. Superior Court* (1982) 31 Cal. 3d 424

[97] It is difficult to imagine what case might be sufficiently complex to merit two lawyers in the eyes of the trial court. Appellant faced a capital murder charge; several attempted murder charges; other charges; several disputed special circumstance allegations [which had been the subject of proceedings in the Court of Appeal]; an uncharged criminal conspiracy allegation of indeterminate scope; uncharged and unproven allegations of gang membership; trial with a co-defendant whose defenses would be adverse to Appellant; and a potential penalty phase at which all mitigating evidence of his complex history should be presented.

Lead counsel had explained reasons the case was not yet ready, including the fact that the state took an appeal after dismissal of special circumstance allegations, there was a separate trial of other charges against Appellant and the co-defendant, the case returned from the appellate court in 1994, preparation of important parts of the case had been delegated to the original second counsel, Ms. Bachers, and Ms. Bachers was forced to withdraw from the case shortly before trial was scheduled due to medical reasons, having not completed the assigned work. These explanations are both plausible, and uncontradicted in the record. There is no reason to believe that trial counsel was actually more prepared than he had represented to the trial court, and no reason to believe that Ms. DeKelver was prepared in the least before the trial began. As discussed further in the portion of this argument addressing the denial of necessary continuances, Appellant's counsel were in fact unprepared for trial.

E. Necessary Funding Was Unreasonably Denied or Delayed.

The denial of adequate and timely funding precluded counsel's adequate representation. Appellant refers to and incorporates herein the fuller description of funding disruptions reflected in the record, set forth in the factual introduction to this Argument.

On April 26, 1995, in *in camera* proceedings before the trial judge, appellant Vo's counsel complained that they were unable to prepare properly for the penalty phase because requests for necessary funding had been disapproved. (4/26/95, RT 4519-4528.)

Funding was arbitrarily cut by the Conflicts Administration program, which had a conflict of interest because its funding had been exhausted by another multi-party trial in the county.

Appellant's lead and second counsel had an in camera hearing with the trial court and the Conflicts Administrator after the jury began deliberations on May 10, 1995. (Vol. 7, CT 1819.) The conflicts administrator, Ms. Arlidge, stated that "they have not yet been paid because the conflicts administration has not yet submitted their claims to the county." (5/10/95, RT 5603.) The trial court stated, "I would like them compensated so they can meet their bills and we can proceed with this case." (5/10/95, RT 5603.)

An additional *in camera* proceeding was held with appellant, his counsel, the conflicts administrator, and the trial court on May 16, 1995, concerning the non-payment of trial counsel. (5/16/95, RT 5609-5617.) The trial court again stated its intention to proceed immediately to penalty phase if special circumstances were found true, that the jury had been told the case would take only 6 to 8 weeks, and that "we're really going to have problems if you're not able to proceed." (5/16/95, RT 5611.)

On June 5, 1995, after denial of a continuance motion, the trial court commented that counsel should have "brought a motion in front of the supervising judge to compel payment from the county," but trial counsel informed the court that the Conflicts program had advised him to do something different, representing "that it was working out through other mechanisms and forces that I don't purport to understand . . . ." (6/5/95, RT 5668.)

Informed that non-payment was also affecting other lawyers in trial, the trial court again expressed grave concern, stating "...this issue kind of really bothers me, because this really goes to a constitutional dimension." (6/5/95, RT 5668.) Later that day, trial counsel was ordered to appear before the PC §987 judge, Judge Hastings, to obtain approval for expert fees, and also "for an audit of your billings as to over the four years as to why you are not prepared to proceed." (6/5/95, RT 5705.) Counsel objected, stating he could not get a fair hearing with Judge Hastings. (6/5/95, RT 5705-6.)

On June 7, 1995, Judge Hastings denied a motion to disqualify himself from hearing a PC § 987 motion and ruled on the motion. (Vol. 8, CT 2217.) Counsel moved for disqualification on the grounds that: (1) he believed Judge Hastings had "exhibited significant personal dislike for me personally" (6/7/95, RT 2)[98]; (2) that the judge had "set views on the issues of 987 money" substantially impairing his ability to exercise appropriate discretion, indicated by his "complete unwillingness to be open to the expenditure of 987 funds" (6/7/95, RT 2-3); and (3) the judge had a conflict of interest as he sits on the board of directors of the Conflicts Administration Program, which "is under significant pressure by the County of Santa Clara to cut expenses." (6/7/95, RT 6.)

Judge Hastings explained that counsel appointed through the Conflicts Program are not paid by the court, but by the Conflicts Program. (6/7/95, RT 11-12.) Judge Hastings advised counsel to "Bring it up with him [Judge Creed], because I'm not

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[98] The 6/7/95, RT 1-43 is duplicated at Vol. 9, CT 2414-2458.

involved in it, I'm not involved in these payments." (6/7/95, RT 11.) Trial counsel explained he had done so, and was sent to Judge Hastings, "so I'm being put between two Superior Court judges." (6/7/95, RT 12.) Judge Hastings responded: "I can't assist you, counsel, because I'm not involved in the payment of these claims," and noted that an expert and CJCJ had been paid some sums of money. (6/7/95, RT 12.) As described further below, the judge's misunderstanding of the scope of mitigation and the role of defense counsel contributed to his decision to deny most funds requested, and prevented trial counsel from preparing and presenting mitigating evidence. Judge Hastings authorized only $357.50 of the requested $20,075. (6/7/95, RT 38.)

In appellant's case, the Conflicts Administrator had a conflict of interest because of the press and expense of other cases, which made funds unavailable to appellant. The denial and unconscionable delay of funding to which appellant Vo was entitled under state law violated, in turn, his federal due process rights. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343.) The Conflicts Administrator's conflicting obligations deprived Appellant of the funding needed to defend against capital charges and a death sentence. This conflict of interest undercut his right to counsel, to defend, to due process of law, and to reliable determinations of his guilt, eligibility for death, and sentence.

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1. The Trial Court Unreasonably Failed to Ensure Adequate and Timely Funding.

a. The Trial Court Failed to Exercise Appropriate Control and Discretion to Ensure Appellant's Counsel Had Adequate Funding.

Under state law, trial counsel had access to necessary funding pursuant to Penal Code § 987.9, which provides in pertinent part:

> § 987.9. Funds for investigators and experts for indigent defendants in capital cases or in cases involving second degree murder following prior prison term for murder
>
> (a) In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

Pursuant to local practice, however, funding in cases represented by conflict counsel was administered by the Conflicts Administrator. The local practice did not comply with state law, which places responsibility for providing funding on the trial court, and does not allow for that responsibility to be delegated.

b. The Trial Court's Unreasonable View of the Scope of Mitigating Evidence and Trial Counsel's Duty to Prepare and Present it Resulted in Denial of Necessary Funds.

In denying requested funding to complete necessary investigation of mitigating evidence so that such evidence could be presented at the penalty trial, the trial court employed an incorrect understanding of the scope and function of mitigation, and of counsel's professional responsibilities in developing and presenting such evidence. The trial court's idiosyncratic views are contrary to established United States Supreme Court precedent, and require reversal as an unwarranted restriction of Appellant's right to counsel, right to defend, and due process rights, as well as his right to a reliable determination of sentence in this capital case.

Reflecting a deep misunderstanding of the nature of mitigation, its importance to the critical determination of whether a defendant should live or die, and counsel's proper role in assessing that evidence, the trial court stated:

> "So if they've been interviewed, so be it; you, as a lawyer, make a decision, read their interviews, get an input as to whether Mr. Vo wants them. Ask Mr. Vo, do you want this person to tell this jury why you should live and not die; it's his case, it's his life. Put the witness on or don't put the witness on. But no reason to interview the person two or three times because the issue is very simple: why should he live and not die." (6/7/95, RT 33-34.)

Trial counsel mentioned a number of witnesses yet to be interviewed. In some instances, Judge Hastings permitted discreet periods of interview time (one hour, one half hour), but as to appellant Vo's family, the judge flatly stated, "I'm not going to allow that," based on

the assumptions that appellant was in touch with them and that "Mr. Vo can make that decision" whether to call them. (6/7/95, RT 34-38.) Judge Hastings therefore authorized $357.50 of the requested $20,075. (6/7/95, RT 38.)

In *Lockett v. Ohio* (1978) 438 U.S. 586, the United States Supreme Court explained that a state may not prevent the sentencer

> "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

(*Id.*, at p. 605.) In *Eddings v. Oklahoma* (1982) 455 U.S. 104, the High Court elaborated upon this rule and its underpinnings. It explained that

> "the rule in *Lockett* followed from the earlier decisions of the Court and 'from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime,' *Gregg* v. *Georgia, supra*, at 197, the rule in *Lockett* recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937)."

(Id., at 112.) Consequently, Eddings' trial judge's ruling that he was not permitted to consider mitigating evidence was incorrect, requiring reversal. This Court, similarly, recognizes the broad scope of mitigation:

> "At the penalty phase a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (§ 190.3; *Penry v. Lynaugh* (1989) 492 U.S. 302, 317 [109 S. Ct. 2934, 2946, 106 L. Ed. 2d

> 256]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394, 398-399 [107 S. Ct. 1821, 1824-1825, 95 L. Ed. 2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8 [106 S. Ct. 1669, 1670-1673, 90 L. Ed. 2d 1]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116 [102 S. Ct. 869, 875-878, 71 L. Ed. 2d 1]; *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973] (plur. opn. of Burger, C. J.); *People v. Mickey* (1991) 54 Cal. 3d 612, 692-693 [286 Cal. Rptr. 801, 818 P.2d 84].)

(*In Re Gay* (1998) 19 Cal.4th 771, 814.)

Appellant's trial court's view that the issue at penalty phase is "very simple, why should he live and not die" (6/7/95, RT 33-34) suggests at best a tenuous grasp of the concept of mitigating evidence that the jury is constitutionally required to consider. His comments on how counsel should discharge their duties, and the order limiting their ability to prepare and defend by refusing to fund necessary investigation, however, are strikingly at odds with what the United States Supreme Court and this Court in fact require of capital trial counsel.

Criminal defendants are entitled under the Sixth Amendment to the assistance of counsel.

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his

> innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

(*Powell v. Alabama* (1932) 287 U.S. 45, 68-69.) Thus,

> "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942); see *Powell* v. *Alabama, supra*, at 68-69.

(*Strickland v. Washington* (1984) 466 U.S. 668, 685.)

Counsel's obligations at the penalty phase are no less rigorous than at the guilt phase of trial. (See, *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619.) Indeed, the sentencing issues are of paramount importance, because of the

> "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

(*Boyde v. California* (1990) 494 U.S. 370, 382 (1990) [quotation and emphasis omitted].)

A series of decisions by the United States Supreme Court recognizes the scope of trial counsel's duties at the penalty phase of a capital trial. In *Williams v. Taylor* (2000) 529 U.S. 362, for example, the High Court found counsel's performance deficient and prejudicial, noting:

> "The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id.* at 207, 227. They failed to conduct an investigation that would have uncovered extensive

> records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings [fn. omitted] that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.
>
> "Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. *Id.* at 595. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.* at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. *Id.* at 563-566."

(Id., at pp. 395-396.) Implicit in this recital of available evidence that Mr. Williams' trial counsel failed to introduce is the understanding that counsel has the personal obligation to investigate a broad range of potentially mitigating evidence, and there is no suggestion that counsel can discharge that obligation by deferring decisions of what witnesses to call to the client, as was the trial court's order in Appellant's case.

This Court has similarly held that trial counsel's obligation to investigate and present mitigating evidence is personal, and that counsel cannot meet that obligation by conducting interviews that are either brief or non-existent, as ordered by the trial court in Appellant's case:

> "Petitioner has established that [trial counsel] did not personally interview potential witnesses and spoke to those he did put on the stand only briefly in the hallway outside the courtroom. Little effort was made to identify and marshal potentially mitigating penalty phase evidence."

(*In re Gay*, *supra*, 19 Cal.4th 771, 828; see also *In re Lucas* (2004) 33 Cal.4th 682.)

The United States Supreme Court has clarified further the nature of trial counsel's duties in capital cases. In *Wiggins v. Smith* (2003) 539 U.S. 510, 522-523, the High Court emphasized that trial counsel have a duty to conduct reasonable investigations according to prevailing professional norms[99], and then to exercise reasonable professional judgement. The standard of care at the time of Mr. Wiggins' trial in 1989 required counsel to prepare a social history report. (*Id.*, at p. 524.) The limited investigation conducted was also unreasonable in light of what counsel had discovered about the client's background. (Id., at p. 525.) Following *Wiggins*, the High Court in *Rompilla v. Beard* (2005) 545 U.S. 374 found trial counsel's performance ineffective and prejudicial because counsel had failed to discover mitigating evidence contained in files concerning a prior offense; this decision, again, emphasizes the broad nature of counsel's investigative responsibilities and the necessity of exercising professional judgment in the direction of the investigation and presentation of mitigating evidence.

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[99] *Wiggins* cites the Standards of the American Bar Association as one source of those norms. See, e.g., 1 ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55 (2d ed. 1980); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989)

These settled lines of federal constitutional law make clear that the trial court's assumptions about the limited scope of mitigation, and his refusal to permit counsel to investigate and exercise professional judgement, were erroneous. The ruling prevented counsel from preparing Appellant's defense to penalty. The trial court's interference with counsel's responsibilities requires reversal.

F. The Trial Court Abused its Discretion and Stripped Appellant Vo of His Right to Effective Representation and a Fair Trial by Refusing Necessary Continuances to Permit Counsel to Prepare.

The trial court unreasonably refused necessary continuances to permit Appellant's counsel to prepare for trial. The denials of continuance motions rendered trial counsel unable to fully protect his client's interests and defend against capital charges and the death judgment sought by the state. Appellant's trial rights and his ability to defend were compromised by the refusal to grant necessary continuances in the following respects, among others:

1. Appellant's counsel had anticipated second counsel preparing motions and objections. Once second counsel was forced to withdraw from the case, the ability to prepare and present motions and objections was compromised. Counsel therefore largely relied upon objections made and motions filed by counsel for the co-defendant, although the interests of the co-defendants were adverse.

2. On January 6, 1994, Appellant's counsel announced he was unable to comply with ordered discovery, as he was not prepared and he had no second counsel. (Vol. 6, CT 1512-1513.) During the guilt phase, mental health evidence sought to be introduced by Appellant's counsel was excluded due to his failure to comply with discovery.

3. Replacement second counsel was appointed to assist with his defense on

February 10, 1995. (Vol. 10, CT 2741.) Jury selection began on February 14, 1995. (Vol. 6, CT 1646.) Appointed on the eve of trial, she obviously needed time to acquaint herself with the prosecution's case and potential defenses to guilt and penalty; she was not appointed sufficiently in advance of trial to develop trial strategy and file pretrial motions before jury selection began.

4. Following the verdicts at guilt phase, Appellant's trial counsel reiterated: "I do not in fact believe that we are prepared for the penalty phase, that we have not had – and again, I don't believe it is a fault of a laziness or lack of application, but we are not ready." (6/5/95, RT 5664.) A motion for a reasonable continuance to "become adequately prepared for the penalty phase," was denied. (6/5/95, RT 5668.)

5. At sentencing, Appellant's trial counsel presented an assessment of Appellant's history, to support an argument that a death sentence was inappropriate. (Vol. 11, CT 2791-2819.) Appellant was constitutionally entitled to present this additional mitigating evidence to his jury at the penalty phase, and the record of the trial demonstrates the evidence could have been presented had a continuance been granted.

California law requires that a criminal defendant be afforded a continuance of a proceeding upon a sufficient showing of good cause. (Pen. Code § 1050(e); *People v. Murphy* (1963) 59 Cal.2d 818, 825 [continuance should be granted to afford a reasonable opportunity to prepare defense]; *People v. Plyer* (1898) 121 Cal. 160, 164-165 [continuance should be granted to enable defendant to secure a material witness].) [100]

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[100] The trial court's obligation is simply summarized in *People v. Fong Chung* (1907) 5 Cal.App. 587, 590:

> It is the duty of the court, when due diligence has been used, and it appears that the application is made in good faith, and the evidence is material to continue the case for a reasonable time so that the case may be fairly tried on its merits.

Although the granting of a continuance is typically within the broad discretion of the court, "'myopic insistence upon expeditiousness'" in the face of a justifiable request for a delay constitutes a clear abuse of that discretion. In *People v. Courts* (1985) 37 Cal.3d 784, 791, this Court held that the trial court erred in denying a request to continue proceedings to enable defendant to retain counsel. The *People v. Courts* opinion aptly quotes *Ungar v. Sarafite* (1964) 376 U.S. 575, 589, which states,

> "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

In capital cases particularly, trial courts should accommodate such requests "'to the fullest extent consistent with effective judicial administration..'" (*People v. Courts*, *supra*, 37 Cal.3d 784, 790 [quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 209]; See also, *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875-876 [59 Cal.Rptr. 440] ["discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense"]; *United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1361, amended 764 F.2d 675 [court erred in denying continuance to enable defendant to retain a psychiatric expert].)

There is no mechanical test for deciding when a denial of a continuance warrants reversal. Rather, "'the answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" (*People v. Byoune* (1966) 65 Cal.2d 345, 347 [quoting *Ungar v. Sarafite*, *supra*, 376 U.S.

at p. 589].) California courts typically consider the following four factors:

(1) The diligence of the defendant;

(2) The usefulness of a continuance;

(3) The inconvenience to the court; and

(4) The prejudice to the defendant if the continuance is not granted.

(*People v. Courts*, *supra,* 37 Cal.3d at pp. 791-795; *Owens v. Superior Court of Los Angeles County* (1980) 28 Cal.3d 238, 251; *United States v. Flynt*, *supra*, 756 F.2d at p. 1359.)

As demonstrated below, appellant and his counsel endeavored to advise the trial court of the reasons a continuance was necessary to properly defend against the capital charges, and against the death sentence sought by the state. The usefulness of the requested continuances was obvious, on the face of these hearings; in particular, when the denial forced co-counsel to begin work only four days before trial, a serious constitutional error occurred. It is apparent from the trial record alone that appellant was prejudiced by the denials of necessary continuances. Appellant was necessarily prejudiced, because he was forced to trial in a state of unreadiness after his second counsel withdrew for medical reasons; with substitute second counsel appointed only as the trial began; without having completed necessary investigation and consultation with experts; without access to adequate and timely funding to complete investigation, nor timely compensation to his counsel; in a complex case at which not only his liberty but his very life was at stake.

None of the circumstances leading to the need for continuances was the fault of Appellant.

In determining whether appellant was diligent, this Court must focus on the conduct of the defendant, not defense counsel. (*People v. Robinson* (1954) 42 Cal.2d 741, 748 [defendant's personal efforts to retain counsel were sufficient to render denial of continuance an abuse of discretion].) Appellant Vo's due process rights were gravely jeopardized by trial counsel's inability to properly prepare, due to the errors of the trial court. (*United States v. Pope* (9th Cir. 1988) 841 F.2d 954, 956-957 [although defendant conceded his counsel was not diligent, court found improper the denial of continuance after finding defendant was not similarly dilatory]; United States v. Fessel (5th Cir. 1976) 531 F.2d 1275, 1280 [same].)

In this case, appellant Vo fully cooperated with his counsel, and in no way was he responsible for delays in preparation occasioned by the loss of second counsel or unavailability of funding. The court must give a capital defendant the opportunity to present to the jury all pertinent mitigation evidence (*Lockett v. Ohio* (1978) 438 U.S. 586), even at the cost of necessary delay. (See *United States v. Fessel*, *supra*, 531 F.2d at p. 1280.)

In a hearing shortly before trial, Appellant's counsel explained that in 1994, after special circumstance allegations were reinstated and counsel sought a psychiatric expert, he finally obtained approval for *Keenan* counsel; eventually Ms. Bachers was appointed,

and she began work on the case in May, bringing to the defense her expertise in pretrial motions, instructions, and penalty phase investigation; and then in early December, she developed health problems requiring her withdrawal. (1/17/95, RT 50-53, 56.) Counsel had delegated the penalty phase development to Ms. Bachers. (1/17/95, RT 57-58; 1/17/95, RT 54.) Appellant Vo has a complex social history, encompassing his birth in Vietnam, numerous dislocations, stressful family circumstances, abuse, substance abuse of a parent, possible neurological issues, cultural factors, and other issues, which counsel was not prepared to present. (1/17/95, RT 53, 58, 60-62.) Counsel explained that if he has been incompetent in his approach, he should be relieved, "but my client should not suffer if I have made a wrong decision." (1/17/95, RT 59.) "He is the one that faces the death verdict, not me." (1/17/95, RT 62-63.) Counsel further explained that he had been unable to secure replacement second counsel without success (1/17/95, RT 63-64), noting that many lawyers in the county were "caught up in the Mexican Mafia case." (1/17/95, RT 64-65), and that potential lawyers were unwilling to take conflicts cases such as Mr. Vo's because of difficulties getting authorization for expenditures and getting paid. (1/17/95, RT 65-66.) In short, "this matter is not ready, and I believe if Mr. Vo was required to proceed to trial based upon the state of non-readiness at this point, that he would be deprived of competent counsel and the right to put on a competent defense." (1/17/95, RT 66.)

Lead counsel was diligent in seeking a continuance once second counsel was

forced to withdraw and he learned the enormous amount of preparation remaining to be done. Appellant himself had nothing to do with any delays in preparation, and trial counsel appropriately argued that Appellant should not be forced to a capital trial without adequate preparation. The usefulness of a continuance is clear, as is the severe potential for prejudice: Appellant was entitled to defend, and little had been done to investigate and prepare the penalty phase. At least three of the factors the trial court was required to consider, therefore, weighed in favor of the requested continuance. The trial court, however, found most persuasive its own convenience in proceeding to trial immediately, and not disturbing its previous decision that the trials of Appellant and co-defendant Hajek be joined.[101]

Another motion for continuance was made mid-trial on June 5, 1995, appellant's *in camera Marsden* motion was denied. (Vol. 8, CT 2210; 6/5/95 Vol. 22, RT 5650-5671.) Appellant Vo complained of counsel's failure to communicate, that he wished additional evidence to be elicited from certain witnesses, that counsel failed to object to gang allegations, that he had been inadequately prepared for his testimony, and that the trial court's refusal to grant a continuance before trial may have been the result of the judge's animosity toward trial counsel. (6/5/95, RT 5650-56.) The trial court, in fact, acknowledged animosity based on the fact that trial counsel was not prepared and

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[101] Appellant also contends that the refusal to sever his trial from Hajek's was improper and denied him a fair trial, so this justification for also denying a continuance is particularly prejudicial. Appellant refers to and incorporates herein Argument 1 of this brief.

requested a continuance. (6/5/95, RT 5655, 5658.) Appellant's trial counsel supported the client's motion, stating his surprise at the jury's guilt phase verdicts. (6/5/95, RT 5657.) Appellant's trial counsel next moved for a reasonable continuance to "become adequately prepared for the penalty phase," which motion was denied. (6/5/95, RT 5668.) Trial counsel stressed, "this case is not ready at this time." (6/5/95, RT 5670.)

Because these uncontested representations demonstrated that an additional continuance would be useful, the trial court abused its discretion by denying Appellant Vo's requests for continuance. (*People v. Dodge* (1865) 28 Cal. 445, 448 [continuance should have been granted to permit appearance of a material witness]; *Delaney v. United States* (1st Cir. 1952) 199 F.2d 107, 114 [denial of third request for continuance, necessary to avoid prejudicial pretrial publicity, was reversible error].)

While trial courts have broad latitude in determining the need for continuance, the usefulness of reported opinions affirming denials of such requests may all be distinguished the case at bar. Generally, in those cases the movants could not provide the names of attorneys they intended to retain or the witnesses they would call, nor could they prove the new evidence was not simply cumulative. (See, *People* v. *Courts*, *supra*, 37 Cal.3d at 791 n. 3; *People* v. *Grant* (1988) 45 Cal.3d 829, 844 [248 Cal.Rptr. 444] cert. denied sub *Grant* v. *California* (1989) 448 U.S. 1050 [continuance denied to enable defense counsel to obtain additional testimony where defense counsel could not declare that the evidence would be helpful].)

The preparation of Appellant's penalty phase defense clearly was more than "helpful": indeed, the trial court was constitutionally bound to permit the preparation and presentation of mitigating life history evidence. (*Lockett v. Ohio*, supra, 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Wiggins v. Smith* (2003) 539 U.S. 510, 535.) Unable to complete that preparation in time for the penalty phase presentation to the jury, Appellant's counsel instead submitted a written assessment of Appellant's history to the trial court at sentencing, to support an argument that a death sentence was inappropriate. (Vol. 11, CT 2791-2819.) Clearly, this additional evidence was evidence that Appellant was constitutionally entitled to present to his jury at the sentencing phase, and the trial record demonstrates that the additional mitigating evidence could have been presented had a continuance been granted.

In determining whether the denial of a continuance constitutes an abuse of discretion, California courts consider the inconvenience to the court and the prejudice to the opposing party. (See *People v. Byoune*, *supra*, 65 Cal.2d at p. 348 [any prejudice or inconvenience must be evident from the record on appeal].) These concerns are balanced against the importance of the continuance to this defendant. (See *United States v. Pope*, supra, 841 F.2d at p. 957 ["[b]alanced against the importance to Pope's defense of a psychiatric evaluation, the inconvenience of a request for continuance made on the day trial was scheduled to commence did not justify the denial"].) The prejudice must be "serious" in order to justify a denial. (*People v. Courts*, *supra*, 37 Cal.3d at p. 794.)

The record before the Court in this case reflects only the trial court's displeasure that trial counsel was not prepared, and its determination to proceed with a joint trial because the prosecution and counsel for the co-defendant were ready for trial. Those concerns were not balanced against the paramount need to ensure Appellant a fair trial. Rather, the trial court, for its own convenience, arbitrarily denied the motion.

G. These Fundamental Errors Require Reversal.

Three interlocking errors – the trial court's refusal to timely appoint second counsel, the trial court's refusal to ensure timely and adequate funding for the defense, and the trial court's refusal to provide necessary continuances – together stripped Appellant of a fair trial by restricting his counsel's ability to defend.

These extraordinary errors not only impinged on Appellant's right to counsel, rendering counsel's assistance ineffective, but also deprived Appellant of core trial rights which the right to counsel is designed to protect, including: due process of law; a fair trial; the right to defend; the right to confront and cross-examine; and heightened capital case reliability in the determinations of guilt, death eligibility, and sentence.

Because these errors affected the reliability of the entire proceeding and undermined the appropriate functioning of the adversary process, Appellant contends that the appropriate standard of review is that described in *United States v. Cronic*, *supra*, 466 U.S. 648, 659-660. The likelihood that otherwise competent counsel could perform adequately given the multiple impediments improperly imposed by the trial court is so

slim that prejudice must be presumed.

Alternatively, it is clear that Appellant was prejudiced by each of the errors, and overwhelmingly prejudiced by facing them simultaneously. His second counsel was appointed literally on the eve of trial despite the urgent need for second counsel to prepare motions and prepare mitigation evidence. Necessary investigative and expert work for the defense was delayed or denied, and counsel were forced to proceed with trial although they were not being paid, causing extreme personal financial hardship and distraction from the task at hand. And because the other parties were prepared to proceed and the trial court refused to sever the co-defendants for trial, Appellant was forced to defend against complex charges, an uncharged conspiracy, two prosecutors, and the death sentence sought by the state despite his counsel's lack of preparedness, and counsel's insistence that adequate representation could not be provided. The state cannot show beyond a reasonable doubt that the errors were harmless. (*Chapman* v. *California* (1967) 386 U.S. 18, 23.)

3. THE TRIAL COURT UNREASONABLY REFUSED TO PERMIT TRIAL COUNSEL TO WITHDRAW OR BE RELIEVED, WHEN COUNSEL WAS UNPREPARED TO ADEQUATELY DEFEND APPELLANT VO.

As set forth more fully in Argument 2, incorporated herein by reference, the trial court denied appellant Vo his right to counsel by denying and delaying the appointment of second counsel; by delegating funding to a seriously underfunded conflicts agency which denied and delayed funding for the defense; and by refusing necessary continuances to

permit counsel to prepare to defend. Furthermore, when the trial court accused counsel of dealing in bad faith, counsel's request to withdraw and to protect his client's interests through the appointment of additional counsel was summarily denied. These rulings compounded the harm from the trial court's prior rulings.

On May 2, 1995, co-defendant Hajek moved for discovery of Vo's expert Dr. Berg's handwritten notes, and was joined in the request by the People. The trial court ordered that appellant turn over the notes, or the court would not allow Dr. Berg to testify, stating that appellant's counsel had failed to comply with discovery in good faith. Appellant's trial counsel, James Blackman, declared a conflict of interest and moved to be relieved; the trial court denied the motion. (Vol. 7, CT 1809.)

Co-defendant Hajek's counsel had obtained handwritten notes from Dr. Berg, and sought discovery of the raw data of testing he had performed. (Vol. 20, RT 4954.) Appellant Vo's counsel objected, on the ground that the expert would not be relying on the testing, and that it was therefore not discoverable. (Vol. 20, RT 4955.) The trial court stated it did not believe appellant Vo's counsel was proceeding in good faith (Vol. 20, RT 4955), and ruled that Dr. Berg would not testify unless the raw data were turned over. (Vol. 20, RT 4956.)

Appellant's counsel argued that he was calling Dr. Berg simply to testify to a narrow issue: why appellant Vo had stayed in the house with Hajek and explaining his relationship with co-defendant Hajek, taking into consideration appellant's relationships

with his siblings and his parents' stormy marital history. (Vol. 23, RT 5958.) The trial court again ruled that Dr. Berg would not testify. (Vol. 23, RT 5958.) Appellant's counsel objected that the exclusion of the testimony would substantially impair Vo's ability to defend in this capital case. (Vol. 23, RT 5958.)

The trial court maintained that appellant's trial counsel had not complied in good faith with discovery, had not provided discovery despite four years of preparation, and was trying to hold the court "hostage." Furthermore, the trial court stated,

> "As such, the court is going to take a very, very strong position and tell Mr. Blackman that the court does not believe his explanation, the court does not trust Mr. Blackman in his defense, and the court thinks Mr. Blackman is dealing with the court in bad faith."

(Vol. 20, RT 4959.) Mr. Blackman responded:

> "Then I suggest – at this point I then declare a conflict of interest, and I ask the court to appoint a lawyer for my client so he is represented by an attorney before the court who has some respect of the court so he is not subjected to a disparate treatment because of what the court believes as to my handling of this matter."

(Vol. 20, RT 4959.) The trial court denied the motion to appoint additional counsel, as well as trial counsel's motion to be relieved. (Vol. 20, RT 4959.)

The trial court's rulings were unreasonable and the error deprived appellant Vo of his rights to counsel, to present a defense, due process of law, fair trial, and reliable and non-arbitrary determinations of guilt, capital eligibility, and penalty.

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A. The Right to Representation by Unconflicted Counsel.

Gideon v. Wainwright (1963) 372 U.S. 335, established that indigent criminal defendants have a right to counsel to aid and assist them in defending against charges, under the Sixth Amendment right to counsel and the Fourteenth Amendment due process clause, which requires the states to provide those guarantees of the Bill of Rights essential to a fair trial.

Counsel in this case was unable to properly represent appellant Vo because his lack of preparation provoked the trial court, which was angry with and mistrustful of counsel, leading to the exclusion of evidence critical to appellant Vo's defense. Appellant sought to explain his relationship with co-defendant Hajek and why he remained in the house via psychological evidence, which would have supported his defense and his testimony that he did not know of the co-defendant's plans, intended no harm, did not kill or participate in killing the victim, and wished to leave but did not out of misguided loyalty. Trial counsel characterized the situation as one of conflict of interest, as his client's case suffered the wrath of the trial court directed against counsel.

Under the Sixth and Fourteenth Amendments to the United States Constitution (*Powell v. Alabama* (1932) 287 U.S. 45, 68-71 and *Holloway v. Arkansas* (1978) 435 U.S. 475, 481-487) as well as article I, section 15 of the California Constitution (*People v. Bonin* (1989) 47 Cal.3d 808, 833-834), a defendant in a criminal case has a right to the assistance of counsel. Included in this right is "a correlative right to representation that is

free from conflicts of interest." (*Wood v. Georgia* (1981) 450 U.S. 261, 271.) A criminal defendant "is entitled to counsel whose undivided loyalties lie with the client." (*Stoia v. United States* (7th Cir. 1997) 109 F.3d 392, 395, citations omitted.)

The Sixth Amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence (*McMann v. Richardson* (1970) 397 U.S. 759, 770-771), and the right to counsel's undivided loyalty. (*Wood v. Georgia*, *supra*, 450 U.S. at pp. 271-272. *See also Mannhalt v. Reed* (9th Cir. 1988) 847 F.2d 576, 579-580; *United States v. Allen* (9th Cir. 1987) 831 F.2d 1487, 1494-1495.) The duty of loyalty ("perhaps the most basic of counsel's duties" [*Strickland v. Washington* (1984) 466 U.S. 668, 692]), places a responsibility on the attorney to put his client's interest ahead of his own. (*See, e.g.,* ABA Annotated Model Rules of Professional Conduct, Rule 1.7 cmt. (1992).) When there is an actual conflict, counsel breaches that duty of loyalty. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692.)

The guarantee of unconflicted counsel is so important that, unlike other Sixth Amendment claims, when a defendant alleges an unconstitutional actual conflict of interest, "prejudice must be presumed" (*Lockhart v. Terhune* (9th Cir. 2001) 250 F.3d 1223, citing *Delgado v. Lewis* (9th Cir. 2000) 231 F.3d 976, 981; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 350), and harmless error analysis does not apply. (*United States v. Allen*, *supra*, 831 F.2d at pp. 1494-1495, citing *Cuyler v. Sullivan*, *supra*, 446 U.S. at p.

349. *See Mickens v. Taylor* (2002) 535 U.S. 162, 173 [*Sullivan* standard "requires proof of effect upon representation but (once such effect is shown) presumes prejudice"].) Prejudice is presumed since the harm may not consist solely of what counsel does, but of "what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to pretrial plea negotiations and in the sentencing process." (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 490, emphasis in original.)

Trial courts presented with a conflict have an affirmative duty to protect a defendant's rights. (*Glasser v. United States*, *supra*, 315 U.S. 60.) Thus, when the possibility of a conflict is "sufficiently apparent" to a trial court, there arises "a duty to inquire further." (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272.) When a trial court is made aware of an attorney's actual or potential conflict of interest, Supreme Court precedent requires that the trial court "'either appoint separate counsel or . . . take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.'" (*Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892, 897, quoting *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 484). The court's failure to do so amounts to a violation of the defendant's Sixth Amendment rights. (*Campbell v. Rice*, *supra*, 302 F.3d at p. 897. *See also People v. McDermott* (2002) 28 Cal.4th 946, 990 ["[w]hen a trial court knows or should know of a possible conflict of interest between a defendant and defense counsel, the court must inquire into the circumstances and take appropriate action"]; *People v. Bonin*, *supra*, 47 Cal.3d at p. 836 [when a trial court knows or should know of a possible

conflict, the court is obligated "not merely to inquire but also *to act in response to what its inquiry discovers*"] (emphasis added).) The duty to inquire arises whenever the possibility of conflict is "brought home to the court." (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485, quoting *Glasser v. United States*, *supra*, 315 U.S. at p. 76.)

As this Court has observed:

> It is important to recognize that adverse effect on counsel's performance under *Sullivan*, . . . is not the same as prejudice in the sense in which we often use that term. When, for example, we review a traditional claim of ineffective assistance of counsel. . . we require the defendant to show a reasonable probability that the *result* (i.e. the disposition) would have been different. This, however, is not the inquiry called for under *Sullivan*.

(*People v. Easley* (1988) 46 Cal.3d 712, 725.)

In this case, the adverse effect of trial counsel's conflict of interest is readily apparent: key evidence sought to be presented in support of appellant Vo's defense was excluded by the trial court. Jurors would naturally be curious about why Vo went and remained at the house with Hajek if he did not share Hajek's bizarre intent to harm the family. Exclusion of this evidence meant that the prosecutor's speculation about Vo's intent and motivations (along with Hajek's attempts to shift blame) went unchallenged except by appellant Vo's own testimony.

B. The Right to Defend.

It is without question that a criminal defendant must be afforded an opportunity to present a defense to the charges against him. In *Crane v. Kentucky* (1986) 476 U.S. 683,

690, the high court stated: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [*California v. Trombetta* (1984) 467 U.S. 479, 485.]"

The rights of a defendant to present witnesses and challenge those of the prosecution has "long been recognized as essential to due process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) In fact, the U.S. Supreme Court has recognized that few rights are more fundamental. (*Id.*, at p. 302; see also *Washington v. Texas* (1967) 388 U.S. 14, 19.) In *Washington v. Texas*, 388 U.S. at p. 19, the court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This is a fundamental element of due process of law.

In *People v. Frierson* (1985) 39 Cal.3d 803, this Court acknowledged the fundamental nature of the right to present a defense by holding that defense counsel may not override his client's openly expressed desire to defend in the guilt phase of a capital case, as long as there is some credible evidence to support the desired defense.

Appellant had a right to defend against the state's allegations in his capital trial.

Trial counsel's conflict of interest, and the trial court's ruling excluding psychological evidence supporting his defense, stripped appellant Vo of his fundamental constitutional right to defend.

C. Heightened Requirement of Reliability.

Because this is a capital case, the Eighth Amendment's concern with the reliability of the judgment has also been violated by the errors addressed in this argument. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

D. Conclusion.

Trial counsel had a conflict of interest in that his lack of preparation and failure to provide discovery so infuriated the trial court that evidence critical to appellant Vo's defense was excluded, in orders reflecting the trial court's explicit anger with trial counsel. The trial court refused to inquire as to the conflict of interest declared by appellant Vo's counsel, and refused to appoint appellant Vo separate counsel, who could proceed without burdening appellant with the wrath trial counsel had incurred from the trial court. These errors deprived appellant Vo of his right to be represented by unconflicted counsel, to present a defense, and to reliable determinations of guilt, capital eligibility, and sentence.

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4. ADMISSION OF EVIDENCE CONCERNING A CONVERSATION THE CO-DEFENDANT HAD WITH A WITNESS BEFORE THE OFFENSE WAS ERRONEOUS AND INFLAMMATORY.

A. Procedural history.

Appellant refers to and incorporates herein Argument 1, regarding denial of his motion for severance. On January 17, 1995, appellant Vo filed Motions in Limine (Vol. 6, CT 1535 et seq.), which included a motion for severance of his trial from that of co-defendant Hajek. (Vol. 6, CT 1536-1540.)[102] The severance motion noted that the night before the incident, Hajek told witness Tevya Moriarty that he planned to take revenge for a fight between some young women, and he planned to kill the family of one of them the next day. Appellant Vo argued that the use of these statements made by the co-defendant violated the principles of *People v. Aranda* (1965) 63 Cal.2d 518[103] and *Bruton v. United States* (1968) 391 U.S. 123.[104]

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[102] Appellant notes that this motion was filed during the period of time he sought appointment of second counsel and a continuance of the trial. Lead counsel had stated that he required the assistance of second counsel for motions as well as to prepare the penalty case. Appellant Vo's ability to fully and compellingly present this motion was gravely compromised by circumstances his counsel was then facing due to trial court errors, as set forth more fully in Argument 2 of this brief. Nonetheless, his counsel presented compelling reasons for severance, and the trial court again abused its discretion in refusing to sever appellant's trial from that of his co-defendant.

[103] In *People v. Aranda*, *supra*, this Court held that the statement of one co-defendant implicating another cannot be admitted in a joint trial. The trial court has three alternatives: [1] effectively delete any statements that could be used against the co-defendant; [2] sever the trials of the defendants; or [3] exclude the statement entirely. (*People v. Aranda*, supra, 63 Cal.2d at 530-531.)

[104] *Bruton v. United States*, *supra*, 391 U.S. 123 held that admission of a co-defendant's extrajudicial statement violated the defendant's Sixth Amendment right to

The motion for severance was denied on January 19, 1995. (Vol. 6, CT 1565.)

On February 6, 1995, appellant Vo filed a motion in limine to restrict testimony of witness Tevya Moriarty. (Vol. 6, CT 1580-1582.) Vo's counsel characterized the motion as following up on the court's denial of severance; he requested that the court reconsider the motion for severance, or preclude the statements made by co-defendant Hajek to Moriarty on the basis that they are hearsay as to Mr. Vo. (Vol. 1, RT 229.) The trial court denied appellant Vo's motions, ruling the testimony of Ms. Moriarty admissible; the court declined to limit her testimony to Hajek and exclude any reference to what Hajek may have said "they" planned. (Vol. 6, CT 1583.) On March 28, 1995, the trial court ruled the tape and transcript of an interview of Tevya Moriarty was admissible. (Vol. 7, CT 1689.) Appellant's counsel renewed the objection immediately before Moriarty testified, earning the derision of the trial court since he had heard the objection before. (Vol. 15, RT 3636.)

B. Moriarty's Testimony Was Used to Improperly Paint Appellant Vo As a Sadistic Killer.

As set forth more fully in Argument 6, incorporated herein, the prosecution was improperly permitted to use its uncharged and unproven conspiracy theory to argue – without any factual foundation – that appellant Vo shared co-defendant Hajek's intent to

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cross-examine the witnesses against him, even where the jury receives a limiting instruction. The risk is too great that the jury will be unable to disregard the evidence in deciding guilt, despite instructions to do so.

kill members of the Wang family. As set forth more fully in Argument 1, incorporated herein, the trial court's refusal to sever the trials of appellant Vo and co-defendant Hajek paved the way for appellant's jury to hear an enormous quantity of irrelevant and prejudicial evidence, including Moriarty's testimony, and greatly restricted Vo's ability to confront and cross-examine the witnesses and evidence against him. (See also, Argument 7.)

There is no evidence appellant was present for, or even aware of, the conversation between co-defendant Hajek and witness Moriarty. There is no evidence appellant was mentioned in the conversation, and Moriarity testified that Hajek presented the intentions of which he spoke in that conversation as his alone. There is no evidence appellant ever adopted Hajek's admission of an intent to harm the Wang family.

Moriarty testified that she worked at Home Express while attending Prospect High School, where she met co-defendant Hajek during the summer of 1990. Hajek was a cashier, and they were on friendly terms; he called her two or three times. (Vol. 15, RT 3637-40.) These were informal teenaged conversations. (Vol. 15, RT 3640.) Moriarty had trained Hajek for about three weeks, and never had any problems with him. (Vol. 15, RT 3641.) She never saw signs of mood swings or anything out of the ordinary on his part. (Vol. 15, RT 3644.)

On January 17, 1991, at 8:15 p.m., Hajek called Moriarty and they spoke until about 8:50. (Vol. 15, RT 3637.) After some small talk, he told her about a girl he was

seeing, and about the fight at the mall. He described a group of girls as the aggressors, and said he had pushed one of the girls to get her away from his friend. (Vol. 15, RT 3646.) Hajek said about twenty girls were fighting with the girl he was with, and the girl he pushed told Hajek that he should have kept his nose out of their business. (Vol. 15, RT 3648.)

Moriarty recalled little detail, but Hajek told her he wanted to get back at the girl who picked the fight. He said he was going to break into her house, kill her family, and kill her last. (Vol. 15, RT 3649-52.) Moriarty was "thrown for a loop," and afraid of making him angry. (Vol. 15, RT 3653.) Hajek said he was going to make it look like a robbery, but she did not recall him mentioning weapons or how the intended victims would be killed. (Vol. 15, RT 3655.) Hajek spoke in terms of "I," not "we;" she had the impression three people would be involved, but cannot firmly recall the conversation. (Vol. 15, RT 3665-66.)[105] Moriarty told her parents but did not call the police; she later saw a news broadcast regarding the crime and arrests and told her parents she knew who did that. Moriarty called the police the following Sunday. (Vol. 15, RT 3668.)

The prosecutor intended to and did use Ms. Moriarty's testimony to argue that Vo was involved in planning to kill the Wang family. In his opening statement, the prosecutor advised the jury that Ms. Moriarty would testify that "they" were going to

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[105] On cross-examination by appellant Vo's counsel, Moriarty reiterated that Hajek only spoke of himself participating in any killing, and no one else. (Vol. 15, RT 3684.) Further examination by Hajek's counsel elicited her firm recollection that Hajek said, "I am going to kill them." (Vol. 15, RT 3684.)

break in and kill the family. (Vol. 13, RT 3013-3014.) Based on Hajek's statement to Moriarty, the prosecutor told the jury that the two defendants planned sadistic torture, and that the two of them had carried out the plan of which Hajek spoken. (Vol. 13, RT 3014-3015.)

In closing argument at the guilt phase, the prosecutor described Hajek telling Moriarty about the plan, and that three people were to be involved, as an "overt act" in furtherance of a conspiracy. (Vol. 21, RT 5373.) Torture, he argued, was shown by Hajek's desire for revenge, as expressed to Moriarty. (Vol. 21, RT 5375.) He concluded that this was a case where "two cold-blooded murderers had a plan to kill an entire family of five," and that there was no way around the evidence of planning reflected in Hajek's statements to Moriarty. (Vol. 22, RT 5555.)

C. Appellant Vo Was Stripped of His Right of Confrontation, and Reversal is Required.

In a defining case for Confrontation Clause analysis, the high court recently held that "[w]here testimonial evidence is at issue ... the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 46. [emphasis in original].)

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of ...." (*Id.* at 124 S.Ct. p. 1367, citing *Mattox v. United States* (1895) 156 U.S. 237, 244 [39 L.Ed. 409; 15 S.Ct. 337].)

It has long been settled law that a co-defendant's extrajudicial statement inculpating another defendant may not be used in any way against the other defendant. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123; *People v. Massie*, *supra*, 66 Cal.2d 899, 916-917.) Appellant Vo refers to and incorporates herein Argument 7, regarding violations of his right to confront and cross-examine due to the admission of statements made by the co-defendant at their joint capital trial.

Co-defendant Hajek's statements to Moriarty about Hajek's plan to kill, and suggesting that he planned to carry out the deed with others, were in fact inculpatory of appellant Vo in this joint trial. Indeed, these reported statements permitted the prosecution to spin its conspiracy theory around appellant Vo, without any evidence that Vo was even aware of Hajek's plans and intentions. Absolutely no opportunity was provided for Vo to examine Hajek about his plans, his statements to Moriarty, or any other aspect of the case.

The prosecution cannot now prove beyond a reasonable doubt that the evidence of Hajek's statements to Ms. Moriarty did not contribute to appellant Vo's conviction and the death verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Arizona v. Fulminante, supra,* 499 U.S. at p. 296.) The death judgment must be reversed.

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5. THE TRIAL COURT ERRED IN ADMITTING A TAPED CONVERSATION BETWEEN THE CO-DEFENDANT AND APPELLANT VO, IN WHICH APPELLANT'S UTTERANCES WERE INAUDIBLE AND FOR WHICH NO RELIABLE TRANSCRIPT EXISTED, AS IT PERMITTED JURORS TO DRAW UNRELIABLE CONCLUSIONS ABOUT APPELLANT'S CULPABILITY WHICH ARE UNSUPPORTED BY EVIDENCE.

On March 28, 1995, the trial court ruled that a surreptitious tape recording made of a conversation between appellant Vo and co-defendant Hajek after their arrest would be admitted at trial. (Vol. 7, CT 1688.) However, a transcript prepared by the prosecution was ruled misleading and inaccurate, and thus not admissible. (Vol. 7, CT 1688.)

On April 13, 1995, Exhibit 53 (the surreptitious tape recording of defendants, which had been made January 19, 1995, at the police station) was played for the jury over appellant's objection; by stipulation, this recording was not transcribed by the court reporter. (Vol. 7, CT 1722) Detective Walter Robinson testified at trial that the sound quality of the tape is poor (Vol. 16, RT 3815), but that portions are identifiable as being spoken by co-defendant Hajek; only Hajek is audible on the tape. (Vol. 16, RT 3818, 3844.)

During their guilt phase deliberations, on May 11, 1995, the jury requested a transcript of Exhibit 53; their request noted that a transcript was referenced in testimony of Off. Robinson. (Vol. 7, CT 1823.)[106] The trial court responded to this request by

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[106] Later testimony of Juror Alice Miller indicates that the jury listened to the tape recording during guilt phase deliberations. (10/12/95, RT 18-19.)

advising the jury that, "The transcript was not received in evidence." (Vol. 7, CT 1824.)[107]

During penalty phase jury deliberations, on June 27, 1995, the jury requested a cassette player and the tape recording admitted as Exhibit 53 (Vol. 10, CT 2628), which were provided. (Vol. 10, CT 2627.)

After the trial concluded, Vo's counsel conducted interviews of jurors and learned that jurors believed the tape contained appellant Vo's admission that both defendants were murderers. Appellant Vo's Motion to Reduce Death Verdict to the Penalty of Life Imprisonment Without the Possibility of Parole [Penal Code §190.4(e); §1181(7)] was filed on August 16, 1995. (Vol. 10, CT 2730-2740.)[108] This motion was supported by the Declaration of Jeane DeKelver, appellant's second counsel, relating conversations with several jurors after the penalty phase (the first also attended by the prosecutor and an investigator for the Public Defender, and the second also attended by counsel for co-defendant Hajek). (Vol. 10, CT 2741-2744.)[109]

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[107] The People's transcript of this tape recording was ruled unreliable and inadmissible. (Vol. 7, CT 1689.) The court reporter did not transcribe this tape when it was played for the jury. (Vol. 7, CT 1722.) Appellant refers to and incorporates herein Argument 21, concerning the failure to make a complete record of the trial.

[108] Appellant argued that: (1) the trial court is required to weigh the evidence and make an independent determination whether death is the appropriate sentence; (2) the trial court has the power to reduce the jury's verdict in its role as a thirteenth juror; stating the reasons why the evidence presented at guilt and penalty phase militate against a death sentence; (3) the application of the death penalty should be narrowed to only execute the worst of the worst. (Vol. 10, CT 2730-2740.)

[109] Jurors Eadie, Delarosa, Miller, Frahm, and Candelaria discussed the deliberations after the verdict. The jurors believed that on the tape (Exhibit 53), they heard appellant Vo state several times, "we're murderers." They repeatedly said the tape made a difference in the penalty verdict. Neither the prosecutor nor any defense counsel

On August 18, 1995, co-defendant Hajek filed a Motion for New Trial. (Vol. 10, CT 2752-2755.)[110] This motion was supported by the Declaration of Brenda Wilson, a paralegal who attended an interview with three jurors on August 10, 1995. (Vol. 10, CT 2756-2757.)[111]

Appellant's Motion for New Trial was also filed on or about August 20, 1995, arguing, *inter alia*, that payment issues[112] prevented full investigation of matters concerning jury deliberations; all of these errors and obstacles, the Motion argued, resulted in an unfair trial for appellant Vo. (Vol. 10, CT 2764-2772.) This motion was also supported by a Declaration of James W. Blackman Respecting Juror Interview. (Vol.

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heard this statement on the tape. One juror asked if the sentence could be commuted, and that she felt it should be commuted.

Three jurors (Miller, Frahm, and Candelaria) later met with defense counsel and stated that they believed appellant Vo said on the tape, "we killed her;" one juror stated that appellant would not have been convicted without the tape. These jurors also stated that they "assumed" co-defendant Hajek had told appellant Vo about his conversation with witness Tevya Moriarty the night before the murder. (Vol. 10, CT 2741-2744.)

[110] Co-defendant Hajek argued that a new trial should be granted because the death verdict is contrary to the law and evidence, and the jury considered improperly admitted evidence; co-defendant Hajek reiterated earlier objections to admission of Exhibit 53 including that its inaudibility would confuse and mislead the jury. (Vol. 10, CT 2753-2754.)

[111] The declaration of Brenda Wilson recounts an interview with three jurors on August 10, 1995. All jurors stated that the most influential piece of evidence supporting the death verdict against co-defendant Hajek was a taped conversation between the co-defendants. Jurors spent two to three days trying to decipher the tape, and each reported they had heard each defendant say "we killed her." One juror would not have returned a death verdict absent the statements, "we killed her." (Vol. 10, CT 2756-2757.)

[112] Appellant refers to and incorporates Argument 2, which *inter alia* argues that the non-payment of attorney fees and necessary funding compromised his representation and deprived appellant Vo of a fair trial.

10, CT 2773-2774.)[113]

On October 12, 1995, Appellant Vo's motion for new trial based on issues regarding Exhibit 53, joined by co-defendant Hajek, was heard; jurors Miller and Frahm were sworn and examined, the motion was argued, submitted, and denied. (Vol. 11, CT 2827-2828.)

At the motion for new trial, appellant Vo's counsel argued:

> The tape was of extraordinarily poor quality. It was hard to hear. What you heard was hard to hear and there was a lot on the tape you couldn't hear at all. [. . .] [T]he jurors heard statement which they attributed to Mr. Vo on that tape to the effect of, we killed her, and they heard that on apparently two or three or four occasions depending on who you talk to on the jury, they heard that on the tape. And from our perspective, those things were just not on the tape.
>
> So, you have jury confusion that has started by the playing of this tape recording. There was no transcript possible because the transcript made it even more confusing. So this particular bit of evidence which turned out to be of extraordinary importance was put before the jury and substantial confusion resulted.
>
> From our perspective, taking our declarations as it were as offers of proof, they ruled on both the penalty phase and the guilt phase as they did placing substantial weight on the fact that they heard my client make these admissions, when those are not statements on the tape.
>
> So you bring into question the quality of the verdict because it is based on something that does not exist. And it violates, I would suggest, Mr. Vo's

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[113] Appellant's lead counsel had interviewed juror Eadie at his home on August 1, 1995. Eadie said the jury did not conclude which defendant was responsible for what behavior, and did not concern itself with "intent to kill" since one or both must have been involved in the killing. A number of jurors placed great weight on the taped conversation between the defendants, and their perception that appellant Vo had made admissions that he and co-defendant Hajek had killed the victim. (Vol. 10, CT 2773-2774.)

> right to reliable, competent, trustworthy evidentiary basis for both the guilt and penalty verdicts.

(10/12/95, RT 10-11.) Co-defendant Hajek's counsel also argued that the trial court had a duty to make an independent determination of whether the statements in question were on the tape, stating[114]:

> I think the basic problem with all this and reason I always had a problem with the tape is this: in every trial the evidence needs to be reliable. That's fundamental. Bur particularly in a capital case, the Eighth Amendment of the United States constitution requires reliability and due process of law. Also requires that the evidence received be competent and reliable. So on those bases, the Fifth, Fourteen and Eighth Amendments, and under the doctrine of due process of law, we are requesting that a hearing be conducted.
>
> I think I need to make it clear here, we are not making any accusation that the jurors did something wrong in the jury room. They were given a piece of evidence and they did what any human being would do with it. The heart of the problem has to do with whether that piece of evidence was reliable in the first place.

(10/12/95, RT 14-15.)

The trial court received the testimony of two jurors, subject to a motion to strike. (10/12/95, RT 17.) Juror Alice Miller testified that the jury had a poor tape recorder during the guilt phase deliberations, and they heard nothing incriminating as to appellant Vo then. (10/12/95, RT 18-19.) During penalty phase deliberations, she and fellow jurors had a different tape recorder, and when they listened to Exhibit 53, they believed

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[114] By court order, objections made by one defendant were deemed made by the other, unless explicitly stated otherwise. (Vol. 6, CT 1565.)

they heard Vo say "we killed her" approximately three times. (10/12/95, RT 19.) She stated, "we considered the tape as part of our deliberations and all that was contained on it." (10/12/95, RT 20.) The jury listened to portions of the tape "numerous times," and jurors listened to it with headphones "several different times." (10/12/95, RT 21.) After listening to the tape with headphones several times (during at least the first of which she could not hear the supposed admission even with headphones), Juror Miller "was able to hear it on the straight tape." (10/21/95, RT 21.)

Juror Linda Frahm testified that during the penalty phase deliberations, she heard a statement attributed to Mr. Vo, that "we killed her." She believes she heard it twice. (10/12/95, RT 22-23.) She testified that the jury listened to the tape during penalty deliberations "at the request of a couple of the jurors." (10/12/95, RT 24.)

Appellant Vo's counsel pointed to the declaration of Vo's second counsel, Ms. DeKelver, that she had listened to the tape under optimal circumstances and heard no such admission; trial counsel Blackman also represented that he had listened to the tape and never heard such an admission, even while listening on a home stereo system with headphones. (10/12/95, RT 25-26.) Trial counsel requested that the trial court "specifically listen to the tape under the most advantageous circumstances that the court can find so that the court can make a factual finding one way or the other." (10/12/95, RT 26.)

Counsel for co-defendant Hajek argued that the trial court, in this situation, was

required to sit as a fact finder, and that the objection was that the jury had "received in essence contaminated evidence." (10/12/95, RT 26.) Counsel for the co-defendant further argued, joined by counsel for appellant Vo:

> I think under *Trevino*[115] and other cases that have to do with motions for new trial it would probably be best if the court listened to the tape on the cassette player the jurors used and make a decision on that. If the court were to find you do not hear those statements under the same conditions using the same machinery, then the court would have to make a determination under an objective standard as to whether that affected the jury verdict.

(10/12/95, RT 27.) Co-counsel for appellant Vo also cited *People v. Hedgecock* (1990) 51 Cal.3d 395, 414.[116] (10/12/95, RT 29.)

The prosecutor argued that the evidence was properly admitted, and there was no improper conduct by jurors, so the trial court had no duty and should not inquire further. (10/12/95, RT 27-28.) The trial court took a brief recess, then denied the motion for new trial without specifically articulating the grounds for denial, and without listening to the tape using the same equipment or making a finding, as requested by defense counsel. (10/12/95, RT 30.)

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[115] *People v. Trevino* (1985) 39 Cal.3d 667, 696, addresses differences between the standards of review employed to determine sufficiency of the evidence and a motion for new trial. The opinion in *Trevino* concluded that the trial court, which granted a motion for new trial, had erred in earlier denying a motion for judgment of acquittal, as an independent review of the evidence did not demonstrate sufficient evidence for conviction. The *Trevino* opinion supports the principle that the trial court has an obligation to independently review the evidence on a motion for new trial.

[116] *People v. Hedgecock* (1990) 51 Cal.3d 395 held that where a new trial motion is based on allegations of juror misconduct, the trial court may hold a hearing to determine the truth of the allegations.

A. The Prosecution Used This Recording, in Which Co-Defendant Hajek Makes Inculpatory Statements, to Demonstrate the Co-Defendant's Guilt.

The prosecution introduced the tape recording, and Detective Robinson's testimony about the circumstances under which it was made, to demonstrate the guilt of co-defendant Hajek. Robinson testified that only Hajek is audible on the tape. (Vol. 16, RT 3818, 3844.) No one testified that appellant Vo had made admissions on this tape. The transcript prepared by the prosecution was deemed so unreliable that it was excluded.

Appellant Vo refers to and incorporates herein Argument 1, error in denial of his motions for severance; Argument 7, denial of his right to confront and cross-examine co-defendant Hajek about his extrajudicial statements; and Argument 6, regarding the uncharged conspiracy and error in failing to provide limiting instructions to the jury concerning which evidence could be used against which defendant.

The trial court erred in admitting this tape into evidence at the guilt phase of appellant Vo's trial, and permitting it to be used without restriction against appellant Vo. The extrajudicial admissions made by co-defendant Hajek on that tape were highly inculpatory as to Mr. Hajek. Because co-defendant Hajek did not testify, appellant Vo had no opportunity to confront and cross-examine him, and the danger of prejudice to appellant Vo is so great that reversal is required as a matter of law. (*People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123.)

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B. The Trial Court Unreasonably Failed to Require the Court Reporter to Transcribe the Audible Portions of the Tape, Depriving Appellant of a Complete Record and Reliable, Meaningful Appellate Review.

The failure to report significant proceedings and to make a record of the applicable law violates not only appellant's rights under state law, but also his federal constitutional rights to due process, a fair trial, meaningful appellate review, and the Eighth Amendment requirement of reliable and non-arbitrary procedures in capital cases. (*Gardner v. Florida* (1977) 430 U.S. 349, 360- 362). The failure to provide appellant Vo with his state law entitlement to a complete transcript of capital proceedings is a further ground on which his federal due process rights were infringed, requiring reversal. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347.) Appellant Vo refers to and incorporates herein Argument 21, concerning the failure to report proceedings in his capital case.

The fact that the parties stipulated to not transcribing the recording as it was played for the jury does not relieve the trial court of its statutory and constitutional obligation to ensure a complete record. In the alternative, there was no reasonable tactical justification for trial counsel's stipulation, as no possible benefit could accrue to appellant Vo from the failure to transcribe an important and contested tape recording in which Mr. Vo's voice was inaudible.

The United States Supreme Court has repeatedly "emphasized before the importance of reviewing capital sentences on a complete record." (*Dobbs v. Zant* (1993) 506 U.S.357, 358, citing *Gardner v. Florida* (1977) 430 U.S. 349, 361.) This is so

because a panoply of constitutional rights are specifically involved when the accuracy of a capital case record is at issue.

The Fifth and Fourteenth Amendments guarantee the right to due process in an appeal's consideration (see *Frank v. Mangum* (1914) 237 U.S. 309, 327-328; *Cole v. Arkansas* (1948) 333 U.S. 196,201), e.g., in the resolution of the record's accuracy and completeness, particularly in any record reconstruction proceedings. "Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review." (*People v. Howard* (1992) 1 Cal.4th 1132, 1166; see also *Griffin v. Illinois* (1956) 35 1 U.S 12, 20, 76 S.Ct. 585; *Draper v. Washington* (1963) 372 U.S. 487, 496-499; see *People v. Barton* (1978) 21 Cal.3d 513, 517-518.)

Finally, the Eighth Amendment requires that the record be sufficient "to ensure that there is no substantial risk that the death sentence has been arbitrarily imposed." (*People v. Howard*, *supra*, 1 Cal.4th at 1166.) This is particularly so as to errors involving the appellate record: "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." (*Gardner v. Florida*, *supra*, 430 U.S. at 361.) Otherwise, the "capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*, [(1972) 408 U.S. 238l]." (*Gardner v. Florida*, *supra*, 430 U.S. at 361.)

Each of the federal constitutional protections underlying the requirement of an adequate record is also magnified by the Eighth Amendment's requirement of heightened reliability in capital cases. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 and n.13; see also *McElroy v. United States Ex Rel. Guagliardo* (1960) 361 U.S. 234 (Harlan, J., diss.).) All the same rights are also guaranteed under the state constitution's parallel provisions. (Art. I, Sections 1, 7, 15, 16, 17 and 24.)

C. The Jury's Extra-Record Attempt at Reconstructing the Contents of Inaudible Portions of the Audio Tape is Tantamount to Jury Misconduct, Because it Deprived Appellant Vo of Notice, the Assistance of Counsel, the Opportunity to Defend, a Fair Trial, and a Reliable Verdict in This Capital Case.

The trial court abused its discretion in denying appellant Vo's motion for new trial, after it was discovered that jurors believed, during penalty phase deliberations, that they heard admissions made by Mr. Vo. Such admissions are simply not present. No witness testified that admissions were made by Mr. Vo on that tape.

The jury's purported discovery and consideration, during deliberations, of admissions unknown to anyone before and during the trial deprived appellant Vo of constitutionally-required due process notice and an opportunity to be heard, the assistance of counsel on a critical factual and legal issue, the opportunity to defend, and a reliable verdict.

Denial of the motion for new trial under these extreme and unusual circumstances was an abuse of discretion. Appellant refers to and incorporates Argument 30,

concerning the denial of the new trial motion.

D. Appellant's Conviction and Death Sentence Must be Reversed.

For reasons set forth above and throughout this brief, appellant Vo's conviction must be reversed because his trial was irredeemably tainted by many inter-related errors, including the refusal of the trial court to sever the trials of the two co-defendants, and the admission and use by the jury of evidence properly admissible only against the co-defendant, including Hajek's admissions on the audiotape recording made shortly after arrest.

Even if reversal of the guilt verdict was not required, this Court would be obligated to reverse the penalty verdict. The jury's purported discovery of previously unknown admissions of appellant Vo was tantamount to jurors unilaterally obtaining extra-record information bearing on the case; their actions deprived Mr. Vo of notice, due process, a fair trial, the assistance of counsel, and a reliable, non-arbitrary verdict in his capital sentencing trial. The error is constitutionally intolerable.

6. THE PROSECUTION'S UNCHARGED CONSPIRACY THEORY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS, FAIR TRIAL, JURY TRIAL THE RIGHT TO DEFEND, AND RELIABLE DETERMINATIONS OF GUILT AND PENALTY, AS IT PERMITTED JURORS TO INFER GUILT OF CHARGED OFFENSES ON A QUANTUM OF EVIDENCE LESS THAN THE STANDARD OF PROOF.

A. Factual Introduction.

Although the information charged no conspiracy to commit burglary, robbery,

murder, or any other felony against co-defendants Vo and Hajek, the prosecutor made clear, from the very outset, that his theory of the crime was a revenge conspiracy in which both defendants willingly participated. In support of his theory, the prosecutor presented vague and bizarre statements by co-defendant Hajek to others; most of these were made after events at the Wang household. Moreover, the trial court allowed this inflammatory evidence to go before the jury without making necessary foundational findings. The broad and vague scope of the uncharged conspiracy improperly allowed the State to fill evidentiary gaps with innuendo and to obtain a capital sentence against Appellant in violation of his fundamental constitutional guarantees.

No written notice concerning the nature and scope of the information was ever provided pretrial. (Vol. 6, CT 1442-1453; Vol. 13, RT 2986 et seq.) No third parties – including Norman Leung, McRobin Vo, and Lori Nguyen, who all were called by the prosecution and examined concerning the existence of an alleged conspiracy – were charged with conspiracy, either.

Counsel for appellant Vo and co-defendant Hajek objected to use of the uncharged conspiracy. (Vol. 16, RT 3903, 3900.) During a pretrial hearing on the admissibility of letters written by co-defendant Hajek, Hajek's counsel objected that neither the testimony nor Hajek's comment in the letter concerning potential evidence supported a plan or conspiracy.

> I also think that essentially what the district attorney is trying to do is to use Mr. Leung as a way in which to establish a broad conspiracy which does not

> apply to the [Penal Code section] 187 [homicide charge]. That's the problem I have with attempting to use this type of evidence. . . . I think that it also is not clear by looking at this evidence that it is evidence of a conspiracy between my client and between Loi Vo, because quoting what the district attorney said, "The D.A. is supposed to have a piece of evidence that is a for sure we planned to go over there," that's not Mr. Hajek saying they planned to go over there, that they had a plan together. That's him quoting what's been told him. (Vol. 16, RT 3900.)

She continued:

> But in any event, there is a second problem with both evidence item 78 and also 75 [Hajek's letters], which is again referring to the broad brush that the district attorney seeks to use here. (Vol. 16, RT 3901.)
> ***
> And it seems essentially what the district attorney is seeking to do is use Norman Leung and the fact that he might or might not have rejected an offer to do something with my client, and according to these writings Mr. Vo, in order to prove that Mr. Vo and Mr. Hajek must have been involved in the plan together. And I don't see the – I don't see the logical connection between those things. (Vol. 16, RT 3901.)

Appellant Vo's counsel adopted those objections, and added:

> Each of these exhibits [the letters] would be hearsay as to my client. There's no showing that there was then an ongoing conspiracy. There's no showing they're adoptive admissions. There's no showing of any other legitimate recognized basis to get around the hearsay objection. They are writings and statements by Mr. Hajek and would represent hearsay as to my client.
>
> They're irrelevant and [objectionable under Evidence Code section] 352 as to my client because the prosecution will seek to have the jury speculate without an adequate foundation in any of these three letters.
>
> One, you don't know who the parties to this conspiracy are. You don't know whether the conspiracy is a robbery conspiracy or a homicide conspiracy. And the vice in it is once it gets before the jury they're allowed to speculate as to what does it all mean without an adequate foundation, without adequate guidance. (Vol. 16, RT 3903.)

The prosecutor responded that the statements in Exhibit 78 established a conspiracy because they were describing statements made earlier, in furtherance of the conspiracy.

> My contention is that these letters are admissible because they refer to a conspiracy which is not broad, but is very specific because it is put in context of Exhibit 78: "She has something planned for this case. There is a problem with something. D.A. is supposed to have a piece of evidence that is a for sure we planned to go over there."
>
> How much more specific can he be in this case, we planned to go over there ahead of time, conspiracy, to murder. This is the case. (Vol. 16, RT 3904-3905.)

However, counsel for both defendants asserted that the letters alone were insufficient to establish a conspiracy to commit the charged offenses, and appellant Vo's counsel stated:

> No, [Penal Code section] 1223 and cases cited under that section are very clear that the conspiracy must be established as a foundational fact before statements pursuant to that conspiracy are admissible under 1223. And I think what he's attempting to do is put the letters in and then step back in the hopes that somehow they have enough evidentiary value to get him over these foundational hurdles, but he can't do it. Because the letters are in and of themselves not enough, because they're hearsay statements by Mr. Hajek not provably in furtherance of a conspiracy, so they cannot be used for any purpose against my client.. (Vol. 16, RT 3905-3906.)

Objections to the conspiracy theory were reiterated before the case went to the jury. The trial court acknowledged that the uncharged conspiracy was a "real tricky" area of law. (Vol. 21, RT 5261.) Co-defendant Hajek's counsel objected to the conspiracy instructions proffered by the prosecutor, and in particular to the felony-murder theory grounded in an alleged conspiracy that was not sufficiently proven to take it to the jury.

(Vol. 21, RT 5285-5286.) Appellant Vo's counsel also objected, incorporating the arguments of Hajek's counsel and adding:

> There's a broad objection which I would have as to the instructions as a whole and that is that because of the number and multiplicity of theories offered by the prosecution, conspiracy, aider and abettor, felony murder, there are such a number of instructions and that each deal with the issues of intent and knowledge in a somewhat different way. So that the net effect of giving the type of instructions and the particular instructions that you are contemplating is to cause irreparable confusion on the part of a jury insofar as it relates to intent and knowledge, either as to a principal or an aider and abettor, and it makes it virtually impossible for the jury, in an understanding way, to sort out the criminal liability based upon the remaining circumstances of this particular case. . . .
>
> We would, as Ms. Greenwood [Hajek's counsel] indicates, object to the giving of any instructions on conspiracy, any instructions on the subject of conspiracy as it relates to felony murder. The instructions that have been proposed are not accurate statements of law and they are not adequately supported in the trial record. (Vol. 21, RT 5286-5287.)

The prosecutor's alleged conspiracy, however, was very clearly not the limited conspiracy to commit murder that he asserted as the rationale in a hearing prior to witness Leung's testimony. (Vol. 16, RT 3905.) The prosecutor's broad and nebulous conspiracy theory stretched back to a prior robbery involving co-defendant Hajek and Norman Leung, as well as Hajek's possession of a stolen vehicle and a shotgun on an earlier occasion (Vol. 15, RT 3656, 3658, 3659-60; Vol. 16, RT 3897, 3899), events in which appellant Vo was <u>not</u> involved. (Vol. 15, RT 3542-3543; Vol. 17, RT 4179.) The prosecutor's theory included as evidence of a "conspiracy" statements made only by Hajek, in letters Hajek wrote. (Vol. 16, RT 3912, 3936.) He asserted that Hajek's threat against Tevya Moriarty and his sending Moriarty's address to appellant Vo were also part

of the conspiracy, (Vol. 17, RT 4149), as was co-defendant Hajek's assertion in a letter that both defendants faced legal liability. (Vol. 17, RT 4159.)

In arguing to the jury, the prosecutor contended that the object of the alleged conspiracy was burglary:

> If you find that Mr. Vo went into that house with a felonious intent, it doesn't matter whether he intended or whether the killing was even accidental. He is guilty of murder in the first degree as part of that conspiracy. (Vol. 21, RT 5370.)

He argued a conspiracy was shown by Vo's diary entry showing that Vo was not involved in prior offenses with Hajek (Vol. 21, RT 5370), co-defendant Hajek's arrest for those offenses, and Hajek's statement suggesting that Norman Leung was invited to participate in the events at the Wang house. (Vol. 21, RT 5370.) The prosecutor regarded Vo's keeping letters written by Hajek in Vo's cell as part of the conspiracy, and evidence that appellant Vo somehow agreed with the "truth" of those letters, including Hajek's bizarre assertions that the job was "professional" and that they were "terrorists." (Vol. 21, RT 5372.)

Torture, revenge, and sadism were also allegedly part of the uncharged conspiracy. (Vol. 21, RT 5375.) The prosecutor painted the conspiracy as a bizarre, sadistic, cold-blooded killing scheme in which multiple victims were endangered – based on the prosecution's cross examination of Hajek's mental health experts, suggesting that co-defendant Hajek may have been sadistic. The prosecutor then stressed Vo's culpability especially since he was "a normal person" without the mental health impairments of co-

defendant Hajek. (Vol. 22, RT 5573.) Near the end of his argument to the jury, the prosecutor stressed the breadth of his conspiracy allegations: that the defendants planned ahead of time "to go over and get revenge." (Vol. 22, RT 5583.) He insisted that the taped conversation between Hajek and Vo recorded two "fully informed co-conspirator[s]." (Vol. 21, RT 5374.)[117]

The uncharged conspiracy theory was urged as a way for jurors to infer, despite the lack of evidence, that appellant Vo premeditated, deliberated, and had the requisite intent to support the various special circumstance allegations. Tarring Vo as a willing co-conspirator in a broad conspiracy was a way of filling evidentiary gaps in the prosecution case, by attributing to appellant Vo the bad acts and statements of co-defendant Hajek. Appellant Vo refers to and incorporates herein Arguments 8, 9, 10, 11, and 14, concerning insufficiency of the evidence.

A wide variety of evidence – both testimonial and documentary – was placed before the jury pursuant to this conspiracy theory. As Vo's counsel pointed out in his objections, the trial court allowed the evidence to be presented without first making the required foundational finding that a conspiracy was shown, and without determining at any point the scope of the alleged uncharged conspiracy[118]. Some documentary evidence

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[117] The state's own evidence was that only Hajek's voice was audible on the tape. (Vol. 16, RT 3818, 3844.) See, Argument 5 regarding improper admission of the taped conversation between Hajek and Vo, incorporated herein by reference.

[118] For example, when objections were made to the introduction of Vo's diary and some of Hajek's letters, the trial court stated that it would wait to rule on admissibility, to see how the statements fit into the conspiracy theory. (Vol. 15, RT 3542.) Faced with

was later not admitted into evidence, but the damage had been done, since the jury had heard of these matters.

The malleable uncharged conspiracy theory was used to justify evidence and argument offered by the prosecutor, including the following testimony:

1. **McRobin Vo**, the brother of appellant Vo, was called by the prosecution. He did not know co-defendant Hajek, but Loi Vo and Hajek may have borrowed his car to go to the beach one day. (Vol. 14, RT 3523.) On the morning of the incident, Loi Vo left between 7 and 8:00 a.m., possibly with Hajek. (Vol. 14, RT 3528-3529.) He visited Hajek in jail, but Hajek did not answer questions about how the victim was killed. (Vol. 14, RT 3531.) McRobin Vo identified his brother's handwriting in a diary, which he had not seen before (Exhibit 80; Vol. 15, RT 3547), and identified appellant's handwriting on three letters (Exhibit 94, 95, 96; Vol. 15, RT 3548-9, 3552-3, 3554.) McRobin Vo was asked foundationless questions about his brother selling firearms (Vol. 15, RT 3555, 3561), and being involved with murder for hire. (Vol. 15, RT 3566.)[119]

2. Prosecution witness **Norman Leung** testified that he knew Hajek, Vo, and Lori Nguyen. (Vol. 16, RT 3912.) Leung had known Hajek for over three years by 1991, but rarely saw Vo. (Vol. 16, RT 3921.) Leung did not recall being asked by Hajek to go with him and Vo to Ellen Wang's house to get revenge (Vol. 16, RT 3927, 3928, 3930), or being asked to help commit a murder. (Vol. 16, RT 3930.)

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objections to the admission of letters written by Hajek, urged by the prosecutor as evidence of a conspiracy, the trial court decided to admit the evidence subject to a motion to strike. (Vol. 16, RT 3936.)

Asked to have proceedings outside the presence of the jury to determine whether a witness' testimony supported the prosecution's theory of a conspiracy, the trial court stated, "I really don't like to try a case twice. Once outside the presence of the jury and have kind of like a dress rehearsal and try the case then in front of the jury." (Vol. 16, RT 3907.) The trial court ruled, "I'm going to allow the District Attorney to proceed." (Vol. 13, RT 3010.)

[119] See *People v. Wagner* 1975) 13 Cal.3d 612, 619, holding that it is misconduct to ask foundationless questions solely for the purpose of exposing the jury to such insinuations.

3. **Lori Nguyen** was called by the prosecution to testify about the events that occurred on January 14, 1991, when she and co-defendant Hajek were confronted by Ellen Wang and others. (Vol. 17, RT 4026-4041.) After Hajek and Vo were arrested, Ms. Nguyen falsely told the police that Hajek drove away from the fight in Vo's blue car. (Vol. 17, RT 4047.) Ellen was in a gang called the Eagles, and she threatened to kill or "get" Hajek. (Vol. 17, RT 4061.) Hajek and Ellen were screaming on the telephone, and he threatened to "get" Ellen, too. (Vol. 17, RT 4062.) Hajek never said he would kill Ellen's family, and never said he was going to have appellant Vo help him. (Vol. 17, RT 4065.) The prosecution theory was that appellant Vo was involved in the crimes because he was in love with Lori Nguyen. (See, e.g., Vol. 21, RT 5394.)

4. **Tevya Moriarty** was called to testify concerning co-defendant Hajek's telephone call on the night before the homicide. (Vol. 15, RT3644.) Moriarty testified that Hajek spoke of his plan in the singular (Vol. 15, RT 3656), and that he planned to make it look like a robbery. (Vol. 15, RT 3655.) The prosecutor asked about Hajek committing other crimes with other people (Vol. 15, RT 3656), on the theory that this witness believed this crime would be similarly planned. (Vol. 15, RT 3658.)

In addition, the prosecutor offered considerable documentary evidence which he asserted supported his broad conspiracy theory, although most of it was extraneous as to appellant Vo:

- Over objection of appellant's counsel (Vol. 15, RT 3536-3537), a short diary of appellant Loi Vo was introduced as Exhibit 80. The diary was proffered to "corroborate" Vo's involvement in the alleged conspiracy, and admitted over objection. (Vol. 17, RT 4179.) Vo was questioned on cross-examination about an entry in the diary, which referred to the arrest of Hajek and Leung and the fact he was luckily not with them that night. (Vol. 20, RT 5027.)

- Three letters apparently written by appellant Vo were introduced as Exhibits 94, 95, 96. (Vol. 15, RT 3548-9, 3552-3, 3554.) 94 and 95 were admitted against Vo only. (Vol. 17, RT 4183, 4186-7.) Vo was cross-examined about Exhibit 95, a letter in which he stated love for Lori Nguyen.

- Three letters written by co-defendant Hajek referred to his prior arrest with Norman Leung. The prosecutor proffered Exhibits 65, 75, and 78 as evidence of a conspiracy between Hajek and appellant Vo. (Vol. 16, RT 3896.) The prosecutor also proffered the circumstances of Hajek's prior arrest, to explain the letters. (Vol. 16, RT 3899.) Hajek's admissions, the prosecutor argued, were admissible against appellant Vo because Hajek's reference to inviting Leung to participate was a statement made in the course of the alleged conspiracy. (Vol. 17, RT 4143.)[120]

- Letters written by Lori Nguyen to appellant Vo (Exhibits 66, 67, 68) were proffered to show the relationship between the defendants and this witness. (Vol. 17, RT 4167.) They were initially not admitted. (*Ibid.*)

- Exhibit 72, a letter written by Hajek, was proffered as containing an admission that people were tied up. It was admitted against both defendants, over appellant's objection. (Vol. 17, RT 4168.)

- Exhibit 73, Hajek's letter to Vo, was admitted over appellant's objection. (Vol. 17, RT 4171.)

- Exhibit 76, written by Hajek, described a possible insanity defense and his plan to "get rid of" witness Moriarty. (Vol. 17, RT 4175.)

- Appellant Vo objected to admission of Exhibit 77, written by Hajek. (Vol. 17, RT 4176.)

- Exhibit 78, another letter written by Hajek, was proffered by the prosecution as evidence of motive, since Hajek claimed "we did this for her." The letter was admitted over objection. (Vol. 17, RT 4177.)

- Photographs of Lori Nguyen, found in Hajek's cell, were admitted as to Hajek only. (Vol. 17, RT 4182.)

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[120] Appellant refers to and incorporates herein Argument 1, the improper denial of appellant's severance motion, and Argument 7, concerning the denial of appellant's right to confront and cross-examine the co-defendant.

Appellant's counsel objected particularly to statements and writings of co-defendant Hajek, on hearsay and relevance grounds, and also because appellant Vo was denied his federal constitutional rights to due process and confrontation because he could not examine co-defendant Hajek concerning these statements. (Vol. 17, RT 4179.)

The jury was instructed it must decide separately the guilt of each defendant. (Vol. 8, CT 1975.) However, jurors were not instructed specifically which evidence was admitted for what charges or allegations. (see Vol. 9, CT 2057, 2059.) Additional instructional errors are addressed in more detail below.

The prosecutor's proffer of the conspiracy evidence and his argument shows he certainly did not regard himself bound by the usual burden of proof, focusing on specific charges and evidence relevant to each. Rather, the uncharged conspiracy afforded him latitude to argue expansively that appellant Vo's friendship with co-defendant Hajek, Hajek's history of crimes and bad acts, Hajek's statements, and appellant Vo's presence at the Wang household on the day of the offenses amounted to Vo's criminal responsibility for premeditated capital murder. The confusion engendered by instructions on the uncharged conspiracy afforded the jury reasons to accept the prosecutor's point of view, whether or not the existence of a conspiracy to murder or burgle was ever proven.

The prosecution argued in a manner conflating his uncharged and amorphous conspiracy theory with the requirements of first degree murder, urging the jury that it did not matter how they arrived at a finding of guilt for first degree murder. First, he argued premediated and deliberate murder, based on a "conspiracy" to get into the Wang house: any felonious intent, he contended, was sufficient. (Vol. 21, RT 5368-70.) Next, he argued that under the felony murder rule, even an aider and abettor is liable; he argued that the uncharged "conspiracy" proved liability, citing co-defendant Hajek's

participation in another crime, in which Vo did not participate, but which crime Vo noted in his diary. (Vol. 21, RT 5370-5371.) Further evidence of a conspiracy, according to the prosecutor, was that Hajek wrote appellant Vo a letter; he asserted that the mere fact Vo kept the letter meant that Hajek's assertions were true. (Vol. 21, RT 5372.)

B. Legal Overview.

The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that particular offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 390; People v. Liu (1996) 46 Cal.App.4th 1119, 1128.) Since conspiracy to commit murder is an "inchoate crime," a defendant can be found guilt of conspiracy to commit murder absent any evidence that a human being was killed or injured in any manner. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1229.)

Because a conviction for conspiracy to commit first degree murder "by definition does not include the death of or even the serious injury to another person" it follows that such a conviction cannot support a death sentence. (*Coker v. Georgia* (1977) 433 U.S. at 598 .) This Court so held in *People v. Hernandez* (2003) 30 Cal.4th 835.

The alleged conspiracy in this case was not charged, and its scope was not defined. The prosecutor used his expansive conspiracy theory as a substitute for evidence of

appellant Vo's guilt of capital charges, urging that it was the functional equivalent of proof of first degree murder. By this means, the prosecution was permitted to obtain a capital conviction and death sentence, although there was no proof that appellant participated in this alleged conspiracy, the nature and scope of the conspiracy was undefined, and the jury was not required to find its existence beyond a reasonable doubt. This back-door method of persuading the jury to convict and execute Vo violated both the Eighth Amendment, and appellant's due process rights.

In *Enmund v. Florida* (1982) 458 U.S. 782, the Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on one who 'aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. " (Id., 458 U. S. at 797.) Flying in the face of *Enmund*, the uncharged conspiracy theory here transformed an ill-advised friendship into a capital offense, with the result that appellant – a very young man with no criminal record, who neither intended to kill nor killed – is on death row. The Eighth Amendment guarantee of particular reliability in capital cases was eviscerated in this case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

As set forth more fully in Arguments 8, 9, 10, and 11 concerning insufficiency of the evidence, the ploy of using an uncharged criminal conspiracy (as well as the improper joinder of the co-defendants, set forth more fully in Argument 1) invited the jury to

assume guilt and convict based on improper factors, despite insufficient evidence of the actual charges.

As discussed in the next section of this argument, the failure to charge the alleged criminal conspiracy in the information deprived appellant Vo of his constitutional due process right to notice and an opportunity to be heard – to confront and challenge the evidence against him in the context of the legal charges against him. Also discussed below are errors flowing from the failure of the trial court to control the misconduct of the prosecution in using the uncharged conspiracy theory to introduce inflammatory and irrelevant information and urge findings of guilt, despite insufficient evidence.

Due process of law requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship* (1970) 397 U.S. 358, 361-364; *Jackson v. Virginia*, supra, 443 U.S. 307, 318 318-319.) It follows that a flawed conviction, based on insufficient evidence, would violate the reliability and non-arbitrariness required by the Eighth Amendment. The uncharged conspiracy theory, argued as the functional equivalent of proof of the actual charges, undermined these fundamental precepts of criminal law.

Because the incriminatory portions of the uncharged conspiracy theory rested on acts and statements of co-defendant Hajek, who was tried in a joint proceeding, appellant Vo was improperly deprived of the opportunity to confront and cross-examine the source of that evidence. Appellant refers to and incorporates herein Argument 1, concerning the

wrongful refusal to sever the co-defendants for trial, and Argument 7, regarding his inability to confront and cross-examine Hajek, the source of alleged incriminating extrajudicial statements.

C. Because the Alleged Conspiracy Was Uncharged, Appellant Was Deprived of Notice and the Opportunity to Defend.

The parameters of the prosecutor's uncharged conspiracy theory were nebulous. A vast amount of inflammatory information was placed before the jury in furtherance of the uncharged theory, then urged by the prosecutor as a surrogate for proving the charged offenses.

Due process of law requires that a person be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . to examine the witnesses against him, to offer testimony, and to be represented by counsel." (*In re Oliver* (1948) 333 U.S. 257, 273, quoted in *Lankford v. Idaho* (1991) 500 U.S. 110, 126.) Presenting extensive evidence of an amorphous and uncharged offense strips a criminal defendant of these basic guarantees. The failure to charge the alleged conspiracy deprived appellant Vo of the opportunity to fairly defend, and permitted the jury to use evidence of an alleged conspiracy without the bothersome detail of needing to find a conspiracy was proven beyond a reasonable doubt.

Notice is as important at the sentencing phase of a capital trial as it is at the guilt phase. As the High Court explained in *Gardner v. Florida* (1977) 430 U.S. 349, 360,

n. 23:

> "Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."

In this case, the alleged uncharged conspiracy invited the jury to impose a death sentence on the basis of appellant's mere association with Hajek, reinforced by extensive evidence about the death-worthiness of the co-defendant, Hajek, and to disregard appellant's youth, lack of a prior criminal record, military service, and positive efforts to overcome obstacles that he faced in life. State law requires that notice be given of the factors in aggravation sought to be introduced by the state at penalty phase. (Penal Code § 190.3.) The nature and evidence of the alleged conspiracy were not so noticed. (Vol. 6, CT 1579.)

An exception to the notice requirement is made for proof of offenses or special circumstances (Penal Code § 190.3), which typically are proven at the guilt phase of trial. In this case, however, the uncharged conspiracy was explicitly not proven at the guilt phase of trial, so that exception has no application to this unusual circumstance. Appellant Vo was deprived of adequate notice of the factors in aggravation, violating state law, his due process rights, and his Eight Amendment right to a reliable determination of sentence. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

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D. The Trial Court Erred in Permitting a Vast Amount of Alleged "Conspiracy" Evidence to Be Presented to the Jury Without First Finding the Existence and Scope of the Alleged Conspiracy.

The trial court had a duty to safeguard the proceedings from admission and misuse of inflammatory and irrelevant evidence. Admission of irrelevant evidence violated appellant's rights to due process and rendered the trial fundamentally unfair. (See, e.g., *Duncan v. Henry* (1995) 513 U.S. 364, 366.) As defense counsel aptly stated, the trial court's treatment of evidence related to the alleged conspiracy (and the prosecutor's argument urging its admission) was backwards: the trial court allowed the evidence without making the foundational finding that a conspiracy existed, and only after the jury had been exposed to these unreliable and inflammatory materials did the legal relevance of the evidence occasion a ruling. In fact, much of the evidence was relevant only to Hajek, and did not relate to Vo. There was, in fact, insufficient evidence that the alleged conspiracy existed at all.

The Fifth Circuit warned in language apropos of the instant trial court's reckless decision to allow the jury to hear whatever the witness had to say and then deal with it later: "It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound;' and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" (*Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886; see also *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337 ["The advantage of [in limine] motions

is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury"].)

The improper admission of evidence purportedly bearing on the uncharged and unproven conspiracy in this case was particularly pernicious as to appellant Vo, and should not have been allowed in advance of a ruling, based on substantial evidence, that the purported conspiracy existed.

> "'Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' [Citations.]"

(*Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153, 158; accord, *People v. Manson* (1976) 61 Cal.App.3d 102, 126 ["[a]ssociation, by itself, does not prove criminal conspiracy"].) The core of a conspiracy is an agreement to commit an unlawful act. *(United States v. Esparsen* (10th Cir. 1991) 930 F2d 1461, 1471; see also *United States v. Kelly* (3rd Cir. 1989) 892 F2d 255, 258 ["The essence of a conspiracy is an agreement"].) Conduct that furthers the objective of the conspiracy is not sufficient to make a person a conspirator even if the person knew about the conspiracy and voluntarily helped to further its objectives. (See *People v. Horn* (1974) 12 Cal.3d 290, 296; see also *United States v. Falcone* (1940) 311 US 205, 210-211; *United States v. Benz* (11th Cir. 1984) 740 F2d 903, 910-911.)

As set forth more fully above, a vast amount of inflammatory information was presented to the jury under the prosecution's uncharged conspiracy theory. This evidence

was largely admitted without limiting instructions, meaning the jury was allowed to consider it against both defendants and for all purposes. (In the face of such inflammatory information and argument by the prosecution, however, limiting instructions may have been too feeble a remedy.)

The trial court failed to first find the existence of a conspiracy before permitting the jury to hear evidence relevant to that uncharged theory. At no time did the trial court decide the scope of the alleged conspiracy. The alleged uncharged conspiracy was, therefore, "anything goes" – limited only by the prosecutor's imagination.

In essence, the prosecutor presented evidence and argued that the jury should return guilty verdicts on capital murder charges because: [1] appellant Vo and co-defendant Hajek were friends, [2] Hajek committed other bad acts, some which Vo was aware of, [c] Hajek told someone of his plan to kill in advance and later admitted responsibility, [d] Hajek allegedly hatched the plan to avenge Lori Nguyen, and Vo was friendly with Nguyen; and [e] Vo went to the house with Hajek. Notably missing was any evidence that Vo knew of Hajek's plot to kill, or participated in the killing itself. There was no evidence that appellant Vo legally adopted Hajek's incriminatory statements.

It was the trial court's responsibility to rule on the existence and scope of the alleged uncharged conspiracy before permitting any of this evidence to be used against petitioner. Because the trial court did not do so, the jury was exposed to and free to use considerable evidence relevant only to the co-defendant, and to fill any evidentiary gaps

with speculation, bias, and outrage at the results of the crime.

A limitless *charge* of conspiracy would obviously violate due process of law on many levels – by failing to provide notice and an opportunity to confront the evidence, by failing to ensure that only relevant evidence was admitted, by failing to require that the jury convict only on proof beyond a reasonable doubt. All those concerns are in operation in this case, because the prosecution relied extensively on its uncharged conspiracy theory in lieu of proving its case for capital murder against appellant Vo beyond a reasonable doubt.

This is the very antithesis of the adversarial system of justice. The trial court was woefully inattentive to appellant's basic constitutional trial rights, permitting this capital case – the most serious kind of case, where the very life of an individual hangs in the balance – to be overrun with rumors, speculation, innuendo, trash talk, and a raft of factual information that was irrelevant to this individual.

Society condemns tabloids for publishing such fluff as fact. However titillating, speculation and guilt-by-association can cause considerable anguish in personal lives. They have no place in a court of law, as a substitute for relevant and admissible evidence of the actual crimes alleged.

Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding that appellant conspired to commit murder or premeditated and deliberated the killing of Ms. Hung. His conviction and sentence were

obtained in violation of state law. (*People v. Anderson* (1968) 70 Cal.2d 15, 34-35.) The improper convictions also violated appellant's federal rights to due process of law *(Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt"]), to present a defense (*id.* at p. 314 ["[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused"]) and to reliable guilt and penalty verdicts. (U.S. Constitution, Sixth, Eighth and Fourteenth Amendments.; California Constitution, Article I, §§ 7, 15, 16 and 17.)

This Court has a strong obligation to ensure that the trial courts enforce constitutional trial rights by requiring judges to find both the existence and the scope of any alleged uncharged conspiracy, before allowing prosecutors free reign to paint a criminal defendant guilty by piecing together a picture of connection with an unsavory character, an adolescent crush, and mere presence at the scene as adding up to conduct close enough for capital charges.[121]

The trial court in this case failed to protect appellant. Even if it found the existence of a conspiracy – which it eventually did by implication, since some instructions were

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[121] The phrase, "close enough for government work" comes to mind. That phrase may be somewhat amusing in the context of functions like pothole repair, a forum in which individual constitutional rights are not implicated, and generally speaking, no person's life is at stake.

given – it did not do so *in advance* of admitting evidence, and it never found the *scope* of the conspiracy. It did not instruct the jury on limitations of the evidence it heard, and did not require the jury to find a conspiracy (or its scope) beyond a reasonable doubt. Any and all speculation and scurrilous information about the co-defendant was therefore fair game for the prosecution, and then the jury, to use. These proceedings had more in common with a smear campaign than the state and federal constitutions can tolerate.

E. The Prosecution Was Not Required to Prove the Existence of a Conspiracy, or its Scope, Beyond a Reasonable Doubt.

Due process of law requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship* (1970) 397 U.S. 358, 361-364; *Jackson v. Virginia*, supra, 443 U.S. 307, 318 318-319.)

In this case, the prosecution urged that his uncharged conspiracy theory provided a basis for convicting appellant Vo of first degree murder under alternate legal theories: premeditated and deliberate murder, and felony murder. The prosecution argued that its conspiracy theory, and all the material presented in furtherance of the theory, was the functional equivalent of proof of the charges – but a significant amount of inflammatory information, irrelevant to the actual criminal charges against appellant Vo, came before the jury only because of the uncharged conspiracy theory. That information was the crux of the state's case for the jury to convict appellant Vo on capital murder charges, and to sentence him to death.

The alleged uncharged conspiracy was both amorphous and broad, and the theory rested almost entirely on Hajek's acts and statements, liberally dosed with sheer speculation. As set forth more fully in Argument 7, appellant Vo was not afforded the opportunity to confront and cross-examine Hajek, despite the obvious reliance of the state on Hajek's actions and extrajudicial statements to spin the web of incrimination around Mr. Vo.

The uncharged conspiracy theory impermissibly lightened the prosecution's burden of proof, by permitting virtually all of the evidence against Hajek to be used against appellant Vo, preventing Vo from adequately challenging that evidence by confronting and cross-examining co-defendant Hajek, and urging the jury to infer Vo's guilt despite a lack of evidence that Vo planned to kill, intended to kill, or did kill.

The High Court has rightly condemned unconstitutional efforts by prosecutors to gain tactical advantage.

> "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

(*Berger v. United States* (1935) 295 U.S. 78, 88.)

It is the duty of the trial court, however, to keep in check the excesses of the prosecution. For example, in *People v. Hill* (1998) 17 Cal.4th 800, 821, this Court held that the trial court's failure to "rein in [the prosecutor's] excesses" created a "poisonous" atmosphere at trial. (See also, *Viereck v. United States* (1943) 318 U.S. 236, 248; *United States v. Corona* (5th Cir. 1977) 551 F.2d 1386, 1391, fn 5 [trial judge has the duty to rein in prosecution misconduct].) As the High Court has noted, the trial judge is "not a mere moderator, but is the governor of the trial for purposes of ensuring its proper conduct." (*United States v. Young* (1985) 470 U.S. 1, 10 [citations omitted].)

The trial court in Mr. Vo's case refused to place limitations upon the prosecution's conduct, including its flagrant misuse of the uncharged conspiracy to bootstrap irrelevant and inflammatory information into something that would persuade the jury to find appellant Vo liable for capital murder. The trial court permitted the jury to hear extensive evidence of the uncharged conspiracy theory, without deciding whether a conspiracy existed, or its scope. The evidence was largely admitted against both defendants, and without limitation as to purpose. And, as icing on the cake, the jury was not required to find that the alleged conspiracy was proven beyond a reasonable doubt before using that evidence in the manner of its choosing.

F. The Jury Was Given Erroneous Instructions Regarding the Uncharged Conspiracy.

Argument XVI of co-defendant Hajek's Opening Brief on Appeal (p. 188 et seq.)

addresses instructional errors concerning the alleged conspiracy. Appellant Vo adopts by reference that argument. Appellant also refers to and incorporates herein Argument 18 of this brief, concerning errors in instructing the jury regarding aider and abettor liability.

The jury was instructed it must decide separately the guilt of each defendant. (Vol. 8, CT 1975.) However, jurors were *not* instructed specifically which evidence was admitted for what charges or allegations, or against whom what evidence could be used. (see Vol. 8, CT 2057, 2059.)

Instructions 21 through 29 and 51 addressed the uncharged conspiracy theory, but not the quantum of proof necessary to find the existence of a conspiracy. (Vol. 8, CT 1981-1990.) Thus, the foundational step – establishing a conspiracy existed – remained as obscure for the jury as it had been at the initial hearing on this evidence. (See, Vol. 16, RT 3906.) These instructions, moreover, do not address the scope of the conspiracy. The jury was not required to return written findings on the uncharged conspiracy, so it is impossible to know whether or not a conspiracy was found unanimously, the scope of any conspiracy found, or the quantum of proof applied by individual jurors or the jurors as a whole.

The jury instructions finally clarified that the object of the alleged uncharged conspiracy was burglary and murder. (Vol. 8, CT 1981; Inst. 21, CALJIC 6.10.5.) Jurors were further instructed that a co-conspirator is liable for the "natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such an act was not intended as a part of the original plan, and even though he was

not present at the time of commission of such act." (Vol. 8, CT 1983; Inst. 22, CALJIC 6.11.)

Jurors were further instructed that "the formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent . . . ." (Vol. 8, CT 1984; Inst. 23, CALJIC 6.12.) This instruction, however, conflicts with another, stating that the "independent" act or declaration of a conspirator is not binding on a co-conspirator. (Vol. 8, CT 1986; Inst. 25, CALJIC 6.15.) Yet another instruction also conflicts with and undermines the instruction excepting co-conspirators from liability stemming from the "independent" acts and statements of a conspirator: the jurors were told they could consider statements of one conspirator against the others if the statements were made during and in furtherance of the alleged conspiracy. (Vol. 8, CT 1990; Inst. 29, CALJIC 6.24.)

This set of instructions was followed immediately by the reading of the information, which did not contain conspiracy allegations because no conspiracy was charged. (Vol. 8, CT 1991 et seq.) Jurors were not instructed what evidence was offered in support of the alleged conspiracy or what evidence was admitted as against only one defendant. The jury was not instructed that it had to find the existence and scope of the alleged conspiracy beyond a reasonable doubt, and no verdict form was provided concerning the alleged conspiracy.

Because the conspiracy was uncharged, jurors were not required to regard it as a

crime, and they may reasonably have understood the conspiracy instructions to fall outside the constitutional requirements of a presumption of innocence and that the burden is on the state to prove the allegations beyond a reasonable doubt. CALJIC 17.02, which was provided to the jury, specifically instructed the jury to regard each count of the information as charging a distinct crime, and required separate findings as to each on verdict forms. (Vol. 8, CT 1976.) No such findings were required of the alleged conspiracy, upon which the prosecution relied so heavily in urging the jury to find appellant Vo guilty of the crimes with which he was charged.

The first sentence of Article 1, § 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].) Petitioner's jury was not required to make unanimous findings about either the existence or the scope of the alleged conspiracy. It was instead free to use that evidence, relevant or not, true or not, applicable to appellant Vo or not, in any way it chose.

As the United States Supreme Court has acknowledged,

> While juries ordinarily are presumed to follow the court's instructions [citation], we have recognized that in some circumstances "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

(*Simmons v. South Carolina* (1994) 512 U.S. 154, 171, quoting *Bruton v. United States*

(1968) 391 U.S. 123, 135.) The trial court's instructions failed to make clear that the prosecution's conspiracy theory was an insufficient substitute for proving its case against Vo, impermissibly relieving the prosecution of its burden of proof on substantive charges. (See, *Francis v. Franklin* (1985) 471 U.S. 307, 317-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524.) There can be no confidence in the verdicts thus acquired, and reversal is necessary.

G. Appellant Was Grievously Prejudiced by the Prosecution's Uncharged Conspiracy Theory, Which Permitted Jurors to Infer Guilt of the Substantive Charges Despite Insufficient Evidence of Either His Guilt or His Involvement in the Alleged Conspiracy.

For all of the above reasons, appellant Vo's trial was irrevocably tainted by the prosecutor's use of an unproven and uncharged conspiracy, the scope of which was amorphous, which was urged as a surrogate for evidence of appellant's guilt. The error is fundamental and stripped appellant's trial of any semblance of fairness. Reversal is required.

7. APPELLANT VO'S RIGHT TO CONFRONT AND CROSS-EXAMINE WAS ABRIDGED BY THE INTRODUCTION OF HIS CO-DEFENDANT'S STATEMENTS AND WRITINGS.

At trial, appellant Vo offered two reasons why severance was necessary and required; the first was that Hajek had made statements to various individuals which directly or indirectly incriminated appellant Vo. (Vol. 6, CT 1536-1538.) Appellant Vo refers to and incorporates herein the portions of Argument 1 (regarding his motions for

severance) addressing his right of confrontation and cross-examination. Appellant Vo also incorporates by reference Argument 4 regarding the admission of witness Moriarty's testimony against him, and Argument 6 regarding the uncharged conspiracy theory used by the prosecution to bind him to co-defendant Hajek's conduct and statements.

A. Factual and Procedural Background.

Appellant Vo argued in the trial court that the use of various extra-judicial statements made by the co-defendant violated the principles of *People v. Aranda* (1965) 63 Cal.2d 518[122] and *Bruton v. United States* (1968) 391 U.S. 123.[123]

> Prejudice results to Vo because he cannot protect himself through the right of cross-examination as to the incriminating effect of Hajek's extrajudicial statements. Consequently, to allow these statements in a joint trial would violate Vo's constitutional rights of cross-examination, confrontation of witnesses and his right to a fair trial. (Vol. 6, CT 1536.)

Severance, appellant urged, was required, also citing: *People v. Massie* (1967) 66 Cal.2d 899[124], and *People v. Turner* (1984) 37 Cal.3d 302.[125] Evidence erroneously admitted,

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[122] In *People v. Aranda*, *supra*, this Court held that the statement of one co-defendant implicating another cannot be admitted in a joint trial. The trial court has three alternatives: [1] effectively delete any statements that could be used against the co-defendant; [2] sever the trials of the defendants; or [3] exclude the statement entirely. (*People v. Aranda*, supra, 63 Cal.2d at 530-531.)

[123] *Bruton v. United States*, *supra*, 391 U.S. 123 held that admission of a co-defendant's extrajudicial statement violated the defendant's Sixth Amendment right to cross-examine the witnesses against him, even where the jury receives a limiting instruction. The risk is too great that the jury will be unable to disregard the evidence in deciding guilt, despite instructions to do so.

[124] *People v. Massie*, *supra*, 66 Cal.2d 899, 916-917, held that a trial court must not refuse consideration of reasons advanced in support of a motion for separate trial, but instead must exercise its discretion. This Court stated that a trial court should "separate

moreover, violates federal constitutional rights. (*Idaho v. Wright* (1990) 497 U.S. 805; 111 L.Ed.2d. 638[126].) (Vol. 6, CT 1536-1537.)

On February 6, 1995, additional motions *in limine* were filed by appellant's counsel, including a Motion Respecting Hajek's Statements to Tevya Moriarty; appellant Vo noted that the motion for severance had been denied, and requesting clarification. (Vol. 6, CT 1580-1581.) In court, appellant's counsel requested reconsideration of the denial of severance, and to preclude witness Moriarty's statements as to Vo on hearsay grounds. (Vol. 1, RT 229.) Hajek primarily spoke of things "he" planned to do, but some of Moriarty's statements refer to "they," implicating an unnamed other or others, which left appellant Vo unable to confront and cross-examine the source of the information (Vol. 1, RT 229-230), violating Vo's right of confrontation. (Vol. 1, RT 232.) Both the prosecution and counsel for co-defendant Hajek strenuously objected to redacting Moriarty's statements to limit references to Hajek alone. (Vol. 1, RT 230-232.) The renewed severance motion was also denied. (Vol. 6, CT 1583.)

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the trials of co-defendants in the face of an incriminating confession, prejudicial association with co-defendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [*Massie*, at 917; extensive footnotes with citations omitted.]

[125] In *People v. Turner*, *supra*, 37 Cal.3d 302, 312, this Court declined to reverse on the basis of denial of severance, noting that the prosecution did not introduce extrajudicial incriminating statements of one defendant, and that at the time the motion was heard, counsel failed to articulate how the defenses conflicted.

[126] *Idaho v. Wright*, *supra*, 497 U.S. 805 held that the Confrontation Clause is violated by admission of hearsay evidence that does not bear particularized guarantees of trustworthiness.

Also admitted at the guilt phase of appellant Vo's joint trial with co-defendant Hajek were a tape recording made shortly after arrest, when Vo and Hajek were placed together in a room and Mr. Hajek made incriminating statements. Various writings of co-defendant Hajek were also the subject of examination of witnesses, and admitted against appellant Vo.

- Exhibit 63 and the first two pages of Exhibit 65, letters written by co-defendant Hajek, were not admitted (Vol. 17, RT 4159, 4163), but the prosecutor had quoted from them and questioned witnesses extensively about them. Although appellant Vo objected to the use of Hajek's extrajudicial statement against him, page 3 of Exhibit 65 was admitted against Vo as well as Hajek.

- Appellant's counsel requested that Exhibit 64, a letter written by Hajek, be admitted against Hajek; it was instead admitted against both defendants. (Vol. 17, RT 4162.)

- Exhibits 72 and 73, written by Hajek, were also admitted against Vo, over objection. (Vol. 17, RT 4168, 4171.)

- Exhibit 78, in which Hajek writes that the crime was committed "for" Lori Nguyen, was admitted over objection. (Vol. 17, RT 4177.) Exhibit 79, billed as a "followup" to Exhibit 78, was excluded (Vol. 17, RT 4178), although its contents had been the subject of examination by the prosecutor.

In none of these instances did appellant Vo have the opportunity to confront and cross-examine co-defendant Hajek regarding his extrajudicial statements, which jurors were free to use in assessing appellant Vo's guilt or innocence.

On June 7, 1995, appellant Vo moved for mistrial as to the penalty phase, and again moved for severance; his motions were denied. (Vol. 8, CT 2215.) During the cross-examination of Dr. Minagawa, an expert witness called by co-defendant Hajek, the

prosecutor elicited testimony that Hajek denied killing the victim – information tantamount to Hajek's accusation that Vo was the killer. (Vol. 23, RT 5892.) Appellant Vo's counsel objected and asked to be heard outside the jury's presence; instead, the trial court instructed the jury that the evidence was only received as to Hajek. (Vol. 23, RT 5893.) Outside the presence of the jury, appellant Vo's counsel argued:

> I do not however feel that admonition of the court is sufficient to protect my client from the prejudicial effect of this type of testimony in the penalty phase of this particular case based upon the facts of this case. (Vol. 23, RT 5908.)
>
> ***
>
> Additionally I would move the court grant a mistrial as to Mr. Vo's penalty phase for reasons I'll elaborate in a moment, and additionally I would ask the court grant a severance.
>
> Because the concern I have is we're into the Aranda Bruton area that we talked about early on. It frankly comes in a different form and in a different way than I expected early on, so I of course couldn't reach it with my original Aranda Bruton severance motion. (Vol. 23, RT 5909.)
>
> ***
>
> The prosecutor through his – what I think is a very artful – and I don't mean that pejoratively at all – cross-examination, raises through the defense expert called by Mr. Hajek, Mr. Hajek's denial that he's involved in the killing, and then links up with that from the psychologist's perception it is in fact a sadistic killing, because of the way the psychologist has answered the questions. (Vol. 23, RT 5909.)
>
> I understand the court's ruling that this is not admissible as against Mr. Vo, and you've admonished the jury in that particular way. But it's the same kind of admonition the court said in Aranda, and Bruton for that matter, said is inadequate as a matter of law to protect Mr. Vo, for example in this particular case, because there's such a tremendous prejudicial overwash between the linkage of the denial by Mr. Hajek that he did the

> actual killing, and the fact that the defense psychologist feels that it's sadistic, and Mr. Vo is unable through his right of cross-examination to clear that issue and to protect himself with his right of cross-examination. (Vol. 23, RT 5909-5910.)

B. <u>The Constitutional Right of Confrontation and Cross-Examination</u>.

The Sixth Amendment right to confrontation, made applicable to the states through the Fourteenth Amendment (*Pointer* v. *Texas* (1965) 380 U.S. 40, 403-405) provides that a defendant in a criminal case has a right to be confronted with the witnesses against him. (*California* v. *Green* (1970) 399 U.S. 149; *Ohio* v. *Roberts* (1980) 448 U.S. 56.)

The Confrontation Clause envisions

> ". . . a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the consciences of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

(*Ohio v. Roberts*, *supra*, 448 U.S. 56, 63-64, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-43.) The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. (*California v. Green* (1970) 399 U.S. 149.) When the prosecution seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant

"to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'" (*Id.* at p. 158, footnote and citation omitted; accord, *Lilly v. Virginia* (1999) 527 U.S. 116, 123-124.)

More recently, the United States Supreme Court confirmed the continuing strength of the principle of confrontation and cross-examination, and clarified the scope of the constitutional provision in *Crawford v. Washington* (2004) 541 U.S. 46.

> "Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, *Dutton v. Evans*, 400 U.S. 74, 94, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."

(*Crawford v. Washington*, *supra*, 541 U.S. at 50-51.)

> "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," *Amdt.* 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States*, 156 U.S. 237, 243, 39 L. Ed. 409, 15 S. Ct. 337 (1895); cf. *Houser*, 26 Mo., at 433-435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country. [Fn. omitted.]"

(*Crawford v. Washington*, *supra*, 541 U.S. at 54.) *Crawford* held that when an out-of-court statement is sought to be introduced at trial, the Confrontation Clause requires two

things: [1] that the witness be unavailable, and [2] that there must have been a "prior opportunity for cross-examination." (*Id.*, at 67.) While co-defendant Hajek was available in a physical sense, his own constitutional right against self-incrimination precluded cross-examination, both before and at the trial. Appellant Vo's confrontation rights were clearly infringed by the introduction of Hajek's statements.

The authorities cited by appellant Vo in his motions for severance, *People v. Aranda* (1965) 63 Cal.2d 518[127] and *Bruton v. United States* (1968) 391 U.S. 123, explicitly prohibit the use of statements made by a non-testifying co-defendant, because such use violates the right to confront and cross-examine the witnesses against one. That rule has been consistently applied:

> In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant. Despite frequent disagreement over matters such as the adequacy of the trial judge's instructions, or the sufficiency of the redaction of ambiguous references to the declarant's accomplice, we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person. See Gray v. Maryland, 523 U.S. 185, 194-195 . . . (1998) (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must comply with Bruton, hold separate trials, use separate juries, or abandon the use of the confession); 523 U.S., at 200 . . . (Scalia, J., dissenting) (stating that codefendant's

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[127] In *People v. Aranda, supra*, this Court held that the statement of one co-defendant implicating another cannot be admitted in a joint trial. The trial court has three alternatives: [1] effectively delete any statements that could be used against the co-defendant; [2] sever the trials of the defendants; or [3] exclude the statement entirely. (*People v. Aranda*, supra, 63 Cal.2d at 530-531.)

> confessions "may not be considered for the purpose of determining [the defendant's] guilt").

(*Lilly v. Virginia* (1999) 527 U.S. 116, 127-128 (plur.opn. of Stevens, J.).)

The erroneous admission of these statements of co-defendant Hajek prevented appellant from cross-examining his co-defendant, who made statements and admissions that were used against appellant Vo. The right of cross-examination is secured by the state and federal Confrontation Clause. (*Douglas* v. *Alabama* (1965) 380 U.S. 415, 419.) The trial court's decision to arbitrarily deny appellant Vo his right to confront and cross-examine (or to have a separate trial) also deprived appellant of his right to due process of law under the United States Constitution. (*Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346.) This error also contravenes the Eighth Amendment's concern with the reliability of capital procedures. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.)

C. Reversal Is Required.

Reversal is required as a matter of law. The refusal of the trial court to grant appellant Vo's severance motion permitted his jury to consider extrajudicial statements made by co-defendant Hajek, and did not permit appellant Vo his constitutional right to confront and cross examine.

Hajek's extrajudicial statements, allowed to be considered by appellant Vo's jury but not subjected to cross-examination, were incriminatory in an astonishing variety of ways. Hajek told witness Moriarty in advance that he planned to kill Ellen Wang's family.

Hajek made admissions following the crime, and wrote letters suggesting mutual culpability. Hajek supplied a supposed motive used by the prosecutor against Vo: that the crimes were committed "for Lori." Hajek threatened witnesses, and made statements about constructing a mental health defense; this and other statements were attributed to Vo as well by the prosecutor, under his limitless conspiracy theory. The abundance of this inflammatory information, not subject to confrontation, doubtless contributed to the guilt verdicts rendered against Vo: there simply was no legitimate evidence that Vo planned to kill, intended to kill, or did kill the victim.

Hajek told his mental health expert that he had not killed Su Hung; as Vo was the only other potential perpetrator, this amounted to a direct accusation of Vo's guilt, elicited by the prosecution at the penalty phase. In conjunction with the enormously prejudicial statements of co-defendant Hajek elicited at guilt phase, also not subject to cross-examination and confrontation, there can be no confidence in either verdict. None of this evidence would have been admitted, had appellant Vo been permitted the separate and fair trial to which he was entitled.

If this Court determines that reversal is not required as a matter of law, it must nonetheless order a new trial, for appellant Vo was manifestly prejudiced by the use of his co-defendant's extrajudicial statements against him.

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8. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT VO COMMITTED FIRST DEGREE MURDER.

The prosecution proceeded on four theories of first-degree murder: premeditated and deliberate; felony murder, with burglary as the underlying felony; torture murder; and lying-in-wait. Appellant Vo's conviction of murder and sentence of death cannot stand under any of these theories, as they are unsupported by sufficient evidence.

There is no evidence that appellant Vo committed the murder, or delivered any of the blows to the victim; instead, the evidence points to co-defendant Hajek as the perpetrator. There is no evidence that appellant Vo was aware of Hajek's plans to harm members of Ellen Wang's family, much less that he intended for Hajek to kill the victim. There is no evidence that the purpose for entering the home was theft, or that appellant Vo intended to steal or gathered items from the home that were found by police; in any event, the evidence equally supports a theory of after-formed intent, which precludes a conviction of first-degree felony murder. There is no evidence that appellant Vo possessed an intent to torture or did torture the victim; while some evidence suggests co-defendant Hajek may have possessed such an intent, the evidence does not establish that any such intent was known to or shared by Vo; and the physical evidence does not support the charge, either. Finally, there is insufficient evidence that this was a lying-in-wait murder; the trial court erroneously permitted that charge to go to the jury on the theory that Hajek was lying in wait for Ellen Wang, an alleged target who was never present in the home during any of

the events.

A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* factfinder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People* v. *Jones* (1998) 17 Cal.4th 279:

> ". . . [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases . . . ."

(*Id.* at p. 321, quoting *People* v. *Cudjo* (1993) 6 Cal. 4th 585, 623, conc. opn. of Mosk, J.) *See also Beck* v. *Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

Under none of the multiple theories of murder liability advanced by the state (premeditated and deliberate; felony murder, with burglary as the underlying felony; torture murder; and lying-in-wait) was the evidence sufficient to satisfy the *Jackson* standard.

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A. There Is No Evidence That Appellant Committed the Murder.

There was compelling evidence that Hajek was guilty of capital murder. Hajek had a grudge against Ellen Wang arising from a physical altercation earlier in the week, and crank telephone calls he received over the next few days. The night before the crime, Hajek announced to an acquaintance his plan to take a family hostage and kill them one by one. Hajek enlisted appellant Vo the morning of the offense to talk to Ms. Wang. Hajek alone carried a weapon. Blood was found on Hajek's clothing after the offense; none was found on appellant. Unlike appellant, Hajek had a criminal history. Following their arrest, Hajek made self-incriminating statements, wrote incriminating letters, and threatened the family of the homicide victim.

Had appellant Vo enjoyed a separate and fair trial, much of the evidence that the jury heard and considered would not have been admitted against Vo. There was no evidence that Vo was aware of Hajek's plan to kill anyone. There was no evidence that Vo himself committed the murder or intended that anyone be killed. Hajek's statements would have been irrelevant and/or could not have been used against Vo absent the opportunity to confront and cross-examine Hajek. Hajek's extensive criminal and psychiatric history also would have been irrelevant in a separate trial of Mr. Vo. Hajek's threat against the victim's family would have been inadmissible against Vo and not heard by his jury. Jurors' expectations of defense mental health evidence at the guilt phase would not have been raised by the presentation of Hajek's history.

Appellant refers to and incorporates herein Argument 1, regarding the trial court's improper refusal to grant appellant Vo a trial separate from that of his co-defendant, and Argument 7, regarding the error in admitting statements of Hajek without permitting appellant Vo his right of confrontation and cross-examination.

The prosecution's alternate theories in which Vo was painted as an accomplice and/or co-conspirator to felony murder likewise fail to meet the constitutional standard memorialized in Jackson. The evidence was insufficient to support the prosecution's uncharged and unproven conspiracy to murder on any basis. Appellant refers to and incorporates herein Argument 6 regarding the uncharged conspiracy theory, and Argument 18, addressing instructional errors regarding aider and abetter liability.

B. There Is No Evidence That Appellant Vo Intended to Kill, or That He Harbored a Reckless Disregard For Human Life.

In *Enmund v. Florida* (1982) 458 U.S. 782, the Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on one who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (Id., 458 U. S. at 797.) Flying in the face of *Enmund*, the uncharged conspiracy theory transformed an ill-advised friendship into a capital offense, with the result that appellant – a very young man with no criminal record, who neither intended to kill nor killed – is on death row. The Eighth Amendment guarantee of particular reliability

in capital cases was eviscerated in this case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

For Vo to have been properly convicted on a theory of accomplice liability, the state was obliged to demonstrate via substantial evidence (*Jackson v. Virginia*, *supra*, 443 U.S. 307, 319) that he shared the perpetrator's intent (*People v. Beeman* (1984) 35 Cal.3d.547, 561), or that his own reckless actions were the cause of death. (*Enmund v. Florida*, *supra*, 458 U.S. 782.) There was no substantial evidence that appellant Vo intended to kill or was the actual killer. It was co-defendant Hajek who expressed in advance his intent to kill Ellen Wang's family. Vo made no such statements, nor is there evidence that Vo knew in advance of Hajek's plan. It was co-defendant Hajek who had blood upon his clothing at the time of arrest. The evidence is insufficient to sustain a conviction of capital murder against appellant Vo.

C. The Alleged Conspiracy Was Uncharged, Unproven, and Failed to Establish Appellant Had Any Knowledge Hajek Intended to Kill, Much Less That Appellant Agreed and Assisted in That Plot.

Because there was insufficient evidence that appellant Vo committed first degree murder under any theory offered by the prosecution, the prosecutor offered an uncharged conspiracy theory to fill the evidentiary gaps in his case, securing both a capital murder conviction and a death sentence. Appellant Vo refers to and incorporates herein Argument 6, regarding the improper use of this conspiracy theory.

Since conspiracy was not charged, it was obviously never found beyond a

reasonable doubt by the jury. The evidence was insufficient to permit the prosecutor to present this uncharged theory, and the trial court erred in permitting the jury to consider it. Moreover, the theory was based on writings of co-defendant Hajek; as set forth more fully in Argument 7, incorporated herein, appellant Vo was deprived of the opportunity to examine Mr. Hajek concerning this evidence. The conspiracy theory and evidence supposedly supporting it were insufficient as a matter of law, and were used to unconstitutionally strip appellant Vo of his trial rights.

The uncharged conspiracy theory provided a basis for jurors to speculate, despite the lack of evidence, that appellant Vo premeditated and deliberated, and had the requisite intent to support the various special circumstance allegations. This fantastic and unsupported notion was a way of filling evidentiary gaps in the prosecution case, by attributing to appellant Vo the bad acts and statements of his co-defendant, Hajek.

The evidence was insufficient to permit the jury to consider the conspiracy theory; it was thus also insufficient to permit the conspiracy theory to fill evidentiary gaps in the prosecution's case for first degree murder. No agreement between the alleged conspirators before the crimes was shown to exist. There is no evidence that appellant Vo knew of co-defendant Hajek's plot to kill members of the Wang family before he did kill the victim.

D. <u>There Is Insufficient Evidence of Torture Murder</u>.

The prosecutor's argument regarding torture concerned both the torture murder charge and the torture murder special circumstance. He pointed to (1) co-defendant

Hajek's "purpose of revenge" against the victim's grand-daughter; (2) Hajek's statement he intended to kill the whole family, with the grand-daughter last; (3) multiple wounds that occurred while the victim was alive; and (4) evidence that the acts were deliberate. (Vol. 21, RT 5375-5377.) As part of that argument, the prosecutor stressed that under the law, he did not have to show intent to kill[128], that the victim was aware of the pain, or how long the victim lived. (Vol. 21, RT 5377.) The prosecution's theory concerning torture murder also fails the *Jackson* test for sufficiency of evidence.

The evidence showed there were two major injuries to the victim's neck: first a ligature had been applied (Vol. 16, RT 3954-55), and the second wound was a cut or slash through the windpipe, 3.5 inches in length and .75 inches deep. (Vol. 16, RT 3955.) In addition, she had a stab wound to the left shoulder, five very superficial wounds on the left side of her chest, two superficial cuts near the neck wound, and a week-old bruise on her hip. (Vol. 16, RT 3957-58.) The prosecutor acknowledged in his argument that the medical evidence did not show whether the victim was alive when the superficial chest wounds were inflicted. (Vol. 21, RT 5376.)

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[128] The prosecutor's argument that he did not have to demonstrate intent to kill was incorrect. In fact, the instruction given to the jury stated that intent to kill had to be shown. (Vol. 8, CT 2033.) This erroneous argument, however, was symptomatic of and reinforced the improper basis for Vo's conviction and sentence, which was manifestly guilt by association, in the face of insufficient evidence to satisfy the mandate of due process. This fundamental defect led to core problems with this trial in general (that all of the evidence relevant only to co-defendant Hajek was allowed to be used against appellant Vo) and this special circumstance allegation in particular (that the jury only needed to find that "a" defendant possessed the requisite intent and committed the requisite acts).

The primary cause of the victim's death was strangulation, followed by the incision wound on her neck. (Vol. 16, RT 3961.) The stab wound also occurred while she was alive. (Vol. 16, RT 3963) Dr. Ozoa, the medical examiner, could not speculate how much time elapsed between the cut to her neck and her death, but he did not believe she choked on her own blood. (Vol. 16, RT 3966, 3968.) He pointed out that many factors may affect the time from strangulation to death (Vol. 16, RT 3970); nor could he assess any pain she may have felt because she may have been unconscious, and moreover, pain is subjective. (Vol. 16, RT 3971.)

There are two separate sufficiency of evidence problems in this case regarding the torture murder theory as applied to appellant Vo. The first and primary problem is that no evidence showed Mr. Vo (as opposed to co-defendant Hajek) personally intended to kill, intended to torture, or did commit either the murder or the alleged torture. The second is that the presence of wounds other than those causing death cannot be presumed to represent torturous acts.

Significantly, following the prosecution's presentation of evidence, the trial court initially found that there was insufficient evidence to support the torture special circumstance as to either defendant. (Vol. 17, RT 4190.) The reasons it later retreated from this ruling are not explained in the record.

The evidence was that co-defendant Hajek held a grudge against a family member of the victim (whom appellant Vo had never met). Co-defendant Hajek instituted the

scheme, and he alone told a witness of his plot the night before. Co-defendant Hajek alone had blood of the victim upon his clothing. It was co-defendant Hajek who made inculpatory statements after arrest, and Hajek alone who made threats against witnesses. There were no eyewitnesses. Appellant Vo took the stand, and denied knowing of either co-defendant Hajek's intents or his acts until after the homicide occurred. There is no evidence to the contrary – the prosecution introduced no physical evidence, no admissions, and no other personally inculpatory evidence against Mr. Vo. While the evidence that co-defendant Hajek committed the murder (and any torturous acts associated therewith) is substantial, there is no evidence that appellant Vo personally possessed the intent to kill or the intent to torture, or committed acts in furtherance of those alleged intents.

Appellant refers to and incorporates herein Argument 9, regarding torture murder and the torture murder special circumstance. Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts Argument IV of co-defendant Hajek's opening brief, set forth at pages 79-91 of that brief, addressing both the charge of first degree torture murder and the torture murder special circumstance.

E. There Is Insufficient Evidence of Murder by Lying in Wait.

The prosecution's theory of murder while lying in wait fails the *Jackson* test for sufficiency of evidence, as well. Appellant refers to and incorporates Argument 10, regarding insufficiency of evidence to support the lying in wait murder charge and special circumstance. Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers

to and adopts Argument III of co-defendant Hajek's opening brief, set forth at pages 68-78 of that brief, addressing both the charge of first degree lying in wait murder and the lying in wait murder special circumstance.

The evidence of lying in wait proffered by the prosecution was that co-defendant Hajek had told witness Tevya Moriarty of his plan to confront Ellen Wang, then kill her family before killing Ellen. (Vol. 15, RT 3649-52.) Following the presentation of evidence, the trial court found that "they were lying in wait for Ellen, and they killed Su Hung while they were lying in wait for Ellen . . . ." (Vol. 21, RT 5272.) In addition, the trial court found "there is absolutely no evidence on the record there was a surprise attack other than the fact that she may have been tied or bound at the time it did occur." (Vol. 21, RT 5272.)

The jury was invited to find Vo guilty of first degree murder and sentence him to death on no more than association with the guilty party. Even if the lying in wait applies to Hajek, the evidence was insufficient to support criminal liability for murder or the special circumstance on this basis for Mr. Vo, as there is no evidence that Vo planned or shared an intent to ambush, much less kill anyone.

The application of the lying in wait murder theory to appellant Vo amounts to strict liability for being present in the Wang home with co-defendant Hajek. As the United States Supreme Court observed in *In re Winship* (1970) 397 U.S. 358, 364, "the Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged." Federal due process principles require the state to shoulder the burden of proving beyond a reasonable doubt every fact necessary to the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510 [conclusive presumption of intent]; see also, *Connecticut v. Johnson* (1983) 460 U.S. 73.)

F. <u>There Is Insufficient Evidence of Felony Murder</u>.

In this case, the prosecution urged that his uncharged conspiracy theory (and a theory of aiding and abetting, which relied upon the uncharged conspiracy) provided a basis for convicting appellant Vo of first degree murder under either of two alternate legal theories: premeditated and deliberate murder, or felony murder. The prosecution argued that its conspiracy theory, and all the material presented in furtherance of that theory, was the functional equivalent of proof of the charges. Nevertheless, as argued above (see Argument 6), a significant amount of inflammatory information, irrelevant to the actual charges, came before the jury only because of the prosecution's uncharged conspiracy theory. That sensational and dubious information was the crux of the state's case for the jury to convict appellant Vo on capital murder charges, and to sentence him to death.

One basis of first degree murder liability argued by the prosecutor was burglary. The prosecutor told the jury that the object of the alleged conspiracy was burglary:

> If you find that Mr. Vo went into that house with a felonious intent, it doesn't matter whether he intended or whether the killing was even accidental. He is guilty of murder in the first degree as part of that conspiracy. (Vol. 21, RT 5370.)

Under California's capital sentencing scheme, felony-murder can be a basis for a capital conviction, but only within restricted parameters, when the homicide occurs in the course of a specified felony. (Penal Code § 190.3; See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 59 [the felony may not be merely incidental to the murder].)[129]

In this case, the prosecution originally urged robbery-murder and burglary-murder; only burglary-murder was permitted to be considered by the jury. The prosecution argued that appellant Vo was in need of money, and that he therefore must have intended to rob the family. (Vol. 21, RT 5391.)[130] Such an argument could be made about huge numbers of people; it is inflammatory and lacking in probative value, particularly as there was no evidence that appellant Vo planned a robbery or moved various items that the prosecution contended were going to be stolen. There was no evidence that Vo intended a theft, when such an intent was formed, or that he (as opposed to Hajek) gathered items found at the house.

The motive allegedly possessed by appellant Vo, robbery, was itself insufficient to prove that he personally and actually possessed such an intent, or that he entered the house with such an intent, or that the victim's death was part of a plan to steal; it is therefore plainly insufficient to demonstrate guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320; *In*

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[129] As may be inferred from the multiple theories of liability offered to the jury, the prosecution argued multiple factual theories. For example, later in his argument he contended that the felonious intent was murder. (Vol. 21, RT 5380.)

[130] Robbery-murder and burglary-murder special circumstance were stricken before the case went to the jury. (Vol. 7, CT 1815.)

re Winship (1970) 397 U.S. 358, 364.)

G. Reversal Is Required.

For the reasons set forth above and throughout this brief, reversal is required.

9. THE TORTURE MURDER SPECIAL CIRCUMSTANCE AND TORTURE MURDER CHARGES MUST BE REVERSED, FOR THEY ARE BOTH UNSUPPORTED BY THE EVIDENCE, AND THE SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. Factual and Procedural Background.

The prosecutor's argument regarding torture concerned both the torture murder charge (as a basis for first degree murder and the torture murder special circumstance. The prosecutor pointed to co-defendant Hajek's "purpose of revenge" against the victim's grand-daughter, and Hajek's statement that he intended to kill the whole family, with the grand-daughter last; also indicative of torture (he argued) were multiple wounds that occurred while the victim was alive; and he insisted that the acts could only be deliberate. (Vol. 21, RT 5375-5377.) He stressed that, under the law, the state did not have to show intent to kill, that the victim was aware of the pain, or how long the victim lived. (Vol. 21, RT 5377.)

The evidence showed there were two major injuries to the victim's neck: first a ligature had been applied (Vol. 16, RT 3954-55), and second was a cut or slash through the windpipe, 3.5 inches in length and .75 inches deep. (Vol. 16, RT 3955.) She also had a

stab wound on the left shoulder, five very superficial wounds on the left side of her chest, two superficial cuts near the neck wound, and a week-old bruise on her hip. (Vol. 16, RT 3957-58.) The prosecutor acknowledged in his argument that the medical evidence did not show whether the victim was alive when the superficial chest wounds were inflicted. (Vol. 21, RT 5376.)

The cause of death was strangulation followed by the incision wound on her neck. (Vol. 16, RT 3961.) The stab wound also occurred while she was alive. (Vol. 16, RT 3963) Dr. Ozoa could not speculate how much time elapsed between the cut and her death, but he did not believe she choked on her own blood. (Vol. 16, RT 3966, 3968.) Various factors may affect the time from strangulation to death (Vol. 16, RT 3970), and he could not speculate about the pain she felt because she may have been unconscious, and pain is subjective. (Vol. 16, RT 3971.)

The torture special circumstance allegation was hotly contested throughout the trial proceedings. In 1992, both appellant Vo and co-defendant Hajek filed motions to dismiss the information pursuant to Penal Code § 995, including among their arguments challenges to the torture special circumstance. (Vol. 5, CT 1173-1186, Vol. 5, CT 1342-1347 [Vo]; Vol. 5, CT 1187- 1225, Vol. 5, CT 1332-1341 [Hajek].) The trial court granted portions of the motion to dismiss in August, 1992, although it did not do so as to the torture murder charge or torture special circumstance allegation. (Vol. 5, CT 1348-1350.)[131] In April,

[131] The prosecution took an appeal from the grant of these motions. The case was relatively inactive in the trial court pending the appeal.

1995, following the presentation of the state's case at trial, both appellant Vo and co-defendant Hajek filed motions to dismiss pursuant to Penal Code § 1118.1, again alleging insufficiency of evidence for torture murder and/or the torture special circumstance, amongst other issues. (Vol. 7, CT 1757-1775 [Vo]; Vol. 7, CT 1741-1756 [Hajek].)

Ruling on the motions to dismiss on April 27, 1995, the trial court initially stated that it intended to dismiss the special circumstance allegations of robbery-murder, burglary-murder, and torture. (Vol. 17, RT 4190; Vol. 7, CT 1795-1796.) Co-defendant Hajek requested and the trial court agreed on May 1, 1995, to defer the ruling on the motions. (Vol. 7, CT 1807.) The motion was finally decided on May 4, 1995, with the trial court striking the robbery-murder and burglary-murder special circumstances, but leaving the torture and lying in wait special circumstances for the jury to decide; in addition, the court declined to dismiss the attempted murder charges. (Vol. 7, CT 1815.)

Following conviction and the death verdicts, appellant Vo's Motion for New Trial was filed on or about August 20, 1995, arguing the verdict was contrary to law and the evidence (PC § 1181(6)) and pointing to insufficient evidence to support the torture special circumstance, among other errors. (Vol. 10, CT 2764-2772.) The motion was denied on October 12, 1995. (Vol. 11, CT 2827-2828.)

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts Argument IV of co-defendant Hajek's opening brief, set forth at pages 79-91 of that brief, addressing both the charge of first degree torture murder and the torture murder

special circumstance.

B. There is Insufficient Evidence to Support a Guilty Verdict on Torture Murder, or a True Finding on the Torture Murder Special Circumstance.

A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* factfinder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People* v. *Jones* (1998) 17 Cal.4th 279:

> . . . [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases . . . ."

(*Id.* at p. 321, quoting *People* v. *Cudjo* (1993) 6 Cal. 4th 585, 623, conc. opn. of Mosk, J.) *See also Beck* v. *Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

There are two separate sufficiency of evidence problems in this case, regarding the torture special circumstance as applied to appellant Vo. The first and primary problem is

that *no evidence* showed Mr. Vo (as opposed to co-defendant Hajek) personally intended to kill, intended to torture, or did commit either the murder or the alleged torture. The second is that the presence of wounds other than those causing death cannot be presumed to represent torturous acts. This Court held in *People v. Raley* (1992) 2 Cal.4th 870, 889, that "torture-murder requires proof of intent to cause pain beyond the pain of death." In *People v. Pensinger* (1990) 52 Cal.3d 1210, 1239, this Court held that the "severity of the victim's wounds" does not establish torture.

Significantly, following the presentation of evidence, the trial court initially found that there was insufficient evidence to support the torture special circumstance as to either defendant. (Vol. 17, RT 4190.) The reasons it retreated from this ruling are not explained in the record. Contrasting with the prosecutor's characterization of Hajek, there was no evidence that appellant inflicted or intended to inflict pain "for any . . . sadistic purpose." (*People v. Wiley* (1976) 18 Cal.3d 162, 168.)

C. The Torture Murder Special Circumstance, as Applied, is Unconstitutionally Vague and Overbroad.

The application of the torture special circumstance to appellant Vo deprived him of his rights under the Eighth and Fourteenth Amendments, by failing to constitutionally narrow eligibility for capital punishment. In *Godfrey v. Georgia* (1980) 446 U.S. 420, the United States Supreme Court determined that the Georgia Supreme Court had failed in its constitutionally required task of limiting death judgments imposed upon a finding of the

"outrageously or wantonly vile, horrible and inhuman" aggravating factor. The Georgia court had failed in its duty to limit capital sentences to "those cases that lie at the core." (446 U.S. at pp. 429-30.) The Court held that a "capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (*Ibid.*, at p. 427.)

The United States Supreme Court has consistently held that state statutes authorizing a potential death sentence must meaningfully distinguish between the cases in which death is an appropriate punishment, and those many more in which it is not. The Court has emphatically reminded state courts that "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of the defendant compared to others found guilty of murder.'" (*Lowenfield v. Phelps* (1988) 484 U.S. 231; see also, e.g., *Maynard v. Cartwright* (1988) 486 U.S. 356.) California's capital scheme failed in this vital function in this case.

This Court considered a facial challenge to the torture special circumstance based on the principles of *Godfrey* in *People v. Davenport* (1985) 41 Cal.3d 247. It recognized the potentially broad sweep of this special circumstance, in that severe pain presumably precedes the death of the victim in the vast majority of murders. (*Id.*, at p. 265.) Thus, a special circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional, first

degree murder with the possible exception of those occasions on which the victim's death was instantaneous. Such a distinction may have nothing to do with the mental state or individualized culpability of the defendant, and would not seem to provide a principled basis for distinguishing capital murder from any other murder. (*Id.*, at pp. 265-66, citations omitted.) This Court sought a constitutional construction of the special circumstance by incorporating the understanding that "it is the state of mind of the torturer – 'the coldblooded intent to inflict pain for personal gain or satisfaction' which sets the torture murderer apart from others who kill with malice aforethought and makes murder by torture one of the most reprehensible crimes that may be committed." (*Davenport*, *supra*, at pp. 269-70.) Thus, this Court rejected the contention that the torture special circumstance is unconstitutionally vague by construing it to include the intent to torture, as defined by established authority. (*Id.*, at p. 271.)

California's torture special circumstance requires a finding of *personal* intent to torture, together with the other statutory elements. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312; *Morales v. Woodford* (9th Cir. 2003) 336 F.3d 1136.) The sentence of death is, quite obviously, personal to each defendant; it must be his or her *own* culpability as to each element of a special circumstance that leads a factfinder to decide the special circumstance is true.

The jury's finding in appellant Vo's case was not so restricted, and as a result, it violates the Sixth, Eighth, and Fourteenth Amendments of the Unites States constitution.

The instructions given in appellant Vo's case permitted the jury to find the torture special circumstance true if **"a defendant"** possessed the intent to kill, the intent to torture, and that "a defendant" did torture the victim. (Vol. 8, CT 2033; Vol. 21, RT 5319-5320.) Thus, these instructions invited and permitted a true finding even if the evidence regarding appellant Vo demonstrated *none* of these elements: it was enough if co-defendant Hajek alone possessed the requisite intents and committed the requisite acts.

As the United States Supreme Court observed in *In re Winship* (1970) 397 U.S. 358, 364, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Federal due process principles require the state to shoulder the burden of proving beyond a reasonable doubt every fact necessary to the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510 [conclusive presumption of intent]; see also, *Connecticut v. Johnson* (1983) 460 U.S. 73.) The failure of a court to instruct the jury on an essential element of the crime charged (or in this case, that the culpability of each defendant was to be considered separately) is the legal equivalent of directing a verdict for the prosecution on that issue. It is not subject to a harmless error analysis. It is error per se. (*Rose v. Clark* (1986) 478 U.S. 570, *Connecticut v. Johnson*, supra, 460 U.S. 73; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Far from ensuring that capital punishment was constitutionally narrowed and its application meaningfully distinguished between those cases in which death is the

appropriate sentence and those in which it is not, the torture special circumstance instruction given to appellant Vo's jury invited the jury to find him death-eligible (and indeed to sentence him to death) for the most arbitrary and capricious of reasons: because *another person* committed bad acts with the requisite intent.

As noted, the evidence was that co-defendant Hajek held a grudge against a family member of the victim (whom appellant Vo had never met); co-defendant Hajek instituted the scheme; co-defendant Hajek alone told a witness of his plot the night before; co-defendant Hajek alone had blood of the victim upon his clothing. While the evidence that co-defendant Hajek committed the murder (and any torturous acts associated therewith) is substantial, the evidence that appellant Vo personally possessed the intent to kill or the intent to torture, and committed acts in furtherance of those intents, is non-existent. The jury was invited to find Vo death-eligible and sentence him to death on no more than association with the guilty party. That outcome is constitutionally intolerable.

D. Reversal is required.

The trial court erred at multiple stages of the proceedings: in failing to dismiss the torture special circumstance allegation; in failing to direct a verdict of acquittal at the close of the state's evidence; in providing jury instructions unconstitutionally allowing a true finding of the special circumstance absent any personal culpability on the part of appellant Vo; and in failing to grant appellant's motion to set aside the verdict. For the reasons set forth above and throughout other arguments set forth in this brief, all of which are

incorporated herein, reversal of the true finding on the torture special circumstance and the penalty phase verdict are required.

10. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE LYING IN WAIT MURDER CHARGE AND LYING IN WAIT SPECIAL CIRCUMSTANCE, AND THAT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. Factual and Procedural Background.

The evidence of lying in wait proffered by the prosecution was that co-defendant Hajek had told witness Tevya Moriarty of his plan to confront Ellen Wang, then kill her family before killing her. (Vol. 15, RT 3649-52.) Following the presentation of evidence, the trial court found that "they were lying in wait for Ellen, and they killed Su Hung while they were lying in wait for Ellen . . . ." (Vol. 21, RT 5272.) In addition, the trial court found "there is absolutely no evidence on the record there was a surprise attack other than the fact that she may have been tied or bound at the time it did occur." (Vol. 21, RT 5272.)

The lying in wait special circumstance was initially dismissed pursuant to a motion under Penal Code §995. (Vol. 5, CT 1348-1350.) Following an appeal by the prosecution, it was reinstated. (Vol. 6, CT 1422-1438.) On April 19, 1995, both appellant Vo and co-defendant Hajek filed motions for judgment of acquittal pursuant to Penal Code §1118.1. (Vol. 7, CT 1757-1775 [Vo]; Vol. 7, CT 1741-1756 [Hajek].) Those motions were denied on May 4, 1995. (Vol. 7, CT 1815.)

Appellant Vo argued in his PC §1118.1 motion that the lying in wait special circumstance allegation should be dismissed for a number of reasons:

- State law requires an intentional killing, with concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Morales* (1989) 48 Cal.3d 527, 556-557.) Neither concealment of purpose nor taking a victim unawares is sufficient to support the special circumstance allegation. (*Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 314-315.) (Vol. 7, CT 1760-1761.)

- "[I]f a cognizible interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (Vol. 7, CT 1761, citing *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011.)

- The substantive charge of murder "by means of lying in wait" must be "sufficiently distinct" from the lying in wait special circumstance to constitutionally justify the existence of the special circumstance. (Vol. 7, CT 1761, citing *People v. Morales*, *supra*, 48 Cal.3d at 557; *Maynard v. Cartwright* (1986) 486 U.S. 356 [capital sentencing statute must distinguish between "normal" first degree murder and those that are death-eligible]; *People v. Green* (1980) 27 Cal.3d 1, 49 [special circumstances are to strictly limit the jury's discretion to impose the death penalty].) A special circumstance "must . . . be based upon specific factual indicia that relate to a rational distinction characterizing a more serious type of murder." (Vol. 7, CT 1762, citing *People v. Hendricks* (1987) 43 Cal.3d 584, 595.)

- There is insufficient evidence that appellant Vo intended to or actually killed the victim. While there was evidence that he made a threat to kill if family members screamed (Vol. 13, RT 3162), he immediately returned a knife he had brandished to the kitchen upon request and did not use it again. (Vol. 13, RT 3163.) Appellant Vo also assured Tony Wang that he had no intent to harm the family. (Vol. 16, RT 3894.) Appellant Vo, unlike co-defendant Hajek, had no blood on his person. (Vol. 15, RT 3590.) (Vol. 7, CT 1762.)

- Because appellant Vo had no intention of killing the victim, he therefore concealed no homicidal purpose. (Vol. 7, CT 1762.)

- The evidence contradicts the element of "a substantial period of watching and waiting for an opportune time to act." The victim was elderly, weighed only 87 pounds, and posed no threat to her killer. She was initially tied, then untied, and on neither occasion was there evidence of a struggle. (Vol. 7, CT 1762-1763.)

- There was no evidence to support the element of a surprise attack immediately after a period of watchful waiting. "At a minimum, the evidence establishes 'a cognizible interruption' as defined in Domino, supra at 1011." (Vol. 7, CT 1763.) The evidence showed that the victim was tied in her bedroom shortly after co-defendant Hajek and appellant Vo arrived at the residence (Vol. 14, RT 3286-88); that she was untied and reading a newspaper at 12:50 p.m. (Vol. 14, RT 3249-50); and she was found dead when the police entered after 3:00 p.m. The evidence did not establish when or how she was killed, rendering the special circumstance allegation of lying in wait completely speculative. (Vol. 7, CT 1763.)

The jury was instructed on murder by lying in wait (Vol. 8, CT 2021, denoted "exact copy of CALJIC 8.25") and on the special circumstance of lying in wait (Vol. 8, CT 2031). In part, the special circumstance instruction stated that the following facts must be proven:

1. [The] [A] defendant intentionally killed the victim, and

2. The murder was committed while [the] [a] defendant was lying in wait.

(Vol. 8, CT 2031.)

Appellant's Motion for New Trial was filed on or about August 20, 1995, arguing *inter alia* that there was insufficient evidence to support the lying in wait special circumstance. (Vol. 10, CT 2764-2772.) The motion was denied on October 12, 1995. (Vol. 11, CT 2827-2828.)

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and

adopts Argument III of co-defendant Hajek's opening brief, set forth at pages 68-78 of that brief, addressing both the charge of first degree lying in wait murder and the lying in wait murder special circumstance.

B. There is Insufficient Evidence to Support a True Finding on the Lying-in-Wait Special Circumstance.

A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* factfinder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) As stated by Justice Mosk in his concurring opinion in *People* v. *Jones* (1998) 17 Cal.4th 279:

> ". . . [B]ecause the death penalty, once exacted, is irrevocable, the need for the most reliable possible determination of guilt and penalty is paramount as a matter of policy. It is also constitutionally compelled: "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases . . . ."

(*Id.* at p. 321, quoting *People* v. *Cudjo* (1993) 6 Cal. 4th 585, 623, conc. opn. of Mosk, J.) *See also Beck* v. *Alabama* (1980) 447 U.S. 625, 638 [the heightened reliability required by the Eighth and Fourteenth Amendments in capital cases applies to both the guilt and penalty determinations].)

C. The Lying-in-Wait Special Circumstance, as Applied, is Unconstitutionally Vague and Overbroad.

The lying in wait circumstance provision set forth in former California Penal Code §190.2, subd.(a)(15), which provided one of the statutory bases for petitioner's being deemed death-eligible, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 17 and 24 of the California Constitution, in that the special circumstance provision, which applies to a substantial portion of all premeditated murders, fails to adequately narrow the class of persons eligible for the death penalty or to provide a meaningful basis for distinguishing between those who are subject to that penalty and those who are not.

Appellant Vo's death-eligibility rests in part upon the finding of a lying in wait special circumstance alleged pursuant to former California Penal Code §190.2, subd.(a)(15)[Initiative adopted November 7, 1978; re-enacted by Initiative adopted June 6, 1990].[132] This provision read as follows:

(15) The defendant intentionally killed the victim while lying in wait.

As construed by the California Supreme Court, this special circumstance provision does not require proof of the defendant's physical concealment from, or an actual ambush of, the victim. It is satisfied by proof of a concealment of purpose, over a substantial period of watching and waiting for an opportune time to act, followed by a surprise attack

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[132]The predecessor statute did not include a lying in wait special circumstance. (Former California Penal Code section 190.2 [Stats 1977, ch. 316].)

on the unsuspecting victim. (*People v. Morales* (1989) 48 Cal.3d 527, 554-557.) As so construed, the special circumstance provision applies to almost all premeditated killings. As explained by Justice Mosk in his dissent in *Morales*:

> this special circumstance does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales, supra*, 48 Cal.3d at 575 (Mosk, J., dissenting.))

As Justice Mosk notes in his *Morales* dissent, there is a second reason why this special circumstance provision, in addition to its failure to narrow, is unconstitutional. It also fails to provide, as required by the Eighth Amendment, a meaningful basis for distinguishing between those who are subjected to the death penalty and those who are not. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *Lowenfield v. Phelps* (1988) 484 U..S. 231, 244; *Zant v. Stephens*, *supra,* 462 U.S. at 877) As Justice Mosk put it, "the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly." (People v. Morales, *supra*, 48 Cal.3d at 575 (Mosk, J., dissenting).)

In general, due process requires that a criminal statute "must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it." *(People v. McCauqhan* (1957) 49 Cal.2d 409, 414; *People v. Superior Court (Enqert)* (1982) 31

Cal.3d 797, 801 (emphasis omitted).) Where the statute defines capital eligibility, the Eighth Amendment provides additional requirements: (1) the death eligibility criterion -- the special circumstance under the California system -- must provide a principled means of distinguishing those who receive the death penalty from those who do not, and (2) must adequately inform the jury of what it must find to impose the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356.) The lying-in-wait special circumstance fails to provide notice, guidance or any principled method to identify a class of murderers who are more deserving of death. The misuse in this case provides a striking example of how this ill-defined special circumstance is merely a vehicle for arbitrariness and capriciousness.

California's capital sentencing scheme, far from narrowing the circumstances under which capital punishment may be imposed, instead is exceptionally broad in scope, encompassing many special circumstances permitting capital eligibility. The "lying in wait" special circumstance has been construed "lying in wait" broadly.

The application of the "lying in wait" special circumstance in this case stretches this already extraordinarily broad statutory factor beyond all recognition. First, the instructions invited a true finding on the special circumstance *without regard to personal culpability*, by stating it must be proven only that "a" defendant intentionally killed the victim, and that the homicide occurred while "a" defendant was lying in wait. (Vol. 8, CT 2031.)

Second, the instructions required no causal *or* intentional nexus between the homicide and the lying in wait, only that the murder was committed "while" "a" defendant

was lying in wait. (Vol. 8, CT 2031.) In the unique circumstances of this case, the trial court found that the lying in wait was *not* a surprise attack on the homicide victim, but that the alleged lying in wait was for another person: Ellen Wang, who was not present during any of the events resulting in these criminal charges. (Vol. 21, RT 5272.) Appellant is unaware of any other case in which the lying in wait special circumstance (or first degree murder charge) was employed in such a situation, where the accused allegedly were waiting for a *different* alleged intended victim, who was *not* the victim and who, in fact, was *never present* at the scene.

Thus, as applied to appellant Vo under the circumstances of this case, the lying in wait special circumstance instruction violated both major aspects of Eighth Amendment jurisprudence in its overbreadth: the requirement of individualized sentencing, and the requirement that death eligibility be adequately narrowed and channeled to avoid arbitrary and capricious application of capital punishment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) The special circumstance instruction directed the jury to find true the special circumstance allegation as to Mr. Vo, even if only co-defendant Hajek was lying in wait, and regardless of whether his "watchful waiting" was for the purpose of killing the victim or for some other purpose – such as confronting another person altogether.

The application of the lying in wait special circumstance to appellant Vo amounts to strict liability for being present in the Wang home with co-defendant Hajek. As the

United States Supreme Court observed in *In re Winship* (1970) 397 U.S. 358, 364, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Federal due process principles require the state to shoulder the burden of proving beyond a reasonable doubt every fact necessary to the crime charged. (*Sandstrom v. Montana* (1979) 442 U.S. 510 [conclusive presumption of intent]; see also, *Connecticut v. Johnson* (1983) 460 U.S. 73.) The failure of a court to instruct the jury on an essential element of the crime charged (or in this case, that the culpability of each defendant was to be considered separately) is the legal equivalent of directing a verdict for the prosecution on that issue. It is not subject to a harmless error analysis. It is error per se. (*Rose v. Clark* (1986) 478 U.S. 570, *Connecticut v. Johnson*, supra, 460 U.S. 73; *Jackson v. Virginia* (1979) 443 U.S. 307.)

A statutory "narrowing" factor which fails to genuinely narrow the class of persons on whom a death sentence may be imposed permits an even greater risk of arbitrariness than the statutes considered as a whole in *Furman*, and, like those statutes, is unconstitutional. As was true for those sentenced to die in pre-*Furman* Georgia, being sentenced to die in California upon conviction of murder with a lying in wait special circumstance is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman,* 408 U.S. at 309-310 (Stewart, J., concurring.) Accordingly, the lying in wait special circumstance finding and petitioner's death sentence, which rests in

part upon that constitutionally inadequate narrowing factor, must be set aside.

D. Reversal is Required.

The trial court erred in failing to direct a verdict of acquittal at the close of the state's evidence; in providing jury instructions unconstitutionally allowing a true finding of the special circumstance absent any personal culpability on the part of appellant Vo, and allowing a true finding despite the fact that the period of waiting found by the trial court concerned someone else entirely, and not the victim of the homicide; and in failing to grant appellant's motion to set aside the verdict. For the reasons set forth above and throughout other arguments set forth in this brief, all of which are incorporated herein, reversal of the true finding on the lying in wait special circumstance and the penalty phase verdict are required.

11. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT COMMITTED ATTEMPTED MURDER WHILE ARMED WITH A KNIFE.

An amended Information was filed by the District Attorney on March 2, 1994, alleging in Counts 2 through 5 that on January 18, 1991, co-defendant Hajek and appellant Vo attempted to murder Cary Wang, Alice Wang, Tony Wang, and Ellen Wang. (Vol. 6, CT 1442-1453.)

The evidence that co-defendant Hajek had a plan to kill Ellen Wang's entire family consisted of his statements to Tevya Moriarty the night before the homicide. Hajek told Moriarty he wanted to get back at the girl who picked the fight. He said he was going to

break into the girl's house, kill her family, and kill her last. (Vol. 15, RT 3649-52.) Appellant Vo was not present during the Hajek-Moriarty conversation, and no evidence was presented that appellant Vo even knew of Hajek's threat against the family, much less adopted it.

Evidence presented at trial was that appellant Vo held a knife near Cary Wang when she returned to the home, but he did not touch her with the knife; Mrs. Wang testified via a Mandarin interpreter that he had threatened to kill the family if she (Mrs. Wang) screamed. (Vol. 13, RT 3161-62, 3217, 3241-42.) On cross-examination by appellant Vo's counsel, Mrs. Wang acknowledged that Vo actually said he would not hurt her if she did not scream. (Vol. 13, RT 3248.) Upon Mrs. Wang's request, appellant Vo returned the knife to the knife block in the kitchen. (Vol. 13, RT 3241-42; Vol. 20, RT 4988-9.) The evidence indicated that thereafter, Vo did not have a knife. Tony Wang was tied up after he returned home, but scissors were used to cut the rope. (Vol. 16, RT 3869, 3344.) Alice Wang was neither threatened nor physically restrained, and Ellen Wang was not present at the home at any point prior to the arrests of co-defendant Hajek and appellant Vo.

Appellant's Motion to Dismiss Special Circumstance Allegations and Counts of the Information Pursuant to Penal Code § 1118.1 was filed on April 19, 1991, requesting *inter alia* that the four attempted murder charges be dismissed for insufficient evidence. (Vol. 7, CT 1757-1775.) Co-defendant Hajek's Motion to Dismiss Under Penal Code Section

1118.1 was filed the same day, raising similar grounds (Vol. 7, CT 1741-1756.) The motions to dismiss were argued and submitted on April 24, 1995. (Vol. 7, CT 1792.)

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts Argument VII of co-defendant Hajek's opening brief, set forth at pages 111-119 of that brief.

A. Legal Introduction.

Penal Code § 1181.1 provides for a directed judgment of acquittal of charges if there is insufficient evidence to support them:

> "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence of either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

(Quoted at Vol. 7, CT 1760.) The test on review is "whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." (*People v. Ainsworth* (1988) 45 Cal..3d 984, 1022; *People v. Trevino* (1985) 39 Cal.3d 6678, 695; cited at Vol. 7, CT 1741-1742.)

In his motion pursuant to Penal Code § 1181.1, appellant Vo argued:

> "Attempted murder is a specific intent crime. The allegation that the crime was premeditated requires that it be 'preceded and accompanied by a clear, deliberate intent to kill and not under other conditions precluding the idea of deliberation'; that the person decides to kill and 'makes a direct but ineffectual act' to kill another (CALJIC 8.67)."

> "Attempted murder requires that 'acts of a person who intnds to kill another person will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to kill. Such acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstances not intended in the original plan."
>
> "There is no evidence of any act against Alice or Ellen. The statement attributed to Mr. Vo about 'killing the whole family' falls far short of substantial evidence. This statement was always conditioned on someone calling the police or screaming (Vol. 13, RT 3162), neither of which occurred. Moreover, the corpus delicti rule prohibits the use of this statement given the lack of evidence of any act (*Jones v. Superior Court* (1979) 96 Cal.App.3d 390)."

(Vol. 7, CT 1773.)

This Court, addressing the corpus delicti rule, has stated that the classic purpose of the rule is to "ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169.)

The United States Supreme Court has held that a criminal conviction consistent with constitutional due process must be based on ". . . evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Furthermore, the court has required ". . . that the factfinder . . . rationally apply that standard to the facts in evidence." (*Id.* at p. 317 (emphasis supplied).) Application of the standard, in turn, implies that a "mere modicum" of evidence, though relevant, could not ". . . by itself rationally support a conviction beyond a reasonable doubt." (*Id.* at 320.)

Jackson's standard is constitutionally mandated by the due process guarantees of the

Fifth and Fourteenth Amendments (Id., at p. 316; *People v. Johnson* (1980) 26 Cal.3d 557, 576), the parallel California Constitution's guarantee in Article I, Section 15 (*People v. Thomas* (1992) 2 Cal. 4th 489, 544 (Mosk, J., diss.)) and in this case is additionally mandated by the Eighth Amendment's guarantee of heightened reliability and heightened due process in capital cases (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 and n.13; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305), as well as the Sixth Amendment's guarantee of effective assistance of counsel.

The resulting constitutionally-mandated standard for appellate assessment of whether evidence is sufficient to support a conviction has been defined as:

> [W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(*People v. Thomas*, *supra*, 2 Cal. 4th at p. 544 (Mosk, J., diss.), quoting *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 (original emphasis); see *People v. Wader* (1993) 5 Cal.4th 610, 640; *People v. Price*, *supra*, 1 Cal.4th at p. 462; *People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

Although the reviewing court must regard the evidence most favorably for respondent and in support of the judgment, this court has emphasized that the appellate court must ". . . resolve the issue in light of the whole record -- i.e., the entire picture of the defendant put before the jury . . . ." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 562.)

Furthermore, echoing *Jackson*, *supra*, this Court requires "substantial" evidence for

each essential element of the crime to uphold a conviction against a sufficiency-of-the-evidence challenge. (*Ibid.*) Evidence which merely raises a strong suspicion of guilt does not suffice. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) For the jury to find guilt beyond a reasonable doubt, this court has held that ". . . the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 174-177.) In other words, the record must contain evidence that is reasonable, credible and of solid value to support the jury's rejection of inferences consistent with innocence. (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bassett* (1968) 69 Cal.2d 122, 139.)

B. There Is No Evidence Appellant Vo Possessed the Mens Rea Necessary for Attempted Murder.

As set forth more fully in Argument 1, the denial of severance permitted the jury to consider statements of co-defendant Hajek which would not have been admitted at a separate trial. Specifically, the evidence of Hajek's alleged plot to kill the Wang family was his statement the night before, in a telephone call to Moriarty, about what he intended to do. Appellant Vo was not present and did not adopt those statements; indeed, there is no evidence at all that he knew of Hajek's plan.

Cary Wang testified that appellant Vo threatened to kill the family if she screamed or called the police. (Vol. 13, RT 3161-62, 3869.) Appellant Vo's account of this brief

conversation was different; he reported that he told her no one would be hurt if she did not scream. (Vol. 20, RT 4988.) It is clear in the context of the events that any threat was intended to obtain Mrs. Wang's cooperation, rather than an expression of intent to kill. The evidence is *uncontroverted* that appellant Vo immediately returned the knife to the kitchen upon Mrs. Wang's request, and several hours then passed before he was arrested. There is no evidence that Vo again held a knife, or made statements of an intent to kill anyone. His other actions were incompatible with an intent to kill: Vo watched cartoons with Alice Wang (Vol. 14, RT 3293), untied Su Hung's hands (Vol. 14, RT 3343), was alone with Cary Wang when they left the house, and did not harm her or make her fearful. (Vol. 13, RT 3256.)

In any event, appellant Vo's statement alone was insufficient to establish the crime of attempted murder under the corpus delicti rule. "The corpus delicti of a crime must be proved independent of the accused's extrajudicial statements." (*People v. Alcala* (1984) 36 Cal.3d 604, 624 (disapproved on other grounds in People v. Falsetta (1999) 21 Cal.4th 903).)

C. <u>There Is No Evidence Appellant Vo Committed Acts in Furtherance of an Intent to Kill Which He Did Not Possess</u>.

As noted by co-defendant Hajek in his motion pursuant to Penal Code § 1181.1[133],

> "An attempt is a specific intent to commit a substantive crime, plus a direct, unequivocal act toward that end. (*People v. Camodeca* (1959) 52 Cal.3d

[133] It was agreed that objections raised by one party would be deemed adopted by the other defendant, unless otherwise specified on the record. (Vol. 6, CT 1565.)

142, 145.) 'Preparation alone is not enough, there must be some appreciable fragment of the crime committed and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter . . . .' (*People v. Buffum* (1953) 40 Cal.2d 709, 718.) Thus to support a charge of attempted murder under Penal Code §664-187, the prosecutor must show that the perpetrator had the specific intent to kill and committed a direct unequivocal act in furtherance of that intent, that being more than mere preparation. (*People v. Adami* (1973) 36 Cal.App.3d 452, 455.)"

(Vol. 7, CT 1753.)

In this case, there was no evidence that appellant Vo committed acts in furtherance of any alleged attempted murder.

D. Reversal is Required.

The trial court abused its discretion in refusing to grant the motion for directed verdict of acquittal on all four attempted murder charges brought against appellant Vo. The evidence did not support either element of the attempted murder charges, a specific intent to kill and acts in furtherance of such an intent.

The primary evidence proffered in support of the intent to kill element consisted of statements of the co-defendant about his plan. Appellant Vo was not present, and there is no evidence that he adopted or even knew about those statements. While the evidence showed that Mr. Vo briefly brandished a knife and made some statement to Mrs. Wang, it is uncontroverted that he immediately returned the knife to the kitchen upon request; that set of circumstances falls far short of demonstrating a personal intent to kill or an act in furtherance thereof. Mrs. Wang, her husband, and her daughter Alice were not physically

harmed in the course of events over several hours that day; the fourth alleged victim was not present at all.

By refusing to grant the motion for directed verdict of acquittal, the trial court violated appellant Vo's state and federal rights to due process of law, and the Eighth Amendment's guarantee of reliability in capital proceedings. The trial court further violated state law, ignoring his duties under Penal Code § 1181.1; this arbitrary disregard of a state law entitlement further violates federal due process protections. *(Hicks v. Oklahoma* (1980) 447 U.S. 434.) Reversal of the attempted murder charges is required.

12. THE TRIAL COURT ERRED IN PERMITTING IRRELEVANT AND PREJUDICIAL EVIDENCE OF CO-DEFENDANT HAJEK'S INTEREST IN OZZIE OSBOURNE'S MUSIC, ALLEGED SATANIC MATTERS, AND OTHER ALLEGED BAD ACTS.

The prosecution committed misconduct in introducing irrelevant evidence of co-defendant Hajek's alleged bad acts and bad character at the guilt phase of trial, including but not limited to Hajek's interest in Ozzie Osbourne's music (Vol. 15, RT 3680; Vol. 17, RT 4091, 4121), alleged satanic matters (Vol. 17, RT 4091), and alleged other bad acts (e.g., fear he would sacrifice the family dog, Vol. 15, RT 3666; auto theft, Vol. 15, RT 3659, 3647). The trial court erred in allowing the introduction of this evidence and the prosecutor's related arguments, and further erred in failing to provide limiting instructions prohibiting the jury from using this inflammatory and irrelevant evidence against appellant Vo.

These errors violated appellant Vo's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United Stated Constitution by undermining his rights to due process of law, a fair trial, the assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence. They impermissibly lightened the prosecution's burden of proof, by inviting jurors to speculate that both co-defendant Hajek and appellant Vo were guilty on the basis of Hajek's bad acts and bad character.

Appellant Vo refers to and incorporates herein Argument 1 (regarding the refusal of the trial court to sever his trial from that of co-defendant Hajek), Argument 6 (regarding the trial court's error in permitting the prosecution to present evidence allegedly supporting an uncharged and unproven conspiracy), and the other arguments set forth in this brief.

The bad character and bad act evidence regarding co-defendant Hajek was relevant only to him, if it was relevant at all. Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and incorporates by reference Argument IX of co-defendant Hajek's Opening Brief on Appeal (at p. 133 et seq. of Mr. Hajek's brief), addressing error in admitting evidence of Hajek's alleged interest in Satan worship.

Under California Evidence Code § 352, a trial court "may exclude evidence if its probative value is substantially outweighed" by the probability that it will "create substantial danger of undue prejudice, of confusing the issues, or misleading the jury." In recognition of the severely biasing effect of bad character and irrelevant bad conduct

evidence, California Evidence Code § 1101 prohibits admission of evidence of bad character and conduct to prove conduct on a specific occasion. (See, e.g., *People v. James* (2000) 81 Cal.App.4th 1343, 1354 [noting that "three hundred years of jurisprudence recognizes" the biasing effect of propensity evidence on unguided jurors; see also, *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 776 (*reversed on other grounds*, *Woodford v. Garceau* (2003) 538 U.S. 202).) The arbitrary deprivation of the state law protections of Evidence Code § 1101 amounts to an independent federal due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-47.)

Such "propensity" conduct is prohibited independently on federal constitutional grounds, as it creates an undue danger of prejudice in contravention of the right to due process of law. (*Michelson v. United States* (1948) 335 U.S. 469, 475-76.) The fact that co-defendant Hajek held reprehensible or unappealing beliefs unconnected to the offense was his First Amendment right. (*Dawson v. Delaware* (1992) 503 U.S. 159, 163.)

In any event, co-defendant Hajek's beliefs and actions at times other than the offense have no possible relevance to appellant Vo and his personal culpability for any of the crimes alleged. Mr. Vo had the right to be convicted only if the State proved beyond a reasonable doubt every fact necessary to constitute each crime. (*In re Winship* (1970) 397 U.S. 358, 364.) The admission of wholly irrelevant and inflammatory information about his co-defendant impermissibly lightened the state's burden of proof (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-24), and cannot be reconciled with the constitutional

protections to which he is entitled even in an ordinary criminal trial.

This was no ordinary criminal trial, however. Appellant Vo was on trial for his life. The Eighth Amendment absolutely requires that "any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

The prosecution committed misconduct in offering inflammatory propensity evidence concerning co-defendant Hajek, and urging it be used even against appellant Vo. The prosecution argument repeatedly suggested that Hajek was evil, and that his bad character reflected on appellant Vo – urging, for example that the two shared "sadism" (Vol. 22, RT 5593) and proffering argument regarding Satanism (to which an objection was sustained, Vol. 22, RT 5576, but only after the words were heard). The prosecution tactic of winning at all costs and by any means has long been condemned in our jurisprudence. In *Berger v. United States* (1935) 295 U.S. 78, the United States Supreme Court held that prosecutors may not, consistent with due process, use illegitimate means to secure a conviction:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring

about a just one.

(*Id.*, at 88.) The Court found that the prosecutor in *Berger* made arguments that were "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." (Id.) Moreover, the prosecutor argued his own extra-record "knowledge," and cast aspersions on defense counsel. The High Court continued:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

(Ibid.) The High Court concluded that reversal was required:

> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached. [citations omitted.] Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.

(Ibid.)

The United States Supreme Court in *Berger* relied in part on a case decided by the California Supreme Court, *People v. Wells* (1893) 100 Cal. 459. The prosecutor in *Wells* asked an improper question that suggested a nefarious plot on the part of the appellant, and this Court held the question was clearly meant "to take an unfair advantage of appellant by intimating to the jury something that was either not true, or not capable of being proven in

the manner attempted. And the wrong was not remedied because the court sustained an objection to the question." (Id., at 461.) More questions of this nature ensued, and this Court reasoned:

> It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury; and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: "As, 'well we know'; or, 'We could, an if we would'; or, 'if we list to speak'; or, 'There be, an if there might.'" This was an entirely unfair way to try the case; and the mischief was not averted because the court properly sustained the objection...

(Ibid.) Thus, this Court held:

> It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.

(Id., at 465.)

The trial court abused its discretion in permitting the prosecutor to introduce evidence of bad acts and character of co-defendant Hajek. Even if the admission of these matters was proper as to Hajek, they were wholly irrelevant and utterly inflammatory as to

appellant Vo. Reversal is required.

13. GRISLY PHOTOS SHOULD NOT HAVE BEEN ADMITTED, AS THEY DID NOT INVOLVE CONTESTED ISSUES AND SERVED ONLY TO INFLAME THE PASSIONS OF JURORS.

A. Procedural History.

Over appellant's objection, the court admitted a host of bloody, gruesome photographs of the crime scene, the murder victim, and the autopsy.

On January 17, 1995, appellant Vo filed Motions in Limine, including a Motion to Preclude Admission of Grisly Photographs. (Vol. 6, CT 1540.) The motion stated:

> Photographs of the decedent both at the scene of the offiense and at the autopsy would be irrelevant under Evidence Code section 352. The cause of death and the manner of death are not in controversy, and consequently, photographs of the elderly victim with the injuries which she sustained will have no relevance to the jury and will serve only to prejudice the jury.
>
> Admission of grisly photographs without a sufficient showing of relevance renders the trial unfair under federal constitutional standards. *Ferrier v. Duckworth*, 902 F.2d 545.[134] (Vol. 6, CT 1540.)

Objections of both defendants to photographs J-1 thru J-7, J-19, J-22[135] were heard and the matter submitted on February 7, 1995. (Vol. 6, CT 1616; Vol. 1, RT 258, 317-322.)

The prosecutor argued that the photographs were relevant because one of the special circumstance allegations was torture, and the victim suffered stab wounds which

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[134] *Ferrier v. Duckworth* (1990) 902 F.2d 545, 548, holds that the introduction of irrelevant photographs to inflame the jury is a violation of due process.

[135] Appellant Vo did not object to other photographs of the crime scene, which did "not have the prejudicial inflammatory effect." (Vol. 1, RT 318.)

were not a cause of death. (Vol. 1, RT 258.) In response to defense arguments, he further argued that the photographs showed torture, strangulation, the slashing of the victims's throat which caused death, and "six extra stab wounds on her chest," and that her body had been moved after she was seen alive on the bed. (Vol. 1, RT 320-321.)

Appellant Vo's counsel argued that jurors, being unfamiliar with these types of photographs, would be "bothered" and "prejudiced," and that the photographs were not relevant. (Vol. 1, RT 317.) Moreover, the information contained in them could be adequately described by police officers who attended the scene, and the coroner. (Vol. 1, Vol. 1, RT 318, 321.) Exhibits 19 and 22, for example, depict an "elderly woman with some very serious injuries on hr neck," including "a gaping wound on the lady's neck [that] would have nothing to do with the government's theory of torture." (Vol. 1, RT 318.)

Co-defendant Hajek joined in the motion, and argued that Exhibit 22 is "particularly objectionable because it is duplicative," and that the position of the victim's scarf had been altered in that photograph. (Vol. 1, RT 319.) Counsel for both defendants clarified that the objection was raised on state and federal due process grounds. (Vol. 1, Vol. 1- 2, RT 319-329.)

On February 8, 1995, according to the minute order in the Clerk's transcript, the trial court ruled that photographs J-1 through J-24 were admissible. (Vol. 6, CT 1617.) The reporter's transcript, on the contrary, notes only a tentative ruling, with the matter

taken under submission so counsel could review the case cited by the trial court:

> The Court: I took certain motions under submission yesterday, number one, dealing with the photographs, i think they're marked as exhibits here. I was going to tell counsel that I am probably going to rely on People versus Crittendon at 9 Cal.4th 83, as to the admissibility of those photographs. So if any counsel wish to be heard before I rule on that, they can take a look at that case. (Vol. 2, RT 323.)

Photographs of the victim were first introduced via the testimony of responding officer Harrison. He identified Exhibit 17 (Vol. 14, RT 3379), showing the victim with a red towel on her neck. (Vol. 14, RT 3380.) Exhibit 17 was also the subject of testimony by Officer Dotzler (Vol. 14, RT 3462-3464, 3469-3470.)

Photographs were also introduced during the testimony of Angelo Ozoa, M.D., who performed the autopsy. Exhibit 19 depicted the body as he received it, "lying on a stainless steel operating table;" Exhibit 20 depicted the back side of the body; Exhibit 21 is a close-up of her wrists. (Vol. 16, RT 3950.) Exhibit 22 was an autopsy photograph depicting the cut on the victim's throat, described as follows by Dr. Ozoa:

> Now, the second major injury in that part of the body [in addition to fractures and other indications "that some external force had been applied to the neck"] was a cut or a slash on the front of the neck. And this measured three and a half inches in length and approximately three quarter inch in depth, and it was deep enough so that it cut through the trachea or wind pipe completely. And also, it partially cut the external jugular vein on the right side.

(Vol. 16, RT 3955.) The strangulation mark left by a cord was only partially visible "because I believe a portion of that has also been cut through." (Vol. 16, RT 3955.) Petechiae were also visible on the face. (Vol. 16, RT 3956.) Exhibit 18, a crime scene

photograph, also showed the neck wound and position of the rope. (Vol. 16, RT 3957.)

B. The Photographs Are Prejudicial.

The trial court abused its discretion by admitting gory, gruesome and inflammatory photographs, which were irrelevant and cumulative because the matters depicted therein were not at issue, and were well-described otherwise. (*People* v. *Gallego*, *supra*, 52 Cal.3d at p. 197.)

The prosecutor further aggravated the prejudice from the horrific photographs, claiming they demonstrated that Hajek did not kill in an out-of-control explosion of rage, but rather, that the killing was "methodical," cold and calculating. (Vol. 22, RT 5564.) The photographs showed nothing of the sort; instead, they left vivid visual impressions of the outcome, designed to overcome the lack of evidence of the actual events of the killing. This argument immediately followed the prosecutor's urging in his argument that both defendants were liable, and that he did not have to prove participation by appellant Vo because of the alleged uncharged conspiracy, described in this portion of his argument as a conspiracy to torture the victim. (Vol. 22, RT 5563.)

In short, the prosecution used the gruesomeness of the photographs as part of an effort to urge jurors to ignore the lack of evidence that appellant had anything to do with the homicide. The prosecutor did the same in arguing that the lack of blood on appellant Vo meant that Vo was the killer. (Vol. 22, RT 5566.) He hoped that the grisly outcome would be sufficient to persuade jurors to punish anyone involved in the broader events of

the day, regardless of proof. That hope was rewarded by Vo's convictions and subsequent death sentence.

C. The Photographs Are Not Relevant To A Disputed, Material Issue.

This court has held, in conformance with Evidence Code section 350, that a trial court ". . . has no discretion to admit irrelevant evidence." (*People* v. *Turner* (1984) 37 Cal.3d 302, 321; *see People* v. *Anderson* (1987) 43 Cal.3d 1104, 1137, overruled on other grounds *People* v. *Adcox* (1988) 47 Cal.3d 207, 233.) The photographs at issue served no evidentiary purpose; they worked only to inflame the jury. Here, as in *Turner*, "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of the infliction of the wounds to the issues presented." (*People* v. *Turner, supra*, 37 Cal.3d at p. 321.)

Photos which ". . . go only to the issue whether a human being had been killed .... should not have been received into evidence." (*People* v. *Anderson*, *supra*, 43 Cal.3d at p. 1137.) Witnesses testified to the appearance of the crime scene in detail and provided diagrams. Witnesses also testified to Su Hung's appearance and injuries. The exhibits did not document any disputed issues and the manner of death was not in dispute. Nor was the quantity or distribution of blood at the scene relevant to any issue in the case. (*Ferrier* v. *Duckworth*, *supra*, 902 F.2d at p. 548.) These horrifying photographs were irrelevant and unnecessary.

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D. The Photographs Are Cumulative.

Even assuming, *arguendo*, that there was some issue at stake, there was no need to inundate the jury with repetitious, prejudicial photos. The pictures admitted over appellant's objection duplicated other admitted evidence and matters adequately described in witnesses' testimony. This court has expressed "serious doubt" about the admissibility of photographs that reveal ". . . how the victims were killed . . . but. . . . are also largely cumulative of expert and lay testimony regarding the cause of death, the crime scene, and the position of the bodies." (*People* v. *Anderson, supra*, 43 Cal.3d at p. 1137.) Without providing any probative value, the photos improperly provoked the jury's emotions. (*See*, e.g., *People* v. *Smith*, *supra*, 33 Cal.App.3d at p. 69.)

E. The Trial Court Failed To Conduct A Proper Balancing Under Evidence Code Section 352.

The trial court's conclusory statement that it intended to permit admission of the prejudicial photographs based on *People v. Crittendon* (1994) 9 Cal.4th 83 (Vol. 2, RT 323) falls far short of the individualized consideration of each challenged piece of evidence mandated by Evidence Code § 352. Nor did the court evaluate the necessity of admitting each prejudicial photograph. (*People* v. *Allen*, *supra*, 42 Cal.3d at p. 1257.)

In *Crittendon*, this Court found specific reasons why the disputed photographs were necessary to advance the state's case, including the "planning and deliberation with which the offenses were executed;" for example, the defendant even brought a pillowcase from his own home with which to bind the victims, bound them with "thoroughness," and

separated them. (*People v. Crittendon*, *supra*, 9 Cal.4th 83, 134.) By contrast, the photographs in this case did not advance the state's case factually. The gaping wound in the victim's neck, for example, was not part of the torture allegation that the state advanced for admission of the photographs, and that the prosecutor later argued before jury deliberations. The purpose served by these photographs was meant to be, and was, inflammatory.

F. The Trial Court's Erroneous Admission Of The Photographs Violated The Fifth, Sixth, Eighth and Fourteenth Amendments, Mandating Reversal.

The trial court's admission and the prosecutor's use of the bloody crime-scene photographs violated appellant's rights to fair trial, impartial jury, due process of law and capital case heightened due process guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

These photos did nothing to resolve a central issue in the case: which defendant committed the murder. Instead, they served to focus the jury's attention on the horror of the event, to the extent that the identity of the actual killer became irrelevant. This error compounded the errors complained of elsewhere in this brief, which permitted appellant Vo to be convicted of first degree murder and special circumstances, and sentenced to death, despite evidence that the killing was committed by the co-defendant acting on his own, and with no evidence that appellant intended to kill, participated in killing, or knew until later that co-defendant Hajek harbored a murderous scheme.

The irrelevant, bloody photographs admitted into evidence so inflamed appellant's jury against him as violate his right to an impartial jury, per the Sixth Amendment. This error also infected his trial with fundamental unfairness (*Ferrier* v. *Duckworth*, *supra*, 902 F.2d at p. 548) resulting in an unconstitutional deprivation of liberty, in violation of the Fifth and Fourteenth Amendments. (*See, Hicks* v. *Oklahoma*, *supra*, 447 U.S. at p. 346.) The repetitious, gory images served no evidentiary purpose, biased the jury against appellant and improperly encouraged it to punish him for the horror it saw, completely apart from whether he had been proven guilty of the crimes alleged beyond a reasonable doubt.

Furthermore, the horror and sympathy the photos evoked in the jury prevented it from making a rational decision based on relevant evidence, violating the Eighth Amendment's guarantee of heightened capital case due process. (*Beck* v. *Alabama, supra,* 447 U.S. at p. 638 and n.13.) Because of their gruesomely pervasive quantity and qualitative emotional impact on the jury, the erroneously admitted and used photographs, measured either individually and cumulatively, were not harmless beyond a reasonable doubt and reversal is mandated.

14. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE USE-OF-KNIFE ENHANCEMENTS IN MOST COUNTS.

There was insufficient evidence to support use of knife enhancement as to appellant in counts 3, 4, 5, 6, and 9 of the information. Reversal is required.

Appellant refers to and incorporates herein the facts and authorities set forth in Argument 11, regarding insufficient evidence to support the attempted murder allegations with which he was charged.

The evidence that co-defendant Hajek had a plan to kill Ellen Wang's entire family consisted of his statements to Tevya Moriarty the night before the homicide. Hajek told her he wanted to get back at the girl who picked the fight. He said he was going to break into her house, kill her family, and kill her last. (Vol. 15, RT 3649-52.) Appellant Vo was not present during that conversation, and no evidence was presented that appellant Vo even knew of Hajek's threat against the family, much less adopted it.

Evidence presented at trial was that appellant Vo held a knife near Cary Wang when she returned to the home, but did not touch her with the knife; she testified that he threatened to kill the family if she screamed. (Vol. 13, RT 3161-62, 3217, 3241-42.) Upon Mrs. Wang's request, appellant Vo returned the knife to the knife block in the kitchen. (Vol. 13, RT 3241-42; Vol. 20, RT 4988-9.) Tony Wang was tied up after he returned home, but scissors were used to cut the rope. (Vol. 16, RT 3869, 3344.) Alice Wang was not threatened or physically restrained, and Ellen Wang was not present at the home at any point prior to the arrests of co-defendant Hajek and appellant Vo. Aside from the one brief period when Vo held a knife near Cary Wang before putting it away, there was no other evidence that Vo was seen with or used a knife that day. Unlike co-defendant Hajek, there was no blood found on Vo's person or clothing.

Penal Code § 1181.1 provides for a directed judgment of acquittal of charges if there is insufficient evidence to support them:

> "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence of either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

(Quoted at Vol. 7, CT 1760.) The United States Supreme Court has held that a criminal conviction consistent with constitutional due process must be based on "... evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Furthermore, the court has required ". . . that the factfinder . . . rationally apply that standard to the facts in evidence." (*Id.* at p. 317 (emphasis supplied).) Application of the standard, in turn, implies that a "mere modicum" of evidence, though relevant, could not ". . . by itself rationally support a conviction beyond a reasonable doubt." (*Id.* at 320.)

In this case, the evidence is clear that appellant Vo used a knife only briefly, when Mrs. Cary Wang returned home; the knife was returned to the kitchen upon her request. The knife was used to secure Mrs. Wang's compliance; it was never used in furtherance of the homicide committed by the co-defendant. Assuming for the sake of argument that there was sufficient evidence of attempted murder (see Argument 11), there is no substantial evidence that appellant Vo personally used a knife in furtherance of those

allegations.

The trial court abused its discretion in refusing to grant the motion for directed verdict of acquittal on the use of knife allegations brought against appellant Vo.

By refusing to grant the motion for directed verdict of acquittal, the trial court violated appellant Vo's state and federal rights to due process of law, and the Eighth Amendment's guarantee of reliability in capital proceedings. The trial court further violated state law, ignoring his duties under Penal Code § 1181.1; this arbitrary disregard of a state law entitlement further violates federal due process protections. (*Hicks v. Oklahoma* (1980) 447 U.S. 434.) Reversal of the attempted murder charges is required.

15. THE TRIAL COURT ERRED IN INSTRUCTING JURORS ON TWO THEORIES OF FIRST DEGREE MURDER, WHEN THE INFORMATION CHARGED ONLY SECOND DEGREE MURDER.

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts Argument XIX of co-defendant Hajek's opening brief, set forth at pages 221-228 of that brief. Appellant Vo and co-defendant Hajek were charged in the information with second degree malice murder pursuant to Penal Code § 187, and were not charged with first degree murder pursuant to Penal Code § 189.

The jury was improperly instructed on theories of deliberate and premeditated murder and burglary felony murder, in violation of appellant Vo's rights to due process of law, and to a fair and reliable process under the Eighth Amendment. Reversal is required.

16. THE TRIAL COURT ERRED IN INSTRUCTING JURORS ON MULTIPLE ALTERNATE THEORIES OF FIRST DEGREE MURDER, AND REFUSING TO REQUIRE JURORS AGREE ON THE THEORY OF GUILT AND REACH A UNANIMOUS VERDICT THAT THE STATE HAD PROVEN ITS CASE.

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts Argument XXII of co-defendant Hajek's opening brief, set forth at pages 250-258 of that brief.

17. JURY INSTRUCTIONS IMPROPERLY RELIEVED THE PROSECUTION OF ITS BURDEN TO PROVE ALL CHARGES BEYOND A REASONABLE DOUBT.

The jury was repeatedly instructed regarding the concept of reasonable doubt. The trial court read CALJIC No. 2.90 (1979 Rev.) to the jury, regarding the general presumption of innocence and reasonable doubt.[136] (Vol. 21, RT 5293; Vol. 8, CT 1978.)[137]

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[136] This Court has rejected related, but distinct, arguments in many cases. (See, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 385-386.) The instant case presents a stronger factual showing on different issues and therefore mandates reversal. However, to the extent that this court finds *Jennings* and similar cases applicable, appellant very respectfully asks that it reconsider its holdings therein.

[137] "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in a case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the

The trial court also gave four related instructions, two of which discussed reasonable doubt's relation to circumstantial evidence, and the other two of which addressed proof of specific intent or mental state. Although each of the latter four addressed different evidentiary points, they all nearly identically stated that if one interpretation of the evidence appeared reasonable and another interpretation unreasonable, it would be the jury's duty to accept the reasonable.

The following instructions received by the jury promoted repeatedly the concept that they were bound to accept a "reasonable" interpretation of the evidence, which is a concept fundamentally at odds with the core constitutional requirement that the state bear the burden of proving its case beyond a reasonable doubt:

> CALJIC No. 2.01: sufficiency of circumstantial evidence to show guilt. (Omitted from oral instructions, although written instructions were provided to the jury; Vol. 8, CT 1971.)
>
> CALJIC No. 2.02: sufficiency of circumstantial evidence to show specific intent. (Vol. 21, RT 5305-5306, Vol. 8, CT 1998.)
>
> CALJIC No. 8.83: sufficiency of circumstantial evidence to show special circumstance. (Vol. 21, RT 5320-5321; Vol. 8, CT 2034.)
>
> CALIIC No. 8.83.1: sufficiency of circumstantial evidence to show mental state required by special circumstance. (Vol. 21, RT 5321, Vol. 8, CT 2035)

Although these instructions were not specifically repeated at the penalty phase, the jury was given the basic instruction defining circumstantial evidence, set forth in CALJIC 2.00. (Vol. 25, RT 6373-6364, Vol. 10, CT 2632.) Since jurors were not instructed to use

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charge." (Vol. 21, RT 5293.)

circumstantial evidence in a different way at penalty phase, it must be assumed that they remained affected by the repeated admonition at the guilt phase to accept the "reasonable" interpretation.

CAI.JIC No. 2.90 is incomprehensible to a modern jury. Furthermore, its inherent problems were greatly exacerbated by the quadruple reiteration that the standard was actually only proof that evidence "appears reasonable," rather than proof beyond a reasonable doubt.

These errors were particularly significant in appellant Vo's case, where he was tried with a co-defendant whose culpability is clear[138], using alternate theories of first degree murder[139] and an uncharged criminal conspiracy[140] to urge guilt by association (where the evidence was in fact insufficient to demonstrate appellant's guilt[141]), and the jury was also burdened in its task of deciding the issues by erroneous aiding and abetting instructions[142].

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[138] Argument 1 addresses the trial court's unreasonable refusal to sever the trials of these co-defendants, whose defenses were inconsistent and irreconcilable. Arguments 1, 4, 5, 6, and 7 address errors in the admission of evidence, and its consideration by the jury, flowing from the denial of severance. In Argument 10, appellant urges that he was prejudiced by instructions applicable only to the co-defendant, and Argument 20 notes that the jury was allowed to infer appellant's guilt from the co-defendant's motive.

[139] Argument 16 addresses the errors in instructing the jury on alternate theories of first degree murder, and refusing to ensure a unanimous verdict. Arguments 8 and 15 concerns errors in permitting the jury to consider first degree murder at all. Argument 17 asserts that instructional errors relieved the prosecution of its burden of proof.

[140] Argument 6 addresses errors in permitting jurors to consider an uncharged conspiracy theory.

[141] Arguments 8, 9, 10, 11, and 14 address the insufficiency of the evidence of appellant Vo's guilt.

[142] Argument 18 addresses the instructional errors concerning aiding and abetting.

Appellant refers to and incorporates herein the other arguments in this brief concerning these errors, which, together with the erroneous instructions concerning proof beyond a reasonable doubt, stripped him of a fair trial.[143]

A. CALJIC No. 2.90 is Confusing and Misleading.

Due process requires proof of guilt beyond a reasonable doubt for a criminal conviction to occur. (*In Re Winship* (1970) 397 U.S. 358, 361-364; *Jackson v. Virginia*, supra, 443 U.S. 307, 318 318-319.) In *Eversole v. Superior Court* (1983) 148 Cal.App.3d 188, 199, the California Court of Appeal cited the concurring opinion of Justice Mosk in *People v. Brigham* (1979) 25 Cal.3d 283, concerning the manner in which ". . . legal definitions sometimes obscure rather than illuminate their subjects. . . ," and observed that Justice Mosk ". . . persuasively advances the view that no definition of 'beyond a reasonable doubt' is better than the definition set forth in the standard jury instruction. [CALJIC No. 2.90.]" (*Eversole*, *supra*, at n. 6.)

In *People v. Brigham*, *supra*, the majority opinion disapproved a different definition of reasonable doubt contained in former CALJIC No. 22 and also criticized CALJIC No. 2.90 for using archaic language regarding the presumption of innocence and reasonable doubt instruction, which ". . . more than any other is central in preventing the conviction of the innocent.. . ." and joined Justice Mosk in calling for revision of CALJIC 2.90. (*People*

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[143] Co-defendant Hajek has raised similar contentions in his Argument XXI, set forth at pp. 235-249 of his AOB, which appellant Vo refers to and adopts ursuant to California Rules of Court, Rule 8.200(a)(5).

v. Brigham, *supra*, 25 Cal.3d at p. 290 and n. 11.)

The United States Supreme Court voiced a similar criticism in *Cage v. Louisiana* (1990) 498 U.S. 39, in reversing a death sentence due to a reasonable doubt instruction allowing conviction where jurors found guilt to a "moral certainty," with reasonable doubt defined as any "grave uncertainty" or "actual substantial doubt." (*Id.* at 40.) The unanimous opinion found the related instruction violated the due process clause, which protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*Id.*, at p. 341, citing *In re Winship*, *supra.*)

This instruction was later found constitutional, in and of itself. (*Victor v. Nebraska* (1994) 511 U.S. 6, 11.) In this case, though, in conjunction with the instructions discussed below which repeatedly undermined the requirement of proof beyond a reasonable doubt, there is a reasonable likelihood that the jury was misled as to the standard required for conviction. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.)

The use of these instructions violated appellant's rights to due process of law and heightened due process in a capital ease, as well as his rights to a jury trial, fundamental fairness at trial, and a reliable determination of guilt and penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

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B. Four Other Instructions Undermined The Constitutional Requirement Of Proof Beyond A Reasonable Doubt, Mandating Reversal.

Besides CALJIC No. 2.90, four other instructions addressed reasonable doubt and told the jury that, if one interpretation of the evidence appeared reasonable and another unreasonable, *it would be the jury's duty* to accept the reasonable interpretation, contrary to the due process requirement that appellant may be convicted only on proof of guilt beyond a reasonable doubt. (*In Re Winship*, *supra*, 397 U.S. at pp. 361-364; *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319.)

These instructions required that the jury accept an indication that the evidence was incriminatory if it "appeared reasonable," i.e., a standard substantially below proof beyond a reasonable doubt. (But see, *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) In *Cage v. Louisiana*, *supra*, the United States Supreme Court addressed a similar problem, concerning instructions that equated reasonable doubt with grave or substantial doubt and therefore unconstitutionally allowed a finding of guilt based on a degree of proof below that required[144] by the due process clause. (*Cage v. Louisiana*, *supra*, 498 U.S. at p. 40.)

If due process is violated by jury instructions requiring reasonable doubt to be grave or substantial, as in *Cage*, then the instant jury instructions are also violative of the Fifth,

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[144] Id.; see *United States v. Indorato* (1st Cir. 1980) 628 F2d 711, 721, n. 8; *State v. Manning* (S.C. 1991) 409 S.E2d 372, 374 [reversing capital murder conviction because of due process deficiencies in "moral certainty" reasonable doubt instruction]; *People v. Hewlett* (N.Y. App. Div. 1987) 519 N.Y.S. 555, 557; *Dunn v. Perrin* (1st Cir. 1978) 570 F.2d 21, 24; *United States v. Nolasco* (9th Cir. 1992) 926 F.2d 829 (en banc).

Sixth, Eighth and Fourteenth Amendments, as they negated reasonable doubt if evidence of guilt merely "appeared reasonable." Reversal is required if there is a reasonable likelihood that the jury was misled as to the standard required for conviction. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.)

Furthermore, these instructions also constituted an impermissible mandatory, conclusive presumption of guilt upon a preliminary finding that evidence of guilt merely "appears reasonable." Such a presumption violates not only due process, but also appellant's right to a jury trial by removing fundamental questions from the jury. (*Carella v. California* (1989) 491 U.S. 263, 265.)

These instructions for told jurors four times in modern language that they should follow evidence of guilt that "appears reasonable." Even if the jury was trained in archaic English and found CALJIC 2.90 to merely be in conflict with the four other instructions, those instructions' failure to resolve this constitutional question does not ". . . absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322.)

This was a case extensively based on circumstantial evidence, so far as appellant Vo was concerned. Having no proof that appellant Vo planned to kill or did kill, the prosecutor concocted a conspiracy theory, relying on co-defendant Hajek's actions and Hajek's statements. These multiple instructions undermining the requirement of proof beyond a reasonable doubt allowed the prosecutor to succeed: all he had to do was persuade the jury that his theory of a nefarious and murderous conspiracy was more

"reasonable" than appellant Vo's denials of guilt.

These instructional errors – particularly in conjunction with the multiple other errors in this case – involved the basic standard to be applied at trial, undermined the accuracy of the verdicts and operated as a mandatory, conclusive presumption, here violating the Fifth, Sixth, Eighth and Fourteenth Amendments. Therefore, reversal is subject to a special harmless error analysis, which is ". . . wholly unlike the typical form . . . " (*Carella v.California*, *supra*, 491 U.S. at pp. 267-273 (Scalia, J., conc.).) The use of conclusive presumptions, such as those used here, can be held harmless " . . . only in those 'rare situations' when the reviewing court can be confident that [such an] error did not play any role in the jury's verdict . . ." such as an instruction regarding a charge on which the defendant was acquitted or an element of a crime that the defendant admitted. (*Id.*, 491 U.S. at pp. 269-270, quoting *Connecticut v. Johnson* (1983) 460 U.S. 73, 87 (Scalia, J., conc.).) This is not such a "rare situation." Therefore, reversal is mandated.

Assuming, arguendo, even the lesser, traditional harmless beyond a reasonable doubt test (*Chapman v.California*, *supra*, 386 U.S. at p. 23), however, reversal is mandated. The improper instructions were read four times and were relied upon by the prosecutor regarding key elements of his case. The prosecution strongly urged the jury to accept his uncharged and unproven scenario of a conspiracy to torture and murder, and urged that conspiracy as the basis for finding appellant Vo guilty of the charges and special circumstances.

A reasonable juror may well have held doubts about appellant's guilt, requiring acquittal, but for the multiple, repeated instructions emphasizing the jury's duty to accept apparently reasonable interpretations of evidence that pointed toward guilt. When the wrong standard is used to assess guilt, the deference normally given the factfinder's judgment is inappropriate. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, n. 10; *In Re Carmaleta B.* (1978) 21 Cal.3d 482, 496.)

18. THE INSTRUCTIONS REGARDING AIDING AND ABETTING WERE CONFUSING, AND FAILED TO APPRISE THE JURY PROPERLY OF THE PROSECUTION'S BURDEN OF PROVING EACH ELEMENT OF EACH CRIME AS TO EACH DEFENDANT SEPARATELY.

Petitioner's convictions and sentence were rendered in violation of his rights to due process, to a fair trial, and to fair and reliable guilt and penalty determinations, in that the instructions permitted jurors to convict appellant Vo without finding that he personally possessed the specific intent required for the charged offenses, in violation of Petitioner's federal constitutional rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellant Vo refers to and incorporates herein Argument 6, regarding that illegitimate conspiracy theory, and Argument 1, regarding the trial court's error in refusing to sever his trial from that of the co-defendant.

The jury was instructed that an aider and abetter is culpable as a principal (Vol. 8, CT 2004-2005, 2062), that a union of conduct and a particular mental state is necessary for

conviction of alleged crimes (e.g., Vol. 8, CT 2007-2009, 2023,), and about the mental states necessary for the various crimes and special allegations (e.g., Vol. 8, CT 2010-2013, 2016-2018, 2020-2021, 2028-2029, 2031-2033, 2035-2036, 2038, 2040, 2042, 2043, 2046-2048, 2053, 2054).

The jury was also instructed on the uncharged conspiracy. Appellant Vo contends that both the introduction of alleged "conspiracy" evidence and the confusing instructions to jurors concerning the uncharged conspiracy not only invited, but actually caused juror confusion, and permitted jurors to find him guilty of crimes without understanding that they were required to find that appellant Vo personally possessed the specific intent necessary for conviction as an aider and abettor. The jury's confusion is demonstrated on the record by one of its questions to the trial court, asking for clarification of the relationship between the alleged conspiracy and the requirement that specific intent be found in order to return a true finding on special circumstances.

Instructions 21 through 29 and 51 address the uncharged conspiracy theory, but not the quantum of proof necessary to find the existence of a conspiracy. (Vol. 8, CT 1981-1990.) These instructions, moreover, do not address the scope of the conspiracy. The jury was not required to return written findings on the uncharged conspiracy, so it is impossible to know whether or not a conspiracy was found unanimously, the scope of any conspiracy found, or the quantum of proof applied by individual jurors or the jurors as a whole, n making any such finding, if indeed they did so.

The jury instructions finally clarified that the object of the alleged conspiracy was burglary and murder. (Vol. 8, CT 1981.) Jurors were further instructed that a co-conspirator is liable for the "natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such an act was not intended as a part of the original plan, and even though he was not present at the time of commission of such act." (Vol. 8, CT 1983.)

Jurors were further instructed that "the formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent . . . ." (Vol. 8, CT 1984.) This instruction, however, conflicts with the next instruction, stating that the "independent" act or declaration of a conspirator is not binding on a co-conspirator. (Vol. 8, CT 1986.) Yet another instruction also conflicts with and undermines the instruction excepting co-conspirators from the "independent" acts and statements of a conspirator: the jurors were told they could consider statements of one conspirator against the others if the statements were made during and in furtherance of the alleged conspiracy. (Vol. 8, CT 1990.)

Appellant Vo's jury was instructed with CALJIC 3.00 and CALJIC 3.01, which provide as follows:

> The persons concerned in the [commission] [or] [attempted commission] of a crime who are regarded by law as principals in the crime thus [committed] [or] [attempted] and equally thereof include:
>
> 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime or,

2. Those who aid and abet the [commission] [or] [attempted commission], of the crime.

(CALJIC 3.00, Vol. 8, CT 2004.)

A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she,

1. With knowledge of the unlawful purpose of the perpetrator and

2. With the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

[A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be personally present at the scene of the crime.]

[Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and betting.]

[Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]

(CALJIC 3.01, Vol. 8, CT 2005.)

On May 16, 1995, the jury sent a note to the trial judge, apparently referring to Instruction 57 (Vol. 8, CT 2028-9) and asking about the relationship between an aider/abettor or co-conspirator and the requirement for the special circumstances that a defendant "intentionally" killed the victim. (Vol. 7, CT 1825.) The note reads:

> (p. 57) ¶ 3 under Special Circumstances: If a 'defendant' is determined to be an 'aider and abettor' or a 'co-conspirator' does he then become: '(The) (A) defendant on page 59, item # 1 which reads: **#1. (The) (A) defendant intentionally killed the victim.**

(Vol. 7, CT 1825; emphasis supplied in original by enclosing language bolded here in a

box.) The jurors' note apparently refers also to Instruction 59 (Vol. 8, CT 2036), regarding the special circumstance of lying in wait. After informally discussing a response with counsel that day (Vol. 7, CT 1826), and further discussion on May 17, 1995, the trial court again instructed the jurors with Instruction 59, regarding the lying in wait special circumstance. (Vol. 7, CT 1829.) Merely providing the jury once again with Instruction 59 did not clarify in the least how jurors were to use the uncharged conspiracy, if at all, in deciding whether to return true findings on this alleged special circumstance.

A reasonable interpretation of the jury note is that jurors wanted to know whether membership in the uncharged, unproven, amorphous conspiracy supplied the "intentional killing" requirement for that special circumstance. The correct legal answer to that question was no. The prosecution is required to prove each element of each allegation presented to the jury for decision, beyond a reasonable doubt, and individually as to each defendant. (*In Re Winship* (1970) 397 U.S. 358, 361-364; *Jackson v. Virginia*, *supra*, 443 U.S. 307, 318 318-319; *Ring v. Arizona* (2002) 536 U.S. 584.)

The jury's question reflected confusion in that it was also required to consider specific intent as to each criminal offense alleged, including murder and the multiple counts of attempted murder. The conflicting and confusing set of multiple jury instructions did not make clear to jurors how to go about reconciling the uncharged conspiracy theory with any of the specific intents required.

The trial court's instructions failed to make clear that the prosecution's conspiracy

theory was an insufficient substitute for proving each element of each charge in its case against appellant Vo; they thus impermissibly lightened the prosecution's burden of proof. (See, *Francis v. Franklin* (1985) 471 U.S. 307, 317-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524.)

An aiding and abetting conviction requires proof not merely of "knowing aid" but also that the defendant had the specific intent to encourage or facilitate the offense with which the principal was charged. (*People v. Beeman* (1984) 35 Cal.3d.547, 561.)

Beeman error is constitutional error because it deprives the defendant of his right to have a jury find the existence of each element of the charged offense beyond a reasonable doubt. (*Martinez v. Borg* (9th Cir. 1991 937 F.2d 422, 423.) That is critical here because the penalty of death can only be imposed upon an aider or abettor if he has the intent to kill. (*Enmund v. Florida* (1982), 458 U.S. 782.) Such intent must be established beyond a reasonable doubt and found by a unanimous jury.

Here, the instructions given – in conjunction with the uncharged conspiracy of vast breadth, and the admission in this joint trial of inflammatory evidence that was only relevant, if at all, to co-defendant Hajek – were sufficiently ambiguous to permit conviction upon a finding of an intentional act which aids some criminal offense, without necessarily requiring a finding of intent to encourage or facilitate each of the particular criminal offenses charged. Even worse, these instructions permitted jurors to use alleged membership in an uncharged and unproven conspiracy as a proxy for proof of each

element of each offense, rendering appellant Vo thereby eligible for a capital sentence, based on this bootstrapped finding. Such a precarious foundation for a capital verdict violates due process, and there can be no confidence in the reliability of a verdict produced by such dubious and unconstitutional methods. Reversal is required.

19. APPELLANT'S JURY WAS BURDENED WITH INSTRUCTIONS BEARING ONLY ON CO-DEFENDANT HAJEK'S CONDUCT AND HIS MENTAL DEFENSES, WHICH HAD NO APPLICATION TO APPELLANT'S CASE OR DEFENSE, BUT WHICH WERE NOT ACCOMPANIED BY LIMITING LANGUAGE.

Appellant Vo was deprived of a fair trial because his jury was provided with instructions bearing only on the conduct and mental state defenses of co-defendant Hajek, and no limiting instructions were provided. At a minimum, such instructions were confusing because they were inapplicable to appellant Vo; but the erroneous instructions permitted the jury to use Hajek's conduct as evidence of appellant Vo's guilt. This error was reinforced by the prosecutor's improper argument, which invited jurors to impute co-defendant Hajek's actions and mental state to appellant Vo. (See, e.g., Vol. 21, RT 5372, 5293.) Moreover, they invited the jury to use the absence of mental state defenses on Mr. Vo's behalf as evidence of his personal guilt.

These erroneous instructions deprived appellant Vo of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and corollary provisions of the California Constitution, including his rights to due process, a fair trial, to be convicted only upon proof beyond a reasonable doubt of his personal guilt, and reliable

and non-arbitrary determinations of guilt, capital eligibility, and sentence.

Appellant Vo refers to and incorporates herein Argument 1, regarding the improper refusal of the trial court to sever appellant Vo's trial from that of his co-defendant, Argument 6, regarding the alleged uncharged and unproven conspiracy, and Argument 18, regarding the theory of aiding and abetting, as well as the other arguments set forth in this brief.

Because there was more than one defendant, the jury was instructed that it must decide separately whether each defendant was guilty or not guilty. (Vol. 8, CT 1975, Instruction 15.) It was not instructed specifically what evidence was admissible about which defendant, or for what charges or allegations. (See, CALJIC 2.07, Vol. 8, CT 2057, Instruction 85, regarding evidence admitted only against one defendant, which does not specify any particular evidence; and Vol. 8, CT 2059, Instruction 86, regarding evidence admitted for a limited purpose.) The instructions therefore permitted the jury to use any evidence against either defendant, unless specifically instructed otherwise.

Some instructions related only to co-defendant Hajek's mental state defenses (Vol. 8, CT 2037, Instruction 65; Vol. 8, CT 2060, Instruction 88), and to Hajek's conduct alone (Vol. 8, CT 2049, Instruction 77; Vol. 8, CT 2051-2052, Instructions 79-80; Vol. 8, CT 2061, Instruction 89). Appellant Vo was not responsible for Hajek's conduct, and it could not possibly have bearing on appellant Vo's guilt or innocence. Some instructions – in particular, one about a statement of intent made by a defendant before the crime (Vol. 8,

CT 2056, Instruction 84) and one about statements made after the crime (Vol. 8, CT 2058, Instruction 86) – appear to apply only to Hajek, but were not accompanied by a limiting instruction.

Appellant is constitutionally entitled to be convicted only where there is substantial evidence of guilt (*Jackson v. Virginia* (1979) 443 U.S. 307, 320) and his personal guilt is proven beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) The failure to limit the use of evidence and application of particular instructions to co-defendant Hajek alone impermissibly lightened the prosecutor's burden of proof, by inviting jurors to rely upon evidence and theories that were wholly irrelevant to appellant Vo. (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

The error, together with many other errors described in this brief, invited the jury to decide appellant Vo was guilty on the basis of evidence applicable only to co-defendant Hajek. Moreover, instructing appellant Vo's jury regarding mental state defenses was extraordinarily prejudicial: it inverted the burden of proof, viewing Vo as obliged to prove mental state defenses – which were never intended to be his defense at the guilt phase – inviting jurors to find guilt on the basis that mental state defenses were not proven. This inversion of the burden of proof was strongly reinforced by the prosecutor's improper argument (e.g., the prosecutor argued that appellant Vo was the best witness for guilt because Vo was unaware of Hajek's mental illness (Vol. 21, RT 5392)).

Whatever justifications the respondent may advance for pursuing the uncharged

conspiracy theory and seeking to have jurors find appellant Vo guilty on the basis of acts and statements attributable to his co-defendant, it is constitutionally intolerable to impose on a capital defendant the burden of proving an affirmative defense which he has not raised.

Due process of law requires that the burden of proof be on the prosecution to prove guilt beyond a reasonable doubt. A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a *rational* factfinder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.) The burden of proving guilt may not be shifted to the defendant himself, nor the standard of proof impermissibly lightened. . (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

The fact that jurors were instructed to individually decide guilt does not cure the error. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322.)

The Eighth and Fourteenth Amendments to the federal constitution require heightened standards of reliability in capital cases. (*Woodson* v. *North Carolina* (1976) 428 U.S. 280, 305.) In capital cases, both due process of law and the Eighth Amendment require that "any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida* (1977) 430 U.S. 349,

358.) The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

Respondent cannot show that imposing upon appellant Vo the burden of proving an affirmative defense that he did not raise was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required.

20. THE TRIAL COURT'S INSTRUCTIONS IMPROPERLY PERMITTED THE JURY TO INFER GUILT FROM ALLEGED EVIDENCE OF MOTIVE.

The prosecution theory in this case was that co-defendant Hajek had a motive of revenge against Ellen Wang, which led him to plan and execute the events underlying capital charges. Evidence was presented that Hajek had previously had an altercation with Ms. Wang; that he told Tevya Moriarty the night before the offenses that he planned to kill her and her entire family; and that he made statements and admissions following the offenses which demonstrated a continuing grudge against Ms. Wang. The prosecution emphasized this motive in opening statements and closing argument at the guilt phase. (See, e.g. Vol. 13, RT 3012-3014; 3018, 3026; Vol. 21, RT 5376, 5391.) None of this alleged motive evidence was attributable to appellant Vo.

A subsidiary motive argument presented by the prosecution was that appellant Vo was in need of money, and that he therefore must have intended to rob the family. (Vol.

21, RT 5391.)[145] Such an argument could be made about huge numbers of people; it is inflammatory and lacking in probative value, particularly as there was no evidence that appellant Vo planned a robbery or moved various items that the prosecution contended were going to be stolen.

Appellant Vo was deprived of a fair trial because his jury was provided with an instruction pursuant to CALJIC No. 2.51, permitting it to consider presence or absence of motive as tending to prove or disprove his guilt, and that of co-defendant Hajek. (Vol. 8, CT 2067; Vol. 21, RT 5336.) The jury was *not* instructed that motive alone was insufficient to find guilt. The motive instruction did not require the jury to find a motive beyond a reasonable doubt, nor did it require the jurors to restrict its consideration of co-defendant Hajek's alleged motive to Hajek only. Instead, it invited jurors to find culpable mental states as to each defendant on the basis of Hajek's alleged motive and planning.

This erroneous instruction deprived appellant Vo of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and corollary provisions of the California Constitution, including his rights to due process, a fair trial, to be convicted only upon proof beyond a reasonable doubt of his personal guilt, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence.

Appellant Vo refers to and incorporates herein Argument 1, regarding the improper refusal of the trial court to sever appellant Vo's trial from that of his co-defendant,

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[145] Robbery-murder and burglary-murder special circumstance were stricken before the case went to the jury. (Vol. 7, CT 1815.)

Argument 6, regarding the alleged uncharged and unproven conspiracy, and Argument 18, regarding the theory of aiding and abetting, as well as the other arguments set forth in this brief. Appellant also refers to and incorporates Argument XVIII of co-defendant Hajek's Opening Brief on Appeal (p. 211 et. Seq.), addressing this issue as to co-defendant Hajek.

Appellant is constitutionally entitled to be convicted only where there is substantial evidence of guilt (*Jackson v. Virginia* (1979) 443 U.S. 307, 320) and his personal guilt is proven beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) The failure to instruct that motive alone was insufficient to demonstrate guilt, and further failure to limit the use of alleged motive evidence concerning co-defendant Hajek alone impermissibly lightened the prosecutor's burden of proof. (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

The error, together with many other errors described in this brief, invited the jury to decide appellant Vo was guilty on the basis of evidence applicable only to co-defendant Hajek – his alleged motive for revenge. Not only was the jury invited to find guilt on the basis of another's alleged motive, but it was not even required to find motive beyond a reasonable doubt.

The motive allegedly possessed by appellant Vo, robbery, was itself insufficient to prove guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320; *In re Winship* (1970) 397 U.S. 358, 364.) Poverty alone is insufficient evidence of a motive to steal. *(People v. Wilson* (1992) 3 Cal.4th 926, 939; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024; *People v.*

Hogan (1982) 31 Cal.3d 815, 854.)

The fact that jurors were instructed to individually decide guilt does not cure the error. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322.)

In capital cases, both due process of law and the Eighth Amendment require that "any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

Respondent cannot show that imposing upon appellant Vo the burden of proving an affirmative defense that he did not raise was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required.

21. THE TRIAL COURT ERRED IN DECLINING TO ENSURE THAT ALL PROCEEDINGS WERE PROPERLY REPORTED TO PERMIT FULL APPELLATE REVIEW OF A COMPLETE RECORD.

The appellate record is not adequate to permit meaningful appellate review because there were unreported proceedings of a critical nature not reflected in the record. Section 190.9 requires that all proceedings "shall be conducted on the record with a court reporter present." The applicable language of the section is applied to all proceedings since its

effective date of January 1, 1985. (*People v. Freeman* (1994) 8 Cal.4th 450, 509.)

Throughout these proceedings, the trial court failed to ensure that all matters were reported, as required by statute. Numerous off-the-record conferences occurred during the preliminary hearing and both guilt and penalty phases of trial. In addition, documents presented for filing were not preserved as part of the Clerk's Transcript. The absence of a complete record deprives appellant Vo of meaningful appellate review.[146]

During the preliminary hearing, the following matters were not reported; in all, transcripts are missing for 31 matters occurring during the preliminary hearing alone:

> June 3, 1991: two off-the-record discussions were held during discussion of a defense request for a transcript of a taped police interview of witness Tevya Moriarty, after the prosecutor presented the transcript to the witness to refresh her recollection. (Vol. 1, CT 11.)
>
> June 4, 1991: two off-the-record matters are noted. The first occurred during the prosecutor's examination of Ellen Wang. (Vol. 1, CT 111.) At the end of the proceedings that day, the trial court announced he had "a **matter I do want to address with Mr. Vo.** It does not relate to Mr. Hajek." (Vol. 1, CT 155.)[147]
>
> June 5, 1991: three unreported matters. The court interrupted examination of witness Ellen Wang for an off-record discussion of an undisclosed nature. (Vol. 1, CT 163.) The transcript notes "Off the record" later in the witness' testimony. (Vol. 1, CT 166.) At the request of the prosecutor, an unreported bench conference was held concerning a relevance objection during Vo's

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[146] Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo refers to and adopts Argument XXIV of co-defendant Hajek's opening brief, set forth at pages 269-275 of that brief.

[147] The following day, the trial court stated that during an in camera hearing on June 4, 1991, concerning letters written by Mr. Vo to his counsel and copied to the court. The letters were deemed to concern matters of attorney-client privilege, and sealed. (Vol. 1, CT 275-276.) However, the *in camera* hearing itself was not transcribed.

cross examination of the witness; the objection was denied on the record. (Vol. 1, CT 219.)

June 6, 1991: four unreported discussions. The trial court interrupted the examination of Cary Wang for an off-record discussion. (Vol. 2, CT 282.) On the prosecutor's motion, an unreported bench conference was held following Vo's objection to questioning. (Vol. 2, CT 313.) Two more off-record discussions are noted during this witness examination, although their subjects are not. (Vol. 2, CT 334, 355.)

June 7, 1991: seven off-the-record discussions. Between directing McRobin Vo to return to court on another date and calling Cary Wang to continue her testimony, the court held an unreported discussion. (Vol. 2, CT 364.) A bench conference occurred during witness examination. (Vol. 2, CT 381.) Some matter was addressed "off the record" at the end of redirect examination. (Vol. 2, CT 441.) Prior to the direct examination of Tony Wang, an unreported discussion occurred. (Vol. 2, CT 417.) During a break in his testimony, the transcript notes that "another matter was heard" in this case, the nature of which is not disclosed. (Vol. 2, CT 427.) The court interrupted examination for an off-record discussion (Vol. 2, CT 438), adjourned for the day, but then held an unreported bench conference. (Vol. 2, CT 439.)

June 11, 1991: two off-the-record discussion. During Vo's cross-examination of Tony Wang, an unreported discussion was held. (Vol. 3, CT 568.) The court called for a bench conference after Vo's counsel announced he could not see witness Alice Wang (Vol. 3, CT 571.)
June 12, 1991: six off-record matters, and a taped interview was unreported. Numerous portions of a recorded interview of Alice Wang were played to refresh her recollection, but these were not transcribed of specifically identified. (Vol. 3, CT 668, 669, 670, 671.) The court went "off the record" (Vol. 3, CT 669), and held an unreported bench conference during this witness' testimony. (Vol. 3, CT 672.) During the testimony of McRobin Vo, the transcript reflects "off the record" three times. (Vol. 3, CT 700, 701.) Just prior to adjournment, the trial court went "off the record" again. (Vol. 3, CT 781.)

June 13, 1991: three unreported discussions, and reference to an unreported in-chambers discussion. The trial court held a bench discussion, apparently concerning scheduling. (Vol. 4, CT 803.) Appellant Vo's counsel

referenced an in-chambers discussion regarding blood samples and co-defendant Hajek's jacket (Vol. 4, CT 813); during the discussion of what items should be produced, the court announced:

> "Excuse me. I would rather not have this on the record. You want to discuss it with [the prosecutor] Mr. Schon, I don't think a conversation is appropriate in the middle of a preliminary hearing."

The court then went "off the record" and further unreported discussion was apparently had between counsel. (Vol. 4, CT 814.) During discussion of a proposed stipulation that a witness would testify co-defendant Hajek's fingerprints were on a letter, Exhibit 4, the trial court again ordered proceedings off-record. (Vol. 4, CT 816.)

June 17, 1991: one off-the-record interlude noted. (Vol. 4, CT 878.)

After the preliminary hearing, appellant Vo's trial counsel moved for appointment of second counsel on several occasions. On November 15, 1991, trial counsel filed a Request for Hearing as to the Denials of Requests for Second Attorney. (Vol. 4, CT 1003-1004.) Counsel noted that his first two written requests were returned to counsel, rather than being maintained in the court files. (11/20/91, RT 3.) Appellant refers to and incorporates herein Argument 2 of this brief.

During pretrial proceedings and the guilt phase of trial, numerous additional unreported matters occurred.

March 30, 1994: The minute orders indicate that the case had been assigned to Judge Creed for all purposes, and that an unreported conference was held in chambers. (Vol. 6, CT 1448-1459.)

December 16, 1994: Appellant Vo noted in-chambers proceedings with the trial court regarding his need for second counsel. (Vol. 1, RT 2-4.) None are reflected in the minute order for this date. (Vol. 6, CT 1508.) In camera proceedings on this subject are also not reported for earlier dates, although

there is a sealed transcript of a hearing held on January 17, 1995.[148]

February 7, 1995: An unreported discussion was held at the bench, in the midst of pretrial motions and discussions of scheduling. (Vol. 1, RT 259; Vol. 6, CT 1615-1616.)

February 23, 1995: A discussion was held off-the-record during jury selection, at the bench. (Vol. 3, RT 821.) The nature of the discussion is not reflected, nor does this occurrence appear in the Clerk's Transcript. (Vol. 6, CT 1655-1656.)

March 2, 1995: Another unreported side-bar discussion was held during jury selection. (Vol. 6, RT 1275.) It was again not noted in the Clerk's Transcript. (Vol. 6, CT 1661-1662.)

March 15, 1995: An unreported bench conference was held, to stipulate that a juror could be excused. (Vol. 9, RT 2146-2147.) No notation of the unreported proceedings appears in the Clerk's Transcript. (Vol. 6, CT 1674-1675.)

March 21, 1995: Counsel discussed a stipulation off-the-record during jury selection. (Vol. 10, RT 2385.) This is not reflected in the Clerk's Transcript. (Vol. 6, CT 1680-1681.)

March 29, 1995: On the day the jury was selected and sworn(which was the day before opening statements), immediately after counsel for co-defendant Hajek requested discovery regarding potential rebuttal witnesses from the prosecution, a discussion was held off the record. (Vol. 12, RT 2954.) No record of this discussion appears in the Clerk's Transcript. (Vol. 7, CT 1690-91.)

March 31, 1995: Thirty-two items were pre-marked as exhibits (Exhibits 55 through 86 for identification), but the proceedings in which this was accomplished were not reported.[149] (Vol. 7, CT 1695.)

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[148] Appellant refers to and incorporates herein Argument 2, concerning his need for second counsel and need for a continuance.

[149] It does not appear a court reporter was present on that day, as the CT notes "Not Reported" in the space on the minute order form that is reserved for the name of the court reporter. (Vol. 7, CT 1695.) Counsel for the defendants are also marked "NOT

April 13, 1995: Portions of a tape-recorded conversation between the defendants after their arrest were played for the jury, but not transcribed; the portions played were also not identified. (Vol. 16, RT 3785-3786, 3816-3818; Vol. 7, CT 1722-1723.) The absence of a record of this evidence is a critical error, since jurors mistakenly believed they heard admissions in portions of the tape that were, in fact, unintelligible. Appellant Vo refers to and incorporates by reference Arguments 5 and 30 of this brief.

April 17, 1995: At the close of a day of prosecution testimony, the trial court held an unreported discussion about scheduling, at sidebar. (Vol. 17, RT 4013.) This conference was not reported in the Vol. 7, CT. (Vol. 7, CT 1724-1725.)

April 26, 1995: At the start of proceedings for the day, there were apparently off-the-record discussions. (Vol. 19, RT 4520.) An earlier in camera hearing involving appellant Vo was held (Vol. 19, RT 4519; Vol. 7, CT 1793), but counsel for co-defendant Hajek requested to go "on the record." {(Vol. 19, RT 4520.)

May 2, 1995: After receiving a jury note, the court announced a recess and asked for counsel's responses at the end of the recess. The record does not reflect the conversation that almost certainly occurred, but instead, the Reporter's Transcript begins again with the jury back in place for further witness testimony. (Vol. 20, RT 5051-5052.) Immediately upon the close of testimony for the day, the trial court responded to the jury note. (Vol. 20, RT 5105-5107.)

May 3, 1995: Immediately at the start of the Reporter's Transcript for the day, appellant Vo's counsel stated that he "asked to go on the record" and he "appreciate[d]" the opportunity to do so, as he had objections to questioning of Mr. Vo by the prosecution. (Vol. 21, RT 5110.) The context of his remarks strongly suggest the matter had been discussed off the record, and furthermore, that the trial court was somehow granting a favor by allowing objections to be made on the record and outside the jury's presence.

May 4, 1995: The court and counsel "meet informally in the jury room to discuss jury instructions," and those discussions were not transcribed. (Vol. 7, CT 1815.)

PRESENT." (Vol. 7, CT 1695.)

May 10, 1995: After the jury retired to deliberate guilt, it requested an easel, paper and markers, a tape player, and an exhibit list, which were provided. (Vol. 7, CT 1820, 1819.) Discussions of these requests is not memorialized in the Reporter's Transcript.

May 11, 1995: During jury deliberations, a request for 3-hole-punched jury instructions (to place in a binder the jury brought in) was received and granted. (Vol. 7, CT 1822, 1821.) A second jury note requested a transcript of the taped conversation between co-defendant Hajek and appellant Vo received a written response from the trial court, that no transcript was received in evidence. (Vol. 7, CT 1824.) The "informal conference with respective counsel" was not transcribed. (Vol. 7, CT 1821.)[150]

May 16, 1995: As a result of another jury note asking for clarification of whether an aider and abettor or co-conspirator becomes "a defendant" for purposes of special circumstance allegations (Vol. 7, CT 1825), the trial court again elected to hold an unreported "informal" conference with counsel before responding. (Vol. 7, CT 1826.)

May 17, 1995: As a result of another jury note requesting the meanings of certain penal code sections involving weapons enhancements (Vol. 7, CT 1829) to which the court responded in writing (Vol. 7, CT 1827), the trial court again held an unreported informal conference with counsel. (Vol. 7, CT 1829-1830.)

May 18, 1995: Two notes were received from the deliberating jury: the first concerned an error in instruction 68 [two degrees of robbery] (Vol. 7, CT 1832-1833), and the second concerned the work conflict of a juror. (Vol. 7, CT 1834.) The court again elected to hold unreported informal conferences with counsel concerning these matters. (Vol. 7, CT 1831.)

Following the well-accustomed habit of refusing to report all proceedings, the trial court permitted additional unreported matters during the penalty phase.

May 25, 1995: In proceedings on June 5, 1995, counsel for co-defendant

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[150] As noted above and set forth more fully in Arguments 5 and 30, this tape and information that was not contained on the tape proved to be critical to the jury's determinations of guilt and penalty, at least as to appellant Vo.

Hajek referred to off-record proceedings concerning Juror Williams' request to be excused, which she believed were held on May 25, 1995. (Vol. 22, RT 5698.)

June 7, 1995: The trial court invited counsel to a bench conference, which was not reported. (Vol. 23, RT 5950.) On that date, appellant Vo moved for mistrial as to the penalty phase, and again moved for severance; both motions were denied. (Vol. 8, CT 2215.)

June 14, 1995: The trial court held a discussion regarding penalty phase jury instructions, which is not reflected in the Reporter's Transcript. (Vol. 10, CT 2614-2615; Vol. 25, RT 6314-6315.)

June 15, 1995: Between 2:00 and 4:00 p.m., the court and counsel engaged in unreported "informal" discussions of jury instructions. (Vol. 10, CT 2617; Vol. 25, RT 6347.)

June 20, 1995: During penalty phase deliberations, a note was received from the jury requesting an exhibit list (Vol. 10, CT 2620), which was supplied (Vol. 10, CT 2618); any discussion concerning this note was not reported. (Vol. 10, CT 2618).

June 22, 1995: As the jury was deliberating penalty, the court and counsel again met "informally" in unreported proceedings (Vol. 10, CT 2625) to discuss yet another jury note, which requested clarification of whether jurors needed to be unanimous to decide on a sentence of life without the possibility of parole. (Vol. 10, CT 2623.) The court provided a written response that "You must be unanimous no matter what decision you make." (Vol. 10, CT 2624.) Discussions of and objections to this response are not in the record.

Finally, during jury deliberations at the penalty phase, it developed that jurors believed they had heard admissions of appellant Vo on a tape recording. This tape was not transcribed when it was played for the jury. Appellant refers to and incorporates herein Argument 30, regarding his new trial motion, which addresses errors surrounding the

jury's use of this tape recording and the trial court's refusal to make a finding as to whether the alleged admissions – never heard by anyone else – existed.

When a trial court presides over various conferences off the record, either at the bench or in chambers, the failure to have the proceeding reported is error. (*Freeman*, *supra*, at 509.) The failure to report significant proceedings and to make a record of the applicable law violates not only appellant's rights under state law, but also his federal constitutional rights to due process, a fair trial, meaningful appellate review, and the Eighth Amendment requirement of reliable and non-arbitrary procedures in capital cases. (*Gardner v. Florida* (1977) 430 U.S. 349, 360- 362,). The failure to provide appellant Vo with his state law entitlement to a complete transcript of capital proceedings is a further ground on which the inadequate record violates his federal due process rights. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347.)

While the subject matter of many unreported proceedings is simply unavailable from the record, there are strong indications that unreported matters involved critical issues in appellant's case on appeal, including but not limited to: (1) his representation by counsel; (2) his need for second counsel; (3) the content of recorded interviews played at the preliminary hearing and at the trial, the latter of which emerged as a critical issue); (4) jury selection issues; (5) numerous discussions about jury instructions, at both guilt and penalty phases, in this extremely complex case; and (6) discussions about the numerous jury notes, including requests to clarify jury instructions. Appellant is left unable to fully

litigate, and this court unable to fully review, the errors set forth in this opening brief.

Appellant was denied his right to effective assistance of counsel (*Strickland v. Washington* (1984) 466 U.S. 668, 685-687) by the trial court's refusal to make an adequate record, compounding other court errors that seriously undercut the defense function. (See Argument 2.) These resulted in defense counsel's failure to insure a complete record for post-conviction review. Trial counsel was forced to proceed without timely second counsel, timely or adequate funding, and needed continuances; in the face of the trial court's entrenched decision to not make a complete record, and the immediate concerns of trying this capital case knowing the trial court would not ensure appellant Vo received adequate representation, it is no wonder appellant's trial counsel treated the opportunity to put matters on the record as a privilege (see, e.g., Vol. 21, RT 5110), although it is in truth a right. Trial courts and counsel in capital cases know or should know of the right of automatic appeal, and of the statutory provision and constitutional need for a complete record. Appellant Vo was prejudiced because he can prove only circumstantially the errors occurring in proceedings that were not reported. Appellant is prevented from raising, and this Court is precluded from deciding, issues arising in those proceedings which are not demonstrated or referenced elsewhere in the record. (*Strickland v. Washington*, *supra*, 466 U.S. at 696-697.)

The record is the basis for an appeal; a party cannot intelligently prepare a brief until the character of the record on appeal is known. (*Peebler v. Olds* (1945) 26 Cal.2d

656, 658.) The existence of such state procedural rights gives appellant a "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by" such rights, i.e., any violation of these state-defined procedural rights also constitutes a federal constitutional due process violation under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346-347.)

The United States Supreme Court has reiterated that it has generally "emphasized before the importance of reviewing capital sentences on a complete record." (*Dobbs v. Zant* (1993) 506 U.S.357, 358, citing *Gardner v. Florida* (1977) 430 U.S. 349, 361.) This is so because a panoply of constitutional rights are specifically involved when the accuracy of a capital case record is at issue.

The Fifth and Fourteenth Amendments guarantee the right to due process in an appeal's consideration (see *Frank v. Mangum* (1914) 237 U.S. 309, 327-328; *Cole v. Arkansas* (1948) 333 U.S. 196,201), e.g., in the resolution of the record's accuracy and completeness, particularly in any record reconstruction proceedings. This is so as to the Fourteenth Amendment because "[u]nder the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review." (*People v.Howard* (1992) 1 Cal.4th 1132, 1166; see also *Griffin v. Illinois* (1956) 35 1 U.S 12, 20, 76 S.Ct. 585; *Draper v. Washington* (1963) 372 U.S. 487, 496-499; see *People v. Barton* (1978) 21 Cal.3d 513, 517-518.)

Additionally, appellant Vo has the Fifth and Fourteenth Amendment due process

"right not to be denied an appeal for arbitrary or capricious reasons," *Griffin v. Illinois*, *supra*, 351 U.S. at 37 (Harlan, J., diss.); the right to an accurate record on appeal, *People v. Gloria* (1975) 47 Cal.App. 3d 1,7; the right to a review of all legally admissible evidence, *People v. Johnson* (1980), 26 Cal.3d 557, 576-577; and the right to review on a record settled in accordance with procedural due process. (*Chessman v. Teets* (1957) 354 U.S. 156, 162- 165 and n.12; *People v. Pinholster* (1992) 1 Cal.4th 865, 923, n.9.)

The Sixth Amendment, through the Fourteenth, guarantees competent counsel on appeal, which in turn imposes on that counsel both the obligation to brief all arguable issues, citing the appellate record and appropriate authority, and the preliminary obligation to insure that there is an adequate record before the appellate court to resolve those issues. (*People v. Barton*, *supra*, 21 Cal.3d at 518-520.) When the record is missing or incomplete, "counsel must see that the defect is remedied," or counsel will fail to provide a competent level of advocacy. (*Id.*, at 520.) Because of the failure of defense counsel to ensure a complete record, appellant Vo is prevented from fully demonstrating the nature and magnitude of the prejudicial errors occurring outside the record.

Finally, the Eighth Amendment requires that the record be sufficient "'to ensure that there is no substantial risk that the death sentence has been arbitrarily imposed." (*People v. Howard*, *supra*, 1 Cal.4th at 1166.) This is particularly so as to errors involving the appellate record: "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is

imposed." (*Gardner v. Florida*, *supra*, 430 U.S. at 361.) Otherwise, the "capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*, [(1972) 408 U.S. 238l]." (*Gardner v. Florida*, *supra*, 430 U.S. at 361.)

Each of the federal constitutional protections underlying the requirement of an adequate record is also magnified by the Eighth Amendment's requirement of heightened reliability in capital cases. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 and n.13; see also *McElroy v. United States Ex Rel. Guagliardo* (1960) 361 U.S. 234 (Harlan, J., diss.).) All the same rights are also guaranteed under the state constitution's parallel provisions. (Article. I, §§ 1, 7, 15, 16, 17 and 24.)

In this case, appellant has met his burden of demonstrating "that the appellate record is not adequate to permit meaningful appellate review." This Court cannot conclude, consistent with the requirement of meaningful appellate review, that appellant has failed to make an adequate case for reversal based on the trial court's refusal to ensure a complete record pursuant to state law.

For all the above reasons, appellant Vo's conviction must be reversed.

22. THE CUMULATIVE ERRORS AFFECTING THE GUILT PHASE OF APPELLANT VO'S TRIAL REQUIRE REVERSAL.

Reversal is mandated on each of the errors raised occurring during the guilt phase of appellant Vo's capital trial. Assuming arguendo that this Court finds each error

individually harmless, the cumulative effect of all these errors demonstrates that a miscarriage of justice occurred, undermining the integrity of the proceedings and requiring relief.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that may not amount to a deprivation of due process individually may cumulatively produce a trial that is fundamentally unfair]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnally v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness tas to make the resulting conviction a denial of due process"].)

California has long recognized that reversal may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result. (See, e.g., *People v. Ramos* (1982) 30 Cal.3d 553, 581; *In Re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388; *People v. Buffum* (1953) 40 Cal.2d 709, 726; and see *United States v. McLister* (9th Cir. 1979) 608 F.2d 785.) In *People v. Williams* (1971) 22 Cal.App.3d 34, the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, or was not harmless error... [Citations.]

(Id., at pp. 58-59.)

Reversal is required unless it can be said that the combined effect of all the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *(Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams*, *supra*, 22 Cal.App.3d 34, 58-59.)

Appellant Vo has demonstrated that a number of errors of federal constitutional dimension occurred during or related to the guilt phase and that each such errors mandate reversal. The circumstances under which he was tried, found guilty, and found eligible for capital punishment constituted a shocking convergence of errors combining to strip him of the fair proceedings to which he was constitutionally entitled. Denied a separate trial, his jury was invited to use against him all of the evidence introduced against the co-defendant, including out-of-court statements which were not subject to cross-examination and confrontation. He was denied necessary continuances, denied necessary second counsel sufficiently in advance of trial to prepare, and repeatedly denied timely funding for his defense and to pay his lawyers – even where funds were approved and fees were indisputably earned. His lawyer was not permitted to withdraw upon good cause shown. The prosecution's boundless, uncharged, and unproven conspiracy theory permitted jurors to find guilt upon less than proof beyond a reasonable doubt of individual culpability, and multiple instructional errors exacerbated this problem. His convictions and the true findings on the special circumstances were unsupported by substantial evidence. The guilt trial was a perfect storm of prejudicial error, calculated to drag appellant Vo to the death

chamber on the coattails of his far more culpable co-defendant. There can be no confidence in verdicts obtained under these circumstances.

These errors variously deprived appellant of his rights to liberty, fair trial, an unbiased jury, effective assistance of counsel, confrontation and cross-examination, due process, heightened capital case due process and equal protection under law, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Taken together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required, due to the cumulative error. (See *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, n. 6.; *Derden v. McNeel* (5th Cir. 1992) 978 F.2d I453; cf. *Taylor v. Kentucky*, *supra*, 436 U.S. 478 [several flaws in state court proceedings combine to create reversible federal constitutional error].) The length of deliberations and multiple questions from the jurors suggest that this was a difficult case for jurors to resolve. The multiple errors, in combination, cannot be considered harmless beyond a reasonable doubt.

Assuming arguendo that this court determines there was no constitutional error, it is reasonably probable that a result more favorable to appellant would have been reached absent the above errors. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Moreover, even assuming arguendo that this Court finds no prejudice at the guilt phase from the panoply of errors denying appellant Vo a fair trial, the effect of each and all of these guilt phase errors must be added to the subsequent penalty phase errors in the evaluation of cumulative error in both guilt and penalty phases. (See *People v. Hayes*

(1990) 52 Cal.3d 577, 644 [court weighs prejudice of guilt phase instructional error against prejudice in penalty phase].) The jury was instructed at the penalty phase here to ". . . consider all of the evidence which has been received during any part of the trial . . . ." (Vol. 25, RT 6378, Vol. 10, CT 2643.) However, because the issue resolved at the guilt phase is fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the penalty determination. (*Smith v. Zant* (llth Cir.1988) 855 F.2d 712, 721-722 [admission of confession harmless as to guilt but prejudicial as to sentence].)

As discussed further in a separate argument, post, reversal of the death sentence is mandated, because the state will fail in any effort to show that all the foregoing constitutional and non-constitutional violations had no effect whatever on the jury.

APPELLANT VO'S PENALTY PHASE ARGUMENTS

23. THE TRIAL COURT ERRED IN EXCUSING OVER OBJECTION JUROR ERNST, AND REFUSING TO EXCUSE JUROR WILLIAMS FOR EMPLOYMENT HARDSHIP.

The trial court abused its discretion in excusing one juror over objection, and for refusing to excuse another juror who reported a hardship involving her employment. These errors deprived appellant Vo of due process of law, a fair and impartial jury, a fair trial, his due process right not to be arbitrarily deprived of state law protections, and reliable determination of the issues in his capital trial.

Moving for a new trial on the ground of jury selection issues, appellant Vo argued that the trial court had prematurely and arbitrarily excused one juror for hardship. His replacement, on the other hand, was retained despite strong evidence of hardship. Her resentment at being obliged to serve negatively impacted appellant Vo's rights, including his right to due process. Counsel argued:

> "Over objection, the Court excused prospective juror Ernst. Mr. Ernst advised that his company had locked out its employees in a labor dispute, and he requested to be excused. Attorneys for defendant Vo asked that the Court defer any decision upon this issue, but the Court rejected that suggestion and ordered that Mr. Ernst be excused. The labor dispute was settled shortly after Mr. Ernst was excused and Ms. Williams was seated.
>
> "After the jury returned its verdicts in the guilt phase, Ms. Williams requested to be excused because she wished to participate in a course of instruction given in Washington, D.C. by her employer, and because she felt that her employment promotional opportunities would be substantially impaired. Although counsel ultimately requested that she be excused, the Court refused that request such that someone who appeared to be upset and angry was allowed to participate in the penalty phase proceedings in this matter." (Vol. 10, CT 2770.)

On April 10, 1995, Juror No. 7, Charles Ernst, was excused for hardship over the objections of counsel, and was replaced by juror Kathleen J. Williams. (Vol. 7, CT 1702.) Juror Ernst explained that he worked as an assistant grocery manager, but was currently locked out. (Vol. 14, RT 3412.)

> "My company chose to lock us out on Friday morning. I work for Save Mart Supermarkets, grocery chain. I talked to Regina Guerinan (phonetic), our personnel department. She said as of that time there is no collective bargaining agreement which is what indicates they pay jury pay."
>
> "So I called my union. I finally got a hold of somebody this morning.

> They said it was a grieveable [sic] point. Probably we would not win the grievance. I would not be paid jury pay. My problem is my house payment is paid by my work at Save Mart. I can go to work for a non-union – or for a non-struck company that is union, Nob Hill, PW, Lunardis. I put applications into all those companies. But none of them will hire me as long as I'm on jury duty." (Vol. 14, RT 3412.)

Appellant Vo's counsel objected to dismissal of the juror:

> "My concern is that we're getting far enough down into the alternates and it is a long enough trial, so that represents a problem from my perspective. I don't think anyone knows how long this particular labor dispute will take to resolve and it may well be a fluid type situation."
>
> "So my request is that he not be excused right now, but we wait a matter of a few days until we see what happens in that area."
>
> "I understand the economic concern. I understand the reality of it. I'm also very concerned we're down to three jurors, three alternates at this point. If Mr. Ernst is excused, then we're down to two. That's a little close for comfort."
>
> "So rather than take a position at this point, I would as the court to just defer it for a matter of days and see what's going on." (Vol. 14, RT 3413-3414.)

The prosecutor did not disagree with this concern, and in fact suggested the following:

> "Would it be reasonable to ask Mr. Ernst if he can suffer for the next four days, and with the understanding that if the strike doesn't resolve, he would be excused so that he would be free and he could tell future employers he would be able to get a job next week?" (Vol. 14, RT 3414.)

Counsel for co-defendant Hajek joined in the remarks of appellant Vo and the prosecution. (Vol. 14, RT 3414.) The trial court ruled that Mr. Ernst would be excused that day, and alternate juror Kathleen J. Williams was selected to sit on the jury. (Vol. 14, RT 3414.)

On May 18, 1995, while the jury was deliberating guilt, a jury note was sent to the trial court stating that juror Williams might have a conflict with her work schedule that

would "impact her ability to serve as juror after June 2, 1995." (Vol. 7, CT 1834.) On May 22, 1995, immediately after the jury's verdicts were read, Juror Williams was questioned, but was not excused from service at the penalty phase. Jurors were instructed to return on June 6, 1995, for penalty phase proceedings. (Vol. 8, CT 2114-2115.)

Following the verdicts at guilt phase, counsel for co-defendant Hajek stated:

> "I think given what is happening with the verdict – this would be my position – I think the court needs to make an inquiry to Miss Williams what the harship is and make a ruling after discussion with the attorneys outside her presence what will happen. And I'll state right now it better be something extraordinary becuase I don't want to lose a jury at this point. I'll state that right out front." (Vol. 22, RT 5641-5642.)

Ms. Williams was called into the courtroom, and she explained:

> "On June 5th I am scheduled to go to Washington, D.C. This is a career developmental step for promotion possibility. It is kind of a precursor to advancement in the organization."
>
> "I've already been able to postpone this. It was scheduled for the 1st of April, but this is the last particular two-week period until next year that I'll be able to attend this." (Vol. 22, RT 5642.)

Asked what would happen if she was not allowed to attend, she stated "potentially my career is put on hold. Advancement – my career is on put on hold for another year." (Vol. 22, RT 5643.) Following a brief recess, counsel for co-defendant Hajek reiterated that she could not agree to releasing Juror Williams, primarily because she had deliberated at guilt phase and an alternate juror would not have done so. (Vol. 22, RT 5643-5644.)

Counsel for appellant Vo had moved for a continuance after the guilt phase verdict, stating:

> "At this point I'm not sure – I don't believe we are ready. We are working as hard as we can work. We have the potential of forty witnesses to be called, and at this point we're not prepared to proceed. We are attempting to get ourselves into some state of readiness but not ready now. Experts still have not been paid. We're still in major trouble." (Vol. 22, RT 5640.)

Counsel for co-defendant Hajek objected to any significant break before the beginning of penalty phase. (Vol. 22, RT 5641.) The trial court ordered that evidence regarding Mr. Hajek would go first, in effect creating "two separate trials,"[151] and stated: "The way I see it, there will be a two-week break and in that two-week period of time Mr. Blackman [appellant Vo's counsel] will be ready." (Vol. 22, RT 5641.)

After Juror Williams was questioned about her hardship, appellant Vo's counsel stated that he also did not want her removed, but suggested an alternative that would accommodate both the juror's need to attend training and his need to prepare for the penalty phase:

> [Mr. Blackman]: "Also I am not at all comfortable with the state of my readiness, and would ask that the matter rather than it begin on the 5th begin on the 26th."
>
> "THE COURT: No.
>
> "MR. BLACKMAN: Because that gives my side a more adequate opportunity to be prepared and would accomodate her need to go to Washington and pursue her career. So I would request she not be excused, and additionally request we not begin until June 26th." (Vol. 22, RT 5645.)

The district attorney stated he had "no strong position" about this request. The trial court

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[151] The trial court later clarified that "Deliberations will be together. Evidence will be separate. We will have one trial, so to speak, and then have the other trial, but the jury will get both cases at the same time." (Vol. 22, RT 5648.)

advised the jury to return on June 6, 1995 (Vol. 22, RT 5647), including Juror Williams. (Vol. 22, RT 5647-5648.)

"It is the policy of the State of California that . . . all qualified persons have . . an obligation to serve as jurors when summoned for that purpose." (Code of Civil Procedure. § 197.) "Jury service is, after all, a duty as well as a right." (*People v. Buford* (1982) 132 Cal.App.3d 288, 299.) The legal ground for excusal is stated in Code of Civil Procedure section 204:

> "(a) No eligible person shall be exempt from service as a trial juror by reason of occupation, race, color, religion, sex, national origin, or economic status, or for any other reason . . . . (b) An eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council."

This Court has previously recognized that the improper or indiscriminate use of hardship excusals can violate the rights of a defendant. In *People v. Wheeler* (1978) 22 Cal.3d 258, 273, this Court strongly warned that:

> "[T]he continuing power to excuse prospective jurors on the grounds of 'suitability' and 'undue' hardship is highly discretionary in nature, and courts must be alert to prevent its abuse. In particular, excessive excuses on such grounds as sex, age, job obligations, or inadequate jury fees, can upset the demographic balance of the venire in essential respects."

Moreover, as the *Buford* court observed: "It is doubtful that either the Legislature or the Judicial Council intended that every financial cost be treated as an 'extreme financial burden'" that would justify excusal or deferral from jury service. (*People v. Buford*, *supra*, 132 Cal.App.3d at 298-299.)

In reviewing an exercise of discretion by a trial court, the appellate standard is to ascertain whether or not a reasonable basis for the action can be shown. This Court has long defined the term "judicial discretion" as follows:

> "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Baily v. Taaffe* (1866) 29 Cal. 422, 424.)

In this case, the trial court abused its discretion by excusing Juror Eadie without inquiring to determine whether he would face hardship if the decision whether or not to excuse him was delayed for a few days, to see if the strike settled and his financial concerns would thereby be eliminated.

By the same token, the trial court abused its discretion in refusing to delay the start of penalty phase in order to permit Juror Williams to attend to work-related matters necessary for advancement in her field, and permit appellant Vo's counsel to prepare for the penalty phase. The juror knew that she would be ineligible for advancement for the coming year if she could not attend the required event; unlike Juror Eadie, the record reflects that her hardship was therefore ripe.

Forcing a juror to continue at the cost of advancement in her employment creates a personal hardship inconsistent with a juror's obligations of fairness and impartiality. As the High Court has explained in the slightly different context of judicial bias:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness

> of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14."

(*In re Murchison* (1955) 349 U.S. 133, 136.)

Appellant Vo refers to and incorporates Argument 1, regarding the improper denial of severance. Appellant Vo's trial was irreparably tainted by the jury's consideration of evidence concerning co-defendant Hajek. The differing positions of the co-defendants as to when the penalty trial should begin present yet another instance of the same phenomenon – a situation in which appellant Vo's interests were adverse to those advanced by his co-defendant, and in which Vo's fundamental rights were sacrificed for the sake of moving ahead with the co-defendant's case.

Appellant Vo likewise refers to and incorporates Argument 2, regarding the trial court's denial of necessary continuances and refusal to provide adequate financial means to fully prepare and present his case.

Petitioner's conviction and death sentence were obtained in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States

Constitution, and by Article I, §§ 1, 7, 13, 15, 16 and 17 of the California Constitution, and state law, because the trial court abused its discretion as set forth above. To the extent that the rights violated were state-created, petitioner had a substantial and legitimate expectation in that interest, and was arbitrarily deprived of that liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

24. PETITIONER WAS DEPRIVED OF HIS DUE PROCESS AND STATUTORY RIGHT TO NOTICE OF THE EVIDENCE IN AGGRAVATION BY THE PROSECUTION'S DELAYED NOTICE, AND INTRODUCTION OF AGGRAVATING EVIDENCE NOT INCLUDED IN THE NOTICE.

Appellant Vo was deprived of his due process and statutory right to notice of the evidence in aggravation by the prosecution's delayed notice, and introduction of aggravating evidence not included in the notice. These errors deprived appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and corollary provisions of the California Constitution, including due process of law, confrontation and cross-examination, the effective assistance of counsel, and the right to a reliable and non-arbitrary determination of penalty.

On September 9, 1991, a minute order notes, "People are demanding death penalty." (Vol. 5, CT 1001-1002.) No formal notice was filed at that time, however.[152] On January 19, 1995, the District Attorney was ordered to prepare a notice of evidence in

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[152] The Notice of Prosecution's Penalty Phase Evidence. Penal Code § 190.3 was not filed by the prosecution until February 6, 1995. (Vol. 6, CT 1578-1579.)

aggravation. (Vol. 6, CT 1565.) On February 6, 1995, just days before the start of trial, a Notice of Prosecution's Penalty Phase Evidence. Pursuant to Penal Code § 190.3, dated January 24, 1995, was filed. (Vol. 6, CT 1579.) No proof of service appears in the record.

The notice stated that each guilt phase witness might be recalled, as well as police officers who interviewed the defendants (to testify to the lack of mitigating mental state conditions under PC § 190.3 (d) and (h). (Vol. 6, CT 1578-1579.) In addition, the People noticed an intent to introduce the following:

1. Each member of the Wang family, regarding victim impact. Pre-death photographs of victim will be offered. (Vol. 6, CT 1578.)

2. San Jose officer David Silva, regarding the arrest of Hajek in another incident on January 1, 1991, for possession of a stolen vehicle and loaded shotgun. (Vol. 6, CT 1578.)

3. Off. Luu Pham, Sgt. Ed Escobar, Sgt. John Lax, and DA investigator Bill Clark, to testify as to foundation for "seizure of documents written by defendants Vo and Hajek from their jail cells and residences." All documents which "involve the express or implied threat to use force or violence" will be offered. (Vol. 6, CT 1578.) [153]

4. DOC officer Barikmo and Sgt. Padget, regarding contacts with defendants in jail, "including threats by defendants to harm people and also the seizure of such written statements." (Vol. 6, CT 1578.)[154]

5. Dr. Angelo Ozoa, Coroner, regarding the victim's pain and suffering. (Vol. 6, CT 1579.)

6. McRobin Vo, Norman Leung, Lori Nguyen, Ngoc Nguy, Sindy Luc,

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[153] The notice did not specify what documents would be offered against each defendant.

[154] The notice did not specify statements, or which defendant particular statements would be offered against appellant.

regarding "their personal knowledge of the defendants up to the time of the crime in this case. They can describe factors under Penal Code § 190.3(a), (d), (f), (g), (h)." (Vol. 6, CT 1579.)[155]

7. FBI special agent William Heilman III, regarding handwriting identification of documents written by defendants. (Vol. 6, CT 1579.)

On June 5, 1995, appellant Vo filed a Motion to Restrict Prosecution to Evidence in Their §190.3 Notice Filed February 1995; Request for *Phillips* [156] Hearing. (Vol. 8, CT 2132-2139.)[157] Appellant also filed a Notice of Joinder by Defendant Loi Vo in Co-Defendant's Penalty Phase Motions. (Vol. 8, CT 2140.) Defendant Hajek's Motion to Exclude or Limit Evidence in Aggravation was also filed on June 5, 1995. (Vol. 8, CT

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[155] McRobin Vo is appellant's brother. The remaining witnesses were friends or acquaintances. The notice did not specify aggravating facts to which these witnesses might testify.

[156] *People v. Phillips* (1985) 41 Cal. 29 suggests that a hearing outside the presence of the jury, similar to an Evidence Code § 402 hearing, may be advisable to determine admissibility of aggravating evidence.

[157] Appellant's motion noted informal efforts to clarify the evidence in aggravation the prosecutor would seek to introduce against appellant. Initially, he represented he would only introduce the circumstances of the crime. (Vol. 8, CT 2133.) He then verbally stated that he would call Ellen Wang to testify about victim impact, introduce a photograph of the victim, present a letter seized from appellant's home (Exhibit 96), and present evidence concerning a razor blade found in appellant's jail cell. (Vol. 8, CT 2133.) Appellant contended that the prosecutor failed to comply with his obligation under *People v. Matthews* (1989) 209 Cal.App.3d 155 to provide specific and timely notice of the evidence in aggravation.

This motion argued that the prosecutor is limited at penalty phase to the aggravating evidence noticed under PC § 190.3, that the prosecution is prohibited from presenting evidence irrelevant to the sentencing factors of PC § 190.3, and that a hearing must be held to address admissibility of evidence the prosecution seeks to admit in aggravation.

2118-2125.)[158] The People's Brief Regarding Penalty Phase Evidence was filed June 5, 1995 (Vol. 8, CT 2202-2207)[159].

In open proceedings on June 5, 1995, the trial court ruled that victim impact evidence from Ellen Wang concerning monetary losses and emotional impact would be admitted, but reference to a grandfather in Taiwan was excluded. A photograph of the victim would be admitted. Evidence of appellant's alleged possession of a razor blade was excluded. As to co-defendant Hajek's stolen vehicle and shotgun possession charges, only the fact of conviction is admissible; Hajek's juvenile activities and possession of nunchucks were excluded. The offense of which appellant was acquitted was found inadmissible. (Vol. 8, CT 2210.)

The penalty phase began on June 6, 1995, with opening statements by the People and co-defendant Hajek; opening statement on behalf of appellant Vo was reserved. Ellen Wang testified for the People, and the People rested. (Vol. 8, CT 2213.)

The prosecutor's brief opening statement advised the jurors that:

> "Basically, the People are going to, in essence, be relying largely, almost entirely, on the underlying facts and circumstances of this crime. We're not going to represent that evidence." (Vol. 23, RT 5708.)

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[158] The motion to limit evidence in aggravation objected to introduction of victim impact evidence (Vol. 8, CT 2119-2121), introduction of other purported violent activity under PC § 190.3(b) (Vol. 8, CT 2121-2123), and the use of rebuttal evidence because it has not been noticed nor discovery provided. (Vol. 8, CT 2123-2125.)

[159] The People argued that (1) victim impact evidence is proper, (2) co-defendant Hajek had committed violent acts as a juvenile, (3) that Hajek's prior possession of weapons and a razor blade found in his's cell were violent criminal acts and admissible. (Vol. 8, CT 2202-2207.)

As set forth more fully in Argument 29, incorporated herein, during closing argument the prosecutor's argument included the following:

(1) A listing in the argument, and appeal for jurors to consider, non-statutory factors in aggravation.

(2) The prosecutor's argument improperly urged that the defendants' exercise of constitutional rights militated in favor of capital punishment.

(3) Lack of remorse was improperly urged as an aggravating factor.

(4) The prosecutor argued that age was an aggravating factor in this case.

(5) The prosecutor's argument, while paying lip service to individualized sentencing, strongly urged the jury to consider the defendants jointly, and to consider against both defendants factors which were, in fact, applicable to the co-defendant only.

A. The Prosecutor's Untimely Notice Violated State Law

Penal Code section 190.3 provides, in pertinent part:

> "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial."

The prosecutor's notice was untimely as it was not provided a reasonable period of time before trial.

> "Provisions of the penal statute should be construed according to the fair import of their terms, with a view to effect its objects and to promote justice. (Pen. Code, § 4; *People v. King* (1978) 22 Cal.3d 12, 23.) Even where statutory language is reasonably susceptible of different interpretations, the construction more favorable to the defendant should be adopted. (*People v. Boyd* (1979) 24 Cal.3d 285, 295.) Here, it is clear that hte Legislature

> intended that defendants charged with special circumstances justifying the imposition of the death penalty be informed of the evidence to be used in aggravation within a reasonable period before the trial commences in order to properly prepare for the penalty phase."

(*Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 587.)

The arbitrary deprivation of the state law right to notice of the evidence which would be used against him in aggravation of sentence amounts to a due process violation under federal law. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346.)

B. <u>The Lack of Timely Notice Violated Appellant's Constitutional Rights.</u>

Due process of law requires that a criminal defendant be given notice and an opportunity to be heard on the charges against him. (*In re Oliver* (1948) 333 U.S. 257, 273; *People v. West* (1970) 3 Cal.3d 595, 612.) Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo* (1965) 380 U.S. 545, 552; see also, *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 315 ["process which is a mere gesture is not due process"].) As the High Court has said, "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." (*Joint Anti-Fascist Refugee Comm. V. McGrath* (1951) 341 U.S. 123, 171-72.) The principle is of long standing, that "Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." (*Baldwin v. Hale* (1864) 1 Wall. 223, 233.)

The penalty phase of a capital trial "must satisfy the requirements of the Due

Process Clause" as well. (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also, *Presnell v. Georgia* (1978) 439 U.S. 14, n. 3 [requiring that defendants have the opportunity to rebut evidence and the State's theory in sentencing proceedings].) In the context of a capital sentencing proceeding, the heightened need for reliability requires that the defendant receive fair warning of a sentencing procedure that will be used against him. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The vital importance of notice as a component of due process at the penalty phase has been reiterated and confirmed by the High Court:

> "If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error [citation omitted], and with that, the possibility of an incorrect result.. [Citation omitted.]"

(*Lankford v. Idaho* (1991) 500 U.S. 110, 127.)

The denial of adequate notice of the factors in aggravation pressed by the prosecution not only deprived appellant Vo of his due process rights to notice and an opportunity to be heard, but a panoply of his other trial rights: to a fair trial *(In re Murchison* (1955) 349 U.S. 133, 136); *Duncan v. Louisiana* (1968) 391 U.S. 145, 149); to the benefit of mandatory state criminal procedure (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346); to be free from misinformation of a constitutional magnitude *(United States v. Tucker* (1972) 404 U.S. 443, 447-449); his Fourteenth Amendment right to equal protection (*Oyler v. Boles* (1962) 368 U.S. 448, 456); Sixth Amendment rights to counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335, 339-340), to the effective assistance of

counsel (*McMann v. Richardson* (1970) 397 U.S. 759, 771), to present a defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 690), to trial by jury (*Duncan v. Louisiana, supra*, 391 U.S. 145), and to a properly instructed jury (*Sandstrom v. Montana* (1979) 442 U.S. 510); and his Eighth Amendment right to a non-arbitrary, non-capricious, and individualized determination of whether death was the appropriate sentence (*Lockett v. Ohio* (1978) 438 U.S. 586, 601).

C. Appellant Was Prejudiced.

The error in failing to provide formal notice of the evidence in aggravation a reasonable time before trial compounded the error and prejudice flowing from the trial court's refusal to sever the co-defendants for trial (Argument 1 herein), the trial court's refusal to grant necessary continuances to appellant Vo (Argument 2), and the prosecutor's improper argument at penalty phase (Argument 29), all incorporated herein. Appellant faced a penalty proceeding in which he was not given adequate pretrial notice of the evidence in aggravation, was denied the continuance his counsel desperately needed to prepare to try the case, was forced to face and be painted as responsible for aggravating evidence introduced against his co-defendant, and saw his mitigating evidence wrongly transformed to aggravation by the prosecutor. Reversal is required.

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25. THE TRIAL COURT ERRED IN REFUSING TO PROVIDE A SEPARATE JURY FOR THE PENALTY PHASE.

On February 22, 1995, appellant moved the court to not excuse prospective juror Barrett from serving as a guilt phase juror in the case. (Vol. 3, CT 580.) The trial court denied the request, and ruled immediately that separate juries would not be selected for guilt and penalty phases. (Vol. 6, CT 1654; Vol. 3, RT 580.)[160]

Appellant argued that disqualification from serving on the penalty jury did not automatically exclude them from serving as a guilt phase juror. (Vol. 3, RT 580.) The trial court ruled that the issue was preserved as to other jurors similarly excused (Vol. 3, RT 581), and co-defendant Hajek joined in the motion. (Vol. 3, RT 582.)

Permitting otherwise qualified jurors to serve at the guilt phase of trial was the only way to minimize the adverse consequences of a "death qualified" jury, which is more likely to convict at a guilt phase than a jury not so qualified. The more a prospective juror favors capital punishment, the more likely he or she is to have general attitudes contrary to the principle of impartiality – authoritarian, punitive and unable to tolerate deviant behavior. Jurors tending to favor capital punishment have attitudes on specific phenomena which compromise their impartiality: ready identification with the prosecutor's effort to

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[160] This Court has repeatedly held that separate juries are not required for guilt and penalty phase. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 674.) Appellant respectfully submits that the issue has been wrongly decided, for reasons set forth in the dissent of Justice Marshall (joined by Justices Brennan and Stevens) in *Lockhart v. McCree* (1986) 476 U.S. 162, at 184 et seq.

punish, hostility to low-status persons (in particular, minority groups), improper prejudice against the insanity defense and constitutional protections of the accused and a tendency to distrust defense counsel and trust the prosecuting attorney. (See generally, White, *The Constitutional Invalidity of Convictions Imposed by Death Qualified Jurors*, 58 Cornell L.Rev. at p. 1185. See also, Haney, C., *Death by Design: Capital Punishment as a Social Psychological System* (2005, Oxford University Press), at p. 119 [noting psychological studies empirically demonstrating the biasing effects of death qualification].)

Death qualification violates constitutional guarantees of due process, fair trial, heightened capital case due process and equal protection, guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as parllel state provisions. (California Constitution Article I, § 7(a), (15).) This error abridges a defendant's constitutional right to a jury trial at the guilt stage without any sufficient justification. The only way to accommodate the state's interest in a death qualified jury for the penalty phase and the defendant's interest in a neutral jury at the guilt phase was to impanel two separate juries: one to hear the guilt phase, and the other to hear the penalty phase, should it be reached, and that such a procedure is allowable under § 190.4, subd. (e).

The denial of this motion violated appellant's rights to liberty, a fair trial, unbiased jury, due process, counsel, heightened capital case due process and reliable determinations of guilt, death eligibility, and penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the corresponding

state constitutional provisions. Respondent cannot show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

26. THE REFUSAL TO PROVIDE FOR INTER-CASE PROPORTIONALITY REVIEW DEPRIVED APPELLANT OF A RELIABLE SENTENCING DETERMINATION.

Appellant Vo filed a motion to preclude the death penalty on January 17, 1995, complaining that the imposition of a death sentence on him would be arbitrary under *Furman v. Georgia* (1972) 408 U.S. 238, 254-256, and that such a sentence would be disporportionate, as "the evidence does not distinguish this case from a non-death penalty case" He further sought discovery of the District Attorney's charging practices. (Vol. 6, CT 1540-1541.) Co-defendant Hajek joined in that motion. (Vol. 6, CT 1559-1560.)

On May 22, 1995, appellant filed a Supplement to Defendant Loi Vo's Motion *In Limine*: Motion to Preclude the Death Penalty. (Vol. 8, CT 2079-2096.) The motion argued that application of a death sentence to appellant would be arbitrary (again citing *Furman* and other authorities), and requesting judicial notice of recent cases involving 14 other defendants from Santa Clara County in which capital punishment was not sought. (Vol. 8, CT 2079-2087.) The supplemental motion further argued that the then-recent "Three Stikes" legislation (PC § 667 (c)) superceded and rendered unconstitutional California's capital punishment scheme, relying in part on *Enmund v. Florida* (1982) 458 U.S. 782. (Vol. 8, CT 2084-2095.)

There was no competent evidence in appellant Vo's case that he knew of co-

defendant Hajek's plans or statements that Hajek intended to kill, that Vo had any intent to kill, or that he actually participated in the killing of the victim. Hajek held a grudge against the grand-daughter of the homicide victim; Hajek made incriminatory statements about planning a homicide beforehand, and made incriminatory statements after arrest; Hajek alone had blood on his clothing; Hajek made threats against the family of the victim afterwards. Unlike co-defendant Hajek, appellant Vo had no history of criminal involvement, but instead planned a career in the military.

Appellant argued in his supplemental motion that:

> A party facing the death penalty may challenge the prosecutorial decision to seek a sentence of death if he can offer proof that the decision was made in a random, standardless, or discriminatory fashion. A showing by a defendant that he is capriciously or invidiously charged with special circumstances establishes a violation of fundamental constitutional rights. (*Gregg v. Georgia* (1976) 428 U.S. 153, 188; *Furman v. Georgia* (1972) 408 U.S. 238, 254-56; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 290; *People v. Superior Court (Bridgette)* (1987) 189 Cal.App.3d 1649.) Moreover, the appearance of vindictiveness in seeking the death penalty warrants dismissal of a special circumstance allegation. (See, e.g., *Blackledge v. Perry* (1974) 417 U.S. 21, 28; *In re David B.* 68 Cal.App.3d 931, 936.)

(Vol. 8, CT 2079-2080.) Appellant noted that the constitutional challenge set forth was narrowly tailored to the charging practices of the Santa Clara County District Attorney's Office in this case, and offered the fruits of a search of relevant court files ("limited by the time constraints associated with this case"). (Vol. 8, CT 2080.)

Cases reviewed and summarized in appellant Vo's motion included the

following[161], which demonstrate that appellant and his crimes were not in the category of "the worst of the worst," but rather – by the practices of this District Attorney office -- should have precluded him from consideration for a death sentence. Indeed, appellant's capital charging under these circumstances was akin to being struck by lightening: it was arbitrary and capricious, and therefore prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

> **People v. Angel Zetina Garcia**: The victim was lured by promise of a present (supporting a lying-in-wait special circumstance which was found true), then shot by defendant with shotgun as he approached defendant's car on Christmas day. The death penalty was not sought, although the defendant had previously been involved in a drive-by shooting, armed robbery wherein the victim was slashed with a knife, and was at the time of arrest selling cocaine in a distant city. (Vol. 8, CT 2081; Case No. 149923.)
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> **People v. Edward Jamoll Miller**: Defendant, a 20-year-old with no prior record, kidnaped and robbed the victim, then beat him to death. The death penalty was not sought. (Vol. 8, CT 2082; Case No. 150722.)
>
> **People v. Jeffrey Curtis Ault**: after denying the defendant's advances, the victim was raped, knocked unconscious, taken to a secluded place, stripped of clothing, and murdered by a shotgun blast to her back. After a hung jury, the defendant pled guilty to first degree murder and other charges, and the special circumstance allegation was stricken. (Vol. 8, CT 2082-83; Case No. 137380.)
>
> **People v. Larry Giraldes, Jr.**: The defendant was a drug dealer who executed two victims, also drug dealers, allegedly because they owed him money and were cutting the quality of drugs to increase profits. Defendant was also charged with burglary and conspiracy to escape from jail, and had a prior conviction for assault with a deadly weapon. No special circumstance allegations were charged. (Vol. 8, CT 2083; Case No. 157274.)

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[161] Appellant requested that the trial court take judicial notice of each of these files, housed in Santa Clara Superior Court. (Vol. 8, CT 2080.)

People v. Wiley, Brown, Alvaraz, and Santos: The defendants conspired in a murder-for-hire scheme, with Wiley killing the victim in the course of a kidnaping and robbery; the victim died of strangulation and a head injury, with a contributing stab wound to the abdomen, after being struck, handcuffed, and left in the trunk of an auto for a day or two. No special circumstances were charged. (Vol. 8, CT 2084; Case No. 152075.)

People v. Judith Ann Barnett: The defendant was charged with and convicted of a murder-for-financial-gain scheme to kill her ex-husband. The death penalty was not sought, and she was sentenced to LWOP. (Vol. 8, CT 2085; Case No. 171657.)

People v. Andrew Granger: The defendant was the actual killer of Judith Barnett's ex-husband, and sentenced to LWOP. (Vol. 8, CT 2085; Case No. 75927.)

People v. Charles Drue Smith: The defendant shot and killed his wife and a man who was helping her move. He entered guilty pleas to the murders and a multiple-murder special circumstance, and was sentenced to LWOP. (Vol. 8, CT 2085; Case No. 144492.)

Nuestra Familia: Three of the defendants in this large case pending at the time of appellant's trial had entered into plea agreements with the prosecution, which were expected to preclude the death penalty as to them. The agreement was under seal at the time this motion was made. (Vol. 8, CT 2086; Case No. 156285.)[162]

It is evident that defendants who were much more clearly involved in the potentially capital offenses with which they were charged were permitted to escape the possibility of capital punishment, and that defendants with much more serious criminal

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[162] As set forth more fully in Argument 2 of this brief, incorporated herein, the Nuestra Familia case had an extremely burdensome effect on appellant Vo's ability to defend in at least two direct ways: because of the number of defendants, virtually all of the counsel in the county who were qualified to act as second counsel were occupied, and the funding provided to conflict counsel through the Conflicts Administration Office was exhausted.

histories likewise did not have to face the death penalty, even though all of these defendants were prosecuted by the same District Attorney office, under the same set of laws.

Appellant refers to and incorporates herein Argument 32 of this brief, concerning the various ways in which California's capital sentencing scheme is constitutionally defective, and in particular Part C.7 of that argument, regarding proportionality review.

Appellant made a strong factual showing at the trial level of arbitrary and disproportionate application of the death penalty to him. His arguments were summarily rejected by the trial court. (Vol. 8, CT 2211.) The trial court abused its discretion in not permitting additional discovery of the District Attorney's charging practices and of potentially capital cases in which the death penalty was not pursued, and in failing to hold an evidentiary hearing to develop evidence concerning arbitrary and disproportionate charging practices that resulted in appellant facing a death sentence.

The denial of this motion violated appellant's rights to liberty, a fair trial, due process of law, counsel, heightened capital case due process, and reliable determinations of guilt, death eligibility, and penalty, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and corollary provisions of the state constitution. Respondent cannot show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

27. THE PENALTY OF DEATH AND EXECUTION IN CALIFORNIA ARE ARBITRARILY AND CAPRICIOUSLY IMPOSED DEPENDING ON THE COUNTY IN WHICH THE DEFENDANT IS CHARGED, IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW

Petitioner's death sentence and confinement are unlawful and unconstitutional. They were obtained in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7(b) and article IV, section 16(a) of the California Constitution, because the death penalty in California is imposed arbitrarily and capriciously depending on the county in which the case is prosecuted.

On January 17, 1995, appellant Vo filed a *Motion to Preclude Death Penalty*, which included a request for discovery the District Attorney's charging practices, complained that imposition of a capital sentence on appellant would be arbitrary under *Furman v. Georgia* (1972) 408 U.S. 238; and complained that such a sentence would be disproportionate (Vol. 6, CT 1540-1541). The motion to preclude the death penalty and request for discovery of the District Attorney's charging practices was joined by co-defendant Hajek on January 18, 1995, and the matter was submitted. (Vol. 6, CT 1559-1560.) As of February 7, 1995, one week before jury selection began, the matter remained pending. (Vol. 6, CT 1617.)

On May 22, 1995, appellant filed a Supplement to Defendant Loi Vo's Motion *In Limine*: Motion to Preclude the Death Penalty. (Vol. 8, CT 2079-2096.) The motion argued that application of a death sentence to appellant would be arbitrary (citing *Furman*

v. Georgia (1972) 408 U.S. 238, 254-256 and other authorities), and requests judicial notice of recent cases involving 14 other defendants from Santa Clara County in which capital punishment was not sought. (Vol. 8, CT 2079-2087.) The People's Response to Defendant Vo's Motion to Preclude the Death Penalty, asserting the appropriateness of prosecution discretion in charging decisions, was filed on June 5, 1995. (Vol. 8, CT 2208-2209.) The motion to preclude the death penalty was denied that same day. (Vol. 8, CT 2211.)

It is axiomatic that every person in the United States is entitled to equal protection of the law. (United States Constitution., Fourteenth Amendment.)

It is also true that since 1976 the Supreme Court of the United States has upheld the death penalty in general against Eighth Amendment challenges and allowed the states to vary in their statutory schemes for putting people to death. (*See Jurek v. Texas* (1976) 428 U.S. 262; *Proffitt v. Florida* (1976) 428 U.S. 242; *Gregg v. Georgia* (1976) 428 U.S. 153. *Cf. McCleskey v. Kemp* (1987) 481 U.S. 279.)

Nonetheless, on December 12, 2000, the Supreme Court of the United States recognized that when fundamental rights are at stake, uniformity among the counties within a state, in the application of processes that deprive a person of a fundamental right, are essential. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530-532.) When a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Id.*, at p. 532.)

This principle must apply to the right to life as well as the right to vote.

In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of Penal Code sections 190.2 and 190.25, as to who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of Penal Code §§ 190.2 or 190.25, the prosecutor is free to pick and choose which defendants will face potential death and which will face a potential lesser punishment.

This is not uniform treatment within the state. In some California counties a life is worth more than in others, because county prosecutors use different, or no standards, in choosing whether to charge a defendant with capital murder. (See, Glenn Pierce and Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005) 46 Santa Clara L. Rev. 1.) If different and standardless procedures for counting votes among counties violates equal protection, as in the *Bush* case, then certainly different and standardless procedures for charging and prosecuting capital murder must violate the right to equal protection of the law, as well. Such different and standardless procedures for charging and prosecuting capital murder also violate the Eighth Amendment mandate "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

To further demonstrate the differing standards or lack of standards among the 58 California counties, petitioner requests that funds be made available for further investigation, that discovery be permitted, that the court issue subpoenas and process as necessary, and that a full evidentiary hearing be held further to develop the facts supporting this claim.

This Court must therefore reexamine its prior precedents which hold that prosecutorial discretion as to which defendants will be charged with capital murder does not offend principles of due process, equal protection or cruel and unusual punishment. (*See e.g. People v. Anderson* (2001) 25 Cal.4th 543, 622-623; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Keenan* (1988) 46 Cal.3d 478, 505.)

Unequal treatment among the California counties violates the Fourteenth Amendment Equal Protection Clause, *Bush v. Gore*, *supra*, and article 1, section 7(b) and article IV, section 16(a) of the California Constitution. It also violates the Eighth Amendment and Article I, § 17 of the California Constitution.

28. THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO PROVIDE CONSTITUTIONALLY ADEQUATE GUIDANCE, AND INDEED REQUIRED THE JURY TO CONSIDER, IN MAKING ITS SENTENCING DETERMINATION, FACTORS AND EVIDENCE THAT WERE WHOLLY IRRELEVANT TO APPELLANT.

Appellant Vo's confinement and sentence are illegal, unconstitutional, and void under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, under Article I, §§ 1, 7, 13, 15, 16, and 17 of the California Constitution, and

the statutory and decisional law of the State of California, because the jury instructions given at the penalty phase of his trial failed to provide constitutionally adequate guidance to the jury, failed properly to channel and direct its discretion, and required it to consider evidence and factors wholly irrelevant to appellant Vo.

The arbitrariness and irrationality of these errors cannot be overstated. Appellant Vo was deprived of the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

As set forth more fully in Argument 21, the trial court unreasonably – and in defiance of state law and appellant's constitutional rights – failed to ensure that all proceedings in this capital case were transcribed. Among the missing transcripts are the following:

> June 14, 1995: The trial court held a discussion regarding penalty phase jury instructions, which is not reflected in the Reporter's Transcript. (Vol. 10, CT 2614-2615; Vol. 25, RT 6314-6315.)
>
> June 15, 1995: Between 2:00 and 4:00 p.m., the court and counsel engaged in unreported "informal" discussions of jury instructions. (Vol. 10, CT 2617; Vol. 25, RT 6347.)

As set forth more fully in Argument 2, incorporated herein, appellant Vo's counsel required a continuance before penalty phase, which was improperly denied. As of June 5, 1995, he had not had an opportunity to address jury instructions, among many other

matters bearing on his motion for continuance. (6/5/95, RT 5665.)

Appellant nonetheless filed forty-six proposed instructions; the packet was marked "rejected" by the trial court, and most individual instructions were marked "refused" and signed by the judge. (Vol. 9, CT 2478-2523.) The trial court nonetheless had the responsibility to provide constitutionally adequate instructions to the jury, and appellant had a corollary right to be adjudicated by a properly instructed jury. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145.) The trial court failed in its responsibility.

A. Sentencing factors that the jury was instructed to consider are unconstitutionally vague and overbroad, restricted consideration of mitigation, and permitted consideration of irrelevant sentencing factors.

1. Use of the Unitary List of Sentencing Factors, Including Irrelevant Factors, Was Improper.

The trial court failed to tell the jury which factors were aggravating or mitigating, or to give any definition or explanation of aggravation which might have served as a narrowing principle in the application of the factors. These errors resulted in unconstitutionally arbitrary and inconsistent sentencing, in several distinct respects.

The jury was instructed as follows:

> "You shall consider, take into account and be guided by the following factors, if applicable:
>
> "(A) The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true.

"(B) The presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(C) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceeding.

"(D) Whether or not the offense was committed under the influence of extreme mental or emotional disturbance.

"(E) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(F) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(G) Whether or not the defendant acted under extreme duress or the substantial domination of another person.

"(H) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication.

"(I) The age of the defendant at the time of the crime.

"(J) Whether or not the defendant was an accomplice to the offense and his participation in the offense was relatively minor. And;

"(K) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial."

(Vol. 25, RT 6378-6379.) A "clarification" of how jurors should apply these factors was as follows:

"The following factors may be considered by you as either factors in aggravation or factors in mitigation:

"1. The circumstances of the crime of which the defendant was convicted in the present proceedings, and the existence of any special circumstances found to be true;

"2. The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings;

"3. The age of the defendant."

(Vol. 25, RT 6381.) As argued further in Part A.iv, incorporated herein, the jury was not instructed which factors could only be used in mitigation.

Permitting the jury to use irrelevant or purely mitigating evidence in aggravation impermissibly allows the imposition of the death sentence in an arbitrary and unprincipled manner, violating the Eighth and Fourteenth Amendments. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 192; *Zant v. Stephens* (1983) 462 U.S. 862, 865.) The instructional omissions and ambiguities here made such errors even more likely (indeed, near certain, in view of the prosecutor's summation) and demonstrate the unconstitutional vagueness of section 190.3 and the unitary list of sentencing factors presented to jurors for consideration. (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The unconstitutional vagueness this unitary list therefore gave the jury no guidance whatsoever, and allowed the penalty decision process to deteriorate into a standardless, confused, subjective, arbitrary and unreviewable determination for each juror, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, supra, 428

U.S. at p. 192; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429; *Zant v. Stephens, supra*, 462 U.S. at p. 865.)

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo also refers to and incorporates herein the argument concerning this error, set forth at pp. 319-321 of co-defendant Hajek's Appellant's Opening Brief.

2. Factor A is Unconstitutionally Overbroad and Vague.

Appellant Vo refers to and incorporates herein argument concerning this error, set forth at Section B of Argument 32, post, regarding the unconstitutionality of California's capital sentencing scheme.

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo also refers to and incorporates herein the argument concerning this error, set forth at pp. 312-318 of co-defendant Hajek's Appellant's Opening Brief.

While this Court has repeatedly rejected generic challenges to the overbreadth of Penal Code Section 190.3's factor A (see, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Lewis* (2001) 26 Cal. 4th 334, 394), appellant respectfully urges this Court to reconsider its prior rulings. Alternatively and additionally, the overbroad application of factor A in appellant Vo's case was unconstitutional and prejudicial, because of the unique factual circumstances of this case.

As set forth more fully in Argument 1, incorporated herein by reference, the trial court erred in refusing to sever appellant Vo from co-defendant Hajek for trial. The

defenses of the two defendants were completely adverse. Appellant Vo took the stand and testified that he knew nothing of Hajek's plan to harm any member of the Wang family, and did not participate in the killing. Co-defendant Hajek did not testify, but his hearsay statement suggesting appellant Vo was the killer was admitted at penalty phase; obviously, since he did not testify, appellant Vo was not permitted to cross-examine Hajek.[163]

Co-defendant Hajek, moreover, presented a mental health defense to guilt, which was both irrelevant to appellant Vo's guilt of the homicide, and enormously prejudicial in that (a) he had no such defense to offer, but (b) the prosecutor used that fact to strategic advantage, arguing on the one hand that appellant Vo had no excuses for his involvement (see Vol. 25, RT 6394 [describing Vo as cold-blooded], Vol. 25, RT 6402 [arguing Vo had a "secret life"]), but also painting Vo with the psychopathy that he urged the jury was the true motivation for the co-defendant. (See, e.g., Vol. 25, RT 6393 [Hajek "enjoys being a terrorist"]; Vol. 25, RT 6415 [Hajek is "sadistic"]; Vol. 25, RT 6415 [Hajek dreams of sexually assaulting Ellen]; Vol. 25, RT 6391 [Hajek "gets pleasure from" murder].)

The prosecutor urged, and the instructions required (see Part C. of this argument), jurors to consider all of the evidence in the case, even that applicable solely to the co-defendant. Such evidence included but was not limited to: Hajek's incriminating statements before and after the crime, Hajek's other bad acts, Hajek's alleged fabrication of a mental state defense, Hajek's threat to a witness, Hajek's planning and acts. None of

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[163] Appellant Vo refers to and incorporates herein Argument 7, concerning the denial of his opportunity to confront and cross-examine his co-defendant.

this information would have been admissible in a separate trial, but all of it was used against appellant Vo as the jury considered penalty, as part of the "circumstances of the crime."

The jury was specifically instructed: "You must determine what the facts are from all the evidence received during the entire trial unless you are instructed otherwise." (Vol. 25, RT 6377.) The jury was not provided with any limiting instructions as to which evidence could be considered under factor A as against which defendant – a situation that could not have occurred with separate trials, and could have been prevented or at least ameliorated with adequate instructions in this joint trial. It was not, as argued further below, required to make findings as to the existence of aggravating factors, nor to find them unanimously.

3. Use of Restrictive Adjectives in the List of Mitigating Factors Improperly Restricted Jurors' Ability to Consider and Weigh Evidence in Mitigation.

Appellant Vo refers to and incorporates herein argument concerning this error, set forth in Argument 32, post, regarding the unconstitutionality of California's capital sentencing scheme.

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo also refers to and incorporates herein the argument concerning this error, set forth at p. 322 of co-defendant Hajek's Appellant's Opening Brief.

4. Failure to Instruct That Mitigating Factors are Relevant Only as Mitigators.

As noted above, the jury was instructed that it could consider that three factors of the unitary list of sentencing factors as either aggravation or mitigation: circumstances of the crime; presence or absence of prior felony convictions; and the age of the defendant. (See Part A.i., above; Vol. 25, RT 6381.) It was not instructed that all of the remaining factors could *only* be treated as mitigation.

Although the jury was instructed that the absence of a mitigating factor could not be considered as an aggravating factor (Vol. 25, RT 6381-6382), lacking instructions defining particular factors as applicable only to mitigation, the jury did not have any guidance about how to use that instruction. Given the "whether or not" preface to factors (d), (e), (f), (g), (h), and (i), jurors could reasonably conclude that these factors, too, could either be considered aggravating or mitigating. Under state law, these factors are only relevant as mitigating factors. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

At best, the failure specifically to instruct the jurors that most of the sentencing factors can only be considered as mitigation created constitutionally intolerable confusion. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322.)

No language was read which in any way limited the jurors' consideration of matters in aggravation to the factors stated, consistent with section 190.3. An initial safeguard for

capital sentencing is the enumeration of aggravating factors as such, so as to guide, channel and limit the penalty jury's consideration of evidence against the accused to relevant matters.

Section 190.3 and the sentencing instructions given appellant Vo's jury are unconstitutionally vague in failing to limit the jury to consideration of specified factors in aggravation; they fail to guide the jury, permit the prosecutor to argue non-statutory matters as evidence in aggravation and allow the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable enterprise manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192; *Godfrey v. Georgia, supra*, 446 U.S. at pp. 428- 429; *Stringer v. Black, supra*, 503 U.S. 222, 235; *Zant v. Stephens, supra*, 462 U.S. at p. 865.)

Appellant Vo refers to and incorporates herein argument concerning this error, set forth in Argument 32, post, regarding the unconstitutionality of California's capital sentencing scheme.

Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo also refers to and incorporates herein the argument concerning this error, set forth at pp. 321-322 of co-defendant Hajek's Appellant's Opening Brief.

5. The Trial Court Erred in Refusing to Give Appellant's Pinpoint Instruction, Describing Potential Factors in Mitigation Applicable to Appellant Vo.

Appellant Vo submitted a number of proposed jury instructions, all of which were

rejected by the trial court. (Vol. 10, CT 2478-2523.) The record does not reflect the reasons why requested instructions were requested, because two conferences among counsel and the trial court concerning penalty phase jury instructions inexplicably were not reported. (Argument 21.)

Appellant Vo's Proposed Penalty Phase Instruction No. 13 (Vol. 10, CT 2490-2494) set forth illustrations of potential factors in mitigation applicable to Mr. Vo, which would have illustrated for the jury the individualized nature of the sentencing determination as required by the Constitution. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

Certain of the potential mitigating factors contained in Appellant Vo's Proposed Penalty Phase Instruction No. 13 concerned the circumstances of the offense: lack of criminal sophistication; that Vo (unlike Hajek) did not threaten witnesses or otherwise illegally interfere with the judicial process; that the crime did not involve taking or damaging things of great monetary value; that Vo did not take advantage of another's trust to commit the offense (unlike Hajek, who used friendship to ensnare Vo's participation); and that Vo did not use force or violence to avoid arrest. (Vol. 10, CT 2490-2491.)

Other potentially mitigating factors set forth in the requested instruction addressed sympathetic aspects of Vo's background and character (Vol. 10, CT 2491-2493), including but not limited to:

"(1) whether the defendant's psychological growth and development affected his adult psychology and personality;

(2) whether the defendant has a low sense of self-esteem and self-worth;

(3) the defendant's sense of being the object of ridicule and abuse by his parents and the resultant creation of pain, humiliation, and shame;

(4) whether the defendant suffered any emotional or psychological problems as an adolescent or young adult that prevented him from acquiring necessary social skills and maturity;

(5) the defendant's inability to meet his parents' expectations;

(6) the defendant's ability to engender feelings of love and respect for him by his family, friends, teachers, and correctional officers;

(7) whether the defendant was able to develop and maintain meaningful social relationships with others;

(8) the defendant's sense of social isolation;

(9) the likely effect of a death sentence on the defendant's family and friends;

(10) whether factors in the defendant's upbringing, early family life, and childhood contributed to his criminal conduct;

(11) whether the defendant was subjected to physical or psychological abuse or cruelty during his formative years;

(12) whether the defendant has positively adjusted to the type of structured and institutionalized environment in which he will live for the rest of his life if given a sentence of life in prison without the possibility of parole;

(13) whether the defendant has made positive contributions to the jail environment in which he now lives and whether he will continue to make such contributions if he serves a sentence of life without the possibility of parole;

(14) whether the defendant, by his advice and concern for others, has positively affected both inmates and staff with whom he has associated during his incarceration in jail;

(15) whether the defendant has a calming and guiding effect upon younger inmates;

(16) whether the defendant will assist prison staff in reducing tension and conflict within state prison;

(17) whether the defendant endeavored to obtain an education and exhibited good behavior while incarcerated;

(18) whether the defendant will contribute skilled labor which will help in the operation of the state prison system;

(19) the defendant's artistic potential;

(20) the defendant's age, immaturity, or lack of emotional development at the time of the commission of the crime;

(21) the defendant's willingness and ability to comply with the terms of a sentence of life without the possibility of parole;

(22) the defendant's potential for rehabilitation and for contributing affirmatively to the lives of his family, friends, and fellow inmates;

(23) the likelihood that the defendant will not be a danger to others if sentenced to life imprisonment without the possibility of parole;

(24) whether or not there are any other facts which may be considered as extenuating or reducing the defendant's degree of moral culpability for the crimes he has committed, or which might justify a sentence of less than death even though such facts would not justify or excuse the crime."

Appellant Vo's Proposed Penalty Phase Instruction No. 13 was supported by numerous citations to authority, both federal constitutional and state law. These included

Penry v. Lynaugh (1989) 492 U.S. 302, 319[164]; *Stanford v. Kentucky* (1989) 109 S.Ct. 2969; *Skipper v. South Carolina* (1986) 476 U.S. 1, 3-5; *Eddings v. Oklahoma* (1982) 455 U.S. 104[165]; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605[166]; *People v. Turner* (1990) 50 Cal.3d 668; *People v. Lucero* (1988) 44 Cal.3d 1006, 1030; *People v. Lanphear* (1984) 36 Cal.3d 163, 167.

In addition, appellant Vo requested a specific instruction that his military service in the National Guard "may be considered as a mitigating factor," citing *People v. Garceau* (1993) 6 Cal.4th 140, 206 and Penal Code § 190.3(k). (Proposed Penalty Phase Instruction No. 29, Vol. 10, CT 2509.) The trial court made no notation on this proposed instruction, but it was not given.

The trial court abused its discretion in refusing these instructions concerning

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[164] *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 held: "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse. *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).".

[165] *Eddings v. Oklahoma* (1982) 455 U.S. 104 held that the trial court erred in refusing to consider in mitigation evidence of the defendant's violent family history and mental/emotional disturbance; the sentencer must consider mitigating evidence even if it does not provide a legal excuse from criminal liability.

[166] *Lockett v. Ohio* (1978) 438 U.S. 586, 604 held: "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (emphasis in the original).

potentially mitigating evidence applicable to appellant Vo, which would have clarified for jurors the individualized nature of the capital sentencing determination. The error compounded the errors in instructing the jury with inapplicable factors, and requiring it to base its decision on all evidence in the case, including aggravating evidence relevant only to co-defendant Hajek. This error contributed to the unreliable, non-individualized sentencing process in which the jury was instructed to engage.[167]

6. The Jury Was Instructed to Consider Sympathy, but That Consideration Was Not Limited to the Defendant, as Is Constitutionally Required.

The jury was instructed that in making the penalty determination, it could consider sympathy and like considerations: "In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty. (Vol. 25, RT 6377; Vol. 10, CT 2641.) However, the instruction did not limit these to sympathy for the defendant.

The Eighth Amendment requires that "any decision to impose the death sentence be, and appear to be, based on reason, rather than caprice and emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The confusing instructions given to the jury allowed the jury to decide for itself whether sympathy and sentiment could be weighed both for and

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[167] Pursuant to California Rules of Court, Rule 8.200(a)(5), appellant Vo also refers to and incorporates herein the legal discussion of errors in denying pinpoint instructions at the penalty phase, set forth at Argument XXIII, pp. 259-268 of co-defendant Hajek's Appellant's Opening Brief.

against appellant; the instructions did not clearly guide them.

The trial court failed to instruct the jury to apply sympathy only in mitigation, and that only sympathy for appellant as raised by evidence presented at the penalty phase or based on its observation of appellant could be weighed in the jury's deliberations. (*People v. Lanphear* (1984) 36 Cal. 3d 163.) Instead, the instructions allowed the jury to consider sympathy for the victim and the victim's family members in determining the appropriate sentence for appellant Vo. This error in the instructions violated the Eighth Amendment because it neither suitably channeled the decision-maker's discretion, nor adequately apprised the jurors of the standards by which they must abide in imposing death. (*Gregg v. Georgia, supra*, 428 U.S. at 189.)

As the late Justice Mosk noted on several occasions, with the concurrence of other members of the Court, "if jurors are permitted, indeed, encouraged, to entertain emotion in assessing penalty, in most instances they are likely to order death .... " (*People v. Lanphear, supra*, 36 Cal. 3d at 170.) In other words, "sympathy is more likely to be evoked in favor of the innocent victim" than for the capitally convicted defendant. (*People v. Easley* (1983) 34 Cal. 3d 858, 886.) There is at least a reasonable likelihood that jurors hearing the conflicting instructions delivered here would apply them in an unconstitutional fashion in this case, requiring penalty reversal. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 337-40.)

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7. The Instructions Were Inadequate to Convey the Individualized Sentencing Constitutionally Required in a Capital Case, and in Fact Required Jurors to Consider Evidence and Factors Solely Applicable to the Co-defendant in Making a Determination of the Appropriate Sentence for Appellant Vo.

Jurors were instructed to consider all of the evidence, and were not instructed that evidence relevant only to the co-defendant could not be used against appellant Vo. The jury was instructed specifically:

> "In determining which penalty is to be imposed on each defendant, you shall consider all of the evidence which has been received during any part of the trial of the case, except as you may be hereafter instructed."

(Vol. 25, RT 6378; emphasis added.) The trial court thereafter read a list of all sentencing factors, whether or not applicable. No limiting instructions were given.

Although different factors applied to the cases in mitigation and aggravation as to each defendant, the jury was instructed on all of the sentencing factors under PC § 190.3, including inapplicable factors. (Vol. 25, RT 6378-6379. Vol. 10, CT 2643.) Clarification was provided as to use of only three factors; the jury was instructed it could consider the circumstances of the crime, the presence or absence of prior felony convictions, and age as either aggravation or mitigation. (Vol. 25, RT 6381; Vol. 10, CT 2648.)

The jury was instructed that the word "defendant" applies equally to each unless instructed otherwise. (Vol. 10, CT 2640, Vol. 25, RT 6376-6377.) Although the jury was instructed to decide the question of penalty separately for each defendant (Vol. 10, CT

2646, 2651; Vol. 25, RT 6381), it was not instructed that the evidence introduced in aggravation or mitigation as to one defendant must not be considered in deciding the appropriate punishment for the other defendant. In fact, the jury was instructed to consider all of the evidence, arguments, and sentencing factors. (Vol. 25, RT 6378; Vol. 10, CT 2654.)

Some evidence was admitted as to co-defendant Hajek only, and the jury was instructed to consider this as aggravating evidence only if it was proven beyond a reasonable doubt (Vol. 10, CT 2653); however, its use was not limited to Hajek only. This instruction failed to clarify that the evidence of prior crimes could only be used against co-defendant Hajek, not appellant Vo.

The record is incomplete concerning discussions among the trial court and counsel regarding penalty phase jury instructions. Nonetheless, the trial court had a sua sponte duty to provide instructions to the jury to properly guide its sentencing discretion. (*Maynard v. Cartwright* (1988) 486 U.S. 356.) It failed to do so.

These interlocking instructional errors – requiring jurors to use all evidence admitted at trial, and failing to limit use of aggravating evidence relevant only to the co-defendant – deprived appellant Vo of a reliable, individualized capital sentencing procedure as required by the constitution. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

The instructions were unconstitutionally vague in failing to limit the jury to consideration of specified factors in aggravation; they fail to guide the jury, permit the prosecutor to argue and the jury to consider irrelevant matters as evidence in aggravation, and allowed the penalty decision process to proceed in an arbitrary, capricious, death-biased and unreviewable enterprise manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra*, 428 U.S. at p. 192; *Godfrey v. Georgia, supra*, 446 U.S. at pp. 428- 429; *Stringer v. Black, supra*, 503 U.S. 222, 235; *Zant v. Stephens, supra*, 462 U.S. at p. 865.)

8. No Burden of Proof Was Assigned, Nor the Quantum of Proof Necessary to Establish Factors in Aggravation or the Appropriateness of Capital Punishment for an Individual Defendant.

Appellant Vo refers to and incorporates herein argument concerning this error, set forth in Argument 32, post, regarding the unconstitutionality of California's capital sentencing scheme.

Appellant Vo also refers to and incorporates herein the argument concerning this error, Argument XXVI, set forth at pp. 284-298 of co-defendant Hajek's Appellant's Opening Brief.

9. A Unanimous Finding Beyond a Reasonable Doubt Was Not Required to Establish Factors in Aggravation or the Appropriateness of Capital Punishment for an Individual Defendant.

Appellant Vo refers to and incorporates herein argument concerning this error, set

forth in Argument 32, post, regarding the unconstitutionality of California's capital sentencing scheme.

Appellant Vo also refers to and incorporates herein the argument concerning this error, set forth at pp. 321-322 of co-defendant Hajek's Appellant's Opening Brief.

10. The Jury Was Not Required to Make Written Findings.

Appellant Vo refers to and incorporates herein argument concerning this error, set forth in Argument 32, post, regarding the unconstitutionality of California's capital sentencing scheme.

Appellant Vo also refers to and incorporates herein the argument concerning this error, set forth at pp. 322-325 of co-defendant Hajek's Appellant's Opening Brief.

B. Conclusion

Appellant Vo was deprived of a constitutionally reliable and individualized sentencing procedure, because the jury instructions given at the penalty phase of his trial failed to provide constitutionally adequate guidance to the jury, failed properly to channel and direct its discretion, required it to consider evidence and factors wholly irrelevant to appellant Vo, and to consider as aggravation factors which the jury could only properly consider as mitigation. Reversal is required.

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29. THE TRIAL COURT ERRONEOUSLY REFUSED TO PRECLUDE IMPROPER ARGUMENT BY THE PROSECUTOR.

The penalty proceedings in this case deprived appellant Vo of his State and Federal Constitutional rights to due process, fair trial, a reliable and non-arbitrary determination of penalty, and procedural protections guaranteed by California law, because of the prosecutor's pervasive, highly prejudicial misconduct.

The prosecutor in appellant Vo's case committed misconduct during penalty phase argument in the following ways:

a. The prosecutor improperly argued non-statutory factors in aggravation.

b. The prosecutor's argument improperly urged that the defendants' exercise of constitutional rights militated in favor of capital punishment.

c. Lack of remorse was improperly urged as an aggravating factor.

d. The prosecutor argued that age was an aggravating factor in this case, speculating that defendant would be dangerous in prison because he was youthful.

e. The prosecutor's argument, while paying lip service to individualized sentencing, strongly urged the jury to consider the defendants jointly, and to consider factors applicable to the co-defendant only.

The prosecutor's brief opening statement advised the jurors that:

> "Basically, the People are going to, in essence, be relying largely, almost entirely, on the underlying facts and circumstances of this crime. We're not going to represent that evidence." (Vol. 23, RT 5708.)

During closing argument, the prosecutor argued that the victim was tortured,

referring to the testimony of the coroner. (Vol. 25, RT 6387) He urged:

> "When you consider the Factor "K" evidence, I also want you to consider the impact on the rest of the Wang family. Su Hung wasn't one individual who didn't touch other people's lives. She had five sisters, she had a husband. Consider the effect on Cary Wang. Look how it affected her marriage."

(Vol. 25, RT 6387-88.) The prosecutor continued describing effects on members of the Wang family, describing them as "a lifelong sentence they will have to live with" immediately before referring again to Factor "K" evidence. (Vol. 25, RT 6388.)

Much of the prosecutor's argument focused on co-defendant Hajek. Playing a tape of Hajek's statements highlighting his desire to kill Ellen Wang, the prosecutor argued, "That is the real Stephen Hajek" (Vol. 25, RT 6391), and he urged that Hajek "was aware that psychological defenses might excuse his behavior." (Vol. 25, RT 6392.) He urged jurors to consider various letters written by Hajek "to get the whole picture of Stephen Hajek," arguing, "That's a person who shows absolutely no remorse. Deserves no mercy, no mitigation." (Vol. 25, RT 6392.) Further, the prosecutor argued that Hajek only began taking his medication when he had to face these charges, that Hajek threatened violence against correctional officers after his conviction in one of his letters, and that he would stop and "no correctional officer is safe. That's the real Stephen Hajek." (Vol. 25, RT 6394.) When the prosecutor next compared appellant Vo to Hajek, an objection was sustained. (Vol. 25, RT 6395.)

The prosecutor argued that Factor I, the age of the defendants, was not a mitigating

factor; indeed, he argued that appellant's age "makes them worse prisoners, more dangerous, less controllable in the prison situation." (Vol. 25, RT 6397.)

Jurors were urged to disregard evidence of difficulties in appellant Vo's background, on the theory that his family showed him love and "did not teach him sadism" (Vol. 25, RT 6399) so "he does not fall into this exception or concern." (Vol. 25, RT 6400.) Regarding the friends who testified in mitigation on behalf of appellant Vo, the prosecutor argued that "his other friends were really bad" (Vol. 25, RT 6400), that he "got involved with the wrong crowd after high school" and those people "could be gangsters." (Vol. 25, RT 6402.) Jurors were told that "none of these witnesses are mitigating," and that appellant Vo "[d]oes not deserve any consideration." (Vol. 25, RT 6402.)

Returning to co-defendant Hajek, the prosecutor addressed his other criminal activity, reminding jurors of an event in which he and another person were stopped in a stolen van with a loaded shotgun. (Vol. 25, RT 6403.) Hajek was not mentally ill at the time of the capital offense, the prosecutor maintained, but rather "was under the influence of evil, his own sadistic nature." (Vol. 25, RT 6403.) The prosecutor endeavored to diagnose Hajek as "sadistic," using evidence developed in cross-examination of Hajek's mental health expert. (Vol. 25, RT 6413-6415.) In conclusion, the prosecutor reminded jurors of Hajek's taped statement, arguing,

> "I submit Mr. Hajek is monstrous, voice on that tape. Blood of the 73-year-old woman he never knew on his gloves, is not remorseful, but howling how he further wants to beat and damage her granddaughtter. That's the type of case that deserves the death penalty. Both of these defendants deserve the

death penalty for the monstrous crimes that mark no understanding." (Vol. 25, RT 6419.)

The prosecutor also repeatedly referred to Hajek's alleged sexual interest in Ellen Wang (e.g., Vol. 25, RT 6415), and to a vague "secret life" on Vo's part (e.g., Vol. 25, RT 6402), implying that the defendants were somehow motivated by sexual perversion.

A. The Prosecutor Committed Misconduct in Argument.

A prosecutor can be a forceful advocate, but "[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." (*United States v. Young* (1985) 470 U.S. 1, 7, 105 S. Ct. 1038, quoting *Berger v. United States* (1935) 295 U.S. 78, 88, 55 S.Ct. 629; see also *People v. Talle* (1952) 111 Cal.App.2d 650, 678, 245 P.2d 633.) A prosecutor commits misconduct by referring to facts not in evidence. (*People v. Bolton* (1979) 23 Cal.3d 208, 212, 152 Cal. Rptr. 141 (1979). It is equally well-settled that the prosecutor may not misstate the facts that are in the record. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181-2, 106 S.Ct. 2464.) Indeed, the prosecution has "a 'special duty not to mislead,' and should not deliberately misstate the evidence." (*United States v. Richter* (2d Cir. 1987) 826 F.2d 206, 209 [quotations and citations omitted]; See also *People v. Talle*, *supra*, 111 Cal.App.2d at 677 ["It is [the prosecutors'] duty to see to it that those accused of crime are afforded a fair trial."]) Of course, a prosecutor cannot make up facts. (*People v. Bolton*, *supra*, 23 Cal.3d at 212.

The rules of professional conduct applicable to public prosecutors are not only required as a matter of professional responsibility (see *United States v. Young*, *supra*, 470

U.S. at 8 ["It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw," (quoting ABA Standards for Criminal Justice 3-5.8 (2d Ed. 1980)]); they are also required as a matter of due process. As the U.S. Supreme Court emphasized in *Berger v. United States*, *supra*, 295 U.S. at 88, due process dictates that a prosecutor's "interest" may not be that he "win a case, but that justice shall be done." (See also *People v. McCracken* (1952) 39 Cal.2d 376, 349, 246 P.2d 913.)

In a capital case, prosecutorial misconduct is all the more egregious, because the Eighth Amendment to the U.S. Constitution requires heightened reliability, and due process to ensure that reliability, whenever death is a possible outcome. *(Woodson v. North Carolina, supra*, 428 U.S. at 288-301.) Thus, the prosecutor's failure to provide constitutionally adequate notice, his reliance on the criminality and callous words of appellant Vo's co-defendant to paint appellant with the same tar of condemnation, his use of inadmissible and unreliable evidence, his use of improper, non-statutory aggravation and improper argument that the appellant's mitigating evidence was an aggravating factor, all contributed to the unreliability of the sentencing verdict in this case.

In any capital case penalty phase proceeding, skewing the scales of justice in favor of death creates a constitutionally impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) Therefore, penalty phase prosecutorial misconduct is particularly

egregious in effect. (*See Caldwell* v. *Mississippi*, *supra*, 472 U.S. at pp. 326-334.) A prosecutor's position is such that any improper acts ". . . are apt to carry much weight against the accused when they should properly carry none." (*Berger* v. *Kemp*, *supra*, 295 U.S. at p. 88.)

B. The Prosecutor Improperly Argued Non-Statutory Factors in Aggravation.

Under California law, only statutory factors in aggravation may be considered by the jury at a capital sentencing trial. The prosecutor argued several non-statutory factors in aggravation, including: lack of remorse (Vol. 25, RT 6391, 6396); failure to show mercy to the victim; future dangerousness in prison (Vol. 25, RT 6398, 6420); the co-defendant's alleged sadistic tendencies (Vol. 25, RT 6292, 6394, 6395, 6415, 6416) and sexual interest in Ellen Wang (Vol. 25, RT 6395, 6416); the co-defendant's alleged fabrication of a mental health defense (Vol. 25, RT 6393, 6405, 6407, 6411-6412); appellant Vo's family's caring for him (Vol. 25, RT 6394, 6399); the "bad crowd" that appellant Vo allegedly frequented after high school (Vol. 25, RT 6399, 6400); and Vo's alleged "secret life" (Vol. 25, RT 6401, 6403). In addition, he urged that the "innocence" of the victims was a reason to sentence the defendants to death. (Vol. 25, RT 6387, 6397.)

In *People v. Boyd* (1985) 38 Cal. 3d 762, 775-776, this Court established that evidence of non-statutory aggravating factors is not admissible during the penalty phase of a capital trial, and the prosecutor may not argue that any non-statutory factors should be considered in aggravation:

> "[T]he prosecution's case for aggravation is limited to evidence relevant to the listed factors exclusive of factor (K) – since that factor encompasses only extenuating circumstances offered as a basis for a sentence less than death – while the defense may present evidence relevant to any listed factor including (K)."

The prosecution's argument that evidence other than statutory aggravation – even evidence offered in mitigation – provided a basis for a death sentence was grossly improper and requires reversal.

C. The Prosecutor's Argument Improperly Urged That the Defendants' Exercise of Constitutional Rights Militated in Favor of Capital Punishment.

The prosecutor argued that the defendants were entitled to no mercy, because they had shown the victim no mercy. (Vol. 25, RT 6387.) This argument was improper. It is a non-statutory aggravating factor, which is not permissible under California law (see above), nor does it serve to narrow and channel the jury's discretion at sentencing. The argument suggested that the exercise of appellant's constitutional rights should be weighed against the fact that the victim was not permitted such rights.

This Court has consistently held that in the penalty phase of a capital case, a jury should properly consider "sympathy or pity for the defendant in determining whether to show mercy and spare the defendant from execution, and that it is error to advise the jury to the contrary." (*People v. Robertson (I)* (1982) 33 Cal.3d 21, 57, citing *People v. Vaughn* (1969) 71 Cal.2d 406, 422, and *People v. Polk* (1965) 63 Cal.2d 443, 451.) Accordingly, it is "erroneous and misleading" for the prosecutor to suggest to the jurors

that they should not consider sympathy or pity in reaching their penalty verdict. (*People v. Robertson (I)*, *supra*, at p. 58.)

This Court has held that "[i]t is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience." (*People v. Haskett* (1982) 30 Cal.3d 841, 863.) Similarly, the United States Supreme Court has held that the Eighth Amendment requires "consideration of the character and record of the **individual offender** and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304.)

The suggestion that appellant should die because he did not accord his victim due process of law is contrary to the Eight Amendment because in no homicide case, capital or non-capital, will the defendant be able to make such a showing. This proffered basis for the imposition of a death sentence does nothing to channel the juror's discretion, and it operates to preclude consideration of those factors relevant to the determination of sentence in a capital case. (See *Lockett v. Ohio* (1978) 438 U.S. 586 and *Eddings v. Oklahoma* (1982) 455 U.S. 104.)

D. Lack of Remorse Was Improperly Urged as an Aggravating Factor.

The prosecutor improperly urged lack of remorse as a factor in aggravation. Appellant Vo contended that while he was present in the home where the capital offense took place, he did not commit that crime. It was improper to urge the exercise of appellant

Vo's constitutional right to defend as a basis for a death sentence.

Prosecutorial argument seeking imposition of death based on a defendant's lack of remorse violates a defendant's Fifth, Eighth and Fourteenth Amendment rights, as well as California law. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Fierro* (1991) 1 Cal.4th 173, 244; *Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527, 1544-1545.)

To the extent that the prosecutor's argument was based on the statements of co-defendant Hajek after the crime, those statements were irrelevant to appellant Vo; they failed to constitutionally channel the jury's discretion during their deliberations of sentence, and failed to provide him with the individualized determination of sentence required by the Eighth Amendment. (See *Lockett v. Ohio, supra,* 438 U.S. 586; *Eddings v. Oklahoma, supra,* 455 U.S. 104; *Woodson v. North Carolina, supra,* 428 U.S. 280, 304.)

E. The Prosecutor Argued That Age Was an Aggravating Factor in this Case, Speculating That Appellant Would Be Dangerous in Prison Because He Was Youthful.

Co-defendant Hajek had committed a number of acts from which jurors could reasonably infer that he might pose a risk of assaultive behavior in prison. These included prior criminal activity while armed with a weapon, the fact he had blood on his person after the homicide, his statements that he wished to kill another victim, threats against witnesses, physically violent behavior in the jail, and a specific threat to assault guards after conviction. None of these factors was present with appellant Vo; indeed, Vo

presented evidence to the effect that he would not pose a danger in prison.

The prosecutor, however, reminded the jurors of Hajek's multiple deeds of misconduct, and proceeded to argue that both defendants would be dangerous in the future; part of this argument for death relied upon the fact that the defendants were young. (See, e.g., Vol. 25, RT 6420.) This argument, as applied to appellant Vo, rested on two improper prongs: urging the jury to condemn appellant for the misconduct of another, and urging the jury to treat appellant's youthful age itself as an aggravating factor despite his lack of a prior record. The argument again deprived appellant Vo of the individualized determination of sentence which he was guaranteed. . (See *Lockett v. Ohio, supra,* 438 U.S. 586; *Eddings v. Oklahoma, supra,* 455 U.S. 104; *Woodson v. North Carolina, supra,* 428 U.S. 280, 304.)

F. The Prosecutor's Argument, While Paying Lip Service to Individualized Sentencing, Strongly Urged the Jury to Consider the Defendants Jointly, and to Consider Factors Applicable to the Co-defendant Only.

The Eighth Amendment requires that a defendant facing capital charges receive an individualized determination of penalty. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304.) This Court has held that the sentence of a co-defendant is irrelevant at penalty phase. (*People v. Belmontes* (1988) 45 Cal. 3d 744.)

Throughout his argument, the prosecutor strongly urged the jury to consider the culpability of appellant Vo and co-defendant Hajek jointly. For example, he argued that "there's no question that these two murderers, attempted mass murderers, deserve the

death penalty," and that the only issue was whether jurors had the "guts" to impose it. (Vol. 25, RT 6386.) Hajek was the obviously more culpable defendant: it was Hajek who knew Ellen Wang and had a dispute with her, Hajek who enticed appellant Vo to go with him that day, Hajek who had blood on his clothing, Hajek who bragged about the crime, who said later that he wished to kill Ellen Wang, who threatened witnesses, who had prior criminal trouble. The prosecutor focused on Hajek, then argued that Vo was just as evil and deserving of the death penalty – but none of the evidence relating to Hajek's culpability was relevant in the least to appellant Vo. As a consequence, Vo did not receive an individualized sentencing proceeding as the Constitution requires. (See *Lockett v. Ohio, supra,* 438 U.S. 586; *Eddings v. Oklahoma, supra,* 455 U.S. 104; *Woodson v. North Carolina, supra*, 428 U.S. 280, 304.)

G. Conclusion

Appellant refers to and incorporates herein Argument 28 concerning improper jury instructions, which failed to advise the jury that it could not use evidence relevant to co-defendant Hajek as a basis for sentencing appellant Vo to death.

For all these reasons, appellant Vo's sentence of death must be reversed. Considered individually, and certainly cumulatively, these acts violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to liberty, a fair trial, notice, unbiased jury, cross-examination and confrontation, due process, heightened capital case due process, reliable guilt determination and individualized and reliable penalty determination.

(See *Hicks* v. *Oklahoma*, *supra*, 447 U.S. at p. 346; *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 428-429; *Stringer v. Black*, *supra*, 503 U.S.; *Zant v.Stephens*, *supra*, 462 U.S. at p. 865.)

30. THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION FOR NEW TRIAL.

The trial court's denial of appellant Vo's Motion for New Trial was erroneous and an abuse of discretion. The trial court arbitrarily deprived Vo of his entitlement to a new trial under state law, and violated his rights to due process of law, a fair trial, the assistance of counsel, confrontation and cross-examination, and to reliable and non-arbitrary determinations of guilt, capital eligibility, and punishment under the 5th, 6th, 8th, and 14th Amendments of the United States Constitution, and corollary provisions of the California Constitution.

All but one of the grounds raised for a new trial are addressed in other arguments in this brief, and incorporated herein. The remaining ground for a new trial came to light only after the penalty verdict, when trial counsel learned that jurors considered and relied on non-existent evidence: jurors believed they heard appellant Vo admit to killing the victim on a tape recording of exceedingly poor quality, but in fact no such admission was made on that tape. This and related bases for the new trial motion are addressed in more depth in this argument.

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A. Procedural History.

Appellant Vo's Motion for New Trial was filed on or about August 20, 1995, arguing the verdict was contrary to law and the evidence (PC § 1181(6)) and pointing to various errors throughout the trial:

> (1) Insufficient evidence to support the torture special circumstance.
>
> (2) Insufficient evidence to support the lying in wait special circumstance.
>
> (3) Admission of letters written by co-defendant Hajek, over objection of appellant Vo.
>
> (4) Denial of the severance motion despite inconsistent defenses, and the admission of evidence applicable only to one defendant.
>
> (5) Admission of co-defendant Hajek's statement to witness Moriarty the night before the homicide, over objection of appellant Vo.
>
> (6) Admission of a tape recording of a conversation between the defendants (Exhibit 53), despite such poor quality that substantial portions were inaudible, permitting the jury to speculate and base its verdict on unreliable evidence.
>
> (7) Excusal over objection of prospective juror Ernst, and the refusal to excuse juror Williams for employment hardship.
>
> (8) Denial of continuance requests, requiring counsel to defend when he was not prepared to go forward.
>
> (9) Payment issues that caused counsel to be unprepared at trial, prevented counsel from preparing and presenting additional evidence for sentencing, and prevented full investigation of matters concerning jury deliberations; all resulting in an unfair trial for appellant Vo.

(Vol. 10, CT 2764-2772.) This motion was also supported by a Declaration of James W.

Blackman Respecting Juror Interview. (Vol. 10, CT 2773-2774.)[168]

On August 18, 1995, co-defendant Hajek filed a Motion for New Trial. (Vol. 10, CT 2752-2755.)[169] This motion was supported by the Declaration of Brenda Wilson, a paralegal who attended an interview with three jurors on August 10, 1995. (Vol. 10, CT 2756-2757.)[170] Also pending before the trial court was appellant Vo's Motion to Reduce Death Verdict to the Penalty of Life Imprisonment Without the Possibility of Parole [Penal Code §190.4(e); §1181(7)], filed on August 16, 1995. (Vol. 10, CT 2730-2740.)[171] That motion was supported by the Declaration of Jeane DeKelver, appellant's second counsel,

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[168] Appellant's lead counsel interviewed juror Eadie at his home on August 1, 1995. The jury did not conclude which defendant was responsible for what behavior, and did not concern itself with "intent to kill" since one or both must have been involved in the killing. A number of jurors placed great weight on the taped conversation between the defendants, and their perception that appellant Vo made admissions that he and co-defendant Hajek had killed the victim. (Vol. 10, CT 2773-2774.)

[169] Co-defendant Hajek argued that a new trial should be granted because the death verdict is contrary to the law and evidence, and the jury considered improperly admitted evidence; co-defendant Hajek reiterated earlier objections to admission of Exhibit 53 including that its inaudibility would confuse and mislead the jury. In addition, Hajek asserted that the jury was improperly instructed on the elements of lying in wait. (Vol. 10, CT 2753-2754.)

[170] The declaration of Brenda Wilson recounts an interview with three jurors on August 10, 1995. All jurors stated that the most influential piece of evidence supporting the death verdict against co-defendant Hajek was a taped conversation between the co-defendants. Jurors spent two to three days trying to decipher the tape, and each reported they had heard each defendant say "we killed her." One juror would not have returned a death verdict absent the statements, "we killed her." (Vol. 10, CT 2756-2757.)

[171] Appellant argued that: (1) the trial court is required to weigh the evidence and make an independent determination whether death is the appropriate sentence; (2) the trial court has the power to reduce the jury's verdict in its role as a thirteenth juror; stating the reasons why the evidence presented at guilt and penalty phase militate against a death sentence; (3) the application of the death penalty should be narrowed to only execute the worst of the worst. (Vol. 10, CT 2730-2740.)

relating conversations with several jurors after the penalty phase (the first also attended by the prosecutor and an investigator for the Public Defender, and the second also attended by counsel for co-defendant Hajek). (Vol. 10, CT 2741-2744.)[172]

On October 12, 1995, the trial court heard appellant Vo's motion to preclude the death penalty, joined by co-defendant Hajek, and it was denied. Appellant Vo's motion for new trial based on issues regarding Exhibit 53, joined by co-defendant Hajek, was heard; jurors Miller and Frahm were sworn and examined, the motion was argued, and submitted. Motions for new trial based on denial of severance, special circumstance issues, admission of letters of the defendants, and the tape recording were denied. (Vol. 11, CT 2827-2828.)

B. Applicable Legal Provisions

Penal Code § 1181 enumerates the statutory grounds upon which a new trial may be granted. Subdivision (5) provides that a new trial may be granted when the court has erred in the decision of any question of law arising during the course of the trial. (Vol. 10, CT

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[172] Jurors Eadie, Delarosa, Miller, Frahm, and Candelaria discussed the deliberations after the verdict. The jurors believed that on the tape (Exhibit 53), they heard appellant Vo state several times, "we're murderers." They repeatedly said the tape made a difference in the penalty verdict. Neither the prosecutor nor any defense counsel heard this statement on the tape. One juror asked if the sentence could be commuted, and that she felt it should be commuted.

Three jurors (Miller, Frahm, and Candelaria) later met with defense counsel and stated that they believed appellant Vo said on the tape, "we killed her;" one juror stated that appellant would not have been convicted without the tape. These jurors also stated that they "assumed" co-defendant Hajek had told appellant Vo about his conversation with witness Tevya Moriarty the night before the murder. (Vol. 10, CT 2741-2744.)

2766.) Subdivision (6) of that section provides that a new trial may be granted "When the verdict or finding is contrary to law or evidence ," including insufficiency of the evidence. (Vol. 10, CT 2766-2767, citing *People v. Robarge* (1953) 41 Cal.2d 628; *People v. Knutte* (1896) 111 Cal.453; *Witkin, California Criminal Law*, Vol. 6, §§ 3064, 3065.)

In *People v. Fosselman* (1983) 33 Cal. 3d 577, 582, this Court held that:

> "Penal Code section 1181enumerates nine grounds for ordering a new trial. It is true the section expressly limits the grant of a new trial to only the listed grounds . . .. Nevertheless, the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.' (Glasser v. United States (1942) 315 U.S. 60, 71 [additional citations omitted.]."

In *People v. Hedgecock, supra*, 51 Cal.3d 395, 414, cited by counsel for appellant Vo (10/12/95, RT 29), this Court held that a trial court has discretion to hold an evidentiary hearing to determine the truth of allegations of jury misconduct prior to deciding the new trial motion, and that jurors may be subpoenaed to testify.

C. Appellant Was Entitled to a New Trial to Correct Multiple Instances of Unfairness.

1. Insufficient Evidence to Support the Torture Special Circumstance.

Appellant Vo's Motion for New Trial argued that:

> "The evidence does not establish the existence of the elements which must be proven for this particular special circumstance and does not establish a specific intent on the part of Loi Tan Vo to kill the victim in this case. Additionally, the evidence does not establish pain in addition to the pain

which is inherent in the death of the victim." (Vol. 10, CT 2767.)

At the hearing on the new trial motion, held October 12, 1995, counsel argued:

> "As to the special circumstances of torture and lying in wait . . . there are a number of elements that must be established, and it is our position, which I incorporate now . . . that the evidence as to this particular case as it relates to Mr. Vo, does not support the necessary evidentiary foundation for either the torture or lying in wait.
>
> "As the California Supreme Court has articulated those elements . . . with the specific intents and type of pain and all the rest of it we discussed that the evidence just does not establish the existence of these specials, the evidence in this case." (10/12/95, RT 7.)

Counsel also argued that there was insufficient evidence to show the "qualitative difference" making death the appropriate punishment. (10/12/95, RT 7-8.)

In denying the motion for new trial, the trial court noted that "there was sufficient evidence on the record to justify a finding of torture." (10/12/95, RT 29.)

Appellant refers to and incorporates herein Argument 9, regarding insufficiency of the evidence to support the torture special circumstance.

2. Insufficient Evidence to Support the Lying in Wait Special Circumstance.

In his Motion for New Trial, appellant Vo argued:

> "The evidence does not prove the elements as to the special circumstance of lying in wait and does not prove a specific intent to kill on the part of Loi Tan Vo." (Vol. 10, CT 2767.)

At the new trial motion, counsel argued that there was insufficient evidence to support the lying in wait special circumstance finding, and that the evidence was

qualitatively insufficient to support the imposition of capital punishment. (10/12/95, RT 7-8.)

In denying the motion for new trial, the trial court noted that "the target was not the victim," but that "they lying in wait was there." (10/12/95, RT 29.)

Appellant refers to and incorporates herein Argument 10, regarding insufficiency of the evidence to support the lying in wait special circumstance.

3. Admission of Letters Written by Co-defendant Hajek, over Objection of Appellant Vo.

Moving for a new trial, appellant Vo argued:

> "During the guilt phase the Court admitted, over the objection of Loi Tan Vo, various letters which were written by Mr. Hajek during his incarceration.
>
> "The prejudicial impact of these letters upon Vo was significant because of their inflammatory nature and the language of the letters. The letters represented hearsay as to Vo and there was insufficient support in the record for the prosecution's assertion that they were written pursuant to a conspiracy. It was impossible for Vo to protect himself through the right of cross-examination/confrontation." (Vol. 10, CT 2767-2768.)

During the new trial motion, counsel argued:

> "Additionally, we would base the motion on the admission of the letters. It appears that the jury was concerned and considered the various letters which Mr. Hajek wrote when he was incarcerated, and I think the weight of the evidence shows the letters which he wrote when he [Hajek] was suffering from this psychological state, the psychiatric state. So we've got letters written by arguably an incompetent or substantially impaired way [sic] and those were used against my client Mr. Vo." (10/12/95, RT 8.)

Appellant refers to and incorporates herein Arguments 2, 6 and 7 , regarding the

trial court's error in admitting letters written by co-defendant Hajek, which were irrelevant and inflammatory as to appellant Vo.

4. Denial of the Severance Motion Despite Inconsistent Defenses, and the Admission of Evidence Applicable Only to One Defendant.

Appellant Vo moved for a new trial on the ground that the trial court had erred in denying him a severance from his co-defendant:

> "In pre-trial proceedings, Vo made a Motion for Severance, and it was error for the Court to deny that motion. The prejudicial effect of the denial of the Motion became apparent as the matter proceeded through the guilt and the penalty phases.
>
> "On various occasions evidence was admitted before the jury when it was appropriately admissible as to only one defendant and should have been restricted as to one defendant. However, because of the Court's denial of the Motion for Severance the jury was confronted with the problem of separating the evidence and allocating it to a particular defendant, and this responsibility proved to be impossible.
>
> "The defendants presented inconsistent defenses and because they were required to do so in the context of a joint trial, were subtantially hampered in obtaining complete and quality consideration of the defense because of the position taken by the co-defendant as to that evidence. The jury experienced substantial difficulty in separating the evidence and the issues as to each individual defendant." (Vol. 10, CT 2768.)

At the new trial motion, counsel for appellant Vo argued:

> "[W]e suggest the reason for the severance motion and the reason why we brought the severance motion originally in this case, the concerns which we expressed along that line have come to pass, because I would suggest that it was completely impossible for the jury, based on the totality of this record and the evidence that related to Mr. Vo contrasting and comparing that with the evidence that related to Mr. Hajek, to keep the two separate.
>
> "Also there were inherent conflicts between the defense of Mr. Hajek

and the defense of Mr. Vo, so that as I on behalf of Mr. Vo sought to raise matters that I thought were appropriate from his perspective, that brought in a conflict of interest from Mr. Hajek's standpoint.

"Again I don't case any aspersions or make any negative comment about Mr. Hajek's defense reaction to what I did, because we were put in a position where in order to protect the best interest of Mr. Hajek, his counsel needed to do certain things, which turned out to be antagonistic and harmful to Mr. Vo. So we're not able to get a fair trial with the jury's individualized opinion or individualized evaluation of the evidence as to Mr. Vo because we have to worry in a sense about the two prosecutors, one for the government and one for the co-defendant." (10/12/95, RT 8-9.)

The trial court denied the motion on this ground. (10/12/95, RT 28.)

Appellant refers to and incorporates herein Argument 1, regarding the trial court's egregious error in refusing to sever the trials of appellant Vo and co-defendant Hajek.

5. Admission of Co-defendant Hajek's Statement to Witness Moriarty the Night Before the Homicide, over Objection of Appellant Vo.

Appellant Vo's Motion for New Trial argued that:

"Over objection, the Court allowed into evidence Hajek's statement to Tevya Moriarty on the evening before the homicide. The Court did not limit or restrict the admissibility of the statement to Hajek.

"In a separate trial, this statement would not have been admissible against Vo and no way was possibly [sic] for him to protect himself from the prejudicial impact of this statement in a joint trial." (Vol. 10, CT 2768-2769.)

At the new trial motion, appellant Vo's counsel argued:

"[A] separate and independent ground of the problems [sic] that pertain from Mr. Vo's standpoint is Mr. Hajek's statement to Ms. Moriarty. In a separate trial with Mr. Vo alone, Mr. Hajek's statements to Ms. Moriarty would not have been admissible . . . and to bring them into a trial where Mr. Vo is attempting to defend himself substantially ties his hands and makes it

virtually impossible for him to do that because of the evidence that comes in against the co-defendant which can't be separated by a jury." (10/12/95, RT 9.)

Appellant refers to and incorporates herein Argument 4, regarding the trial court's error in admitting co-defendant Hajek's statement to witness Moriarty the night before the offense, and refusing to limit its use to Hajek alone.

6. Admission of a Tape Recording of a Conversation Between the Defendants, Despite Such Poor Quality That Substantial Portions Were Inaudible, Permitting the Jury to Speculate and Base its Verdict on Unreliable Evidence.

Appellant Vo argued in his New Trial Motion two errors related to the admission of a tape recording of a conversation between appellant Vo and co-defendant Hajek: first, that the admission of the tape was error because it was of such poor quality that it invited speculation, and second, that the jury in fact speculated and based its verdict in part on unreliable evidence. Specifically, jurors thought that they heard appellant Vo admit to killing the victim, but in fact no such admission is contained in that tape recording.

> "Officers of the San Jose Police Department tape recorded a conversation between Vo and Hajek after they were arrested for the instant homicide.
>
> "The tape was of poor quality and a substantial portion of the tape was impossible to hear.
>
> "The effect of the admission of this tape recording was to allow the jury to speculate and surmise such that their verdict is not based upon quality and reliable evidence." (Vol. 10, CT 2769.)

Elaborating on the lack of quality evidence to support the verdicts, Vo argued further:

"In statements to counsels after the verdicts were returned, various members of the jury stated that they placed great weight upon their review of the tape recording made of conversations by Hajek and Vo when they were in police custody. Various jurors stated that they heard on the tape on three or four occasions that Vo admitted to the killing of the elderly victim.

"The tape recording has been reviewed on many occasions by counsel for the parties and it is clear that no statements by Vo, admitting the killing, exist on the tape recording. The jurors have stated that they place great weight upon their belief as to Vo's admissions, and consequently the verdicts both as to the penalty phase and the guilt phase are so devoid of factual support as to violate the rights of due process and a fair trial." (Vol. 10, CT 2769-2770.)

In arguing the new trial motion, counsel for appellant Vo stated:

"There are a number of points that relate to the tape recording that was taken, what we call the surreptitious tape recording, and it was taken by officers of the San Jose Police Department of various conversations . . . between Mr. Vo and Mr. Hajek after they were arrested.

"The tape was of extraordinarily poor quality. It was hard to hear. What you heard was hard to hear and there was a lot on the tape you couldn't hear at all. Again we're confronted with a situation that is the evidence and somehow I'm supposed to defend Mr. Vo against that, and I think it was of such a poor quality that it should not have been allowed in, and in fact caused one of the more significant problems in this case, and that is as shown by the declarations which we have filed and as shown by the testimony which we would offer, the jurors heard the statement which they attributed to Mr. Vo on the tape to the effect of, we killed her, and they heard that on apparently three or four occasions depending on who you talk to on the jury, they heard that on the tape. And from our perspective, those things were just not on the tape.

"So you have jury confusion that has started by the playing of this tape recording. There was no transcript possible because the transcript made it even more confusing. So this particular bit of evidence which turned out to be of extraordinary importance was put before the jury and substantial confusion arose." (10/12/95, RT 9-10.)

"So you bring into question the quality of the verdict because it is based on something that does not exist. And it violates, I would suggest, Mr.

Vo's right to reliable, competent, trustworthy evidentiary basis for both the guilt and penalty verdicts." (10/12/95, RT 11.)

a. Factual Basis for New Trial.

The trial testimony concerning alleged statements of appellant Vo contained in the tape recording was brief: Officer Walter Robinson testified that only Hajek's statements are audible on the tape. (Vol. 16, RT 3818, 3844.) At no point were any alleged admissions by appellant Vo introduced via testimony.

Addressing the issue of jurors considering and founding their verdicts on non-existent admissions of appellant Vo, appellant's lead counsel, James W. Blackman submitted a declaration recounting his conversation with Juror Eadie. (Vol. 10, CT 2773-2774.) Mr. Blackman's declaration states in pertinent part:

> "5. Mr. Eadie stated that the jury concluded that the victim was killed in the residence between 10:00 a.m. and 3:00 p.m. on the date of the homicide. He stated that because both of the defendants were involved in the residence and in various activities within the residence that 'one or both must have been involved in the killing.' He stated that **the jury was not concerned about the specific conduct attributable to a particular defendant** and did not arrive at a conclusion as to whether one was the actual killer and as whether [sic] the other was an aider and abetter. The jury did not attempt to attribute particular behavior to an individual defendant.
>
> "6. He stated that **the jury was not concerned about the intent to kill** because of its conclusion that the evidence was sufficient based upon its analysis that the victim was killed at the residence within the time frame specified above and that one or both must have been involved in the killing.
>
> "7. Mr. Eadie advised that a number of jurors placed great weight upon statements made by the defendants when their conversations were tape recorded after their arrest by the San Jose Police Department. A number of jurors placed great weight upon their perception that Vo made admissions on

the tape to the effect that he and Hajek had killed the victim. According to Mr. Eadie, various jurors believed that it was extremely important and gave great weight to their perceptions as to both the guilt and the penalty phase." (Vol. 10, CT 2773-2774; emphasis added.)

The Declaration of Jeane DeKelver in Support of Motion for New Trial and to Reduce Death Verdict to LWOP states that after the death verdict, she (in the company of the Deputy District Attorney and an investigator from the Public Defender's Office) met with several jurors: Ron Eadie, Richard Delarosa, Allice Miller, Linda Frahm and Lorraine Candelaria. (Vol. 10, CT 2741-2743.) Pertinent excerpts from that declaration follow:

"6. After the verdict, the jurors stated that they had heard Loi Vo state on the surreptiously [sic] taped conversation between defendants (hereinafter referred to as 'the tape') that 'we killed her' several times.

"7. The jurors stated that the district attorney had provided one tape player during the guilt phase and a different and better one during the penalty phase.

"8. The jurors repeatedly stated that the tape made the difference in the penalty phase.

"9. In discussing this purportedly [sic] statement by Loi Vo on the tape ('we killed her'), it was agreed between all counsel (Mary Greenwood, James Blackman, Peter Waite and Jeane DeKelver) that no one heard this statement being made.

"10. Based on my independent review of the tape and when the tape was played for the jury, in open court, during the guilt phase, Hajek was heard stating 'we're murderers.'

"11. The jurors stated they never figured out who killed the victim or how she was killed.

* * *

"14. On August 3, 1995, I went to the office of the district attorney. I listened to the tape, using the specific tape player the jurors used during the penalty phase.

"15. During the preparation for the guilt phase, I received a transcript of the tape and the tape from lead counsel, James Blackman. I spent at least two hours listening over and over to this tape, using a good quality Sony recorder, with earphones. Based on this, I added and corrected words on the transcript. **I did not hear Loi Vo state that 'we killed her'**.

"16. On August 3, 1995 when I used the tape player the jurors referred to, I heard additional but insignificant words I had not heard before; however, **I did not hear the words 'we killed her'**. I was specifically listening for these words based on the juror statements.

"17. On August 10, 1995, three jurors (Miller, Frahm and Candelaria) agreed to meet with Mary Greenwood (attorney for co-defendant Hajek), her paralegal, and myself at the Public Defender's Office.

"18. On August 10, 1995, Lorraine Candelaria stated her opinion that there would have been no conviction of Loi Vo without the tape.

"19. On August 10, 1995, Lorraine Candelaria stated and Alice Miller agreed that they heard Loi Vo say 'we killed her four times on the tape. Alice Miller only heard it three times.

"20. On August 10, 1995, these three jurors stated that all twelve jurors agreed they heard 'we killed her' three times.

"21. On August 10, 1995, these three jurors stated that **the jury decided that they didn't need to decide who killed the victim. They assumed that since both these defendants were in the house and the victim was killed that they both killed her.**

"22. On August 10, 1995, these three jurors stated that they assumed that Hajek told Vo about his conversation with Tevya Moriarty the night before the murder." (Vol. 10, CT 2742-2744; emphasis added.)

A paralegal for the Public Defender, Brenda Wilson, also submitted a declaration in

support of co-defendant Hajek's motion for new trial, recounting the following about the August 10, 1995 meeting with jurors:

> "During this interview, all three jurors [Linda Frahm, Lorraine Candelaria, and Alice Miller] were specifically asked why they returned a death verdict against Stephen Hajek. All three jurors stated that the most influential piece of evidence was the enhanced tape of Stephen Hajek and Loi Vo speaking in the holding cell. The jurors described at length how **they spent between two to three days on the tape trying to decipher it**;
>
> "Each juror stated that she heard each defendant state several times 'We killed her.' **Each juror stated that hearing this was pivotal in determining that they should return a verdict of death**;
>
> "Alice Miller specifically stated that she would not have returned a death verdict against either defendant unless she had heard them state, 'We killed her;'"

(Vol. 10, CT 2756-2757.)

During the motions for new trial, counsel for co-defendant Hajek argued

> "As far as motion for new trial, the areas we have to discuss is the area of the tapel. I'm very concerned about this. I'll tell the court the reason for that because I understand different people can hear different things. Although it doesn't always appear this way to jurors, generally I prepared my case very carefully and I was shocked what I heard from them." (10/12/95, RT 13.)
>
> "I think the basic problem with all this and reason I always had a problem with the tape is this: in every trial the evidence needs to be reliable. That's fundamental. But particularly in a capital case, the Eighth Amendment of the United States Constitution requires reliability and due process of law. Also requires that the evidence received be competent and reliable. So on those basis, the Fifth, Fourteenth, and Eighth Amendments, and under the doctrine of due process of law, we are requesting that a hearing be conducted.
>
> "I think we need to make it clear here, we are not making any accusation that the jurors did something wrong in the jury room. They were

> given a piece of evidence and they did what any human being would do in the first place. The heart of the problem has to do with whether that piece of evidence was reliable in the first place." (10/12/95, RT 13-14.)

At that point, the trial court observed that the transcript of the tape had not been admitted into evidence:

> THE COURT: "When I was listening to the tape and I was reading the transcript, they were not the same. So I ruled early on that the transcript could not be used because when I was listening to the tape the transcript was not an adequate transcription of what I heard on the tape. So I think I ruled that where normally the transcript would be given to the jurors, in this case the transcript was so unreliable that I did not allow it. So it varied from the normal procedure of this court where the transcript would be given and we all listen to it together." (10/12/95, RT 15-16.)

The prosecutor objected to holding a hearing, arguing that "counsel has admitted they are not citing any improper actions by the jury," and characterizing the legal challenge as attacking the "subjective reasoning processes" of jurors. (10/12/95, RT 16-17.) Evidence was permitted from two jurors, subject to a motion to strike. (10/12/95, RT 17.)

Juror Alice Miller testified that she was a juror at both guilt and penalty phases of this trial. (10/12/95, RT 18.) Jurors listened to the take recording of Mr. Hajek and Mr. Vo at the guilt phase, but they had a very poor tape recorded. She heard no admissions of Mr. Vo during the guilt phase deliberations. (*Ibid.*) At the penalty phase, jurors again listened to the tape, and she heard statements in the voice jurors identified as Mr. Vo; she heard that voice say, "We killed her," on three occasions. (10/12/95, RT 19.) Jurors considered that phrase during deliberations. (10/12/95, RT 20.) Juror Miller stated that:

> "We went through the tape once completely, however, we went back over

> hard to hear segments over and over and over, listened to them on headphones, said that sounds like this to me and we would listen again, and if listen again, and if we couldn't agree on what it was we agreed we didn't agree." (10/12/95, RT 20.)

Jurors reviewed portions of the tape numerous times.

> "The first time when I couldn't hear the 'we,' we were listening on headphones. Later on I heard it without the headphones, but we had the headphones on several different times. I had the headphones on several different times. I can tell you for sure which I heard when. After – I believe, and it has been awhile in my memory, but after I heard it on headphones then I was able to hear it on the straight tape." (10/12/95, RT 21.)

Juror Linda Frahm testified that she listened to the tape during guilt phase deliberations. (10/12/95, RT 22.) She heard statements by Mr. Vo that "We killed her," but only during penalty phase deliberations, when jurors were provided with a different cassette recorder. (10/12/95, RT 22-23.) She heard the statements twice, or possible more. (10/12/95, RT 23.) Juror Frahm explained that "the tape was the last thing that we reviewed as a piece of evidence, and that was done at the request of a couple of the jurors." (10/12/95, RT 24.) She did not consider the statements as part of her deliberation, because she "had already formed [her] opinion" and "made [her] decision for the penalty phase." (*Ibid.*)

Appellant Vo's counsel requested a new trial because "they heard and based their decision on something that in fact is not on the tape." (10/12/95, RT 25.) Referring to the declaration of Jeane DeKelver (Vol. 10, CT 2742-2744), appellant's counsel argued:

> "The declaration by Ms. DeKelver is she listened to the tape on the

> same tape recorder under optimum circumstances, and at that point we and particularly she were particularly interested in what was on the tape on this subject, because in my, all of my pretrial preparation, all the rest of it, I took it home, listened to it on my home stereo, didn't hear anything to that effect. Certainly was listening and had nice earphones and all the rest of it, didn't hear it, and neither did she.
>
> "My request would be the court specifically listen to the tape under the most advantageous circumstances that the court can find so that the court can make a factual finding one way or the other.
>
> Additionally, Miss DeKelver points out to me we even went so far as to listen to the tape, listened to it at different times, different places, and with different machinery, and ultimately developed a working transcript, because we were really listening to the tape very, very hard because we knew it was important. And none of us heard, and I believe Mr. Waite [the district attorney] did not hea, anything even closely approximating the statements, 'we killed her.'" (10/12/95, RT 25-26.)

Counsel for co-defendant Hajek argued that the jury "received in essence contaminated evidence." (10/12/95, RT 26.) She requested that the court listen to the tape on the cassette player used by the jurors, and make a determination whether the evidence was reliable. (10/12/95, RT 27.) The prosecutor objected that the recording was properly admitted and the jurors properly considered it. (10/12/95, RT 27-28.)

The trial court took a short recess to review the law. The record does not reflect that he listened to the tape recording or made any factual findings about its accuracy, nor does it reflect his reasons for declining to consider the accuracy and reliability of the evidence that jurors thought they heard. The trial court's entire ruling was: "Motion for new trial is denied." (10/12/95, RT 30.)

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B. Legal Errors: the Jury's Consideration of Unreliable Evidence, Its Refusal to Determine the Facts of the Case and Decision to Instead Rely on Unproven Assumptions, and its Refusal to Make an Individualized Sentencing Determination as Required by Law Required a New Trial.

The trial court's errors in first permitting admission of an unreliable and largely inaudible tape (as set forth more fully in Argument 5, incorporated herein), and then in refusing to grant a new trial when it proved that the jury was mislead about the contents of the recording, deprived appellant Vo of reliable jury determinations at his capital sentencing trial, and of notice, the opportunity to be heard, the assistance of counsel, due process of law, and a fair trial, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, corollary provisions of the state constitution, and state law.

The trial court abused its discretion in refusing to make a factual determination whether the highly prejudicial statements that jurors believed were contained on the tape actually existed.

Appellant Vo and his counsel were unable to meet and respond to the alleged "evidence" of appellant's alleged admissions. Because such statements did not exist, had not been heard by either counsel in many reviews of the recording, were not presented by way of witness testimony and so could not be confronted by way of cross-examination or the presentation of other evidence challenging the existence of the alleged admissions, and were not documented in written discovery, appellant had no notice or opportunity to be

heard concerning this critical piece of alleged (but non-existent) evidence.

Although the factual and procedural context of this error is highly unusual – appellant's counsel have been unable to find cases directly on point – the extreme impact on appellant Vo's ability to defend, on the fairness of his trial, and on the reliability of his sentence are similar in nature and magnitude to jury misconduct cases. When jurors are exposed to extraneous and unreliable evidence, the defendant is stripped of due process of law and the ability to defend. This analogous and established area of law provides useful guidance, and requires that this Court grant appellant Vo relief.

> "The Sixth Amendment's guarantee of a trial by jury requires that the jury base its verdict on the evidence presented at trial. Turner v. Louisiana, 379 U.S. 466, 472-73 . . . (1965). A jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment. Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995). 'Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed "extrinsic."' U.S. v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991) (citing Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987).)"

(Raley v. Ylst (9th Cir. 2006) 444 F.3d 1085, 1094.)

In determining prejudice arising from a jury's exposure to extraneous evidence, courts examine factors relating to the nature and impact of that evidence. Thus, the Ninth Circuit has explained:

> "Several factors are relevant to determining whether the alleged introduction of extrinsic evidence constitutes reversible error: (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and

> (5) any other matters which may bear on the issue of . . . whether the introduction of extrinsic material [substantially and injuriously] affected the verdict. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986), quoted in *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993) (noting that 'none of these factors should be considered dispositive')."

(*Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612.) In this case, the trial record clearly shows that jurors believed they heard statements on the tape that were not heard by anyone else; that the jury spent days considering the tape and discussing the non-existent statements; that the alleged statements were "heard" and considered during deliberations; and that to at least some of the jurors, the alleged statements were critical to their penalty decision. In no way can it be claimed that this extrinsic information was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; See also, *United States v. Harber* (9th Cir. 1995) 53 F.3d 236 [jury's consideration of a case agent report that was not admitted into evidence was inherently prejudicial].)

Due process of law required that appellant Vo be afforded notice and an opportunity to defend against his supposed (but non-existent) admission of guilt, which was secretly at issue during deliberations. (See, *Lankford v. Idaho* (1991) 500 U.S. 110 [lack of notice creates impermissible risk that the adversary process may have malfunctioned, violating the due process clause].) As the United States Supreme Court has instructed:

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr.

> Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial: 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'"

(*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) The High Court continues:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' Dutton v. Evans, 400 U.S. 74, 89 (1970); *Bruton v. United States*, 391 U.S. 123, 135-137 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E. g., *Mancusi v. Stubbs*, 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate '"integrity of the fact-finding process"' and requires that the competing interest be closely examined. *Berger v. California,* 393 U.S. 314, 315 (1969)."

(*Chambers v. Mississippi, supra,* 410 U.S. 284, 295.)

Juror discussions of extra-record or extraneous matters is misconduct, and presumed prejudicial.

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox v. United States*, 146 U.S. 140, 148-150; *Wheaton v. United States*, 133 F.2d 522, 527."

(*Remmer v. United States* (1954) 347 U.S. 227, 229.) In appellant's situation, the jurors were exposed to an object introduced as evidence, but containing information of which no participants in the trial were aware.

Although the physical tape was admitted into evidence, the supposed admission was not in evidence, strictly speaking. Being unaware that anyone could hear something that might be interpreted as an admission, counsel had no chance to object and challenge the information that jurors considered. In the sense that the tape was admitted as physical evidence, the development that jurors believed they found something useful that no one else had found is akin to jurors finding something incriminating or otherwise prejudicial – perhaps a note, or drugs – in the pocket of a jacket introduced into evidence. There is at least one case in which the jurors' review of a physical tape recording was found erroneous, prejudicial, and reversal was required. In *Eslamiania v. White* (9th Cir. 1998) 136 F.3d 1234, a taped interview of the defendant by police was introduced into evidence. On the other side of the tape was a recording of a conversation between the defendant and his brother, which jurors reviewed but was not admitted into evidence.

To the extent that one considers the contents of the tape as akin to testimonial evidence, there was *no testimony* at the trial that appellant Vo had made admissions of guilt, and he thus was prevented from presenting his own evidence or cross-examining on that critical point. It is absolutely clear that reversal is required when jurors are exposed to extra-record information of this nature. In *Leonard v. United States* (1964) 378 U.S. 544,

the High Court reversed the conviction of a defendant because jurors had heard the trial court announce the defendant's guilty verdict in a previous trial, and the jurors were thus presumed biased. This Court, in *People v. Nesler* (1997) 16 Cal.4th 561, ordered reversal because a juror heard information outside court about the defendant's life and alleged habits during deliberations – information far less prejudicial than an alleged admission of guilt.

Since the complete presentation and discussion of the alleged admissions by appellant Vo occurred entirely outside the courtroom, the effect of the jurors' belief that appellant Vo had made an admission was quite similar to the introduction of extraneous information by other means. He was, in fact, facing uncharged and unsworn evidence against him, which the jury had in hand while deciding his case.

The jury's consideration of extraneous information – an alleged admission of guilt, of which no one else was aware and which was not introduced via testimony – goes to the heart of core guarantees under both the state and federal constitutions. Among these is the right to an impartial trier of fact. Jurors exposed to an alleged admission that was not the subject of testimony at trial are irreparably tainted, and cannot be presumed impartial. Instead, prejudice must be presumed.

As the United States Supreme Court observed in *In re Murchison* (1955) 349 U.S. 133, 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our

> system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14."

In appellant's case, his jury was stripped of its impartiality by its extra-record belief that Mr. Vo admitted his guilt. The ephemeral "evidence" of an admission was not presented in court, was not a matter of which appellant or his counsel had notice, does not appear in the trial transcript, and was not subject to challenge by appellant or his counsel. The first appellant and his counsel heard of this alleged "admission" was after the jury's penalty verdict. According to the limited evidence in the trial record, the issue arose only *after* the conclusion of evidence, in the jury room rather than the courtroom.

Appellant Vo had no notice of the explosively prejudicial alleged admission of guilt that the jury believed it heard, and (by the uncontradicted evidence) considered during deliberations. "Central to the right to a fair trial is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial . . .'" (*Holbrook v. Flynn* (1986) 475 U.S. 560, 567, quoting *Taylor v. Kentucky* (1978) 436 U.S. 478, 485.)

Appellant's supposed (but non-existent) admission was not the subject of notice by the prosecution, nor introduced by way of any witness during appellant Vo's capital trial. Appellant Vo could not cross-examine any witness about the existence or reliability of any supposed admission, nor could he present evidence to counter an allegation he had confessed guilt, of which he was never informed until after the jury's penalty verdict.

Nor could appellant Vo's counsel provide the representation to which he is constitutionally entitled. The denial of the right to counsel is reversible error and cannot be deemed harmless. (See *Gideon v. Wainwright* (1963) 372 U.S. 335.)

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

(*Strickland v. Washington* (1984) 466 U.S. 668, 692.) Petitioner was denied the presence and protection of his counsel during his capital trial, and reversal is constitutionally mandated.

In capital cases,

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the **appropriate** punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; emphasis added.)

Having one's jury consider non-existent information of an admission of guilt – information appearing no where in the trial transcripts, and of which appellant and counsel

had no notice – fits the description of an event akin to being "struck by lightning." (*Furman v. Georgia* (1972) 408 U.S. 238, 309 (conc. opn. of Stewart, J.).) It is the very definition of an arbitrary and capricious determination of sentence, one prohibited by our state and federal Constitutions. A death sentence founded on such unreliable evidence cannot stand.

As set forth more fully in Argument 21, incorporated herein, this Court is at a distinct disadvantage in fulfilling its Constitutional duty of fully reviewing this error, as well. On April 13, 1995, portions of the tape-recorded conversation between the defendants after their arrest were played for the jury, but not transcribed; the portions played were also not identified. (Vol. 16, RT 3785-3786, 3816-3818; Vol. 7, CT 1722-1723.)

The failure to prepare a complete transcript of these capital proceedings deprives appellant Vo of his statutory right to a complete record under Penal Code Section 190.9, his rights to due process, a fair trial, meaningful appellate review, and the Eighth Amendment requirement of reliable and non-arbitrary procedures in capital cases. (*Gardner v. Florida* (1977) 430 U.S. 349, 360- 362). The failure to provide appellant Vo with his state law entitlement to a complete transcript of capital proceedings is a further ground on which the inadequate record violates his federal due process rights. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 347.)

The admission of an unreliable and largely unintelligible tape recording was error

in the first instance, as set forth more fully in Argument 5, incorporated herein. There was no transcript of the recording provided to the jury, as the one prepared by the District Attorney was excluded because it was unreliable. No witness testified to any statements allegedly made by appellant Vo, much less alleged admissions of guilt.

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

(*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473.) Had this trial been reported as required, the jurors' consideration of non-existent evidence could easily be resolved by reference to the transcript, which would not have reflected the supposed admission. Had any witness testified to the contents of the tape, an admission either would or would not have been included in that testimony; in the unlikely event that a witness testified that appellant Vo made an admission (information that the diligent prosecutor surely would have presented had it been true), that testimony could have been confronted. Especially given the sorry state of the trial record, the trial court was obligated to make an effort to clear things up for this Court's automatic review, but unfortunately it failed to do so.

Having been advised that jurors considered unreliable "evidence," the trial court had a duty to conduct a full evidentiary hearing and to make findings. The United States Supreme Court requires that when a trial court becomes aware of matters potentially tainting the jury, a full hearing must be held:

> "The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."

(*Remmer v. United States, supra*, 347 U.S. 227, 229-230.) The trial court erroneously failed to review the tape recording personally and make a finding whether the alleged admissions of appellant Vo existed on that tape, as requested by counsel during the new trial motion.

Given the *uncontradicted* assertions of all defense counsel that appellant Vo's alleged admission did not exist (See, e.g. Vol. 10, CT 2773-2774, 2741-2744, 2756-2757; 10/25/95, RT 8-30) – including the Declaration of Jeane DeKelver, which stated in part that the District Attorney did not hear any admissions from Vo on that tape (Vol. 10, CT 2748) – the trial court was obligated to listen to the tape and make a finding about its reliability; in particular, the trial court was required to determine whether the critical alleged "fact" of appellant Vo's alleged admission existed. The trial court did not do so.

The extremely unusual and astonishing situation presented by this case – wherein jurors considered unreliable "evidence" that *no one else involved in the trial* knew existed, and the trial court thereafter *failed* to determine the very existence of that explosive evidence, and *no court transcript exists* to further illuminate what portions of the tape were played for the jury or what words were reasonably audible in the courtroom – requires reversal. In a capital case, at a rock-bottom minimum, alleged evidence of an admission by a defendant – known now to have been considered by jurors, and the kind of

information so likely to influence jurors that prejudice must be presumed – should be known to defense counsel before trial, and should appear somewhere in the transcripts of a full capital trial.

That jurors considered such ephemeral information during deliberations, and that the information is otherwise absent from the trial record, is unimaginable and intolerable in a capital case. Appellant Vo was entitled to a fair trial, and he did not get one. Reversal is required.

7. Excusal over Objection of Prospective Juror Ernst, and the Refusal to Excuse Juror Williams for Employment Hardship.

Moving for a new trial on the ground of juror issues, appellant Vo argued:

> "Over objection, the Court excused prospective juror Ernst. Mr. Ernst advised that his company had locked out its employees in a labor dispute, and he requested to be excused. Attorneys for defendant Vo asked that the Court defer any decision upon this issue, but the Court rejected that suggestion and ordered that Mr. Ernst be excused. The labor dispute was settled shortly after Mr. Ernst was excused and Ms. Williams was seated.
>
> "After the jury returned its verdicts in the guilt phase, Ms. Williams requested to be excused because she wished to participate in a course of instruction given in Washington, D.C. by her employer, and because she felt that her employment promotional opportunities would be substantially impaired. Although counsel ultimately requested that she be excused, the Court refused that request such that someone who appeared to be upset and angry was allowed to participate in the penalty phase proceedings in this matter." (Vol. 10, CT 2770.)

Appellant refers to and incorporates herein Argument 23, regarding errors in excusing and refusing to excuse members of the jury.

///

8. Denial of Continuance Requests, Requiring Counsel to Defend When He Was Not Prepared to Go Forward.

Appellant Vo's requests for continuance were denied, and he requested a new trial on that ground:

> "On various occasions counsel for defendant Vo indicated that the defense was not prepared to proceed. The arguments and presentations as to these requests are incorporated herein.
>
> "The effect of the Court's denial of the request for continuance was to require that an attorney who stated that he in fact was not prepared to go forward, thus depriving Mr. Vo of the services of competent and prepared counsel." (Vol. 10, CT 2770.)

During the new trial motion, the argument regarding the trial court's denial of motions for necessary continuances consisted of the following exchange:

> [Mr. Blackman]: "Also we made a continuance request and I would incorporate the arguments and presentations that were made at the different times that I did that. And I suggested that Mr. Vo was substantially harmed by the fact that his defense team, and I take responsibility for it, was in fact not ready because of the peculiar unique historical events that happened in this case.
>
> THE COURT: "Let's take care of that now. You've had the case over four years. I ruled your reasons for continuance were inadequate and I stand by my ruling." (10/12/95, RT 11.)

Appellant refers to and incorporates herein Argument 2, regarding the trial court's error in denying necessary continuances to appellant Vo.

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9. Payment Issues That Caused Counsel to Be Unprepared at Trial, Prevented Counsel from Preparing and Presenting Additional Evidence for Sentencing, and Prevented Full Investigation of Matters Concerning Jury Deliberations; All Resulting in an Unfair Trial for Appellant Vo.

Appellant Vo's Motion for New Trial concluded with the assertion that payment issues rendered the trial unfair:

> "Although counsel for defendant Vo indicated that he was not prepared to go forward with the matter because of inadequate preparation, the Court ordered that the matter proceed to trial.
>
> "On various occasions counsel for defendant Vo brought to the Court's attention that the county was not making timely payments both [sic] to the attorneys, investigators and the experts.
>
> "The Center on Juvenile and Criminal Justice expended substantial efforts in the preparation of the penalty phase. In June of 1995 the agency submitted a statement of fees and it was not until August 21, 1995 that counsel for the defense was advised that payment had been authorized.
>
> "Counsel for defendant Vo wished to request that the Center on Juvenile and Criminal Justice prepare a factual presentation for consideration by the Court pursuant to the Motion to Reduce the Death Verdict pursuant to Penal Code section 190.4. However, because the fees requested by the Center on Juvenile and Criminal Justice had not been paid upon a timely basis, that agency was unable to proceed with any further efforts as to this matter.
>
> "As shown by the Declarations of counsel respecting their conversations with the jurors, significant issues were raised as to the basis upon which the jurors arrived at their verdicts. Application was made for funds to pursue a more in depth and detailed investigation as to the jury deliberation process and the basis for their decisions, but these requests were refused by the Court.
>
> "Consequently, on numerous occasions the defense of this indigent individual was substantially hampered by financial issues and obstructions

placed by governmental authorities." (Vol. 10, CT 2771-2772.)

At the new trial motion, appellant's counsel argued:

> "There are also the other issues that fit into the same general subject area [of need for continuance], and that is that I indicated that I didn't think we were ready. I know the court has a different view of it. And there were a number of occasions when payments to us and payments to our experts were substantially compromised, and my view is serious isues arose from that." (10/12/95, RT 11-12.)

Appellant refers to and incorporates herein Argument 2, regarding unwarranted denials and delays in funding which deprived appellant Vo of due process of law, a fair opportunity to defend against the charges, the effective assistance of his counsel, and reliable determinations of guilt, capital eligibility, and punishment.

D. Conclusion

Appellant Vo was tried with a more culpable co-defendant, instead of having a fair separate trial at which much of the evidence (introduced by the state and by his co-defendant) would not have been admissible. He was forced to trial despite his counsel's need for a continuance to prepare, and hampered in his ability to defend by delayed appointment of second counsel, and the denial and late payment of necessary funds. The true findings of both special circumstances – rendering him death-eligible – were unsupported by sufficient evidence. A potential juror was improperly excused over objection; a sitting juror was forced to continue serving despite hardship.

Any and all of these were reasons to grant a new trial motion, but one final and additional error tops them all: the trial court's refusal to grant a new trial on the ground

that the jury considered and founded their death verdict on unreliable information that was not in evidence. Appellant's deliberating jurors considered hugely inflammatory information – an alleged admission of guilt by appellant Vo which the jurors believed they heard – which was never the subject of notice to appellant, was never the subject of testimony, was never memorialized in a court transcript, was never heard by any other participants in the trial, and which appellant never had the opportunity to confront and refute.

The goal of the adversarial system of criminal justice is to allow both parties to put forth their evidence and arguments, with the defendant presumed innocent unless proven otherwise beyond a reasonable doubt, by substantial evidence. (*In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307, 320.) Similar principles apply at the penalty phase of a capital trial.[173] (*Gardner v. Florida* (1977) 430 U.S. 349, 358 ["any decision to impose the death sentence [must] be, and appear to be, based on reason, rather than caprice and emotion"]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; See also, *Murray v. Giarrantano* (1989) 492 U.S. 1, 8-9; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) Those constitutionally protected goals become a fantasy when jurors consider information never addressed – not

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[173] While this Court has held that neither party bears the burden of proof on the ultimate question at penalty phase – whether to sentence a defendant to life in prison without the possibility of parole – it is clear that the State bears the burden of proof of aggravating factors, of which the circumstances of the crime is primary.

introduced, not refuted, not even known by the parties.

It is shameful that the State has defended the capital sentence imposed on appellant Vo under these circumstances, as the prosecutor did during the new trial motion. The United States Supreme Court has held:

> "[The public prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

(*Berger v. United States* (1935) 295 U.S. 78, 88.) The District Attorney disingenuously argued that the physical tape had been admitted into evidence, so no harm done. He did not, however, dispute the facts set forth by the defense, including the fact that none of the lawyers heard an admission by Mr. Vo on that tape recording. A win because the other side has been struck by lightning is not a legitimate victory, either for the successful litigant or for the goal of justice.

The jury's consideration of this unreliable, un-noticed, un-litigated, un-recorded, and ephemeral information, particularly information so damning at the very point where appellant Vo's life was in the balance, demands a new and fair trial.

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31. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

Appellant was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for the defense under customary international law as informed by the Universal Declaration of Human Right, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). Additionally, appellant Vo suffered racial discrimination during his trial and penalty phase which also constitutes violations of customary international law as evidenced by the equal protection provisions of the above mentioned instruments and of the International Convention Against All Forms of Racial Discrimination.[174]

While appellant's rights under state and federal constitutions have been violated, these violations are being raised under international law as well, as the first step in exhausting administrative remedies in order to bring appellant's claim in front of the Inter-American Commission on Human Rights. Should all appeals within the United States justice system fail, appellant intends to bring his claim to the Inter-American Commission on the basis that the violations appellant has suffered are violations of the

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[174] Appellant Vo is a foreign national, and additional obligations and protections may apply to him. Appellant Vo anticipates raising additional issues regarding his rights under international law in his habeas corpus petition.

American Declaration of the Rights and Duties of Man.

A. Background

The two principle sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with federal statutes.[175] Customary international law is equated with federal common law.[176] International law must be considered and administered in United States courts whenever questions of right depending on it are presented for determination. *(The Paquette Habana* (1900) 175 U.S. 677, 700, 44 L.Ed. 320, 20 S.Ct. 290.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, II 102, 118, 2 L.Ed. 208.) "When a court interprets a state or federal statute, the statute ought never to be construed to violate the law of nations, if any possible construction remains . . . ." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33, 71 L.Ed.2d 715, 102 S.Ct. D 1510.) The United States Constitution also authorizes Congress to "define and punish... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have

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[175] Article VI, § 1, clause 2 of the United States Constitution provides, "This Constitution ,and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[176] Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1958. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corp.* (1984) 466 U.S. 243,252, 80 L.Ed.2d 273, 104 S.Ct. 1776.[177]

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[178] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first

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[177] See also *Oyama v. California* (1948) 332 U.S. 633, 92 L.Ed. 249, 68 S.Ct. 269, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlaw ed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* at 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law, "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. c, and see Article 56). Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion..' (59 Stat. 1031, 1046.)" (*Id.* at 604.)

[178] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) 9. 137.

expression of a limit on the freedoms of action states enjoyed with respect to their own nationals. [179]

This expression was furthered in 1920 by the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of I labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[180] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[181]

It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[182]

B. Treaty Development.

The monstrous violations of human rights during World War II furthered the

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[179] Buergenthal, International Human Rights (1988) p.3.

[180] *Id.*, pp. 7-9.

[181] Restatement Third of the Foreign Relations Law of the United States, (1987) Note to Part VII, vol. 2 at 1058.

[182] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

internationalization of human rights protections. The first modem international human rights provisions are seen in the United Nations Charter, which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. "[183] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the United Nations drafted and adopted both the Universal Declaration of Human Rights [184] and the Convention on the Prevention and Punishment of the Crime of Genocide.[185] The Universal Declaration is part of the International Bill of Human

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[183] Article 1(3) of the UN Charter, June 26, 1945, 59 Star. 1031, T.S. 993, entered into force October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere --without regard to race, language or religion -- we cannot have permanent peace and security in the world."

Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).

[184] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[185] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, entered into force January 12, 1951 (hereinatfter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, *supra*, p.48.

Rights,[186] which also includes the International Covenant on Civil and Political Rights,[187] the Optional Protocol to the ICCPR,[188] the International Covenant on Economic, Social and Cultural Rights,[189] and the human rights provisions of the UN Charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member D states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, [t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[190] In 1948, the Ninth International Conference of American States proclaimed the American Declaration

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[186] See generally Newman, *Introduction: The United States Bill of Rights, Interm tional Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[187] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, entered into force March 23, 1976 (hereinafter ICCPR).

[188] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, entered into force March 23, 1976.

[189] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, entered into force January 3, 1976.

[190] 0AS Charter, 119 U.N.T.S. 3, entered into force Dec. 13, 1951, amended 721 U.N.T.S. 324, entered into force Feb. 27, 1970.

of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[191]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights D in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[192] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ, "charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[193]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member

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[191] Buergenthal, International Human Rights, *supra*, pp. 127-131.

[192] Buergenthal, International Human Rights, *supra*.

Appellant notes that this appeal is a step in exhausting his administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the viclations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

[193] Buergenthal, International Human Rights, *supra*.

state of the United Nations and of the Organization of American States. As an important player in the drafting of the United Nations Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based interna ional system for the protection of human rights.[194] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and throughout the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[195]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; Ex-President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination[196] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[197] were ratified on October 20, 1994. These instruments are now

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[194] Sohn and Buergenthal, International Protection of Human Rights (1973) pp. 506-9.

[195] Buergenthal, International Human Rights, *supra*, p. 230.

[196] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. __ U.N.T.S. __ (1994).

More than 100 countries are parties to the Race Convention.

[197] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, entered into force on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st

binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[198]

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification onward.[199] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party, or ratifies the treaty.[200] Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[201]

Cong., 2d Sess., 136 Cong. Rev. 17,486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. __ U.N.T.S. __ (1994).

[198] Buergenthal, International Human Rights, *supra,* p.4.

[199] Newman and Weissbrodt, International Human Rights: Law, Policy and Proce', (1990) p. 579.

[200] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980) entered into force Jan. 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc. L., 92d Cong., 1st Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[201] See for example *Inupiat Community of the Arctic Slope v. United States* (9th Cir. 1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); *Crow v. Gullet* (8th Cir. 1983) 706 F.2d 774 (citing the International Covenant on Civil and Pol tical Rights); *Filartiga v. Pena-lrala* (2nd Cir. 1980) 630 F.2d 876 (citing the

C. Customary International Law.

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[202] The United States :hrough signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Cbarter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified a treaty, it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S Constitution.[203]

International Covenant on Civil and Political Rights).

See also Charme, The Interim Obligation of Article 18 of the Vienna *Convention on the Law of Treaties: Making Sense of an Enigma* (1992) 25 Geo.Wash.J.Int'l.L. & Econ. 71. Ms. Charme argues that Article 18 codified the existing interim (preratification) obligations of parties who are signatories to treaties: Express provisions in treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this nor: n continues as a rule of customary international law. Thus all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[202] Restatement Third of the Foreign Relations Law of the United States, § 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed.

[203] Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills,"* (1991) 40 Emory L.J.731 at 737.

Customary international law is "part of our law." (The Paquete Habana, supra, Lt700.) According to 22 U.S.C. § 2304(a)(1), "a principal goal of the foreign policy ,f the United States shall be to promote the increased observance of internationally recognized human rights by all countries.[204] Moreover, the Intemational Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[205] These sources confirm D the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts customary international law. In Filartiga v. Pena-Irala (2d Cir. 1980) 630 F.2d 876, th court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . . ." (*Id.*. at 882.) The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[206] Although the American

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[204] 22 U.S.C. § 2304(a)(1).

[205] Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts & Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

[206] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American

Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member" of the OAS, is bound to recognize its authority over human rights issues.[207]

The United States has acknowledged the force of inter-national human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation trade status with the United States unless China improved its record on human rights. Though Ex- President Bush vetoed this legislation,[208] in May 1993 Ex-President Clinton tied renewal of China's most favored nation status to progress on specific human rights issues in compliance with the Universal Declaration.[209]

Commission of Human Rights, Handbook of Existing Duties Pertaining to Human D Rights, *3*EA/Ser. L/V/II.50, doc. 6 (1980).

[207] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/VIII.52, doc. 17, para. 48 (1987).

[208] See Michael Wines, Bush, This Time in Election Year, Vetoes Trade Curbs Against China, N.Y. Times, September 29, 1992, at A1.

[209] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend Chinas MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent express on of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14Nw. J. Int'l L. & Bus. 66 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the Uni ed States for several years was to use "MFN" status to influence China's compliance with recognized international human rights. See Kent, *China and the*

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations ire criticized and sanctioned for consistent violations of internationally recognized human ights, the United States may not say: "Your government is bound by certain clauses of the Covenant though we in the United States are not bound. "[210]

D. Due Process Violations.

The factual and legal issues presented in this brief demonstrate that appellant was denied his right to a fair and impartial trial in violation of customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[211] ('ICCPR) as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8 1992 with five reservations, five understandings, four declarations, and one proviso.[212] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and

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International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994 (1995)17 H. R. Quarterly, 1.

[210] Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L. Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

[211] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[212] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

purpose of the treaty."[213] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[214]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to I those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been implemented by legislation.[215] The United States declared that the articles of the ICCPR are not self-executing.[216] In 1992, the Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated. "[217]

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[213] Vienna Convention, *supra*, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980.

[214] Restatement Third of the Foreign Relations Law of the United States, (1987) § 313 cmt b. With respect to reservations, the Restatement lists "the requirement.., that a reservat on must be compatible with the object and purpose of the agreement."

[215] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579. See also *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617, where the California Supreme Court held that Articles 55(c) and 56 of the UN J Charter ire not self-executing.

[216] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess.

[217] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No.23, 102d Cong., 2d Sess. at 19.

But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341, 68 L.Ed. 1041, 4 4 S.Ct. 515.)[218] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F.Supp. 791 .) In Noriega, the court noted, "It is inconsistent with both the language of the [Geneva III] treaty ad with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva Ill is to ensure humane treatment of POWs -- not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests . . . . Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and

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[218] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, § 2 of the United States Constitution that all treaties shall be the supreme law of the land. See generally Jordan L. Paust, *Self-Executing Treaties* (1988) 82 Am. J. Int'l L. 760.

tribuna In the determination of any criminal charge against him.., everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life.. . . [[the death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."'[219] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[220]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[221] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review a conviction and sentence by a higher tribunal. '"[222]

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[219] International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

[220] American Declaration of the Rights and Duties of Man, *supra*.

[221] Report of the Human Rights Committee, p. 72, 49 UN GAOR Supp. (No. 40) p. 72, 1 N Doc. A/49/40 (1994).

[222] *Id.*

Further, Article 4(2) of the ICCPR makes clear that no derogation from D Article ("no one shall be arbitrarily deprived of his life") is allowed.[223] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the nonderogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[224] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[225]

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[223] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[224] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer. C t.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

[225] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex. Int'l LJ. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modem human rights treaties is the "protection of the basic rights [individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, fi r the common good, assume various obligations not in relation to other States, but P toward _ all individuals within their jurisdiction." Advisory Opinion No. OC-2/82 of September24, 1982, Inter-Am.Ct.H.R., ser. A: Judgments and Opinions, No.2, para.29 (1982) reprinted in 22 I.L.M. 37, 47 (1983). These opinions are an indicator of emerging genera principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

Appellant's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration, were violated throughout his trial and sentencing phase.

E. Race Discrimination.

Appellant suffered racial discrimination which denied him the fight to a fair trial and sentencing phase. Such discrimination, and the imposition of the death penalty, violate customary international law, as evidenced by Articles 2, 6, and 26 of the International Covenant of Civil and Political Rights, Article 2 of the American Declaration, and the Convention Against All Forms of Racial Discrimination.[226] The Race Convention requires that two-thirds of the state parties object to a reservation in order to determine that it is "incompatible or inhibitive." This practice however, known as the majority system, is seldom relied on in determining incompatibility of reservations within conventions. (Theodore Meron, The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination (1985) 79 Am. J. Int'l L. 283, 315,[227] and the Safeguards Guaranteeing Protection of the Rights of Those Facing the

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[226] Race Convention, *supra*, 660 U.N.T.S. 195, entered into force Jan. 4, 1969. The United States reservation to the Race Convention provides that "nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

[227] But Article 20 of the Race Convention states, "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by the Convention be allowed."

The Committee on the Elimination of Racial Discrimination (CERD), established

Death Penalty.)[228]

Article 26 of the ICCPR provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex ...."[229] Again, this protection is found in Article 2 of the American Declaration which guarantees the right of equality before the law.[230]

The Race Convention, a signed and recently ratified treaty, contains extensive protections against racial discrimination. Article 5 of the Convention provides:

> [S]tates Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the fight of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> b) The right to security of person and protection by the State against iolence or bodily harm, whether inflicted by government officials or by any adividual, group or institution ....[231]

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under the Race Convention, disassociated itself from the idea that, if the constitution of a state party condemns racial discrimination, no further action by that state is required. A/Con 92/8, par. 95, Natan Lerner, UN Convention on Race Convention (1980) p. 116.

[228] United Nations Economic and Social Council (ECOSOC) Resolution 1984/50 of May, 1984.

[229] International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

[230] American Declaration of the Rights and Duties of Man, *supra*.

[231] International Convention Against All Forms of Racial Discrimination, *supra*, 660 U.N T.S. 195.

Furthermore, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention ...."[232]

Safeguards adopted by international organizations are also indicative of customary international law. The Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty adopted by the United Nations Economic and Social Council provide "[c]apital punishment may only be carried out pursuant to a final judgment by a competent court after legal process which gives all possible safeguards to ensure a fair trial

... including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."[233] The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders endorsed the safeguards in 1988, strengthening them as a source of customary international law.

Section 702 of the Restatement Third of the Foreign Relations Law of the United States recognizes that a state violates international law if, as a matter of state policy, practices, encourages or condones systematic racial discrimination. Moreover,

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[232] International Convention Against All Forms of Racial Discrimination, *supra*, 660 U.N.T.S. 195.

[233] United Nations Economic and Social Council (ECOSOC) Resolution 1984/50 of May 1984. See also, General Assembly Resolution 2200A (XXI), annex.

the right to be free from governmental discrimination on the basis of race is so universally accepted by nations that it constitutes a peremptory norm of international law.[234] As such, the courts ought to consider and weigh the jus cogens quality of international instrument norms if they are at odds with state law. If of jus cogens quality, these norms should have a stronger influence against, and increase the burden of justification for, contrary state actions.[235]

Statistical information of various studies shows that the death penalty is imposed in a racially discriminatory manner. The 1990 report of the United States General Accounting Office synthesized twenty-eight studies and concluded that there is a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision.[236] In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder

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[234] A peremptory norm of international law, *jus cogens*, is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, supra, and Restatement Third of the Foreign Relations Law, *supra*.

[235] Gordon Christenson, Jus Cogens: Guarding Interests Fundamental to International Society (1988) 28 Va. J. Int'l L. at 627-28.

[236] United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing (1990) GAO/GGD-90-57. (In *Furman v. Georgia*, (1972) 408 U.S. 238, 33 LEd 346, 92 S.Ct. 2726, the United States Supreme Court held that Georgia and Texas state statutes governing the imposition and carrying out of the death penalty violated the Eighth and Fourteenth Amendments of the Constitution.)

or receiving the death penalty."[237] The GAO report noted that racism was "found at all p stages e the criminal justice system process. "[238] The Baldus study, an empirical analysis accounting for 230 non-racial variables, also found strong evidence of racial bias. The study concluded that killers of whites in Georgia are 4.3 times more likely to be sentenced to death than killers of blacks.[239] This statistical evidence illustrates that blacks are denied equal protection of the law.

In *McCleskey v. Kemp* (1987) 481 U.S. 279, [95 L.Ed.2d 262, 107 S.Ct. 1756], the Supreme Court rejected the use of statistical evidence to show racial discrimination in capital cases.[240] Because discriminatory intent in individual cases is generally undocumented, the Supreme Court's categorical exclusion of statistical evidence in its review of capital cases and its "exceptionally clear proof [of racially discriminatory purpose]" places an intolerable burden on those who have suffered discrimination in criminal justice institutions.

The protections of Race Convention, ICCPR and American Declaration

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[237] United States General Accounting Office, *Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing* (1990) supra, at p. 5.

[238] United States General Accounting Office, Report to Senate and House Committees on the Judiciary: Death Penalty Sentencing (1990) *supra,* at p. 6.

[239] David C. Baldus, George Woodworth, and Charles A. Pulanski, Jr., Equal Justice _nd the Death Penalty: A Legal and Empirical Analysis (unpublished September 1988).

[240] In *McCleskey*, Justice Powell concluded that 1) studies indicating racial discrimination failed to establish that any decision makers in the defendant's case acted with discriminatory purpose in violation of the equal protection clause, and 2) the Baldus study at most indicated a discrepancy that appeared to correlate with race, not a constitutionally significant risk of racial bias in Georgia's capital sentencing process. (*Id.*)

establish an affirmative obligation of the United States to do away with racial discrimination and to proceed with vigor and deliberation to ensure that race is not a prejudicial factor in criminal prosecutions. It is incumbent upon the court to view the facts of this case in light of the recent international commitments the United States has made in the protection of individuals against racial discrimination.

F. Conclusion.

The due process violations and racial discrimination that appellant suffered through trial and sentencing phases are prohibited by customary international law. The United States is bound by customary international law, as informed by such as the ICCPR and the Race Convention. The purpose of these treaties is to bind tons to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights in our own country to which we hold other countries accountable.

32. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT ANDAPPLIED AT APPELLANT'S TRIAL, VIOLATESTHE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of

each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[241] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's

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[241] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

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A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, 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. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances[242] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and

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[242] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down 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 U.S. Constitution and prevailing international law.[243] (See Section E. of this Argument

[243] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those

and Argument 31).

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[244] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[245] or having had a "hatred of religion,"[246] or threatened witnesses

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schemes and, like those schemes, is unconstitutional.

[244] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[245] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[246] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

after his arrest,[247] or disposed of the victim's body in a manner that precluded its recovery.[248] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses

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[247] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[248] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that

they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to alleged prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist,

[or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 2007 WL 135687 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case

where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a

reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

2. In the Wake of *Apprendi, Ring, Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors)

substantially outweigh any and all mitigating factors.[249] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (Vol. 25, RT 6378 et seq.),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (Vol. 25, RT 6380; CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[250] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment

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[249] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[250] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

notwithstanding these factual findings.[251]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[252] In

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[251] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (*Brown I*) (1985) 40 Cal.3d 512, 541.)

[252] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

Cunningham the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law ("DSL"). The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[253] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the

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[253] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special

circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case

before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[254])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[255] As the high court stated in *Ring, supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on

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[254] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[255] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri,*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

> which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

4. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile

delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error,

since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

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5. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole

board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[256] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be,

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[256] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

6. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the

imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly

utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 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*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

7. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

8. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

9. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or

not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*." (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

People v. Morrison (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[257]

In appellant's case, the prosecution strenuously urged a sentence of death based on improper factors, and the jury in fact relied upon the unproven and non-existent "admissions" that jurors (but no one else) thought they heard in a tape recording. (See, Arguments 5 and 30 herein.) The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir.

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[257] There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to aggravate the sentence. See People v. Cruz, No. S042224, Appellant's Supplemental Brief.

1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported

justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[258] as in *Snow*,[259] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[260]

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[258] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (Prieto, supra, 30 Cal.4th at p. 275; emphasis added.)

[259] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (Snow, supra, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

[260] In light of the Supreme Ccourt's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[261] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution.

The United States stands as one of a small number of nations that regularly uses the

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unanimous jury.

[261] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International's website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally

retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]; see Argument 31.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to

only "the most serious crimes."[262] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

33. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS UNDERMINING THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even where no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may require reversal. (See, *Kyles v. Whitney* (1995) 514 U.S. 419, 436-437 [the cumulative effect of errors, none of which individually are sufficiently significant to require reversal, could be collectively significant]; *People v. Hill* (1998) 17 Cal.4th 800, 844-847 [reversing death sentence due to cumulative error].)

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of evidence introduced at the trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F2d 1464, 1476, quoted in *United States v. Frederick* (9th Cir. 1996 78 F.3d 1370, 1381.) Reversal is required unless the cumulative effect of all the errors is

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[262] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the Chapman standard to the totality of the errors, when errors of federal constitutional magnitude combined with other errors].)

Appellant Vo refers to and incorporates herein Argument 22, regarding cumulative error at the guilt phase of his trial. Multiple additional errors occurred at the penalty phase of his capital trial, including but not limited to: a joint penalty trial with a co-defendant offering far different mitigating evidence; constitutionally inadequate notice of the aggravating factors that the prosecution would urge as reasons for imposing a death sentence; instructional errors permitting jurors to use evidence applicable only to the co-defendant, if at all; prosecution misconduct; and the jury's shocking reliance on non-existent evidence as the basis for a sentence of death.

Because it cannot be shown that these multiple errors cumulatively had no effect on appellant Vo's death sentence – to the contrary, the record reflects that it is virtually certain that they did – reversal is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.)

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CONCLUSION

For all of the reasons set forth in this brief, appellant Loi Tan Vo respectfully requests this Court to reverse the judgment of guilt and sentence of death, and grant him a new trial.

Dated: January 17, 2008

Respectfully submitted,

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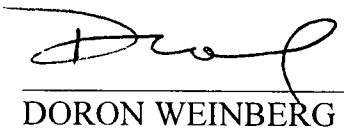
CERTIFICATION OF WORD COUNT
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 13

I certify that Appellant Vo's Opening Brief consists of 149, 255 words.

Dated: January 17, 2008

Respectfully submitted,



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

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