PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CHARLES NG, Defendant and Appellant.	No. S080276 Orange Co. Super. Ct. 94ZF0195

APPELLANT'S REPLY BRIEF

Automatic Appeal from a Judgment of Death
Orange County Superior Court
Hon. John J. Ryan, Judge Presiding

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vs.	
CHARLES NG,	
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Appellant replies to respondent's contentions as follows.

ARGUMENT

Trial Site Selection Issues

I. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE MULTIPLE ERRONEOUS RULINGS AND MISCONDUCT BY THE TRIAL COURT DURING THE VENUE-RELATED PROCEEDINGS IN CALAVARAS AND ORANGE COUNTIES.

A. Respondent's Unavailing Defense of the Orange County Venue

Respondent argues that the venue claims can be "quickly dispose[d] of... based on lack of prejudice because the transfer did not result in an unfair trial", RB 162. Appellant argued that prejudice accrued from the transfer to Orange County due to the absence of Chinese-American representation in the

venire comparable to San Francisco County AOB 213-14. In light of appellant's minority status as a non-citizen of Chinese ethnicity, the ethnic composition of the transferee county should have been a primary factor in venue consideration. Respondent cites People v. Stanley (1995) 10 Cal.4th 764, 792, which affirmed the judgment after the trial court had changed venue, without holding an evidentiary hearing to determine the proper county for transfer. Stanley denied the appellate claim because "nothing in the record hints the choice of Butte County prejudiced defendant". In this case there is ample evidence on the record that the choice of Orange County prejudiced appellant because of the lack of Chinese representation in the venire. Respondent argues that no prejudice was shown because "each juror who decided this case indicated that he or she could judge the case fairly", RB 163, but that fails to address the absence of any Chinese American representation in the venire.

Respondent argues that appellant's showing as to prejudice "improperly relies on sources outside the record", i.e., populations statistics obtained via the Internet, RB 164. This objection must be viewed as anachronistic in light of the current and pervasive judicial reliance on web-sourced information in appellate proceedings, see, e.g. Florida v. Jardines (2013) _ U.S. _, 33 S. Ct. 1409, 2013 U.S. Lexis 2542, (Alito, J. dissenting,

fns. 5 and 6). It is common knowledge above and beyond the specific population studies cited that San Francisco has a larger Chinese-American than does Orange County. Courts rely on this type of demographic information routinely via judicial notice.

Respondent also argues that prejudice cannot be established in this case because "no litigant has the right to a jury that ... necessarily includes members of its own group, or indeed is composed of any particular individual", RB 165, citing People v. Wheeler (1978) 22 Cal.3d 258, 277. Petitioner's claim is not that he was entitled to have a particular quota of Chinese-Americans on his jury, but rather that he should have been tried in a county that had a reasonable number of Chinese-Americans in the venire pool, which is a valid consideration in changing venue.

Respondent downplays this aspect of the case by arguing that "it is impermissible to assume that Chinese American jurors would have evaluated the evidence different than other jurors", RB 165, quoting from Batson v. Kentucky (1986) 476 U.S. 79, 85 ["a person's race simply 'is unrelated to his fitness as a juror'"]. Respondent misses the fundamental point of Batson and Wheeler. Minority representation on a jury is constitutionally essential because of the different perspectives and experiences that minority jurors

bring to the deliberative process. People v. Wheeler (1978) 22 Cal.3d 258, 276, fn. 17, quoted with approval the following analysis:

> As a recent commentator aptly put the point in the context of the case at bar, "[i]t may be argued that the exclusion of jurors on the basis of group membership would be acceptable where it is believed that, for example, blacks are consistently more biased in favor of acquittal than whites. The argument misses the point of the right to an impartial jury under Taylor. Blacks may, in fact, be more inclined to acquit than whites. The tendency might stem from many factors, including sympathy for the economic or social circumstances of the defendant, a feeling that criminal sanctions are frequently applied too harshly, or simply an understandable suspicion of the operations of government. Whites may also be more inclined to convict, particularly of crimes against a white victim. But these tendencies do not stem from individual biases related to the peculiar facts or the particular party at trial but from differing attitudes toward the administration of justice and the nature or criminal offenses. The representation on juries of these differences in jury attitudes is precisely what the representative cross-section standard elaborated in Taylor is designed to foster. (Note, "Limiting the Peremptory Challenge; Representation of Groups on Petit Juries", 86 Yale L.J. 1715, 1733, fn. 77 (emphasis supplied).

That observation applies equally to the considerations underlying the vicinage right, i.e., to have the trial jury include representative views of the various groups found in the place where the crime occurred. Respondent and Batson may well be correct that a particular person's race "simply is unrelated to his fitness as a juror", 476 U.S. at 85, but the racial composition of the venire is highly related to the fairness of the trial.

Respondent argues that Orange County had jurisdiction over the case, citing People v. Simon (2001) 35 Cal.4th 1082, 1097, for the proposition that

it is "beyond any doubt that a superior court to which a felony proceeding has transferred has subject matter jurisdiction over the proceeding". Simon is based on the premise that the transfer was proper in terms of due process and fairness, which cannot be said in this case.

B. Respondent's Unavailing Defense of the Procedural Infirmities in the Change of Venue Decision

Respondent argues that appellant's due process claims fail "because a state court's venue-transfer proceedings do not implicate procedural due process", RB 167. Respondent contends that a state procedure must result in a deprivation of a substantive right in order to constitute a violation of a federally recognized liberty interest, but that choice of venue is neither a substantive right nor a constitutional right. RB 168.

Respondent reaches out to the Fifth Circuit for a case purporting to support this position, Cook v. Morrill (5th Cir. 1986) 783 F.2d. 593, but that case is distinguishable for a number of reasons. In Cook, the prosecution filed a change of venue request in a multi-defendant case involving local corruption that generated considerable publicity. Cook opposed the motion, but it was granted, and he was convicted in a neighboring county. On appeal and on federal habeas corpus he argued that he had been deprived of his Sixth Amendment right to be tried in the county "wherein the crime had been committed", i.e., the federal constitutional right of vicinage. Cook noted that

the United States Supreme Court had not decided whether the Sixth Amendment right of vicinage applied to the states, but that the Fifth Circuit had ruled it did not. Cook next argued that the Texas change of venue procedure violated due process because Cook was not afforded the opportunity to cross-examine the witnesses at the hearing, and because the judge hearing the motion considered materials outside the record. The Fifth Circuit held that "procedural due process requirements apply only to protected Fourteenth Amendment interests", and that Cook's proceedings complied with the state statute governing change of venue.

Cook did not address the argument made by appellant that the arbitrary deprivation of state-conferred procedural rights violates federal due process. See Hicks v. Oklahoma (1980) 447 U.S. 343, 346. Marsh v. County of San Diego (9th Cir. 2012) 680 F.3d 1148, 1157, confirmed that "statutory laws of general applicability can create a liberty interest that is constitutionally protected". In sum, Cook unavailingly complained that the Texas venue statute that governed the change of venue was not up to federal constitutional snuff; appellant in contrast complains that the trial court flouted the California venue statute in violation of both state and federal due process.

Respondent invokes a sports analogy to argue that "appellant is like an Olympic sprinter who loses his race and then challenges the result by

complaining about the way the host city was chosen," RB 169. Respondent's metaphor is inapt. A better analogy is that appellant is like an Olympic hopeful who is denied a berth on the Olympic team because the judges in the qualifying rounds systematically rigged the trial heats to ensure that he would not qualify. That analogy focuses on the judicial chicanery that deprived appellant of a venue selected in accordance with the statutory criteria.

Respondent argues the analogy to the breach of plea agreement is not persuasive because plea agreements are "central to the administration of the criminal justice system", RB 173, citing Missouri v. Frye (2012) _ U.S. _ , 132 S.CT. 139, 1407. Changes of venue may not occur in the majority of cases, but they are essential to the fair administration of justice. Respondent's argument seems to be that the state must abide by its commitments only as to situations that affect a large number of defendants, but may renege with impunity on other commitments that affect fewer defendants. The basic principles of equitable estoppel rebut respondent's position.

Respondent argues that "Judge McCartin did not attempt to steer the case to Orange County; on the contrary, he remain scrupulously neutral", RB 181. In the very next sentence, respondent recognizes that Judge McCartin sent the Judicial Council a worksheet in which he listed Orange County as a venue that he "would like considered". In addition, John Toker, senior

administrative staff attorney at the Judicial Council, discussed site selection with Judge McCartin, and testified that Judge McCartin told him not to consider downtown Los Angeles, and then recommended Orange County, VIII RT Cal. S. 2453-56.

Respondent argues unpersuasively that "there is no substantial evidence that Judge McCartin had recommended a transfer to Orange County", RB 182 notwithstanding the evidence listed above. Moreover, respondent ignores the declaration of James Webster that Judge McCartin told him that he had intended that the case go to Los Angeles or Orange County from the very first time that he was called to replace Judge Perasso. XVI CT Cal S 5833. Respondent inaccurately chides appellant as "the only party seeking to direct the case to a specific county", RB 182, but appellant's efforts to have the case transferred to San Francisco were intended to effectuate appellant's rights to counsel and his right to vicinage.

Respondent's argument regarding the revocation of the agreement is flawed because it fails to recognize that appellant complained of the breach of the agreement before the change of venue to Orange County had been ordered. This was not a case in which appellant remained mute throughout the proceedings, only to complain after the announcement of the site selected. To the contrary, appellant had voluntarily entered into an agreement with

specific procedural components designed to move the case along in a rational manner, and fought immediately when the bargained-for procedural protections were unilaterally and surreptitiously abrogated. Of course a change of venue would have had to occur eventually, and at least the San Francisco counts would have gone to San Francisco based on vicinage, whether or not the San Francisco clerks welcomed the case with open arms or accepted it grudgingly. The trial court would have had discretion to order the change of venue as to the remaining counts in accordance with its usual procedures, and San Francisco would have been the most logical venue given its vicinage in relation to several counts.

II. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO TRIAL IN THE VICINAGE OF THE CRIME BY THE ERRONEOUS TRANSFER OF COUNTS II – VII TO ORANGE COUNTY, AND BY THE ERRONEOUS REFUSAL OF THE ORANGE COUNTY SUPERIOR COURT TO TRANSFER THOSE COUNTS TO SAN FRANCISCO WHERE VICINAGE LAY.

Respondent argues that appellant's argument under the federal Constitution fails, "because the Sixth Amendment's vicinage requirement does not apply to the states", RB 208, and further that "appellant's claim under the state Constitution likewise fails, because the venue transfer waived any vicinage challenge to Orange County".

A. Respondent's Unavailing Waiver Claim.

Respondent fails to recognize that the venue proceedings were expressly, formally, and repeatedly limited solely to the non-San Francisco counts, and that Judge McCartin repeatedly assured counsel for appellant on the record that their vicinage claims as to the San Francisco counts were not waived by the venue agreement. See AOB 216 – 217, fn. 20, citing VIII RT Cal S 2264 – 2265.

Respondent again makes the completely specious argument that "it was undisputed that the case could not advance to trial without a venue transfer" but that "by imposing conditions on its consent to such a transfer, the defense was threatening to hold the case hostage in Calaveras County and indefinitely delay the trial", RB 208. To the contrary, the defense was making every effort to get all counts out of Calaveras County, with at least counts 2 through 7 to their proper vicinage in San Francisco County, and the remaining counts as well in the interest of judicial economy, so that the trial could move forward. The defense was not in any way attempting to "hold the case hostage" to delay the trial. Rather, appellant was simply invoking his constitutional right of vicinage, and the assertion of the constitutional right is generally considered a fair legal option, even if opposed by the court or the prosecution.

B. Appellant's Vicinage Rights.

People v. Posey (2004) 32 Cal.4th 193, 217, affirmed the view expressed in Price v Superior Court (2001) 25 Cal.4th 1046, that the Sixth Amendment's vicinage clause is not incorporated into the Fourteenth Amendment's due process clause. The Supreme Court has not resolved that issue, and there is no majority view among the circuits.

Article I, section 16 of the California Constitution contains a jury trial guarantee that includes "an implicit vicinage right", Price at 1071, which requires "trial in a county having a reasonable relationship to the offense or to other crimes committed by the defendant against the same victim", id. at 1075.

Respondent acknowledges that "Orange County had no reasonable relationship to the crimes", RB 214, but contends that "[a] venue change waives the defendant's vicinage right", citing People v. Guzman (1988) 45 Cal.3d 915, 938 and People v. Remiro (1979) 89 Cal.App.3d 809, 839. Guzman held that a change of venue motion by defense counsel waived vicinage claims even where the defendant himself had objected to the change of venue. That result may be correct where the defendant fails to raise vicinage as a factor in opposition to change of venue. Here, there was no waiver of vicinage by counsel or defendant as to counts 2 – 7, because

appellant repeatedly reserved his venue rights with trial court's acknowledgement.

Respondent attempts to avoid the effect of his acknowledgment that Orange County had no relationship to the crimes through a contorted reading of the Calaveras proceedings. According to respondent, the "only reasonable interpretation of the agreement" is "that it allowed the defense, in the new venue, to reassert the argument it had previously been making – that vicinage was not satisfied in Calaveras County", RB 214. That makes no sense – once the case was transferred to a new venue, it would have necessarily been in a county other than Calaveras, such that appellant would have no interest or incentive to argue that vicinage was not satisfied in Calaveras County. The case was already out of Calaveras County.

A common sense reading of the proceedings makes it unmistakably clear that the agreement preserved appellant's right to argue in the new venue that (1) the new venue lacked vicinage over counts 2 – 7; and (2) that only San Francisco had vicinage over counts 2 – 7. Respondent contends that appellant "was still able to argue that his vicinage rights required a transfer to San Francisco based on the purported lack of vicinage in Calaveras County". RB 214-215. This retrospective characterization of the agreement is incompatible with the express understanding that appellant was free to argue

that the only viable vicinage for counts 2 – 7 was San Francisco. See VIII RT Cal S 2264-2265.

Respondent next asserts that "[i]t makes no sense to interpret the agreement as granting appellant a bigger windfall by permitting a vicinage challenge to the new venue" because "if appellant were permitted to challenge vicinage based on the new venue's lack of connection to the crimes, an additional transfer would have been nearly inevitable", RB 215. That is exactly what the agreement contemplated with respect to counts 2 – 7, i.e., that as to those claims, San Francisco was the only viable vicinage and that either those counts would have to be severed and sent to San Francisco, or that all counts would have to be sent to San Francisco for reasons of judicial economy.

Nowhere does respondent acknowledge the operative facts of this case. Appellant was charged with twelve counts of murder, six of which had vicinage in Calaveras County only (Counts 1 and 8 – 12), and six of which had vicinage in San Francisco and Calaveras County (due to the location of the San Francisco corpses). Calaveras was an untenable venue for any of the counts because of its small size and saturation of publicity. The six counts that had dual vicinage in Calaveras and San Francisco should have been transferred to San Francisco to uphold the right of vicinage. The six counts

with no San Francisco vicinage could in theory have been transferred anywhere that appellant could have a fair trial, with San Francisco being the far strongest candidate for reasons of fairness -- Chinese-American representation -- and for judicial economy. The change of venue of all counts to Orange County was erroneous as a violation of vicinage for six of the counts, and unfair as to venue for six of the counts.

Many if not most cases qualifying for a change of venue do not have an alternative county of vicinage as a controlling factor in the choice of venue determination. This case had a clear vicinage destination for six of the counts, but that fact was ignored in the flawed proceedings below.

C. The Standard of Review

Respondent insists that the standard of review under the state Constitution is the miscarriage of justice standard of Article VI, section 13, RB 219. Respondent disparages appellant's argument regarding prejudice based on different ethnic mixes in Orange County vs. San Francisco as "irrelevant in determining prejudice", citing People v Brown (1988) 46 Cal.3d 432, 448. Brown is important for its affirmation of a more exacting standard of review for errors that affect death sentencing determinations – "We will therefore abide by the reasonable-possibility test as our articulation of the constitutional 'miscarriage of justice' standard when assessing the effect of

state-law error at the penalty phase of a capital trial". In determining whether this error created a reasonable possibility that the verdict would have been different, this Court can look to the fairly clear track record in San Francisco County of not returning death judgments in capital eligible cases. This is not due to "arbitrariness, whimsy, caprice, 'nullification', and the like", RB 222. This is due to local norms as to what crimes warrant the death penalty and what crimes don't. The "reasoned moral response" as to what crimes warrant the death penalty in San Francisco is more favorable to appellant than is the "reasoned moral response" meted out in Orange County.

Representation Issues

III. APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT OF SELF REPRESENTATION BY THE TRIAL COURT'S ERRONEOUS INSISTENCE, UPON GRANTING SELF REPRESENTATION, THAT THE ORANGE COUNTY PUBLIC DEFENDER CONTINUE TO PREPARE FOR TRIAL IN A MANNER THAT REPEATEDLY CONFLICTED WITH APPELLANT AND THAT UNCONSTITUTIONALLY UNDERMINED THE GRANT OF SELF REPRESENTATION.

A. Respondent's Unavailing Waiver Argument[1]

Respondent makes a waiver argument that fails because it ignores the operative fact that the trial court erred in imposing onerous and unconstitutional conditions on the grant of self-representation. Respondent argues both that appellant acquiesced in subsequent representation by

[1] Respondent addresses this argument at pp. 294-301 of respondent's brief.

counsel, and also that appellant failed to renew his request for self-representation when the trial court said it would consider a request. The flaw in the respondent's argument is that the trial court made it clear that any self-representation by appellant would be accompanied by the same onerous and unconstitutional conditions imposed during the initial grant of self-representation.

By way of hyperbolic hypothetical, if the trial court initially granted self-representation on the condition that the defendant wear a Bozo the Clown outfit during the jury trial, and if for that reason the defendant subsequently relinquished self-representation, accepted counsel, and failed to renew his Faretta motion, there would be no waiver because the grant of self-representation had been fatally compromised at the outset. That is what occurred here.

None of the cases cited by respondent entail a grant of self-representation that was burdened by unconstitutional conditions. People v. Tena (2007) 156 Cal.App.4th 598 affirmed a conviction where two judges had erroneously and summarily denied a timely request for self-representation, with the second erroneous denial accompanied by a statement that the defendant could renew a motion at a future date. The defendant did not renew the motion and the court of appeal held that the defendant had

abandoned the request. That case is distinguishable because the court's invitation to renew the request did not carry the baggage of unconstitutional conditions. Similarly, Wilson v. Walker (2d Cir. 2000) 204 F.3d 33 denied habeas corpus relief where the court erroneously denied a Faretta request, but later, after a second change of counsel, the defendant accepted the newest lawyer's appointment and said nothing about self-representation. The Second Circuit stated that it was "unwilling to assume that a renewal of [the defendant's] request would have been 'fruitless'," 204 F.3d 38. That case is distinguishable because there was nothing in the record that indicated the defendant's dissatisfaction with replacement counsel or that he continued to seek self-representation.

Here, appellant continuously reiterated his dissatisfaction with attorney Kelley. The record in this case makes it abundantly clear that any further grant of self-representation would have been accompanied by the same appointment of the Orange County Public Defender in the dual and conflicting roles of stand-by counsel and advisory counsel.

B. The Proof of Prejudice.

Respondent acknowledges that appellant was deprived of the assistance of experienced clinical psychologist, Dr. Nancy Kaser-Boyd, because she felt constrained from assisting appellant on his motion to remove the Orange

County Public Defender while also working for that agency on other cases, and because the trial court had insisted that appellant and the OCPD use the same experts. Respondent thus acknowledges what appellant argued in the opening brief, AOB 271-272, that the unnecessary and burdensome conditions imposed by the trial court on appellant's self-representation cost him the services of an experienced clinical psychologist.

Respondent then asserts that "appellant had not shown that the services of Dr. Kaser-Boyd was providing could not be obtained from another expert", but that assertion fails to consider the trial court's insistence that appellant and the Orange County Public Defender use the same experts. Given that constraint, the fact that "Kaser-Boyd recommended five other experts as replacements", RB 299, is irrelevant. Dr. Kaser-Boyd could have recommended 50 other experts, but none would have been actually available unless the OCPD also retained them.

Respondent argues that "the court here had a compelling reason to appoint the OCPD as standby and advisory counsel because any other choice would have resulted in an extensive delay", RB 301. Respondent points to the estimate by the prosecutor and trial court that it would take a new attorney at least six months to determine whether he or she could even advise appellant", ibid. Respondent's argument is logically flawed: if the trial court

provided appellant with sufficient time to proceed in pro per, that time period would necessarily be adequate for non-OCPD advisory and/or standby counsel to prepare as well. In addition, respondent argues as if the case had some immutable imperative that the trial begin in September 1998, which was clearly not the case.

Appellant's request for a final six month continuance to March 1, 1999, 20 OCT 7033-7055, was a minimal bordering on negligible amount of additional time in light of what had passed. The trial court had no legitimate reason to refuse that request, and should have discharged the Orange County Public Defender and permitted appellant to proceed representing himself without the onerous conditions involving the Orange County Public Defender as standby and advisory counsel.

IV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT OF SELF REPRESENTATION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY THE TRIAL COURT'S ERRONEOUS REVOCATION OF HIS SELF REPRESENTATION WITHOUT JUSTIFICATION.

A. Respondent's Unavailing Waiver Argument.

Respondent again argues that appellant abandoned this claim "because he failed to renew his request for self-representation after the court invited him to do so". RB 216.[2] That is untenable in light of the fact that the trial

[2] Respondent addresses this argument at RB 261-294.

court denied appellant's request for a final six month continuance at the time he summarily revoked self-representation, and insisted that the Orange County Public Defender begin trial two weeks later. Under those circumstances, appellant cannot be faulted for failing to renew his request for self-representation given the trial court's obstinate refusal to provide him sufficient time to prepare.

Respondent takes the position that appellant could have prepared for trial while trial was in progress. Respondent argues that "if self-representation were restored, [appellant] would have even more time to prepare during jury selection which was likely to take a substantial amount of time, and it could continue preparing the defense case during the prosecution's case in chief which was also likely to take substantial time", RB 273.

That assertion is unpersuasive, given that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) require that counsel conduct investigation and trial preparation before the beginning of trial, so that counsel can concentrate on the actual trial proceedings as they occur in real time, and make tactical decisions based on an adequate knowledge of the pertinent facts. See ABA Guidelines, section 10.7 ["Investigation"]. It would be inconsistent and incompatible with the

Faretta guarantee if a pro per defendant could be forced to conduct trial preparations after the trial had begun.

Moreover, it is clear from the context that the court would reconsider a subsequent Faretta motion only if appellant was "ready and able to comply with the rules of court", 5 OC RT 1068-1069, which -- translated into the context of the case -- meant that appellant would not be afforded adequate opportunity to prepare, but would simply have to step into the trial current and swim along with it.

B. Respondent's Failure to Address the Trial Court's Failure to Afford Appellant Any Warning of a Contemplated Revocation Or Any Opportunity to Comply with the Trial Court's Concerns.

Moreover, the trial court's peremptory revocation was erroneous under general principles of due process as explained in People v. Carson (2005) 35 Cal. 4th 1, for failure to comply with the requirements of warning the defendant as to the specific conduct that the court viewed as unduly disruptive, and failure to consider alternative sanctions short of termination. Respondent does not even contend that the court complied with those requirements prior to terminating self-representation. See RB 274-275 [citing Carson generally, but without reference to the four factors enumerated.] The record is devoid of evidence or findings to support the revocation.

The hearing immediately prior to the August 21 revocation occurred on July 15, and contained no warning that revocation would be under consideration at the next hearing, nor any directions to appellant regarding standards of conduct necessary for retention of his pro per status. The July 15 hearing began with appellant's motion to continue argument on the pending motion to dismiss pursuant to Penal Code section 995. 4 RT 965 et seq. During the hearing, appellant told the court about the failure of appointed paralegal assistant Anderson to provide the services he had promised, 4 RT 977-78. The trial court denied the motion to continue, and implausibly characterized the discharge of the non-performing paralegal as a delaying tactic on appellant's part.[3] The court denied the section 995 motion, and set August 21 for the hearing of other motions. 4 RT 991. There were no warnings that any of appellant's conduct had jeopardized his Faretta status. Thus, the court's peremptory revocation of appellant's Faretta rights on August 21 violated virtually every procedural requirement set forth in Carson.

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[3]. The Court: And the firing of the paralegal, supposedly now another paralegal, and we'll have more discussions about that. That is just another circle. The circles are all designed to delay. That is what I meant by circle. We are not moving forward. We are moving around. 4 RT 985-85.

The appointment of the non-performing paralegal had been vacated by the judge handling confidential defense matters a week earlier on July 7, 1998. 20 CT 6915,

While the revocation in this case antedated Carson by several years, prior case law including Ferrel v. Superior Court (1978) 20 Cal.3d clearly conveyed the a defendant's Faretta status could not be summarily revoked without providing the defendant with warnings and an opportunity to continue self-representation under specific standards of behavior. Thus, the trial court violated appellant's Sixth Amendment right of self-representation by summarily revoking his pro per status without prior notice, without warnings about improper behavior, and without any opportunity to comply with standards of behavior required by the court.

Respondent attempts to justify the trial court's termination of appellant's separate self-representation on the basis that appellant's pre-self-representation conduct demonstrated an intent to delay the proceedings. Respondent assets that "[t]hese efforts began when appellant fled from San Francisco to Canada, after the attempted shoplifting that led to the discovery of the murders" and "delayed this case by six years, until his extradition". RB 276. There is no basis for an inference that appellant's invocation of his right of self-representation was dilatory based on the duration of the Canadian extradition proceedings, since they proceeded according to Canadian procedures and under Canadian law that appellant had no control over.

There may have been a permissible inference to the effect urged by respondent if appellant had represented himself in the Canadian extradition proceedings and had somehow extended what had ordinarily had been a brief hearing into a six year marathon, but that obviously did not happen. Appellant was represented by Canadian counsel throughout. Appellant did nothing to prolong the extradition proceedings other than decline to waive an order to extradition. If that constitutes dilatory conduct sufficient to justify revocation of self-representation, then every pro per defendant is at risk of self-representation revocation unless he waives jury trial in favor of a guilty plea. Respondent's argument necessarily leads to that untenable conclusion.

Respondent next attributes dilatory intent to appellant based on his "campaign against his various attorneys", RB 277, citing People v. Clark (1992) 3 Cal. 4th 41, 97 fn. 7, but that is an unfair and inaccurate characterization of the situation. Defendant Clark campaigned against all of the attorneys appointed to represent him apparently to prevent his case from moving forward. Appellant, in contrast, campaigned in favor of the re-appointment of Michael Burt and the San Francisco Public Defender to represent him in the Calaveras County proceedings in addition to the separate San Francisco proceeding where they had been appointed at the outset. Thus, appellant was campaigning for an efficient and expeditious solution to the

multi-county representation issue, while defendant Clark was campaigning against any solution at all.

Respondent next argues that appellant's eventual repudiation of the trial court's insistence that he accept the OCPD as standby counsel demonstrates that appellant was using self-representation for delay. RB 286-288. Respondent fails to acknowledge and address the unequivocal fact that appellant's only objection expressed on June 8, 1998 was to the OCPD continuing as standby counsel, not to the OCPD continuing as advisory counsel. Appellant explicitly asserted that he had agreed to accept the OCPD as advisory counsel at the May 15, 1998 Faretta hearing, 4 RT 835-6, but had not agreed to the appointment of the OCPD as standby counsel with a mandate to continue preparing for trial while appellant was pro per. 4 RT 927.

Respondent blurs this important aspect of the record with the assertion that "[j]ust 24 days after assuring the court he would accept the OCPD as his advisory counsel, he moved to discharge them", RB 287. Respondent fails to acknowledge that appellant moved to discharge them only in their capacity as standby counsel. The motion that appellant actually made cannot be deemed a delaying tactic, because inter alia it mirrored an earlier motion by the OCPD to withdraw as standby counsel. At the hearing on May 27, 1998, Public

Defender Carl Holmes argued that the OCPD could not ethically or practically fulfill both roles as advisory counsel and as standby counsel, and asked to be relieved on one or both. 4 RT 858-860. There was real conflict between appellant and the OCPD with respect to trial preparation tactics, and appellant's motion to have the OCPD stand down as standby counsel but continue as advisory counsel cannot credibly be characterized as a dilatory tactic.

C. Respondent's Failure to Acknowledge Appellant's Track Record of Diligence During His Self-Representation.

Next, respondent argues that appellant's pro per motion to continue the trial was "consistent" with an intent to delay the trial, RB 289. Respondent appropriately acknowledges that "seeking a continuance does not inherently show an intent to delay", but that "in the context of appellant's other actions, his request to postpone his long-delayed trial by another half year is consistent with such an intent", ibid.

Respondent fails to address "appellant's other actions" during self-representation that demonstrates his diligence in self-representation. However, in the course of respondent's argument in support of the court's August 21, 1998 denial of appellant's Penal Code section 1368 motion, respondent chronicled appellant's track record of numerous goal-oriented self-representation efforts on appellant's part between May and August 1998

as indicative that appellant understood the nature of the proceedings, RB 236-237. (See AOB 272-277 for a more detailed summary).

Appellant's pro per track record, as recounted by respondent and as confirmed by the record, demonstrates that he diligently sought to interview numerous witnesses, 6 Sealed 987.9 OCT 2015-2019; obtained the appointment of and funds for mental state experts who eventually testified at trial, 5 Sealed 987.9 OCT 1580-1590; filed legal motions to transfer courts 2-7 to San Francisco, 20 OCT 7003; to suppress evidence; and for discovery of evidence to impeach prosecution witness LaBerge, 20 OCT 7056 and 21 OCT 7144. Appellant's motion to continue listed 50 witnesses who needed to be interviewed, referred to extensive discovery materials he had not yet reviewed, and noted that his preparation efforts had been hampered by a court-appointed paralegal assistant who had promised to assist in several ways but who had done nothing.[4] 20 OCT 7035-7039.

This track record must be considered as an essential factor in determining whether appellant was diligently pursuing representation or using it as a delaying tactic. However, the trial court never inquired at all as to the extent of appellant's pro per trial preparation efforts. The trial court would

[4] This was not exaggeration on appellant's part. The record reflects that paralegal Anderson was appointed on June 16, 1998, did nothing, and was removed from the case on July 7, 1998. 20 CT 6915.

have been privy only to the motions filed in open court and not to the steady stream of preparation efforts undertaken in confidence with the judge handling 987.9 matters. It should be noted that none of appellant's requests for funds or ancillary services was denied as inappropriate, wasteful or dilatory. The trial court's termination of self representation was erroneous for the additional reason that the court failed to inquire as to appellant's affirmative efforts to prepare for trial.

Respondent also cites appellant's August 19, 1998 motion for a new competency trial as an indication of appellant's dilatory intent, RB 288-9 but as set forth in Argument VII regarding competency proceedings, that is an unfair and unwarranted inference under the circumstances. If the trial court's unlawfully imposed burdens on self-representation caused appellant to decompensate towards incompetence, that is the trial court's error, not a tactic conjured up by appellant. The declaration of Dr. Nievod attested to appellant's lack of artifice regarding the renewed competence proceeding. Compare People v. Johnson (2012) 53 Cal.4th 519, 532 [upholding the revocation of Faretta status where the trial court documented the defendant's mental deterioration]. Most importantly, the trial court did not terminate self representation based upon a doubt regarding mental competency, see Indiana v. Edwards (2009) 554 U.S. 164, but rather for the "simple reason" that "you

haven't put any thought into getting ready for trial", 5 RT 1065, by not following protocol, and by dilatoriness, 5 RT 1068, none of which was supported by the record. The peremptory revocation of appellant's Faretta status was improvident and unconstitutional.

V. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL BY THE TRIAL COURT'S ERRONEOUS RULINGS REGARDING APPELLANT'S MOTIONS TO DISCHARGE ATTORNEY KELLEY.

Respondent addresses this argument at RB 302-315.

Respondent's summary of the record regarding the September 21, 1998 Marsden hearing notes that the initial offer of proof included the proposed testimony of deputy public defender Lewis Clapp, RB 303, and subsequently notes that "[a]ppellant later asked to call other witness for the hearing, including psychologist Abraham Nievod". Respondent does not include reference to appellant's specific request to present the testimony of former deputy public defender Allyn Jaffrey regarding specific incidents of attorney/client interaction in which she had "witnessed Kelley "mistreat[] and provoke[] [appellant], and witnessed Kelley yelling at [appellant] over the phone", Sealed 25 CT 8507. Appellant further averred that attorney Jaffrey would confirm that appellant was able to cooperate with attorneys other than Kelley, including both attorneys employed by the Orange County Public

Defender's office and others, Sealed 25 CT 8509. That portion of appellant's offer of proof is important to demonstrate the trial court's error in denying the Marsden motion.

The testimony of both attorney Jaffrey and Dr. Nievod was essential to persuade the court that irreconcilable differences had arisen between appellant and attorney Kelley; that the differences had an objective basis in Kelley's conduct toward appellant; and that they were not contrived or manufactured by appellant for the purpose of delay. Appellant could not have been more explicit that he wanted to call the witnesses to "get the truth out to vindicate this [mis]conception that this court has – [the court: I don't want misconceptions] -- that I am the one that is choosing not to cooperate, when, in fact, it was Kelley that provoked this whole thing", Sealed 6 RT 1522. The court rejected with the comment "going back to the entire file in my mind, Mr. Ng, what you are attempting to do is manufacture a conflict and create delay", which "is not allowed". Sealed 6 RT 1536-1537. In sum, the trial court came to a factual conclusion as to appellant's intent that was contrary to the substance of the proposed testimony from attorneys Clapp and Jaffrey, and Dr. Nievod.

Appellant obviously recognized that the trial court harbored what appellant viewed as a misperception that he [appellant] was manipulating the

system to manufacture a conflict, and sought to present objective third party witnesses to correct that misperception. The trial court rejected appellant's offer of proof entirely on the manifestly untenable ground that "I'm not going to take part in creating a conflict between attorneys representing you, and I think that is what you are trying to do". 6 RT 1622. The trial court erred in refusing to hear appellant's evidence in order to avoid the possibility of sowing dissension among the OCPD ranks, when in fact appellant wanted to call to demonstrate that irreconcilable dissension had already arisen between himself and Kelley. If either attorneys Clapp or Jaffrey gave testimony that contradicted or refuted the position that Kelley had stated in court, that was highly relevant to the court's determination of the existence of an irreconcilable conflict between appellant and Kelley. Thus, the trial court erred in reaching a conclusion as to appellant's intent with respect to the conflict with Kelley without hearing from the witnesses proffered by appellant who could have provided the court with independent objective information about appellant's good faith versus manipulative intent.

Respondent's asserts that "[t]here is no California authority requiring courts to allow testimony at a Marsden hearing" RB 306. Respondent cites People v. Hines (1997) 15 Cal. 4th 997, 1025 for the proposition that "a Marsden hearing is not a full-blown adversarial proceeding, but an informal

hearing in which the court ascertains the nature of the defendant's allegations regarding defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement". That uncontroversial proposition does not in any way justify the trial court's adverse ruling without taking evidence. While a Marsden hearing is not supposed to be an adversarial proceeding, in the sense of having two opposing counsel or opposing parties, the trial court is nonetheless required to make informed and reliable factual determinations as to whether the complaints have "sufficient substance to warrant counsel's replacement", Hines at 1025. Where the court has doubts that the allegations "have sufficient substance" and where the defendant offers extrinsic proof of the substance of the allegations, the trial court cannot consistent with due process both refuse to hear the evidence and make an adverse finding against the defendant.

Respondent then asserts another unobjectionable proposition that "[i]n reaching its decision the trial court is entitled to make a credibility determination between counsel and the defendant", RB 306-07, citing People v. Smith (1993) 6 Cal. 4th 684, 697. Nothing in Smith justifies the trial court's actions in this case. The California Supreme Court granted review in Smith to address the standard trial courts should apply before adjudicating a post-conviction request to appoint substitute counsel to pursue allegations of

ineffective assistance by trial counsel. 6 Cal. 4th at 689-690. The Supreme Court concluded that the standard for substituting counsel was identical for pretrial motions and post-conviction motions:

> "We thus hold that substitute counsel should be appointed when, and only when, necessary under the Marsden standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation] or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result", 6 Cal. 4th at 696 (emphasis supplied).

The Supreme Court then reviewed the Marsden hearing that occurred in the trial court – "the trial court fully allowed defendant to state his complaints, then carefully inquired into them" after which "[d]efense counsel responded point by point". Smith then stated that "[t]o the extent there was a credibility issue between defendant and counsel at the hearing, the trial court is 'entitled to accept counsel's explanation'", ibid, citing People v. Webster (1991) 54 Cal. 3d 411, 36. The defendant in Smith made no offer of proof that was rejected, nor attempted to call any witnesses in support of his claim. Thus, the crucial facts requiring action in this case were not present in Smith.

The comment in Smith that the trial court was entitled to make a credibility determination and accept counsel's explanation over that of defendant does not justify the trial court's refusal to hear the actual evidence

offered by appellant in this case. Webster noted that the trial court had "allowed defendant to explain his single ground of dissatisfaction – counsel's handling of pretrial writs, after which "[t]he court sought a response from counsel and considered the information provided in reaching a decision". 54 Cal. 3d at 435-436. Webster then noted that "[t]here is no evidence that counsel intended to mislead the court" and therefore "[t]he court was entitled to accept counsel's explanation and was not obliged to inquire, sua sponte, into the actual efficacy of counsel's efforts." Id. at 436.

Webster is manifestly distinguishable because it expressly noted that there was "no evidence" presented to the trial court to call counsel's explanation into question, whereas here defendant sought in vain to present evidence to demonstrate that his complaints about Kelley "had sufficient substance to warrant [Kelley's] replacement", Hines, supra, at 1025. It is abundantly clear from the tenor of appellant's comments that appellant understood the court viewed him as a manipulative malingerer, and was doing his best to present objective evidence to rebut that adverse perception. The trial court plainly erred and deprived appellant of due process in refusing to hear his witnesses on this crucial issue.

Respondent's efforts to distinguish the federal cases cited by appellant are unavailing. The Sixth Amendment right to counsel guaranteed by the

Federal Constitution directly encompasses the California Marsden procedure, and numerous federal cases expressly authorize the trial court to take evidence regarding a disputed claim of ineffective assistance of counsel in determining whether to appoint substitute counsel.

Respondent asserts that United States v. Gonzalez (9th Cir. 1997) 113 F. 3d 1026 is distinguishable "because there the trial court did not hold a hearing on defendant's complaint, while here, the court held an extensive in-camera hearing", RB 310. In fact, the district court in Gonzalez did hold an inquiry comparable to what occurred here, but refused to hear testimony that "might have been dispositive", and was reversed for that error. 113 F.3d at 1028. The district court received Gonzalez's motion for substitution of counsel and asked Gonzalez "whether he still wants a new attorney and why" at the beginning of the inquiry. The defendant said that counsel "had forced him to plead" in a plea bargain against his will. The district court then asked defense counsel, "in open court and in the presence of Gonzalez, whether this charge was true" and counsel "denied it". The Ninth Circuit held that the district court abused its discretion in failing to take testimony from an independent witness, a probation officer who had been present during the plea discussion between Gonzalez and his attorney:

> The Court had available an independent witness, Gonzalez's probation officer, to help it resolve the matter. The Court's failure to hold a hearing at which the officer's possibly dispositive testimony could have been presented resulted in an inquiry that was inadequate and both deprived this court of a record for review and denied Gonzalez an opportunity to explore his concerns about his appointed counsel's performance". 113 F.3d at 1028

The key point in Gonzalez is that there existed an independent witness who could have provided a reliable factual basis to determine whether defendant's allegations were true, notwithstanding appointed counsel's denial. Appellant here presented the trial court with a comparable proffer of independent evidence, but the trial court refused to hear it. That is the same abuse of discretion and denial of due process that occurred in Gonzalez.

Respondent's effort to distinguish United States v. Nguyen (9th Cir. 2001) 262 F.3d 998 is equally unavailing. Respondent acknowledges that Nguyen required the trial court, faced with indicia of a breakdown in the attorney-client relationship, to both question the attorney and client "privately and in depth" and "examine available witnesses", RB 311, citing Nguyen at 1004 and Gonzalez, supra. Respondent asserts that Judge Ryan complied with the first obligation "to hold an in-depth in camera hearing", but fails to address Judge Ryan's refusal to "examine available witnesses", which is the fatal procedural flaw in the proceeding below.

Finally, respondent cites Martel v. Clair (2012) ___ U.S. ___, 132 S.Ct. 1276, 1288, but that case supports appellant's position with the its observation that "[a]s all circuits agree, courts cannot properly resolve substitution motions without probing why the defendant wants a new lawyer". Respondent argues that because "the trial court spent two and one-half hours probing why appellant wanted a new lawyer, [that] amply satisfied the current concerns expressed by the high court", RB 311. Respondent may characterize what the trial court did as "probing", but the essence of "probing" is getting to the bottom of a dispute and making a reliable determination of what the operable facts are. The trial court's failure to probe in that specific sense of fact-finding was erroneous and violated appellant's rights under Marsden and the Sixth Amendment.

VI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL BY THE TRIAL COURT'S REFUSAL TO APPOINT THE SAN FRANCISCO PUBLIC DEFENDER TO REPRESENT APPELLANT.

Respondent's argument regarding the refusal to appoint Michael Burt and the San Francisco Public Defender is found at RB 245-260.

A. Respondent's Failure to Address the Trial Court's Lack of Compliance with Penal Code Section 987.05.

Respondent accurately recounts the proceedings of 1994, including the order relieving Calaveras County attorneys Webster and Marovich, and the

proceedings regarding the appointment of Michael Burt and the San Francisco Public Defender in Orange County, RB 246-8. However, respondent argues incorrectly that the Orange County Superior Court "lacked jurisdiction" to appoint the San Francisco Public Defender because because of Penal Code sections 987.2(g), and 987.05, RB 248. Section 987.2(g) provides as follows:

> "Notwithstanding any other provision of this section, when an indigent defendant is first charged in one county and establishes an attorney/client relationship with a public defender, defense services contract, attorney, or private attorney, and where the defendant is then charged with an offense in a second or subsequent county, the court in the second or subsequent county may appoint the same counsel as was appointed in the first the county to represent the defendant when all the following conditions are met:
> (1) The offense charged in the second or subsequent county would be joinable for trial with the offense charged in the first if it took place in the same county or involved evidence which would be cross-admissible;
> (2) The court finds that the interest of justice and economy will best be served by unitary representation; and
> (3) Counsel appointed in the first county consents to the appointment.

Respondent argues that the appointment was prevented by subdivision (3) because the "SFPD did not consent; instead, it told the court it would only accept the appointment under certain conditions". RB 249. Respondent fails to recognize the practicalities of this type of multi-county representation. The SFPD clearly consented to the representation in principle subject to a successful determination as to various protocol aspects of the appointment.

That negotiation process occurs in virtually all major case appointments under Penal Code section 987.05.[5]

The appointing court discusses (and as a practical matter, "negotiates") acceptable terms with respect to length of time for trial preparation, amount of compensation, etc. The fact that there were logistical and administrative matters that need to be resolved between the San Francisco Public Defender

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[5] In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code for preliminary hearings and trials, except in those unusual cases where the court finds that, due to the nature of the case, counsel cannot reasonably be expected to be ready within the prescribed period if he or she were to begin preparing the case forthwith and continue to make diligent and constant efforts to be ready. In the case where the time of preparation for preliminary hearing or trial is deemed greater than the statutory time, the court shall set a reasonable time period for preparation. In making this determination, the court shall not consider counsel's convenience, counsel's calendar conflicts, or counsel's other business. The court may allow counsel a reasonable time to become familiar with the case in order to determine whether he or she can be ready. In cases where counsel, after making representations that he or she will be ready for preliminary examination or trial, and without good cause is not ready on the date set, the court may relieve counsel from the case and may impose sanctions upon counsel, including, but not limited to, finding the assigned counsel in contempt of court, imposing a fine, or denying any public funds as compensation for counsel's services. Both the prosecuting attorney and defense counsel shall have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time.

and the Orange County Superior Court is not tantamount to a refusal of consent.

Respondent also asserts that the San Francisco Public Defender did not consent because the appointment would have also "required the approval of San Francisco's Mayor and Board of Supervisors", RB 250, but again, that is merely bureaucratic protocol, not a refusal of consent. The consent procedure encompassed three component parts: the SFPD, the Mayor, and the Board of Supervisors. The SFPD consented, but the Orange County Superior Court aborted the appointment proceeding before the latter two entities had any opportunity to consent. Presumably if the Orange County Public Defender sought appointment in a different county for a client it already represented in related cases, the OCPD would be under similar constraints to obtain approval through the existing county hierarchy. A refusal of consent entails a statement from the attorney or agency that "I don't want to take this case". That was not the message that Michael Burt and the San Francisco Public Defender gave to Orange County Superior Court. The SFPD's message was that "we do want to accept the appointment subject to resolution of the administrative and logistical matters".

Regarding the amount of time the San Francisco Public Defender required to prepare for trial, respondent fails to recognize that the trial court's

refusal to consider a two-year trial preparation period was arbitrary and unreasonable. The only reasonable course for the trial court to have taken before rejecting the San Francisco Public Defender was to hold a hearing pursuant to Penal Code section 987.05, exactly as counsel for Ng expressly requested[6] and as the prosecution acknowledged – "It is true that Penal Code section 987.05 does give both sides the right to present some evidence on what is a reasonable time to be ready for trial," 1 RT 25. The two primary

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[6] . We request that the court set the matter down for a hearing pursuant to the provisions of Penal Code section 987.05 which we can present evidence as required by statute regarding the time necessary for trial.

> We hoped that this representation issue here would be resolved by a, what I would characterize as a single track proceeding where with the San Francisco Public Defender as the odds on purveyor of legal service for the number of reasons would be appointed.
>
> Your Honor is declining to give a 30-day continuance for them to resolve these things. That means we have to go into the statutory track, Penal Code section 987.05, where we have a process where evidence is presented by the people and by the defense as to the time necessary for trial, and the court then appoints counsel based on the capacity of prospective attorneys to meet that reasonable date. That was not followed in the earlier appointment in this case, your Honor.
>
> This case was, the initial appointment in Calaveras County was done without, in disregard of Penal Code section 987.05. It resulted in a debacle for the last two years which, as Judge McCartin pointed out, has left the case proceeding nowhere. We want to avoid that type of debacle, your Honor. We request a formal hearing 30 days from now. 1 RT 24-25.

pieces of evidence at a properly conveyed section 987.05 hearing would have been (1) the SFPD's time estimate and its justification, and (2) the OCPD's time estimate and its justification as to the time needed to prepare for trial.

That evidence, had it been presented in conformity with section 987.05, would have given the Orange County Superior Court a realistic and objective point of comparison as to whether the San Francisco Public Defender's estimate of two years was reasonable or not. The trial court rejected the San Francisco Public Defender's time estimate out of hand without any factual basis and without undertaking any of the type of inquiry or investigation set forth under Penal Code section 987.05. The trial court then precipitously appointed the OCPD without any semblance of a 987.05 hearing, notwithstanding the express request for one by the OCPD. 1 OC RT 32.

The portion of the September 30 hearing relating to appointment of counsel was conducted by Judge Ryan, 1 RT 18, who eventually tried the case. After denying the defense request for a 30 day continuance to permit the SFPD to work out logistical arrangements, and after denying the defense request for a hearing pursuant to Penal Code section 987.05, the court ruled as follows:

> The Court: There has been far too much delay in this case, it's time to get it moving. Your request is denied. The Public Defender of Orange County is appointed. Judge McCartin will select the dates for motion, for trial, and take care of the statutory 987.05 problems.

> Mr. Holmes [Orange County Public Defender]: The court having appointed the Orange County Public Defender, we would make a request for a hearing under 987.05.
>
> The Court: Do that with Judge McCartin. That what I just said, Mr. Holmes. You have accepted the appointment?
>
> Mr. Holmes: Well, I'd like to say for the record, Your Honor, there has been some significant concern for our office on that matter, not the least of which is how Orange County is going to be paid in this particular case.
>
> The Court: Are you accepting or not?
>
> Mr. Holmes: We are accepting if that's –
>
> The Court: Take up the other issues with Judge McCartin. This court is in recess, ladies and gentlemen. 1 OC RT 32 – 33.

Judge Ryan's ruling flouted the requirement of section 987.05 that the determination "of a reasonable time period for preparation" be made before making an appointment, so that there is an agreement as to the time of trial at the outset. Judge Ryan arbitrarily refused the SFPD's request appointment, notwithstanding its specific request for a 987.05 hearing, and peremptorily appointed the OCPD, notwithstanding its specific request for a 987.05 hearing. That appointment was made without any basis at all for believing that the OCPD could be ready for trial (1) any sooner than the SFPD; much less (2) in accordance with the unspecified but shorter time period contemplated by Judge Ryan.

Judge McCartin was disqualified pursuant to Code of Civil Procedure section 170.6 on September 30, and the case was assigned to Judge Fitzgerald (who was subsequently removed by the Court of Appeal). On October 21, Judge Fitzgerald granted a continuance to January 20, 1995, for a hearing to set a trial date. 1 OC RT 44. On January 20, a deputy public defender, Allyn Jaffrey, argued in favor of transferring the case "out of Orange County for a myriad of reasons" including vicinage, venue, the bankruptcy of Orange County, and the inappropriate cronyism by which the case was initially transferred to Orange County. 1 OC RT 54. Counsel argued for a change of venue on all counts because appellant could not get a fair trial in Orange County because of the unavailability of funds for investigation and trial preparation. The court continued the matter to February 24 to afford time to work on the funding issue. 1 OC RT 95.

On that date, the court tentatively denied the change of venue and vicinage motions, but tentatively granted the OCPD's motion to withdraw for financial reasons, and continued the case to March 24. The court tentatively denied the OCPD's request to appoint Michael Burt in its place, 1 RT 105.

On March 24, the OCPD announced that the funding issues had been almost entirely resolved with the County Board of Supervisors, and that the OCPD was prepared to continue representation. 1 RT 109.

The record demonstrates that the Public Defender was afforded the exact opportunity to determine whether adequate funding would be available before unequivocally accepting appointment that was denied to the SFPD. Judge Fitzgerald stated that he "had intended to recuse the public defender for financial disqualification factors and appoint private counsel", 1 OC RT 111, which was generally consistent with the spirit of section 987.05 if not with the statutory procedure. What was readily apparent is that six months after the Orange County Superior Court refused to appoint the SFPD because they would not unequivocally accept appointment without any assurances regarding funding or trial preparation time, the court took the opposite tack with the OCPD, and made accommodations virtually identical to those denied to the SFPD.

The first discussion of setting a trial date occurred on July 14, 1995. The OCPD discussed the logistical difficulties of preparation, and gave a "speculative guess" that the OCPD would be ready for trial in 30 months, and would be amenable to "setting a soft date" a year from then. 1 OC RT 121. The court agreed – "that is what we are going to do, we will set a soft date of one year with the expectation that it is going to go over", ibid. After discussion of courthouse practicalities, the court set the soft trial date for

September 6, 1996, 1 OC RT 123. That was just three weeks shy of the two year trial date proposed by Michael Burt on September 30, 1994.

The disparity of treatment between the SFPD and the OCPD underscores the arbitrariness of the refusal to appoint the SFPD without any actual information or evidence regarding the realistic amount of time needed to prepare for trial. The trial court's flouting of Penal Code section 987.05 deprived appellant of his Sixth Amendment right to counsel and his right to due process. The OCPD was eventually accorded a reasonable opportunity to prepare for trial, and the case actually went to trial more than four years after the date that the SFPD sought appointment, and more than two years after the SFPD stated that it would be ready for trial.

With respect to the SFPD request for a convenient forum, respondent fails to acknowledge that one of the first orders of business was to adjudicate the vicinage motion that had been reserved during the change of venue proceedings in Calaveras County. The Orange County Superior Court received the case due to the extremely flawed change of venue proceedings, and was not likely to be the trial venue given its lack of vicinage regarding six of the counts. The SFPD's request was entirely unobjectionable given the unlikelihood that the trial would actually be held in Orange County.

Respondent disputes that Penal Code section 987.05 requires the trial court to take evidence and hear argument as to a reasonable length of time for preparation, RB 251, but respondent fails to acknowledge the relevant statutory language: "Both the prosecuting attorney and defense counsel shall have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time" (emphasis supplied). The statute clearly provides defense counsel with the right to present evidence and argument as to both the reasonable time for the trial to be set, and if necessary, the reasons why counsel was not able to complete preparations within that previously set time. The trial court here clearly violated section 987.05 by arbitrarily determining that two years was too long for trial preparation without taking any evidence.

In sum, the SFPD made a clear statement of intent to accept representation in the case, subject to working out the logistical details, and the Orange County Superior Court arbitrarily and erroneously refused to consider the appointment because of its subjective and unsupported reaction that two years was too long for trial preparation.

B. Respondent's Misreading of People v. Ortiz.

Next, respondent asserts that Harris v. Superior Court (1977) 19 Cal.3d 786 did not require the appointment of Michael Burt and the SFPD because

appointment was "forbidden" under section 987.2, citing People v. Ortiz (1990) 51 Cal.3d 975, 989, fn. 5. Respondent has repeated the analytical error of characterizing the SFPD's overture to accept representation in the case as a refusal to accept the case because the SFPD broached logistical matters that any attorney or agency would have to resolve before finally accepting appointment.

Next, the reference to Ortiz does not support or justify the refusal to appoint the SFPD. Ortiz did refer to the requirement that appointment procedures conform to Penal Code section 987.2, but in the context of the requirement of sections (d) and (e) that in larger counties, "the court shall first utilize the services of the public defender to provide criminal defense services to indigent defendants". Ortiz addressed the propriety of appointing the same attorney who had previously been retained by a defendant who ran out of money and could no longer pay the attorney, noting that "frequently, as here, it may be a more efficient use of both time and money to appoint the attorney who represented the defendant in an earlier proceeding than to begin again with a new attorney", id at 989. Thus, Ortiz underscores that the benefits of consolidated representation were squandered by the Orange County Superior Court's refusal to appoint the SFPD.

The same considerations that this Court relied on to grant Harris's writ of prohibition are equally present in this case. The previous representation by counsel that Harris wanted to be appointed in his current case "not only established a close working relationship between petitioners and Attorneys Jordan and Weinglass but also served to provide those attorneys with an extensive background in various factual and legal matters which may well become relevant in the instant proceeding – a background which any other attorney appointed to the case would necessarily be called upon to acquire", Harris v. Superior Court, supra, 19 Cal.3d at 798.

Respondent asserts that Michael Burt did not have as much involvement in the prior representation of appellant as compared to Weinglass and Jordan's prior representation of Harris, and refers to Burt's October 23, 1991 declaration, where he indicated that he had not read much of the discovery, RB 256. That cannot logically weigh against appointment, because Harris focused on the attorney-client relationship formed in the earlier representation, and emphasized that the prior representation afforded counsel useful background information relevant to the current case. There was nothing in Harris that suggested the appointment of prior counsel was predicated on prior counsel somehow having familiarity with the specific evidence in the current case. Here, Michael Burt had represented appellant in

the San Francisco case, consulted with him about the extradition proceedings, sought to represent him in the Calaveras proceedings at the outset, and in the process (1) "established a close working relationship" with appellant, and (2) acquired "an extensive background in various factual and legal matters" that were relevant to the defense of the Calaveras charges. Harris, supra, at 798.

Respondent cites Gresset v. Superior Court (2010) 185 Cal.App.4th 114 and People v. Cole (2004) 33 Cal.4th 1158, 1186 – 7 to support the trial court's refusal to appoint Burt, RB 255 – 6. Gresset is easily distinguishable, because the private attorney whose appointment Gresset sought was not on the county conflict panel. After the public defender and the second public defender had declared conflicts, the trial court turned to the county panel as required by 987.05(e), which provides that if the county public defender has a conflict, "the court shall next utilize the services of the second public defender and then the services of the county-contracted panel prior to assigning any other private counsel", emphasis supplied. No argument was made that the attorney requested by Gresset was eligible for appointment under section 987.2(g). That section relieves the trial court of having to exhaust the three tiers of enumerated attorneys under 987.05 before considering the attorney requested by the defendant.

Cole is equally distinguishable because the court held that the local alternate defender was properly appointed to represent the defendant, notwithstanding the defendant's preference for appointment of a private attorney. Again, the trial court in Cole followed the section 987.05 tiered system for appointment, and there was no multi-county representation aspect involved that would have triggered 987.2(g).

Under these circumstances, appellant was deprived of due process by the trial court's arbitrary abrogation of Penal Code sections 987.05 and 987.2(g), and was deprived of his state and federal constitution right to counsel.

C. Respondent's Unpersuasive Argument Regarding the March 20, 1998 Refusal to Appoint Attorney Burt.

The trial court erred again in March 20, 1998, when it summarily denied appellant's request to appoint Michael Burt to the defense, either in place of or in addition to the OCPD. The same judge who preemptively denied the September 30, 1994 request for representation by the SFPD without any hearing pursuant to section 987.05 was equally peremptory three and a half years later – "We're doing this today", 3 RT 585; "I want answers. I don't want we'll do it next time. I want answers. Either you can or you can't [commit to a September 1998 trial date]", 3 RT 586.

D. The Standard of Review

Respondent argues that People v. Noriega (2010) 48 Cal. 4th 517, 520 imposes the Watson standard of review. However, Noriega did not include a claim that the trial court's unjustified replacement of appointed counsel was an arbitrary abrogation of state statutory right that violated the defendant's federal due process right under Hicks v. Oklahoma (9180) 447 U.S. 443. Here, the trial court's repeated failures to comply with Penal Code sections 987.05 and 987.2(g) violated appellant federal due process rights, and require application of the Chapman standard of review. Chapman v. California (1967) 386 U.S. 18, 24.

VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S ERRORS IN ADJUDICATING THE COMPETENCY PROCEEDINGS PURSUANT TO PENAL CODE SECTION 1368.

The crux of appellant's competency claim is that the trial court erred in summarily rejecting appellant's August 21, 1998 motion to reconsider the previous competency finding based on the recent declaration of Dr. Abraham Nievod. Dr. Nievod had been involved in the case since the 1993 proceedings in Calaveras County, was familiar with appellant's present and past mental state, and declared that it had deteriorated considerably during the previous two months while appellant was representing himself. Dr. Nievod emphasized appellant's increasing depression and diminishing cognitive functioning. In short, appellant had succumbed to the pressure and stress of

being forced to trial without adequate time to prepare while forced to share trial resources with the OCPD, whom he mistrusted.

The trial court erred in finding that there was neither any substantial change in circumstances since the prior competency finding nor any new evidence calling its prior finding into question. 5 RT 1015. The trial court's rejection of Dr. Nievod's current declaration without a hearing was patently erroneous.

Respondent accurately summarizes the factual record before the court at the August 21, 1998 hearing, RB 228-233, but untenably asserts that "Dr. Nievod did not even find that a substantial change of circumstances had occurred since 1996", RB 239. Respondent misunderstands the plain import of Dr. Nievod's August 1998 findings that appellant manifested "a continuation of the same psychological syndromes", 21 Sealed CT 7507, but that "his depression was much more profound and debilitating", 21 Sealed CT 7508-10. In other words, the chronic mental impairments that Dr. Nievod had identified in 1993 had flared up in an acute manner in 1998. Respondent implies that appellant would have had to show that a new and different mental illness had arisen as of August 1998 to constitute a cognizable change of circumstances for 1368 purposes. There is no case law to that effect, and it flouts common sense regarding the course of illnesses. By analogy, there are

a great number of people who suffer from serious back problems, but generally maintain their work and family responsibilities. Yet periodically an acute eruption of debilitating symptoms may require sick leave, disability leave, medical care, etc., for the duration of the eruption. Those acute phases must be viewed as "changed circumstances" within the context of a chronic ailment.

Similarly, respondent incorrectly contends that Dr. Nievod's declaration was not "new evidence" because it "was a restatement of his prior diagnosis", RB 239-40. In fact, the declaration was a reconfirmation of his prior diagnosis plus a report of new developments in the form of increasing depression and decreasing cognitive functioning. The trial court thus faced substantial evidence of deterioration into incompetence, and erred in rejecting it without a hearing, just as an orthopedist would commit malpractice by refusing to treat acute back symptoms on the ground that they were merely a manifestation of an ongoing condition.

VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S ERRONEOUS RULINGS THAT SUBJECTED APPELLANT TO ONEROUS AND UNJUSTIFIED PHYSICAL CONSTRAINTS, INCLUDING A CAGE AND A STUN BELT.

Respondent argues that the trial court's approval of the Orange County sheriff's use of a stun belt from March 1997 through the conclusion of trial in

1999 was an appropriate security measure and did not cause any prejudice to appellant. RB 315-330. People v. Mar (2002) 28 Cal.4th 1201, confirmed that courts should be cautious about forcing a defendant to wear a stun belt because those devices were not "always, or even generally, less onerous or less restrictive" than "more traditional security measures...". 28 Cal.4th at 1228.

Respondent argues that the trial court in this case did not have the benefit of the Mar decision when it forced appellant to wear a stun belt in 1997-1999, citing People v. Virgil (2011) 51 Cal.4th 1210, 1271. Virgil affirmed the use of a stun belt in a trial that took place several years before the Mar decision, and explained that while Mar recognized "the potential psychological consequences of wearing a stun belt", the trial court in Virgil "was not required to foresee and discuss any concerns detailed in that opinion," Id. at 1271.

Appellant's record is significantly different than the record in Virgil because appellant presented expert testimony in support of his motion to remove the stun belt that apprised the trial court of the adverse psychological consequences subsequently discussed in Mar, see 12 RT 2897-2898, and respondent's summary of the testimony of Dr. Stewart Grassian at the October 23, 1998 hearing, RB 325-326. Judge Ryan did not have to "foresee"

the decision in People v. Mar in order to understand the adverse psychological effects of the stun belt. Dr. Grassian had interviewed appellant on two occasions, first in 1994 in the Calaveras County Jail and again in the Orange County Jail in 1998. 12 RT 2890. In the Orange County interview, appellant described the stun belt as very repressive in terms of tightness of fit, which resulted in difficulty breathing and keeping up with the courtroom proceedings. 12 RT 2892. At that point, the court interjected "I have seen Mr. Ng talk almost without stopping for up to 45 minutes" such that "those last comments by Mr. Ng to him [Dr. Grassian], I don't believe had been perceived by anyone in this court room". Grassian gave his opinion that appellant's obsessive tunnel vision was worse in Orange County than it had been in Calaveras County in 1994, such that "that impairment coupled with the stun belt causes a very substantial cognitive impairment in his ability to participant meaningful in this trial...". 12 RT 2895.

Dr. Grassian also opined that "one of the things he [appellant] becomes aware of when he is wearing the belt is an enormous sense of shame, of degradation of already been condemned of being dangerous and bad". 12 RT 2897. The feelings of shame and condemnation resulting from the stun belt echoed and amplified the feelings of shame and degradation caused by the Calaveras County cage. The psychological debilitation that began with the

use of the cage in Calaveras County continued through the use of the stun belt in Orange County and must be considered in terms of its cumulative impact. 12 RT 2894-5. That is the argument made by appellant. For this reason, respondent's comment that appellant "has not presented any cognizable claim regarding the cage", RB 315, fn. 58, is incorrect.

The bottom line is that the trial court abused its discretion in imposing the stun belt on appellant for trial because none of the evidence purporting to show an escape risk related to courtroom conduct. People v. Howard (2010) 51 Cal.4th 15, 28, revisited Mar and confirmed that the trial court must make a finding of manifest necessity based on facts, not rumor or innuendo:

> The Mar court held that the requirements set out in People v. Duran (1976) 16 Cal. 3d 282 for determining when a defendant may be shackled in the courtroom, also govern the decision to compel a defendant to wear a stun belt during trial. Thus (1) there must be a showing of manifest need for the stun belt; (2) the defendant's threatening or violent conduct must be established as a matter of record; and (3) it is the function of the court to initiate whatever procedures it deems necessary to make a determination on the record that the stun belt is necessary. The court must make an independent determination based on facts, not rumor or innuendo, and must not merely rely on the judgment of jail or court security personnel. (emphasis supplied)

The record before the trial court fails the Duran/Mar test. Appellant had never displayed any "threatening or violent conduct" in court, or elsewhere for that matter. As of 1998, appellant had amassed some 13 years of unobjectionable courtroom behavior in Canada and in the United States.

Notwithstanding appellant's unblemished record of courtroom conduct since 1991, respondent comments that "[t]he fact that he did not try to escape when his captors made meticulous efforts to prevent it did not indicate he no longer posed an escape risk", RB 328. Respondent fails to acknowledge that the transfer of the case to Orange County, a modern and secure facility compared to the Calaveras County courthouse, substantially reduced or eliminated any need for additional in-court security.

Moreover, the stun belt is intended to prevent in-court assault, e.g., a defendant's attack on his lawyer, on the prosecutor, or on jurors, who are in his immediate proximity before a bailiff is able to intervene. Concerns about escape can be fully addressed by additional bailiffs in the courtroom stationed at exits. The fragmentary rumor and innuendo about appellant as an escape risk did not justify the stun belt in the courtroom.

Regarding prejudice, appellant's demonstration of discomfort, anxiety, and inhibition is closely analogous to that found prejudicial in Mar, and summarized in Howard, supra, 5 Cal.4th at 28-29:

> The Mar court decided the error was prejudicial. "[D]efendant ... clearly stated that the device made it difficult for him to think clearly and that it added significantly to his anxiety, and the trial transcript confirms that defendant was nervous while testifying at trial. It is, of course, not unusual for a defendant, or any witness, to be nervous while testifying, but in view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict, it is reasonable to believe that many if not most persons would experience

> an increase in anxiety if compelled to wear such a belt while testifying .... Moreover, defense counsel specifically noted that defendant was 'afraid that somebody's going to push the button,' and in light of the circumstances that defendant was on trial for having caused an injury to a law enforcement officer and that the activation of the stun belt was to be controlled by another law enforcement officer, defendant's expressed anxiety in this regard, even if not justified, is plausible."

Apart from the fact that Mar was on trial for assaulting a police officer and all of appellant's charges involved civilians, the showing as to prejudice is virtually identical. Overall, appellant's presentation is stronger because of the years of degradation and indignity that he endured in the cage in Calaveras County. Under these circumstances, it was an abuse of discretion and a denial of due process to require any courtroom constraints above and beyond ankle chains, which would have entirely obviated any escape possibility.

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND HIS RIGHT OF CONFRONTATION BY THE ERRONEOUS ADMISSION OF THE CANADIAN EXTRADITION TESTIMONY OF DECEASED PROSECUTION WITNESS MAURICE LABERGE.

A. Testimony Given in Foreign Jurisdictions Cannot Qualify for Admission Under Evidence Code Section 1291.

Respondent first argues that some of appellant's arguments regarding the inadmissibility of foreign testimony were forfeited because they were not raised at trial. RB 340. Specifically, respondent asserts that appellant did not

argue that (1) there is a legal presumption that California laws do not operate beyond California's borders; (2) the language of the Evidence Code precludes extradition-testimony from being admitted under the prior testimony exception; and (3) when the legislature sought to include evidence of foreign origin in the Evidence Code provisions, it did so explicitly, RB 340-341. On the contrary, trial counsel argued at the hearing at October 8, 1988, that the legislative history of Evidence Code section 1291 contained no provision for the admission of foreign testimony, 7 RT 1611-1614, 26 CT 8668-8691.

Regarding the merits, respondent acknowledges that appellant did argue in the trial court that foreign testimony does not qualify as prior testimony under Evidence Code section 1291, because foreign proceedings do not necessarily comply with California or federal standards of admissibility. RB 341.

Respondent's initial argument is that federal case law does not contain a blanket exclusion of foreign testimony under the Federal Rules of Evidence, RB 341, citing United States v. Salim (2nd Cir. 1988) 588 F.2d 944. Salim involved a United States criminal prosecution in the Eastern District of New York, in which the Government sought and obtained permission to depose a foreign witness who was in custody in France. The deposition was taken in the chambers of a French Magistrate Judge, who posed the party's written

questions to the deponent in French, which were then translated into the deponent's native tongue of Farsi, after which the responses in Farsi were translated into French and then into English. In the process, the deponent had an attorney present and available for consultation, as was required under French law. Moreover, the defendant, while incarcerated, had access to two telephones, an open line to hear the proceedings in the Magistrate's chambers, and the other a private line that enabled him to consult confidentially with his own attorney who was present at the hearing.

The Second Circuit confirmed the admissibility of the deposition because "in the context of the taking of a foreign deposition, we believe so long as the prosecution makes diligent efforts, as it did in this case, to secure the defendant's presence, preferably in person, but if necessary, via a form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witnesses' testimony be preserved anyway", 855 F. 2nd at 950. The Second Circuit did note that the purported cross-examination was conducted by written questions, as opposed to live questioning, but viewed that procedure as comparable to interrogatory responses. It should be noted that Salim preceded Crawford v. Washington (2004) 541 U.S. 36 by many years, and

there is a substantial question whether that type of written questioning would satisfy the Confrontation Clause as currently construed.

The other cases cited by respondent similarly relate to depositions taken in the course of United States federal prosecutions in which a witness who was not subject to federal subpoena was deposed in a foreign county under the auspices of the federal court in which the prosecution was pending. United States v. Siddiqui (11th Cir. 2000) 235 F.3d 1318, 1324, and United States v. McKeed (1st Cir. 1997) 131 F.3d 1, 10.

Respondent's reliance on this line of federal authority has little relationship to a proper construction of the California Evidence Code. The differences between the federally authorized foreign depositions and the Canadian extradition hearing are manifest. Rule 15, Fed. R. Crim. Proc. expressly authorized depositions in foreign countries; Evidence Code section 1290-1291 does not refer to any foreign testimony. The federal cases expressly noted that the federal judge presiding over the domestic prosecution structured the foreign deposition to resemble a domestic deposition as much as possible; here, the Calaveras County Justice Court had zero involvement in or influence over the Canadian extradition hearing.

Regarding the presumption that California law does not have any extra-territorial effect, respondent argues that the admission of foreign testimony

"does not prohibit or remedy any conduct beyond California's borders, so it has no extra-territorial effect" RB 343. That entails an unduly narrow view of the scope of the term, "extra territorial effect".

Appellant has argued that Evidence Code sections 1290-1291 apply solely to prior testimony given in a United States jurisdiction on the basis that the statutes that expressly provide for the admission of foreign-generated evidence all impose admissibility requirements beyond those applicable to domestic evidence. There is a separate provision governing the admission of foreign-generated documents, Evidence Code section 1530, which imposes admissibility requirements beyond those applicable to domestic documents. By necessary implication, those foreign documents would not be admissible under the general provisions of the California Evidence Code governing the admission of "writings", because that would render the foreign evidence provision superfluous.

Because the legislature deemed it necessary to provide a specific statute regarding foreign documents to render them admissible, above and beyond the general Evidence Code provisions regarding writings, the absence of a comparable provision regarding foreign generated testimony means that foreign generated testimony is not admissible under the California Evidence Code. Respondent has no rejoinder to these arguments other than a statement

that the California provisions that expressly refer to and permit the introduction of foreign-generated evidence impose additional requirements for admission not applicable to California-generated evidence. RB 346-7. This merely underscores the legislature's general view that foreign-generated evidence is admissible only with additional indicia of reliability, as specified for foreign documents, Evidence Code section 1530, and for foreign conviction, Penal Code section 686. Respondent fails to acknowledge the anomaly of arguing that the legislature imposed specific requirements for the introduction of foreign documents and convictions, but no additional requirements for the introduction of foreign testimony.

B. The Admission of Laberge's Canadian Testimony Violated Appellant's Sixth Amendment Rights.

Respondent further argues that the requirements of the Sixth Amendment Confrontation Clause were satisfied in this case by the opportunity for cross-examination at the Canadian extradition hearing, RB 351-2, but this is incorrect. As counsel argued and demonstrated during the proceedings below, the primary issues at the extradition hearing were neither appellant's guilt of the California charges, nor the general credibility of Maurice LaBerge. Appellant's Canadian counsel focused on (1) the absence of assurances that California would not impose the death penalty if appellant was extradited; and (2) the admissibility of Laberge's testimony under

idiosyncratic Canadian laws regarding informers. Attorney McLoed examined LaBerge to establish by circumstantial evidence that LaBerge was "a person in authority", in other words, an informer acting under governmental auspices, so as to render inadmissible LaBerge's testimony about his conversations with appellant. 7 RT 1614–15. The cross-examination of LaBerge and the presentation of other evidence on that issue was entirely separate and distinct from LaBerge's credibility regarding the circumstances surrounding his contacts with appellant.

Moreover, the effort of appellant's Canadian lawyer to show that LaBerge was acting under the auspices of Canadian law enforcement authorities during his interactions with appellant would not have made his testimony any more or less admissible in a California court had the interaction occurred in California. Therefore, the crux of the cross examination was idiosyncratic to the Canadian proceedings, and cannot be viewed as functionally equivalent to the type of cross examination that would have been conducted in the California criminal prosecution that ensued.[7]

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[7] Respondent argues that appellant failed to demonstrate that his primary incentive at the extradition hearing was to show that he would be convicted and sentenced to death if extradited. RB 350. However, that litigation strategy is readily apparent from the extradition hearing transcript. 28 CT 9441-9511. After reviewing LaBerge's lengthy criminal history, 28 CT 9441-9504, appellant's Canadian counsel asked "[w]hen was it ... that you first informed on someone else?" There ensued questioning as to the working

C. The Requirement of Reversal.

Respondent argues that the cartoon caricatures would have been admissible in the absence of LaBerge's testimony as admissions under Evidence Code section 1220, RB 353. Respondent argues that "LaBerge's testimony was helpful in explaining the drawings", but were independently admissible because appellant "wrote words on the cartoon drawings", ibid. Appellant disputes that snippets of his handwriting rendered the cartoon images admissible.

Evidence Code section 1220 requires proof by the proponent of evidence claimed to be an admission that the alleged admission was in fact made by an adverse party. See Lewis v. Western Truck Line (1941) 44 Cal.App.2d 455, 465 [the proponent of an alleged admission must present "at least prima facie proof that it was made by [the adverse party]"]. The

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definition of "informant" and its application to LaBerge's activities. 28 CT 9505-9510. Appellant's counsel questioned LaBerge about his access to newspaper articles about appellant during December 1984-January 1985, 28 CT 9537. LaBerge acknowledged that a prison official arranged for him to exercise with appellant on the prison yard, 28 CT 9542, and that he took an interest in appellant's case – "He excited my interest very quickly", 28 CT 9546, although he denied being motivated to obtain evidence against appellant at the beginning of their relationship, 28 CT 9547. He admitted making detailed notes of their conversations, 28 CT 9550. Counsel stated LaBerge's stint as a prosecution witness against an inmate named Gingras, 28 CT 9593, and pressed him whether he did it with the hope of personal benefit, 28 CT 9596.

prosecution in this case was entirely reliant on LaBerge's Canadian testimony to establish a prima facie case that appellant drew the cartoons.

The prosecution could perhaps have had a handwriting analyst identify the written words as authored by appellant, but that would not establish the foundation for admission of the cartoons themselves as adoptive admissions under Evidence Code section 1221. That section requires proof that the adverse party has "manifested his adoption or his belief in its truth". Appellant's handwriting cannot be deemed a manifestation of his "belief in the truth" of what was depicted in the cartoons. Rather, the extrinsic evidence regarding the circumstances of the homicides demonstrated that the cartoon images were frequently if not generally inconsistent with the objective circumstances of the homicides, not accurate representations. Appellant was deprived of his Sixth Amendment right of confrontation by the admission of LaBerge's testimony and the cartoon images, and the violation was prejudicial for all of the adverse and inflammatory inferences urged by respondent at RB 353-4.

X. APPELLANT WAS DEPRIVED OF DUE PROCESS BY THE TRIAL COURT'S NUMEROUS ERRORS IN ADMITTING PREJUDICIAL EVIDENCE.

Respondent's arguments regarding the erroneous admission of evidence at guilt phase are found at RB 373-390.

A. The Erroneous Admission of the Gouveia Testimony

Respondent initial contends that the only objection made at trial was "based on hearsay", RB 374, which the trial court overruled, citing 13 RT 3342. Respondent incorrectly contends that appellant's argument to this Court that there was no applicable exception to the hearsay rule was "forfeited" because trial counsel "did not argue that the hearsay exception for statements of an opposing party was inapplicable because there was no evidence he was actually was the caller", ibid. Evidence Code section 353(b) requires the opponent of proffered evidence to make "an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion". The opponent of the evidence is not required to anticipate and rebut any counter argument that the proponent of the evidence could conceivable make. In addition, respondent is incorrect that appellant's "due process claim is also forfeited because he did not raise it at trial", ibid, because it is preserved under the rationale of People v Partida, supra.

On the merits, respondent acknowledges that there must be some indication that the opposing party was in fact the person who made the statement, citing Lewis v. Western Truck Line, supra. Lewis confirms the requirement that to be admissible under Evidence Code section 1220, an

admission must be accompanied by "at least prima facie proof that it was made by [the party]". 44 Cal.App.2d at 465.

Respondent contends that the prima facie proof was supplied by Gouveia's testimony that the caller "identified himself as appellant", RB 375 (emphasis in original). Respondent does not acknowledge that the prima facie evidence necessary for a section 1220 admission must be independent of the hearsay admission itself. Often in the context of a proffer of an admission in a telephone call, the proponent elicits that the testifying witness who participated in the conversation recognized the party's voice from prior contacts. Here, no such independent evidence existed, and respondent is incorrect that the hearsay statement can authenticate itself.

Regarding prejudice, respondent argues that the testimony from Gouveia could not have rendered the trial fundamentally unfair, implicitly relying on the overall lengthy record. Appellant replies that when viewed cumulatively the combined errors in admitting prosecution evidence and excluding defense evidence did render the trial fundamentally unfair. Estelle v. McGuire, supra.

B. The Erroneous in Admission of Appellant's Statements to Co-Workers and Appellant's Possession of a Knife at Work.

Appellant objected that the evidence of appellant's reiteration of somewhat blood-thirsty U.S. Marine Corps slogans was irrelevant and

prejudicial. Respondent contends that "[a]ppellant's slogans were relevant because they appeared to refer to the murders, his statements about guns were relevant because guns were used in the murders, and his possession of the knife was relevant because it corroborated Maurice LaBerge's testimony", RB 376-7.

Respondent fails to acknowledge the testimony of Ray Guzman, a U.S. Marine who attended infantry training school at Camp Pendleton with appellant, 36 RT 8755, and who confirmed that he, appellant, and the other Marine recruits learned chants in training that included "no gun, no fun", "no kill, no thrill", and "Bravo Company, kill, kill, kill", 36 RT 8759. Appellant and countless other Marines learned these "slogans" as part of their basic training, not as a reflection of prior participation in a criminal endeavor.

Notwithstanding the uncontested evidence that the slogans had their origin in appellant's U.S. Marine Corps training, not in Lake's homicidal spree, respondent asserts that the slogans "were a powerful admission" that appellant participated in the killing of victims for 'fun' and the 'thrill' of the kill", particularly "the evidence that Lonnie Bond and Scott Stapley were shot to death was consistent with appellant's 'no gun, no fun' slogan", RB 378. That argument incorrectly purports to draw an inference about appellant's

involvement in the offenses charged from appellant's statements derived from an entirely different and non-criminal context.

Moreover, the testimony of appellant's co-workers shows that the context of appellant's reiteration of these slogans was for the amusement or entertainment of the co-workers, not in the context of any particular crime. The tenor of the testimony was that the co-workers teased appellant into repeating these statements, apparently because they found it amusing to hear such ostensibly blood thirsty phrases emanating from an otherwise unprepossessing young Asian male.

Finally, respondent's contention that appellant's iterations of the slogans demonstrated that "appellant participated in the killings for 'fun' and the 'thrill' of the kill", particularly regarding Lonnie Bond and Scott Stapley, is thoroughly undermined by the fact that Bond and Stapley disappeared toward the end of April/beginning of May 1985. Appellant's employment with Dennis Movers began in September 1984, 15 RT 3731, and the testimony regarding appellant's interaction of these slogans at work referred to a time period long before Bond and Stapley disappeared. Thus, the evidence cannot logically constitute an admission of involvement in events that had not yet occurred, as respondent repeatedly asserts it did.

Substantial prejudice resulted because the phrases attributed to appellant appear, in a civilian context, to be quite blood thirsty, callous and criminally oriented. In fact, they were vestiges of appellant's Marine basic training from some years earlier. For these reasons, the submission of that testimony deprived appellant of due process and a fair trial, particularly in light of the prosecutor's emphasis on this prejudicial evidence during argument to the jury. See 32 OC RT 7746 ["he often used the phrases 'no kill, no thrill'; 'no gun, no fun'; and 'papa dies, mama cries, and baby fries'"]; 33 OC RT 8090; 8093 ["the defendant was in it for the thrill of the kill, for the fun of using the gun"].

There was also prejudice from the evidence of appellant's position of a butterfly knife at work, as it had no demonstrable connection to any charged offense. See McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 [reversing murder conviction for erroneous admission of evidence regarding petitioner's knife collection, not connected to the murder weapon].

C. The Error in Admitting VCRS Seized from Appellant's Apartment.

Respondent makes no contention that the VCR that was clearly not taken from the Dubs' residence (because the serial number was different from that on the Dubs' VCR) was in any way relevant. The other VCR did not have its serial number, and trial counsel objected that "it was speculation that

the VCR without the serial number came from the Dubs' apartment", RB 383, citing 17 RT 3929-3930. The trial court erred in admitting evidence regarding both VCRs because the evidence lacked any foundation to establish relevance to the charged crimes, but provided fodder for speculation that appellant possessed stolen property from the Dubs' residence.

Respondent contends that "it was reasonable to infer that the VCR with the missing serial number belonged to the Dubs family" because (1) it was a GE, and (2) because "its serial number appeared to have been removed, which suggests that it had been stolen", RB 384. Respondent fails to acknowledge that in 1985, GE VCR players were extremely common, and there was no evidence identifying either of these VCRs as belonging to the Dubs. Respondent contends that other evidence supported that inference, such as testimony that appellant was seen in the proximity of the Dubs' apartment carrying bags, and evidence that two videotapes found in appellant's apartment had labels in Harvey Dubs' handwriting, RB 384. Respondent fails to distinguish between affirmative evidence of ownership, e.g., handwriting on the videotape identified that of Harvey Dubs, versus speculation as to the origin of an item. There was no comparable indicator that the GE VCR belonged to the Dubs, i.e., no fingerprints, no distinctive markings, etc. The VCR evidence improperly contributed to the case against appellant.

D. The Error in Admitting Evidence of Marijuana Found in Appellant's Apartment and Lake's Marijuana Grow in Wilseyville.

The defense initially objected to the prosecution's evidence that the police discovered four baggies of marijuana in appellant's apartment and that it was packaged similarly to marijuana discovered at Lake's Wilseyville property. The defense objection based on lack of relevance was initially sustained, 16 RT 3924. The trial court also erred in admitting testimony of Dennis Mover employee Hector Salcido that appellant had invited him to come to Wilseyville to harvest marijuana. The trial court admitted the marijuana found in appellant's apartment to show that it was part of a joint plan with Lake, not for appellant's personal use, RT 28 RT 6755-6. Respondent's effort to support the admission of this evidence is very tenuous – "appellant's possession of four baggies of marijuana was thus relevant to show that appellant and Lake were participating in a common criminal enterprise, in which they use marijuana to lure the victims to Wilseyville", RB 388. In fact, there was no testimony or suggestion that the four baggies of marijuana found appellant's apartment were used to lure anybody to Wilseyville. Rather, the record viewed most favorably to the prosecution suggests that Salcido was invited to Wilseyville to help harvest marijuana, i.e., unrelated to the baggies of marijuana from appellant's apartment.

Regarding prejudice, respondent argues that "[a]ppellant cannot seriously assert that the marijuana discovered at his home inflamed the jury when police also found possessions of the murder victims there", RB 389. To the contrary, the prosecution's case against appellant was virtually all circumstantial evidence, which was as or more consistent with appellant's testimony that he acted as Lake's pawn and errand boy, than with the prosecution's theory that he was a joint participant in Lake's extensive criminal enterprise. The inadmissible evidence, viewed cumulatively, consistently undermine appellant's defense and deprived him of due process. Estelle v. McGuire, supra.

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S CURTAILMENT OF CROSS EXAMINATION AND EXCLUSION OF DEFENSE EVIDENCE REGARDING LEONARD LAKE AND HIS RELATIONSHIPS WITH THE VICTIMS AND APPELLANT.

Defense counsel set forth the overall theme of the defense in his opening statement to the jury, 11 OC RT 2941-43, that Leonard Lake was a psychopathic serial killer who manipulated many individuals -- including appellant – to unwittingly participate his homicidal schemes. AOB 442-43. Appellant enumerated eight items of supporting evidence that the trial court erroneously excluded, and that individually and cumulatively violated appellant's state and federal constitutional rights to present a complete

defense. AOB 444-64, citing inter alia, Crane v. Kentucky (1986) 476 US 683. Respondent makes various procedural arguments, and additional arguments relating to the substance of the evidence, RB 390 – 426.

A. The Trial Court's Errors

1. Erroneous preclusion of cross examination regarding certain formative influences on Lake's development into a psychopath.

Respondent initially argues that appellant has forfeited the argument regarding the exclusion of Silvia Showalters' testimony that Lake's mother preferred her developmentally disabled son Donald to Lake, AOB 444. Respondent initially contends that trial counsel did not argue for admissibility on this basis to the trial court and did not invoke his Sixth Amendment right to present a defense, RB 391. Appellant again cites People v. Partida, supra, for the proposition that a constitutional claim is cognizable on appeal if it was fairly subsumed in a state law objection.

The specific exchange regarding this important piece of evidence was not argued on the basis of relevance, i.e., the prosecutor's objection was not that the question called for evidence that was irrelevant to the defense theory of the case:

> "Q: Was Donald – between Leonard and Donald did Gloria [their mother] ever express to you her opinion to say to you that Donald was her favorite son over Leonard?
>
> A: Yes.

Mr. Smith: Objection, hearsay.

The Court: Sustained. 21 RT 5003

The theory of admissibility argued on appeal is the same that defense counsel conveyed to the jury during opening statement, i.e. that Lake developed into a psychopath and that his upbringing was likely a contributing factor.

Evidence Code section 354 provides that the erroneous exclusion of defense evidence requires reversal if it resulted in the miscarriage of justice and "[t]he substance, purpose and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means". The trial court clearly understood that the crux of the defense was that Lake was a psychopathic serial killer who killed his brother Donald and others well before he ever came into contact with appellant, and continued doing so afterward with appellant's unwitting and unknowing involvement. Evidence that Lake was the disfavored son in his mother's eyes was a foundational point for developing the portrait of Lake as a mentally disordered psychopath.

Respondent argues that there was an insufficient factual demonstration to support the admissibility because "appellant fails to show (1) how Showalter's statement would have demonstrated that Lake suffered from anti-

social personality disorder; (2) what anti-social personality disorder is; (3) that an expert witness was available and would have testified that Lake suffered from anti-social personality disorder; and (4) how Lake's disorder was relevant to the charges against appellant", RB 392.

Respondent asserts that appellant should have jumped through a series of additional hoops in order to adequately apprise the trial court of the relevance of the evidence. Respondent chides appellant for not presenting expert testimony that, inter alia, Lake suffered from anti-social personality disorder, but respondent fails to acknowledge that appellant did offer expert testimony from an FBI profiler that Lake fit the profile of a serial killer with an anti-social personality, 26 RT 6376-7, but that evidence was also excluded, AOB 448. Respondent's argument is succinctly rebutted by the trial court's sarcastic remark accompanying exclusion of the FBI witness -- "you need an expert to tell these 12 people plus the three alternates that Mr. Lake fits that profile?" 26 RT 6377-78. In sum, the trial court clearly understood the defense strategy of portraying Lake as a psychopathic serial killer, such that there was no further need for appellant to have jumped through the hoops now urged by respondent.

Regarding the hearsay objection, the trial court clearly erred because the evidence sought was admissible under Evidence Code section 1250, the

hearsay exception for a "[s]tatement of declarant's then existing mental or physical state". Section 1250 provides that "[s]ubject to Section 1252, evidence of a statement of the declarant's then existing statement of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, is not made admissible by the hearsay rule when: (1) the evidence is offered to prove the declarant's state of mind, motion, or physical sensation at that time or at any other time when it is itself an issue in the action; or (2) the evidence is offered to prove or explain acts or conduct of the declarant" (emphasis supplied).

The evidence that defense counsel sought to elicit was a "mental feeling" on the part of Lake's mother offered to show that she as declarant acted and conducted herself in accordance with that mental state, and thereby caused resentment, rancor, and worse on Lake's part as he grew up. One undeniable fact is that Lake eventually killed his brother Donald, and fratricide is high on the list of psychopathic homicides.

Respondent suggests that "[a]ppellant does not challenge this hearsay ruling, nor did he do so at trial, so his claim is moot", RB 392. Neither statement is supportable. The prosecutor interjected the hearsay objection, which the trial court immediately sustained without calling for argument on the issue. Trial counsel cannot now be faulted for accepting that ruling and

moving on. People v. Calio (1986) 42 Cal.3d 639, 643 stated that "[a]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding an accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible". Defense Counsel acceded to the trial court's erroneous ruling, but that acquiescence cannot be considered a waiver of the claim for appeal. Similar, appellant clearly raised the claim of error in the opening brief, and respondent addressed it, albeit unpersuasively.

Respondent makes an argument regarding lack of prejudice, asserting that "even if Lake suffered from anti-social personality disorder, it would not have been exculpatory", RB 392. This ipse dixit fails to acknowledge that a primary theme of both the guilt and penalty trial was that Leonard Lake was a psychopathic serial killer who called the shots and manipulated weaker and more dependent individuals, including his girlfriend Cricket and appellant. California and federal law have long recognized that evidence of comparative culpability between codefendants is highly relevant to the jury's penalty determination. See Penal Code section 190.3(j) [enumerating penalty factors, including "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"]. If

the jury believed in accordance with appellant's evidence that Lake supplied all of the malice, murderousness, and inhumanity involved in the homicides, while appellant provided minor logistical support without understand the horror of Lake's overall homicidal plot, the jury would be highly unlikely to return a death verdict.

Respondent also argues that "the jury heard a plethora of evidence about Lake's life and character", RB 392, but this and the other evidentiary items that were excluded were not cumulative, and provided distinct and different aspects of Lake's upbringing and personality that would have provided the jury with a more comprehensive and therefore more convincing portrayal of him. The evidentiary exclusions cannot individually or cumulatively be deemed harmless beyond a reasonable doubt, Crane v. Kentucky supra.

2. The preclusion of cross examination of Karen Roedl as to whether Lake had a "God Complex".

Respondent again argues that "appellant cannot make an argument about relevance unless he made the same argument before the trial court", RB 393, and contends that because "the defense did not inform the trial court that Roedl's testimony was relevant to show that he was an 'unwitting cog' in Lake's plan", the appellant claim is "forfeited", RB 393. The import of the evidence sought was eminently apparent from the context:

Q: Do you remember – you've heard the expression, you know, people, something will happen and people will go, 'oh God'; everybody says that or has said that, and that Leonard had a habit of, somebody might say, 'oh, God' and he would answer 'yes?'

Ms. Honnaka: Objection, relevance.

Q: By Mr. Kelley: As if he was being addressed?

The Court: Sustained.

Q: By Mr. Kelley: Did Leonard Lake – do you think he had a God Complex?

Ms. Honnaka: Objection, relevance.

The Court: It is all so vague. Sustained. 21 RT 5041.

Respondent contends that the trial court's ruling was correct both as to relevance and vagueness. Respondent complains that "there is no evidence explaining what a 'God Complex' is, or why it would have been relevant if Lake had one", RB 393. Respondent adds that "assuming that 'God Complex' is a term from psychology or psychiatry, there was no indication that Roedl is qualified to opine whether Lake had one", RB 393-394.

Respondent ignores the fact that vernacular English has for decades recognized popular expressions to the effect that a person "thinks he's God" or has a "God Complex". This is not a technical psychiatric term, but is a well-recognized characterization by which a person expresses his or her views that another person has a hugely inflated ego, an excessive view of self-

importance, and a disparaging view of others. Wikipedia, a handy reference point for American pop culture, describes a "God Complex" as "an unshakable belief characterized by consistently inflated feelings of personal ability, privilege, or infallibility", adding that "[t]he individual may disregard the rules of society and require special consideration or privileges".

Regarding respondent's suggestion that this was a technical term, Wikipedia explains that "God Complex" is "not a clinical term or diagnosable disorder and does not appear in the Diagnostic and Statistical Manual of Mental Disorder (DSM)." www.wikipedia.org.

The phrase "God Complex" has a fixed and widely known meaning and is a shorthand form for displaying just the kind of bizarre personality that would cause Lake to embark upon his serial killings with a "disregard of the rules of society". This was entirely admissible lay opinion testimony as to a particularly important aspect of Lake's character. [8]

Respondent argues that if the God Complex testimony was used "to prove Lake's conduct toward Appellant" it would have been "inadmissible character evidence" under Evidence Code Section 1101, subd. (a), RB 394. Evidence Code Section 1101 is a general provision applicable to both civil

[8] There is a hoary chestnut of a legal joke that employs the "God Complex" notion in manner readily comprehensible to lay readers and lawyers alike. Q: "What is the difference between God and a federal judge?" A: "God understands s/he is not a federal judge".

and criminal proceedings that places certain constraints on the admission of character evidence. Sections 1102 and 1103 are specifically directed toward criminal cases, and permit a defendant to present evidence of his own character when inconsistent with the charged crime, and to present evidence of the victim's character to prove the conduct of the victim at or around the time of the offense. A capital prosecution requires a further non-statutory exception to Evidence Code Section 1101 to permit a capital defendant to present evidence of a codefendant's conduct and character where relevant to demonstrate the lesser role of a defendant and the more culpable role a codefendant.

CALCRIM 763 defines a mitigating circumstance as "any fact, condition or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime", and further explains that it "reduces the defendant's blameworthiness or otherwise supports a less severe sentence".

One particular factor enumerated in CALCRIM 763 and set forth in Penal Code Section 190.3 subd.(g) is "[w]hether or not defendant acted under extreme duress or under the domination of another person". To qualify as a mitigating factor, the defendant need not demonstrate that there was "extreme" duress or "substantial" domination; evidence of some duress or

some domination is admissible in mitigation. See Eddings v. Oklahoma (1982) 455 U.S. 104.

Finally respondent's prejudice argument fails to address the cumulative prejudice from the multiple errors in excluding evidence. Ms. Roedl's testimony was particularly important because it highlighted that Lake was not merely a vicious and consciousness killer, but also viewed himself in a grandiose manner as controlling and manipulative of others. That testimony would have emphasized to the jurors that appellant was not necessarily any kind of partner to Lake, was not necessarily a knowing aider and abettor to Lake's crimes, but was merely an acolyte who followed directions without knowing of Lake's homicidal mania.

3. Erroneous exclusion of testimony regarding appellant's supplicant posture toward Lake.

Respondent offers essentially the same litany of objections to Ernie Pardini's testimony about appellant's supplicant role toward Lake during the time that appellant worked for Lake at the Philo Motel. Respondent contends that "at trial, the defense did not assert that the testimony was admissible for this reason", i.e., to demonstrate that "Lake manipulated him into feeling obligated to help Lake in Lake's bizarre ventures", RB 395, but the line of

questioning was merely intended to develop a continuing theme that was clear to the trial judge and everybody else in the court room.[9]

Respondent argues that the Pardini testimony was excluded on the basis that it "constituted improper opinion evidence and was vague", RB 395, not on the basis of irrelevance. The trial court was incorrect on those matters because this was straightforward testimony as to the nature of their relationship based on direct personal observation. Pardini described appellant's relationship to Lake in clear terms comprehensible to any juror – "he seemed like a lost child trying to win his father's approval", 23 RT, 5685. Evidence Code Section 800 provides that a lay witness may provide an opinion testimony "including but not limited to an opinion that is ...[r]ationally based on the perception of the witness; and ...[h]elpful to a clear understanding of his testimony". The Law Revision Commission Comment accompanying section 800 states that the "witnesses lay opinion must be based on his own perception". The defense provided ample foundation for Pardini to testify because Pardini lived next door to Lake during this period, was acquainted with appellant and observed their

[9] Respondent repeatedly cites People v. Smithey (1999) 20 Cal 4th 936, 995, in support of a forfeiture argument, RB 395, but fails to address this Court's subsequent decision in People v. Partida, supra, which affirmed appellate review of claims of federal due process violations even though not articulated as such in the trial court.

relationship for a two year period. He described Lake playing a type of war game as part of his 'survivalist beliefs", 23 RT 5684 and the following colloquy occurred:

Q: And when he would be doing these little war games, where was Charles Ng, if you know?

A: He was there a lot of time observing and listening to Leonard's instructions.

Q: In fact, Leonard would actually explain to Charles how to do this or what he was doing?

A: Yes. From my observations that is what was happening, yes. 23 RT 5684 (emphasis supplied).

After testifying that Lake "ordered [appellant] around like a slave, 23 RT 5684, the following occurred:

Q: Did you ever observe to just ignore – I know you said you never heard him talk back. Did you ever hear – observe him to just ignore Lake and just do something else?

A: No, never. He was always very, seemed very subservient and willing to do whatever Lake said.

Q: Did he seem like – did he seem to be afraid of Lake, if you know, or seeking his approval or –

A: I don't think it was fear. I don't [sic] really thought him to be afraid of Leonard or intimidated physically, but I think he really – he seemed like a lost child trying to win his father's approval.

Ms. Honnaka: Objection, lack of foundation.

The Court: Well –

Ms. Honnaka: Improper opinion.

The Court: It is also vague. Sustained. Stricken. The jury is ordered to disregard it.

Q: By Mr. Clapp: In any event, did it seem like Charles – did it seem like Charles tried to please Leonard?

A: Yes.

Ms. Honnaka: Objection – same objection. Calls for improper opinion, conclusion, speculation.

The Court: It was certainly leading. Sustained. 23 RT 5685. (emphasis supplied).

The erroneously stricken testimony related directly to Pardini's personal observations of interactions between Lake and appellant. He was simply describing the dynamic of what he saw and characterized it in plain easily comprehensible English. There was nothing vague about this nor was it any kind of speculative opinion. The trial court added the ground of "leading" to the prosecutor's roster of objections, but that was equally unfounded as the question called for a simple "yes" or "no". Pardini responded with a simple "yes".

4. Erroneous exclusion of evidence of a methamphetamine manufacturing activity of victims Bond and Stapley and of their mutual antagonism with Lake, unrelated to appellant.

Respondent argues that the evidence of Stapley's drug distribution activities in San Diego was irrelevant because "there was abundant,

undisputed evidence that methamphetamine was being manufactured at the Carter house where Stapley, Bond and O'Connor were living", RB 396. The defense position at trial was that there was ample evidence that Bond was manufacturing methamphetamine in Wilseyville. The testimony about Stapley's drug distribution activities was necessary to show that he was also involved in the Wilseyville manufacturing process, and was thus a likely target for Lake's vigilante justice. Defense counsel argued that while there was evidence that Stapley drove Brenda O'Connor up to Wilseyville, there was no context to explain how Stapley knew her, and no evidence that he was as involved in the drug manufacturing business as Bond was, thereby equally in Lake's line of fire. 25 RT 5954. The court ruled "I find it to be irrelevant and 352, etcetera, etcetera, and I would sustain the objection". Ibid. The trial court erred because the evidence would have confirmed the defense theory that Lake had a personal motive to do away with both Bond and Stapley because of their drug dealing, a vendetta that appellant was not involved in.

More prejudicial was the court's exclusion of evidence that Bond and Stapley were going to Wilseyville for a violent confrontation with Lake. Respondent argues that "the defense did not argue that Everett's testimony should have been admitted to show mutual antagonism between Bond and Lake", such that the claim is forfeited on appeal, but the record belies this

contention. The point of defense counsel's question was readily apparent from the question itself in the context of the defense:

> Q: By Mr. Clapp: Did Lonnie say whether – did Lonnie mention to you whether he was going to have a confrontation with his neighbor, Leonard Lake?
>
> Ms. Honnaka: Objection, irrelevant. Calls for hearsay.
>
> The Court: Sustained.
>
> Q: By Mr. Clapp: Did Lonnie ever mention to you someone by the name of Charles Gunnar or Gunnar? 85 RT 6173.

Defense counsel continued to question Everett about Bond's intention to confront Lake, albeit unsuccessfully:

> Q: By Mr. Clapp: Alright. Lonnie left your home; this would have been the last time you saw him. When he left with Miller with the glassware do you recall him saying he was going to, quote, finish it, quote?
>
> Ms. Honnaka: Objection – I'm sorry, objection, irrelevant.
>
> The Court: Sustained. 25 RT 6178

Respondent contends that "[a]appellant fails to explain how the court erred by excluding Curtis Everett's testimony", RB 398, but the trial court was amply apprised of the relevance and importance of the evidence. Defense counsel specifically argued to the court in an in limine hearing on the morning of December 17 that "Everett said... Lonnie said that he was going to take care of Lake also and put an end to this hassling of Lake hassling

Brenda", and for this purpose "he only needed one gun". 25 RT 6049. The prosecutor certainly understood the defense theory in which the evidence was offered – "the People believe that given the reason for admitting this evidence, meaning motive on the part of Leonard Lake to show that he killed alone, I guess is the defense theory on that, we think under 352 it really ought to be excluded" because "it is just simply irrelevant and time consuming and has potential for causing much confusion", 25 RT 6052 – 3 (emphasis supplied). The trial court responded that the evidence of drug activities in Paso Robles is "totally irrelevant" but "what he heard Bond say seems to be relevant and not cumulative and not 352 cumulative". 25 RT 6053.

That ostensible green light to the questions regarding Bond's intent to confront Lake during the hearing out of the presence of the jury turned into a red light when defense counsel actually posed the questions in front of the jury. That turnabout was erroneous on the trial court's part. Respondent's contention that the defense did not argue its admissibility to show the antagonism between Bond and Lake is simply refuted by the record, particularly since the trial prosecutor summarized appellant's theory of admissibility on the record.

Respondent next contends that appellant has not adequately explained why it was erroneous for the trial court to preclude Everett from testifying

that Bond said he was going was going to Wilseyville to "finish it". Respondent fails to acknowledge the specific argument at AOB 447, that the testimony of the Everett's was "critical to support the defense that Bond and Stapley were killed because of their feud with Lake personally over their drug distribution activities and over Lake's untoward advances to O'Connor all unrelated to appellant". The relevance of the evidence was clearly explained to the trial court at the in limine hearing of December 17, 1998, and was set forth at the sufficient specificity at AOB 447 for respondent to mount a counter argument if one was available. Respondent's position is untenable that this claim is "impossible to respond to", RB 399, because of some pleading defect on appellant's part.

Respondent disputes the extent to which the court excluded testimony from Martha Bock, Curtis Everett's wife, regarding Lonnie Bond's statements about his impending confrontation with Lake, RB 400.

At an in limine hearing on the morning of January 4, 1999, the court and counsel discussed the proposed testimony of Marsha Bock-Everett. 26 RT 6190. Defense counsel made it clear that two primary points of her testimony were that (1) Brenda O'Connor repeated statements about her fear of Leonard Lake, and Leonard Lake only with no mention of appellant; and (2) that Bond told her that he was going to confront Lake, 26 RT 6193-4. The

court ruled that it would "permit Lonnie Bond's statement as to the reason for him going to Calaveras" but "the rest of the stuff is totally irrelevant, hearsay, without admission – without exception". 26 RT 6203.

She eventually testified that the last time she saw Bond was about one or two o'clock in the morning of April 18 heading for Wilseyville. 26 RT 635B. She was permitted to testify that "Lonnie was going to confront him [Lake] to settle a score" in response to Lake's predatory statements about Brenda O'Connor. 26 RT 6355. She also testified regarding Bond's statement to her husband that he would have his 22 pistol with him. 26 RT 6357.

Thus, the critical evidence that was excluded was Ms. Bock-Everett's description of Brenda O'Connor repeated statements of fear of Lake and only Lake, because of his stalking activities. Defense counsel had expressly urged the court that "it is significant in our view that Brenda O'Connor never said anything about a Chinese or Asian man" which "helps to refute the prosecution's theory that Ng, Charles Ng, the accused, was assisting Lake in his stalking of Brenda O'Connor." 6 RT 6192. Ms. Bock-Everett was permitted to testify to Lonnie Bond's antagonism toward Lake, but not about Brenda O'Connor's fear of Lake entirely independent of any contact with appellant.

That evidence was admissible under Evidence Code section 1250 as a "statement of the declarant's then existing state of mind, emotion or physical sensation". O'Connor's fear of Lake alone is circumstantial evidence that Lake was a frightening and dominant person while appellant was an unprepossessing subordinate. This evidence was important to convey to the jury that Lake was perceived as the evil mastermind by virtually everyone who knew both Lake and appellant.

5. Erroneous exclusion of evidence of expert testimony regarding Lake's profile as a serial killer.

Respondent argues that the proposed testimony of Robert Ressler, one of the founders of the Behavioral Science Unit of the Federal Bureau of Investigation, was inadmissible because "it was undisputed that Lake was a serial killer – indeed, the prosecution's theory was that appellant planned and committed the charged murders with Lake", RB 401 (emphasis in original). Respondent's position in fact demonstrates the relevance of the evidence offered by the defense – to show that Lake fit the profile of a serial killer and had the concomitant behavioral and psychological traits, while appellant did not fit the profile and therefore was not likely to have "planned and committed the murders with Lake", in accordance with the prosecution's theory. The theory of the defense was that the appellant was Lake's dupe and the testimony of Robert Ressler would have provided an objective expert

basis to enable the jury to differentiate between Lake as the manipulative mastermind and appellant as the unfortunate dupe.

The trial court's comments prior to sustaining the prosecutor's relevance objection revealed the basic failure to assimilate the fundamental importance of this evidence to the defense:

"Kelley: Mr. Ressler is one of the original founders of what we may know as the Behavioral Science Unit of the FBI. And that is the organization or the department, for want of a better word that was created in the FBI several years ago. I think in the 70s –

The Court: I read the CV –

Mr. Kelley: Alright.

The Court: -- of Mr. Ressler and you were marking it for evidence. So you don't have to go through what I've read and what everybody else read. It's for the purposes of the motion. It's in evidence.

Mr. Kelley: Thank you. He's prepared to –

The Court: He's prepared to say that Leonard Lake fits the profile of a serial killer.

Mr. Kelley; True.

The Court: And you need an expert to tell these 12 citizens plus the three alternates that Mr. Lake fits that profile?

Mr. Kelley: He's also prepared to testify that in his experience, and he's done innumerable cases, mostly for the prosecution actually, but he has never had an Asian or heard of an Asian being involved in a serial homicide.

The Court: You expect him to testify to that?

Mr. Kelley: Well, in his experience, yes. I mean I know he'll testify to that.

The Court: Ms. Honnaka?

Ms. Honnaka: Well, Judge, our objections stem from the fact that, first of all, we don't have a report of any kind. But, you know, Mr. Kelley says that he was going to call his witness to establish that Leonard Lake fits the serial killer profile. I never heard this business about the Asians under just now in court.

The Court: I think he just threw that in.

Ms. Honnaka: But I would say that the problem that people have with this is the general admissibility of this kind of profile evidence.

My understanding is that the FBI and the people like Mr. Ressler collect information about all kinds of serial killers and, from that, extrapolate some sort of a profile based on all of these other unrelated cases and the facts related to the unrelated cases. There is insufficient basis, in our view, for admitting in a criminal trial where the facts upon which they are relying as to these unrelated serial murders that occur all over the country, the world.

The Court: Ms. Honnaka, it's not an issue. There are serial murders in this case.

Ms. Honnaka: Correct.

The Court: We don't need an expert to come in from any other state to tell these jurors yet [sic; read "that" ?].

Ms. Honnaka: Okay. Then we'll make a relevancy objection.

The Court: Sustained.

Ms. Honnaka: Alright. Thank you.

The Court: The Asian thing, big trouble, big, big trouble, Mr. Kelley, because you will be getting into all that stuff you've been trying to keep out.

Mr. Kelley: I have no comment. You sustained the objection. I've got my issue exhibit marked. It's now at issue.

The Court: It's at issue. 26 RT 6377-6378

The trial court's view of the offer of proof was too simplistic, and respondent perpetuates that deficiency on appeal. The point of having an expert testify was not merely to identify Lake as a serial killer, but to explain what characteristics and traits he had that qualified him as one. That testimony would have given the jury an objective basis to distinguish between Lake and appellant and would in fact have demonstrated the unlikelihood that appellant was Lake's co-equal or co-participant in the charged murders.

The trial court's comments – "the Asian thing, big trouble. Big, big trouble Mr. Kelley, because we'll be getting into all that stuff you've been trying to keep out" – are somewhat opaque, but in any case cannot provide a basis for excluding the evidence out of ostensible concern for the defense, because it was Kelley who proffered the evidence. Kelley presumably made a tactical decision that the benefit of presenting the Ressler testimony

outweighed whatever "stuff" the court thought Kelley had been "trying to keep out".

Respondent refers to the argument that "Ressler would have testified that [he] did not know of any Asian serial killers, and this would have shown that appellant did not fit the profile of a serial killer", but "[a]ppellant had forfeited this argument as well", RB 402. Respondent contends that Kelley "never asserted that Ressler would testify that appellant did not fit the profile of a serial killer", RB 402, but Kelley's offer of proof certainly encompassed that.

The obvious point that Kelley was trying to make is that Ressler's profile criteria would clearly distinguish between Lake and Ng, to the benefit of Ng. Respondent imputes to appellant the position that "the mere fact that [appellant] was Asian was exculpatory; however, such racial profiling is absurd, inappropriate and not at all probative", RB 402. Respondent views the offer of proof in an excessively narrow manner. The FBI profiling is not based on gross criteria such as race standing alone, but rather on a well extensive profile from behavioral and psychological traits. The fact Asians may be disproportionately represented in the ranks of non-serial killers due to cultural and social factors does not in any way diminish the admissibility of the evidence.

The evidence proffered here was akin to the type of expert testimony approved in People v. Stoll (1989) 49 Cal. 3d 1136. The Supreme Court reversed child abuse convictions because the trial court had excluded expert psychological testimony that the defendant "displays no signs of 'deviance' or 'abnormality'", because "[u]nder existing law and the facts of this case, the evidence bears on a defense claim that the charged acts did not occur" and also constitutes "evidence of his 'good character'". 49 Cal. 3d at 1140. The Supreme Court specifically contrasted the admissibility of "competent but disputable 'expert opinion' as opposed to "new, novel, or experimental scientific techniques not previously accepted in the court", which were subject to a more stringent test under People v. Kelly (1976) 17 Cal. 3d 24, 30. The expert psychological testimony was admissible under Evidence Code Section 1102, which "allows an accused to present expert testimony at this time to indicate his non-disposition to commit a charged sex offense", 49 Cal. 3d 1153. The exclusion of the Ressler testimony was prejudicial by itself, and certainly when viewed in conjunction with the other excluded evidence, thereby denying appellant a right to present his defense. Crane v. Kentucky (1986) 467 U.S. 683.

6. The erroneous exclusion of substantial parts of Lake's journal.

The trial court permitted the defense to present only the diary entry of February 19, 1983, regarding Lake's long standing fantasy about imprisoning a young female in the manner described in the The Collector. However, there were many other entries that were relevant to show that Lake planned felonious and homicidal activities by himself long before appellant returned to California, and that appellant was only a periodic and peripheral participant in Lake's activities afterward. Defense counsel argued that the diary was admissible under Evidence Code Sections 1230 and 1250, and its exclusion violated appellant's Sixth Amendment rights under Chambers v. Mississippi (1967) 386 U.S. 18 and Holmes v. South Carolina (2006) 546 U.S. 319.

Respondent's arguments regarding the exculpatory import and admissibility of the remainder of the diary entries are more in the nature of jury arguments regarding their weight than legal arguments regarding their admissibility. For example, respondent refers to Lake's March 31, 1983 entry that reveals Lake's view of himself as unbound by the constraints of society[10], and argues that "what [the passage] really reflects is Lake's penchant for

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[10]. Now I have no ties to the world. I am both above it and removed from it....Amusing. Our "land of the free" is not prepared to deal [e]ffectively with a truly free man. What can they do to one who carries cyanide in his pockets? When death holds to fears...when there is no responsibilities [sic] beyond the next meal. Society. You are being socked and you don't understand by who or why. And it you did, you are powerless against one who is not afraid to die. 32 OCT 10505-6.

narcissistic drivel", RB 413. Respondent's characterization may well be accurate, but misses the exculpatory aspect of this. It was Lake and Lake alone who was promulgating "narcissistic drivel" in his diary and elsewhere; appellant was not. It was Lake who was glorifying his rejection of the norms of society; appellant was trying to get by with Lake's assistance.

Similarly, the entry of May 9, 1983 entails Lake's assertion that he was "dangerous person" such that "society would worried if they knew that I existed and what I was up to", RB 413, citing 32 OCT 10518. Respondent argues that that passage and others show nothing in addition to the trial evidence of his participation in the charged murders and other murders; his behavior in the M-Ladies video; his statements in the philosophy tape; and the observations of the defense witnesses.

To the contrary, the diary gives a direct glimpse into Lake's pathological mind over an extended period, as opposed to the particular incident referred to by respondent. Moreover, the diary shows Lake's inflated sense of self importance and grandiose self-regard, all of which was very important to differentiate him from appellant, the subservient follower, in the jury's eyes.

Respondent also raised a procedural objection that the constitutional basis of admissibility were not argued in the trial court, such that "[b]ecause

appellant did not make these arguments at trial, he has forfeited them on appeal", RB 406. Respondent again fails to recognize the principle of People v. Partida (2005) 37 Cal.4th 428, 433, stating that an appellant "may argue that the asserted error in admitting the evidence over his Evidence Code Section 352 objection had the additional legal consequence of violating due process", Id. at 435. Accord: People v. Boyer (2006) 38 Cal.4th 412, 441 ["defendant's new constitutional arguments are not forfeited on appeal" where defendant "merely assert[s] that the trial court's act or admission, in so far as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution" (emphasis in original)]. It follows from Partida and Boyer regarding the erroneous admission of evidence that the erroneous exclusion of evidence may have its constitutional consequences redressed on appeal even if the trial objection did not explicitly invoke constitutional rights.

Respondent also makes an argument that the trial court's exclusions of diary entries is not reviewable on appeal because when the court ruled that it would be misleading to admit certain diary entries offered by the defense without admitting other entries offered by the prosecution, "[t]he defense did not indicate that it still wished to introduce the diary entries under this condition", RB 407, citing 29 RT 6969-6970. Respondent fails to

acknowledge that the defense did offer to introduce the entire diary after the trial court made an earlier ruling regarding the admission of both defense and prosecution excerpts. RB 403, citing 26 RT 6396. The following colloquy occurred:

> "Mr. Kelley: To have the diary in without – with the exclusions we are seeking? What about having the entire diary in?
>
> The Court: Let's use 352. I don't how long it took me to read that diary. It is very, very, very long, and it is handwritten. Some of it is typed, but some of it is in handwriting. Some of the handwriting is hard to read. A lot of the diary is just pure junk.
>
> Mr. Kelley: Right. That is why you had initially asked us to go through it and pull out the junk because that is what we tried to do.
>
> The Court: Well, in other words, too time consuming, too confusing, and literally not very relevant.
>
> Mr. Kelley: You're talking about the junk part? I agree.
>
> The Court: I am talking about the whole part.
>
> Mr. Kelley: About the entire diary?
>
> The Court: Yes. Not very relevant, because what is admissible is not being contested at this time. We know about Lake. We know about Lake's involvement. When I say "we" again it is the jury and the court based upon the evidence that is presented. 6 RT 6396 (emphasis supplied).

Following this colloquy, defense counsel summarized the court's ruling as follows – "so the court is ruling right now as it stands what we have offered is inadmissible as in the entire diary? I just want to make sure that

I'm understanding your ruling. But you are not precluding us from re-editing it or something, putting forward other excerpts from the diary for you to reconsider with regard to admissibility...?". The court answered "that is fair" 26 RT 6399. The Court's final ruling at 28 RT 6799-6805 was encapsulated as "the cumulative objection under 352 is sustained and the objection under 356 grounds I think is equally well taken on 356 grounds".

The defense was always willing to have the entire diary admitted to avoid any section 356 concerns. Respondent's contention that appellant's "entire claim regarding the diary thus fails" because the trial court's reference to Evidence Code Section 356 is simply incorrect. Defense was willing to obviate any section 356 problem by introducing the entire diary.

Respondent next argues that the trial court's ruling was not an abuse of discretion because the entries in question were not exculpatory", RB 410. Regarding Lake's diary entry about Beverly Lockhart, respondent contends that Lake's diary entry that he "snooped around" Lockhart's apartment is "unclear" as to "how this relates to [appellant's] culpability for the charged murders" RB 410, and asserts that "his argument is forfeited because the defense did not make it at trial", RB 410. Defense counsel's argument for the admissibility of the Lockhart diary entry was as follows:

> "Lake tells you what he was – Bev Lockhart was the same thing on its face from [as Robert Barufaldi] from the juror's perspective:

> That Lake hooked up with her from the Vantage Club. He took his pictures, tried to get her to get her clothes off. I'm sure he tried to get every woman's clothes off, but that is a fact, he noted her as a target in his diary". 28 RT 6792 (emphasis supplied).

Counsel further explained that "our defense is that people were targets for Leonard Lake for various and sundry reasons, you know, for sex, for the property, for their IDs, for murder", and "people referred to in this diary that don't appear as targets right now become targets when the diary is juxtaposed against their testimony" 20 RT 6792-3. Counsel concluded his presentation by noting Barufaldi "wasn't just some guy he was having sex with" but "that lends credence to our defense" and "lends credibility to our position", and "Bev Lockhart is the same thing" 28 RT 6793.

That argument adequately sets forth the theory of defense. The defense sought to show that Lake had multiple criminal motives, many of which he pursued without any knowledge or involvement on appellant's part. Bev Lockhart may have thought that Lake was simply an innocuous guy coming on to her, but the diary shows that she is in fact a target, unbeknownst to herself or anyone else. This does not directly exculpate appellant for any particular murder, because he was not even in California during Lake's overtures to Lockhart, but provides corroborating circumstantial evidence for the central theme of appellant's defense that Lake was a self-motivated and solo serial killer.

Respondent further argues that "Lake's behavior toward Lockhart could not be used to prove his conduct toward appellant because this would constitute improper character evidence in violation of Evidence Code Section 1101, subdivision (a)", RB 410. The evidence would have been admissible under section 1101 subd. (b) to show Lake's overall "motive", "preparation" and "plan", as well as admissible under a construction of section 1103 that would permit a defendant from presenting evidence of a trait of character of a co-defendant (as opposed to a victim) "to prove conduct of the [co-defendant] in conformity with the character or trait of character", Evidence Code Section 1103(a)(1). That section primarily addresses the admissibility of character evidence as to the victim where the victim's conduct raises a defense. Where the codefendant's character and conduct raises a defense, it should be similarly admissible.

Next, respondent argues that Lake's February 4, 1983 entry regarding his intent to build an underground base and find a "suitable line of females to help cohabitate" the place, 32 CT 10485, is "irrelevant and cumulative" RB 411. The important part of this is to show that Lake's plan for the bunker from the beginning was a private fantasy on his part, and did not include a role for appellant. This would support appellant's testimony regarding his actions recorded on the M-Ladies tape that he was a bit player in Lake's

narcissistic fantasy movie. The diary entries show that the Miranda project was a venture under Lake's sole directorial control.

Respondent further argues that Lake's February 6, 1983 diary entry regarding his forgery of a letter to his mother ostensibly written by his brother Donald (deceased at Leonard Lake's hand) was "cumulative to other undisputed evidence that Lake misappropriated his brother's identity", RB 412. That misses the point of the defense evidence. The exculpatory aspect of Lake's ruse was to demonstrate that Lake had no scruples about committing terrible crimes and then keeping the truth of what had occurred from others. The callous way that Lake gulled his own mother into believing that her other son was still alive and apparently unharmed is comparable to Lake's gulling appellant into participating in what appellant believe to be role-playing and acting out of Lake's fantasy, unaware that Lake intended to (and did) kill the other performers. Respondent emphasis on the identity theft aspect of this evidence misses the larger point.

Of particular note, respondent argues that Lake's July 10, 1984 entry immediately after appellant returned to California – "started teaching Charlie to drive. He is very hesitant to get involved in my plan" – was incriminating, not exculpatory. RB 416. Respondent argues that "it would have contradicted appellant's own testimony, because he denied knowing anything

about the charged murders and maintained that Lake alone was responsible for them". RB 416. Lake's diary entry does not say that he told appellant that he planned to murder anybody, and therefore does not contradict appellant's testimony. Rather, the clear implication is that Lake gave appellant the broad outlines of his Miranda plan, i.e., playing out the fantasy of the captive female, but appellant was "very hesitant" to get involved. The further implication is that Lake thereafter manipulated appellant into being a participant without understanding the full scope, gravity and homicidal nature of it. That is the exculpatory inference that defense counsel wanted to be able to argue to the jury based on Lake's own diary.

Respondent then argues that the diary entries of September 10 and 11, 1984, relating to the murders of victims who lived in the "Pink Palace" were "cumulative" because "there was already abundant evidence that Lake was responsible for the murders of the three palace residences – Sheryl Okoro, Maurice Rock, and Randy Jacobson – and his culpability was undisputed", RB 417. Respondent misses the exculpatory aspects of these entries. On July 10, two months before, Lake wrote that appellant was "very hesitant to get involved in [his] plan", 32 OCT 10652. There was then a two month hiatus in Lake's diary followed by his gloating over seeing "Miranda come to fruit" and referring to the murders of two victims with a third in Lake's sight.

There is no mention of appellant anywhere in the September 10 and 11 entries, supporting the inference that appellant was in fact not involved, in accordance with appellant's pronounced hesitancy that Lake commented on in July. Respondent argues that these entries "did not negate the possibility that appellant had participated in the imprisonment, rape, and murder of the first Operation Miranda victim, apparently Okoro, and the murder of the second Pink Palace residence, apparently Rock", RB 417-418. The entries may not conclusively exonerate appellant from any involvement in those murders but they certainly support an exculpatory inference, because Lake frequently referred to appellant in his diary when appellant participated in the activity being memorialized. Viewed in context, the entries are clearly exculpatory and not cumulative.

The same exculpatory inference arises from Lake's October 15-16, 1984 entries, relating to his murder of third Pink Palace resident, Randy Jacobson. Respondent argues that "the October 15th entry does not indicate that Lake committed the murder alone" RB 418, but again that is the clear implication because the entries state that Lake coordinated with "III", his shorthand for "PP III", code for the third Pink Palace victim, without any reference to appellant's involvement at all. He apparently followed the same

"routine" that he did with the first two Pink Palace murders, and appellant did not have any involvement in that "routine".

Respondent argues that appellant's federal constitutional argument for admissibility of the diary under Chambers v. Mississippi (1973) 401 U.S. 284, and its progeny was not raised at trial, and is "moot" because appellant was "unwilling to introduce the diary under th[e] condition [that the prosecution's selected entries be admitted also]", RB 419. The record reflects that appellant was not "unwilling to introduce the diary under th[at] condition" because counsel specifically urged the court to admit the entire diary, which obviously included the parts proffered by the prosecution.

Finally, respondent has failed to address or acknowledge the exculpatory value of the diary taken as whole. RB 410, fn. 72 ["Respondent will only address the diary entries that appellant discusses in his brief"]. Certainly there are numerous entries of utter banality regarding Lake doing his laundry or cleaning house. Interspersed with these quotidian entries are consistent and repeated affirmations that Lake was fundamentally a loner, a lone wolf, a solitary predator who used women for sex and men as marks of one sort of another. The diary reveals the complete absence of any feelings of human friendship toward any other male, including appellant. This closed and manipulative trait of Lake's comes across from a reading of the entirety

of the diary much more clearly than from reading excerpts. It demonstrates his psychopathic, secretive and conscienceless conduct toward various helpless victims long before appellant returned to California in 1984, as well as his exploitive treatment of appellant after his return.

Appellant has identified four major defense themes that would have been persuasively presented to the jury if the diary had been admitted:

a. Lake's lengthy and solo efforts to murder Charles Gunnar, once his best friend, and to assume Gunnar's identity, all without any assistance from appellant or anyone else.

On March 19, Lake went to the Balasz' house in Calaveras and dug a trench for a gas line and dug a percolation trench for water draining. He noted his intent to "buy a Telepatch lady for Charles [Gunnar] as inspiration to get him to Calaveras". 32 OCT 10500. There were a number of references to Charles Gunnar and his impending divorce from his wife Victoria during the first quarter of the 1983 diary. During this time, Lake attempted unsuccessfully to lure Gunnar to Calaveras. 32 OCT 10504 ["called Charles. He turned me down for Calaveras. Offered bribe. We'll see what happens there"].

On April 3, Lake made arrangements to meet Charles Gunnar in Calaveras County and stated that "Operation 'Fish' (Mobby Dick?) is go". 32 OCT 10507.

On April 4, Lake stated that the "game is afoot", apparently referring to the plan to murder Gunnar but noted that he "Must close down Donald" and reported that he was "nervous" – "if I survive the coming days", he would order "military supplies". 32 OCT 10507.

On April 5, Lake and Gunnar met at Calaveras County, completed the gas line, installed a water filter and hot water pipes, and made a video tape of Charles. Lake commented that "Operation Fish" failed, because "Charles is simply too heavy to move". 32 OCT 10508.

On April 7, Lake ruminated that he was "reconsidering Fish", noting that "the problem revolves around the fact that I have to move objects without help to total security". 32 OCT 10508.

On April 10, Lake reported that he "found an acceptable plan for Fish" but called for "Calaveras next week. A new hole, a winch to move the weight", plus "acid for the preparation of gas". 32 OCT 10510.

On April 20, Lake was in Calaveras with Gunnar, and stated that "Fish failed again. Powder form was not ingested and gaseous form had no effect ($H_2 SO_4$) don't know why." 32 OCT 10511. On April 23, Lake reported a "new idea for Fish". 32 OCT 10512.

On May 4, he commented that he would "have to finish Fish before [he can] move successfully in this direction" toward getting additional females for himself. 32 OCT 10516.

On Tuesday May 16, Lake reported his observation that Gunnar had "whipped" his daughter Heather that day:

> "I've seen him hit his children before, but I've never seen him actually tear into one of his girls with a full force belt. I have fantasied whipping a young woman as part of a sexual submission before, but watching him whip a little girl was too much for me." 32 OCT 10518.

Lake then complained about Gunnar's lassitude and lack of intellectual curiosity. 32 OCT 10519. On May 11, Lake commented that Gunnar family was involved in coping with his mother's death but that Lake "fe[lt] that [he] must push Fish anyway". The next day he commented "it didn't happen. Coward!! Delays, doubts, set-up and no go. Disgusted with myself". 32 OCT 10520. Lake then set up Operation "Fish" for May 17 but could not carry through:

> "Everything was set for Fish. Couldn't go through with it. In the middle of the suburb, with [illegible] knows what damage or who might hear or drop in. Scrub."

On May 20, Lake reported that "the frustration that Fish has overwhelmed these days". 32 OCT 10521.

On May 24, Lake stated "phase one of Fish complete". 32 OCT 10521. Lake makes what appears to be a list of expenses involved in the Fish operation. 32 OCT 10522. May 24 is apparently the date that Lake killed Gunnar and noted in his diary "Charles stayed north" and that Lake took the children to San Jose. 32 OCT 10522. The Fish expenses also included a list of loot he was going to get from Gunnar's property. During the next 3 or 4 days, Lake began assuming Gunnar's identity.

On May 29, Lake reported that "these are full days, busy, productive", noting that "items are being sold, papers cleared" and that "Fish is proceeding beyond expectations". 32 OCT 10524.

On December 9, Lake noted that "Op Fish will terminate soon" because "paperwork is arriving that [he] cannot comply with", and noted "must start scouting around for a suitable replacement".

b. Lake's efforts to launch his Miranda fantasy, without any reference to appellant, but with several references to including his ex-wife Cricket in the scheme.

On February 19, 1983, Lake made the first reference to his Miranda fantasy, derived from the John Fowles book The Collector:

> "Has it really been 20 years I've carried this fantasy? And Miranda...how fitting...my lovely little village in Humboldt, my lovely little prisoner of the future". 32 OCT 10492

On March 30, Lake ruminated about Cricket, who he "would have died for" or "killed for", but noted that he currently had "no ties to the world" being "both above it and removed from it". He reported himself as "free to die, with no responsibility". He commented that "our 'land of the free' is not prepared to deal effectively with a truly free man" because "what can they do to one that carries cyanide in his pockets?" 32 OCT 10505-6.

On June 14, Lake made a diary entry while drunk, in handwriting that was noticeably ragged, in which he declared his belief that what he was doing would in the long run help both the United States and society at large, i.e., his personal eugenics plan to eliminate wasteful consumers and "the stupid" – "by the Gods I am right, but often times I am scared". 32 OCT 10530.

On July 20, Lake made a trip to the Bay Area where he bought various chemicals including nitric acid, hydrochloric acid, formaldehyde, and potassium cyanide, as well as ammunition. 32 OCT 10548.

On July 24, Lake buried survival gear, including weapons and medical supplies, etc., and reviewed his progress on survivalist fronts:

> "Much of which should be done here doesn't happen here. I should have cyanide pills ready, they are not. I should have bug out gear ready. It is not. I have a mental resistance for survival preparation. I'm comfortable and don't want to plan for the worst. It's the old 'if you don't plan for it, it won't happen'. Yeah, tell that to Charlie." 32 OCT 10554-5.

On August 4, Lake worked around his residence and vowed to "continue plans for Miranda". 32 OCT 10560. On August 5, Lake started "ground clearance for Miranda", and looked for a helper to work with him. 32 OCT 10560. On August 8, Lake prepared for another trip to the Bay Area, which included "making up a bunch of cyanide pills to bring with me on the trip" because "death before dishonor". 32 OCT 10562.

On August 28, Lake had made the decision to leave the Garberville residence because it was known to too many people and tied to a traceable bank account. "No use in continuing M until resettled". 32 OCT 10559.

On September 29, Lake moved to the residence in Calaveras County. Cricket joined him the following day and they worked together cleaning and unpacking. On October 2, they "made ten[t]ative plans to resume M", and discussed a "possible underground plantation". 32 OCT 10579. As of October 7, Lake had placed ads on local bulletin boards for women to be models for his photographs and received some responses. 32 OCT 10581.

On October 25, Lake rented a back hoe and did excavation work for the bunker. 32 OCT 10590. On November 4, Lake worked on his bunker and wrote a letter to appellant. On November 14, he went to town and bought various supplies including "stuff for Charlie". 32 OCT 10593.

Lake began his 1984 diary entries with the comment that he was into his "second year as a fugitive" and "still with death [in his] pocket and fantasy [his] major goal". 32 OCT 10598.

On January 8, Lake reflected on Miranda project:

> "1983 was the year of Miranda. Started (and abandoned) in Humboldt County and restarted here, M is a serious underground construction meant to (1) provide facilities for my sexual fantasies (2) provide physical security for myself and my possessions (3) provide limited (very) protection from nuclear fallout". 32 OCT 10602.

Sometime in late May, Lake noted that "one possible development was a decision on C's part that one of the pretty ladies, a blonde named Debbie, would be suitable for M", accompanied by the comment "Debbie isn't all that great, but would be suitable". 32 OCT 10645.

On June 18, Lake went to the Bay Area with Cricket and commented, "our sex life isn't very exciting anymore", adding that "we're bored with each other and staying together more for friendship and mutual advantage more than anything". 32 OCT 10646.

On June 19, Lake noted that he and Cricket "[d]iscussed Debbie/M", but noted that Cricket "doesn't want that to happen now", accompanied by the interjection "sigh". Lake concluded that it "would probably be best for all if hereafter she wasn't involved in M". 32 OCT 10646.

On September 10, Lake typed up a lengthy entry explaining that the gap between entries reflected "a period of time past [sic] that's best left unrecorded". Lake said that he had "learned that my programming of youth... that which is called morality either was not given or was given poorly" because "to all purposes save a very few, I have no morality". He said that "the past two months saw Miranda come to fruit" and that "the perfect woman for me is one who is totally controlled [sic], a woman who does exactly as she is told and nothing else". Lake "observed one woman...who found this not only acceptable but even desirable" and that "I enjoyed using her and (seemingly) she enjoyed being used". However, he lamented that he was "low on money and lacking Xportation [sic], noting again "I must act.", but "for the moment, my life is lacking direction and means." 32 OCT 10653.

The next final journal entry was on November 9, in which he described generally doing repairs and improvements to the Calaveras property and hoping to have second sex with a woman named Mona the following weekend. 32 OCT 10655. Lake also dictated a tape-recording on "Sunday, October 22, 23, something like that", very close to his 38th birthday in which he stated "It's difficult to explain my personality in 25 words or less, but I am, in fact, a loner". 32 OCT 10659. Lake then described his Miranda fantasy

and his goal of having a woman "totally enslaved", adding "[p]rimarily a sexual slave, but nonetheless, a physical slave as well". 32 OCT 10660. The transcript of this recording has a date of June 18, 1985 at the top. 32 OCT 10657. There is no reference to appellant at all in this fantasy scenerio.

c. Lake's reliance on selling marijuana, either grown or stolen, as his primary source of income, as a non-homicidal explanation why appellant promoted contacts between Lake and the Dennis Mover's victims, who were themselves potheads looking for access to the drug.

On February 27, 1983, Lake stated that he "[m]ust make every effort to generate additional funds from dope, sale of surplus items, etc.". 32 OCT 495

On March 7, 1983, Lake described his drug dealing efforts to raise money. 32 OCT 10497. On March 9, he had lunch with "Bev" to "setup some future dope deals". 32 OCT 10498. On March 30, he concluded a dope deal with someone named "Battlers". 32 OCT 10504.

In early April and May, Lake reported success in his drug dealing. 32 OCT 10506-10515.

On September 16, Lake "pulled raid on Greenfield w/Charlie. No detection. Secured. Got two garbage bags of low grade dope. Shipped to country."

d. Lake's dismissive and denigrating attitude toward appellant.

On July 3, Lake received a "letter from Charlie that says nothing". On July 4, appellant returned to San Francisco. Meanwhile, Lake apparently rented a room in a house with other roommates. "Charlie called earlier this day" and "said he wouldn't be in until Sunday or Monday. *!". 32 OCT 10649.[11]

On July 9, Lake "picked up Charlie" and "spent day moving in and getting to know him again".

On July 10, Lake "started teaching Charlie to drive". Lake stated "he is very hesitant to get involved in my plan. He seems to want me to carry him into everywhere". 32 OCT 10652.

On October 16, Lake said he worked 9 hours with Jim. Later he "went to major shopping center with Charlie after work, but "Charlie got busted shoplifting".

On October 17, Lake was involved in "much hasseling [sic] getting the money together and getting him" referring to bail for Charlie who, in Lake's opinion "of course shows no appreciation", but instead adds to Lake's "problems, always more problems". 32 OCT 10654.

[11] The diary entry is dated "9 Jun", but this appears to be a mistake on Lake's part for this and several subsequent days, because the context confirms that the correct date is July 9."

On October 24, Lake reported that "Charlie called" to say there was a question being raised about his citizenship" such that "he may need to jump bail and split". Lake "went to his place and picked up some loot for cash resale". 32 OCT 10654.

On October 26, Lake "changed III's address to S.J." he was "considering a new operation" that entailed loot, I.D., vehicles [and]" Beta" but noted "that unfortunately will need Charlie". 32 OCT 10654.

On November 1, Lake "called Beta and arranged to pay him $500 tomorrow night" and going to "meet Charlie tomorrow noon and make plans".

On November 2, Lake "met Charlie, performed op" and "met with resistance for the first time" and was "unsuccessful in obtaining credit cards or bank codes". He "drove to country for completion" and "cancelled Charlie's running debt to me".

On November 3 he was "up at 0600 and cleaned site" "left for the Bay Area at 0730" where he "dropped off Charlie". 32 OCT 10655.

The clear import of the diary viewed as a whole corroborates appellant's testimony from Lake's own perspective. Lake strongly preferred to carry out his homicidal plans alone, such as Operation Fish and Pink Palace III, even though it was more difficult for him. Lake viewed appellant as a

source of problems who was "very hesitant" to get involved in any of Lake's plans, and whose involvement Lake intentionally minimized or avoided entirely. Nothing in Lake's diary suggests that Lake viewed or treated appellant as a partner in crime, a confidante, or someone he [Lake] could count on. Taken together, the diary as a whole provides essential exculpatory evidence and corroborates appellant's testimony. Its exclusion deprived appellant of his Sixth Amendment right to present a full defense. Olden v. Kentucky, supra; Riley v. Payne, supra.

7. The erroneous exclusion of evidence the video of Lake and Cricket engaged in sadomasochistic activity while discussing a plan to capture other women.

Respondent argues that the video tape from 1983 was inadmissible because "it would not prove anything about Lake's relationship with appellant or appellant's involvement in the murders" RB 422. However, the proffered evidence was a clear demonstration of Lake's long-standing and ingrained pattern or trait of domination toward others in the course of effecting his common scheme and plan to make the Miranda fantasy a reality.

Respondent's Evidence Code Section 1101, subd.(a) objection argument is untenable because the evidence was relevant and admissible to show Lake's common scheme and plan as authorized by section 1101 subd.(b). The common scheme here was that Lake involved both Cricket and

appellant in videos that appeared to have elements of domination and implicit violence, but which Cricket and appellant, respectively, understood as Lake's fantasies. In the video with Cricket, Lake implied that he would make some of Cricket's students disappear, as thinly-veiled euphemism for killing them. The video shows that Cricket did not take these threats of violence seriously, because she believed, presumably from cues she perceived from Lake, that she was merely a character in his fantasy.

The video with Cricket shows a common scheme or modus operandi on Lake's part of involving others on the periphery of his serial killings, but drawing them into Miranda-related fantasies that provided some kind of gratification to Lake without alarming Cricket or appellant, respectively, that Lake was actually murdering people on his own.

Respondent argues that the video with Cricket "would not prove anything about Lake's relationship with appellant or appellant's involvement in the murders", RB 422, but that view is untenably narrow. The common scheme is that Lake used other people in a certain role in the course of his Miranda activities, the role of apparently complicit participant in the process who played along to please or appease Lake, without any involvement in the homicidal aspects of the Miranda plan. The tape with Cricket shows Lake's state of mind that he wanted to have the experience of sharing his Miranda

fantasy with others, but without revealing the homicidal part that might have caused Cricket or appellant to inform the police.

8. Erroneous refusal to permit the defense to recall Cricket after appellant testified.

Respondent argues that the trial court did not err in denying counsel's request to call Cricket because (1) she did not have any newly discovered evidence to offer; and (2) because she could not appear that same day because of her illness, RB 423. However, defense counsel was explicit that her testimony had become necessary because of appellant's unexpected testimony:

> "Obviously we didn't intend originally, as you know, to call Mr. Ng as a witness, and this thing all got thrown open when he expressed a desire to testify. So it is not as though this was a planned occurrence.
>
> It has just put a different light on the defense, and it is something that we believe we need to bring forward in terms of – from an evidentiary standpoint, and in order to provide a defense for Mr. Ng". 32 RT 7689-90.

Counsel was similarly reluctant to reveal the specifics of her anticipated testimony in open court but noted that the prosecution had "all of her interviews and all of her transcripts that had been provided to us in discovery", 32 RT 7689.

The trial court at one point noted in a discussion of the scheduling of closing arguments that the prosecution might want to present rebuttal

evidence before proceeding to argument – "they may have evidence...they may want to call Mr. White or Ms. Balasz", 32 RT 7692.

The trial court's error was its failure to recognize that appellant's personal exercise of his constitutional right to testify changed the defense calculus regarding the value of Cricket's testimony. Defense counsel had a legitimate reason to change its position and to call Cricket to support and corroborate appellant's testimony. Old Chief v. United States (1997) 519 U.S. 172 emphasizes the importance of permitting a party to present an evidentiary narrative according to its assessment of how to present the evidence most effectively. If appellant had testified before the defense initially rested, there would have been no basis for objecting to defense counsel calling Cricket after appellant finished. See Brooks v. Tennessee (1972) 406 U.S. 605. The trial court properly granted appellant's request to testify, but then erroneously denied counsel's request to present Cricket's testimony to corroborate appellant.

The case law recognizes the importance of corroborating a defendant's testimony with independent evidence because of the likelihood that otherwise the jury will view the defendant's testimony with undue skepticism because of the defendant's obvious self-interest. Riley v. Payne (9th Cir 2003) 352 F.3d 1313, 1320 [granting habeas relief because counsel failed to investigate

and present a corroborating witness "to lend credibility to Riley's story" and "create[ ] more equilibrium in the evidence presented to the jury"]; Brown v. Myers (9th Cir 1998) 137 F.3d 1154, 1158 [habeas relief granted to California petitioner because counsel failed to present corroborating testimony – "as it was, without any corroborating witnesses, Melvin's bare testimony left him without any effective reference"]. Defense counsel emphasized to the court that appellant's testimony put a "different complexion" on the case, 32 RT 7689. The trial court should have permitted defense counsel to present Cricket's testimony because appellant's decision to testify constituted changed circumstances and called for the presentation of corroborating evidence. The trial court's rejection of the defense request cannot be deemed harmless beyond a reasonable doubt. Chapman, supra.

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE COURT'S REFUSAL TO INSTRUCT ON ANY OF APPELLANT'S REQUESTED JURY INSTRUCTIONS.

A. The Failure to Instruct on Unanimity.

Respondent's argument highlights the tension between the constitutional principles of jury unanimity as to the elements of the offense, In re Winship (1970) 397 U.S. 358, and a separate line of California and federal cases that dispensed with jury unanimity requirement as to a theory of liability. People v. Napoles (2002) 104 Cal.App. 4th 108, 118-19, cited at

AOB 467, but not addressed by respondent, clearly illustrates this tension. Napoles noted that on one hand "jurors are not required to agree on the specific theory of guilt", but held that a non-unanimity instruction in a child abuse case was erroneous because "reasonable jurors would have understood that a conviction was permissible if different sets of jurors believed that the defendant committed different single acts or omissions constituting abuse, without all 12 agreeing on the commission of any single violation", 104 Cal.App. 4th at 118.

In this case, the prosecution had very little evidence as to what appellant may have done at the times that Lake was committing the charged murders. The possibilities that the jury could have considered ranged from simply introducing Lake to appellant's co-workers at Dennis Moving Company; to participating in a false imprisonment as depicted on the M-Ladies tape; to being present when Lake actually dispatched the victims; or to assisting Lake. Under the Napoles analysis, "[s]uch a result would violate the criminal defendant's right to a unanimous verdict", Id at 118-119.

Schad v. Arizona (1991) 501 U.S. 624 described the problem with non-unanimity instructions very clearly:

> "To say, however, that there are limits on a capital State's authority to decide what facts are indispensable to proof of a given offense is simply to raise the problem of describing the point at which difference as between means becomes so important that they may not reasonably

be viewed as alternatives to a common end, but must be treated as differentiating with the Constitution requires as separate offenses. 501 U.S. at 633.

The bottom line in the Schad plurality opinion was that Arizona non-unanimity requirement between premeditated and felony murder did not fall "beyond the constitutional bounds of fundamental fairness and rationality", Id. at 645. The four dissenting justices emphasized the constitutional deficiency – "the plurality affirms this conviction without knowing that even a single element of either of the ways for proving first-degree murder, except the fact of the killing, has been found by a majority of the jury, let alone found unanimously by the jury as required by Arizona law", 501 U.S. at 655.

Appellant believes that the doctrine enunciated in the dissent will be vindicated because of the basic due process guarantee of jury unanimity as to the actus reus of the charged offense. California's current practice does not require unanimity as to what specific conduct contributed to the homicide; rather the jury merely has to conclude that the defendant did something that satisfied one of several possible scenarios for liability, none of which were proved beyond a reasonable doubt.

Subsequent decisions including Cunningham v. California (2007) 549 U.S. 270 have stated the Sixth Amendment principle regarding proof beyond a reasonable doubt at a level of generality that applies to appellant's

contention here – "[t]his Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and establish beyond a reasonable doubt, not merely by the preponderance of the evidence". 549 U.S. at 281. The elements of aiding and abetting liability for murder exposed appellant to a potential life sentence, as did the elements for premeditated and deliberate murder, as well as felony murder. The non-unanimity instruction given in this case cannot stand the test of time and requires reversal of appellant's murder convictions.

B. Failure to Instruct on Lesser Related Offenses.

Respondent argues initially that under People v. Birks (1998) 19 Cal. 4th 108, the trial court could not instruct on lesser related offenses without the prosecution's consent, which was withheld in this case, RB 431. Respondent then turns to appellant's argument that the lesser related offense instructions also served to encapsulate appellant's theory of defense, and were therefore required under federal constitutional authority, AOB 468, citing Conde v. Henry (9th Cir. 1999) 198 F.3d 734. Respondent points out that this Court rejected this argument in People v. Taylor (2010) 48 Cal. 4th 574, 622. Taylor purported to distinguish Conde because "that case involved the trial court's failure to instruct on lesser included not a lesser related, offense", 48

Cal. 4th at 622 (emphasis in original). However, Conde did not turn on the distinction between lesser included versus lesser related offenses. Rather, it focused on the function of the instruction as encapsulating the theory of defense, not as an alternative avenue for the jury to convict the defendant. The Ninth Circuit noted "that Conde apparently had two inconsistent theories of the case: first, that he was innocent of all charges; second, that he was guilty of kidnapping for the purposes of burglary but not for robbery", such that "it was error to deny Conde's request for instruction on simple kidnapping", 198 F.3d 739-740.

Respondent is correct that the instruction proffered by defense counsel did contain language that would have permitted the jury to convict him of lesser related offenses, RB 432, citing 36 OCT 12035. While it may be constitutionally permissible to preclude a jury from convicting him of a lesser related offense without the prosecutor's approval, it is not permissible to infringe the defendant's right to have the jury apprised of his theory of the case. Here the defense strategy entailed informing the jury of lesser crimes, whether included or related, that defendant wanted to acknowledge culpability for. That is a viable defense strategy that must be conveyed in the jury instructions. Thus, even if the language apparently authorizing the jury to convict of a lesser related offense was not constitutionally required, the

trial court was none the less required to give the remaining portion of the instruction that was constitutionally compelled. See United States v. Kenny (9th Cir. 1981) 645 F.2d 1323, 1337.

Kenny affirmed that "[t]he jury must be instructed as to the defense theory of the case, but the exact language proposed by the defendant need not be used, and is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory". Here, the trial court refused to instruct on accessory after the fact as to all 12 counts, and refused to instruct on other specific offenses that were less serious than the charged offenses.

Respondent refers to Hopkins v. Reeves (1998) 524 U.S. 88 for the proposition that "the Constitution does not require instructions on lesser-related offenses", RB 431, but that overstates the reach of the case. Hopkins rejected the conclusion of the Court of Appeal that required an instruction on a lesser related offense in a capital prosecution if no lesser included offense existed. 524 U.S. 97. The premise of Hopkins was that it was not constitutionally required to permit a jury to convict a defendant of a lesser related offense to effectuate constitutional protection of Beck v. Alabama (1980) 447 U.S. 625. Hopkins did not address the issue of whether the defendant was entitled to an instruction on lesser related offenses, not so that the jury could

understand the theory of the defense case and the limits on appellant's culpability.

C. The Refusal to Instruct on Vicinage/Jurisdiction.

Respondent contends that there is no requirement to instruct the jury to decide whether vicinage existed in Orange County because "a Superior Court in California has subject-matter jurisdiction over any felony committed in this state", and "even if subject-matter jurisdiction were in question, it is the Court, not the jury, who makes that determination", RB 433, citing People v. Simon (2001) 25 Cal. 4th 1082, and People v. Betts (2005) 34 Cal. 4th 1039, 1052, 1054.

Simon expressly differentiated between subject matter jurisdiction and vicinage/venue – "the issue of venue does not involve the issue of subject matter jurisdiction" because "[i]f only the court or courts designated by the relevant venue statute possess subject matter jurisdiction of the proceeding, 'no change of venue from the locality could be valid, for subject matter jurisdiction cannot conferred on a court ...'", Simon at 1096. Simon supports appellant's contention that vicinage/venue is a fundamental right that is comparable to but not identical to subject matter jurisdiction.

Simon further explained that "the question of venue does not involve a matter of a court's fundamental authority or subject matter jurisdiction over a

proceeding", but rather "the right to be tried in a statutorily designated venue is intended, from the perspective of an accused, as a safeguard against being required to stand trial in an unrelated and potentially burdensome distant location", 25 Cal. 4th 1103. This is exactly the right that appellant was deprived of in this case, and that the vicinage question should have been presented to the jury by his proposed instruction.

Simon specifically left open the question whether "a defendant is entitled to have the question of venue submitted to the jury", because "defendant failed to tender such an instruction" to preserve the issue for appeal. 25 Cal. 4th at 1109. Price v. Superior Court (2001) 25 Cal.4th 1046, 1071 confirmed that Article I, Section 16 of the California Constitution has long been construed as encompassing a "vicinage right", although it does not necessarily adhere "to the letter of common law practice", 25 Cal 4th 1071. Price found that Penal Code Section 784.7 required a sufficient nexus between the county of trial and the county where portions of the offense[s] have been committed to satisfy the vicinage requirement. Thus, while venue and vicinage are closely related, "in California, 'venue...is governed by statute' and not the by California Constitution", while vicinage is implicit in Article I, Section 16.

People v. Posey (2004) 32 Cal. 4th 193, cited at AOB 469 but not discussed by respondent, affirmed that "the rule that venue is a question of fact for the jury 'has enjoyed wide spread and long standing following among the ... courts in California'", but concluded that "the rule that venue is a question of fact for the jury should be rejected in favor of the rule that venue is question of law for determination by the court", 32 Cal. 4th at 214-215. However, the Supreme Court expressly made that decision prospective only, such that the change of law would not apply "to the present case or to any other case not yet final on appeal" – "so long as a defendant in a case not yet final has preserved a claim of error based on violation of the now-discarded rule, he may pursue that claim", 32 Cal. 4th at 215. Trial counsel preserved the claim with the instructional request, 36 OCT 12044, and the trial court clearly erred in refusing to so instruct.

The standard of reversal for refusal to instruct on venue/vicinage applied prior to the Posey decision appears to be the standard generally employed for appellate review – whether a properly instructed jury would necessarily have found the disputed fact to be true. People v. Megladdery (1940) 40 Cal.App. 2d 748, 777, affirmed the trial court's reversal of a conviction because the prosecution's evidence purporting to establish venue was not credible. However, the Court of Appeal permitted the offenses to be

retried because the record contained sufficient evidence, if believed, to support a finding of venue. (Megladdery was overruled in Posey on the procedural question of whether venue was an issue for the jury). People v. Sering (1991) 232 Cal.App. 3d 677, 691 concluded that "failure of proof of locus delicti, although if raised as an issue by defense may require reversal and a new trial, cannot result in acquittal of the defendant".

In this case, there was no waiver of the right of venue/vicinage, and there was no colorable factual basis to try the San Francisco counts in Orange County. Neither appellant nor any of the victims nor any of the evidence had any connection with Orange County. Thus, it is clear that the trial court's refusal to instruct the jury to determine venue/vicinage cannot be deemed harmless.

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE FAILURE TO DECLARE A MISTRIAL UPON DISCOVERY OF IMPROPER JURY CONTACTS BY A CALAVERAS COUNTY DISTRICT ATTORNEY INVESTIGATOR.

A. The Operative Facts Regarding Misconduct and Prejudice.

Respondent's position is that only four jurors had any direct conversations with Investigator Hrdlicka regarding his ties (nos. 157, 213, 263, and 287), and that there was no prejudice because the encounters were "brief, infrequent, and unrelated to the trial itself", RB 445-446. Respondent restricts his focus to the specific verbal exchanges between the jurors and

Investigator Hrdlicka, and thus fails to acknowledge or address the potential for prejudice arising from the overall course of their interactions.

Juror #174, dismissed for her extensive conversation with Hrdlicka and for comments overheard when she was talking on the telephone, testified that "from early on in the trial, investigator Hrdlicka and his unusual ties was the focus of attention on the part of several female jurors". 37 RT 8873. Investigator Hrdlicka recognized this interest, responded to it, and encouraged the interactions. Juror #174 testified that approximately a dozen times while the jurors were waiting to enter the court room, Hrdlicka came out of the elevator, saw them congregated, and pulled back his jacket to display his tie. This occurred "probably a dozen times or more". 37 RT 8877.

This chummy interaction is very different from individual and unilateral observations that jurors inevitably make regarding their courtroom surroundings. Hrdlicka fostered a shared experience with several jurors in which he was the focus of interest.

Juror #174 testified that nonverbal interactions occurred more frequently than did verbal exchanges. Investigator Hrdlicka was obviously playing to the group of jurors. The potential for prejudice was very high in that the jurors understood that Hrdlicka was both a prosecution witness and a representative of the prosecution, raising the possibility that the jurors would

view Hrdlicka and the prosecution as the "good guys" but would regard the appellant and the defense team as the "other guys".

Juror #263 testified that he heard jurors wonder aloud "what kind of tie he wears today", 37 RT 8892. This ongoing interaction between Hrdlicka and a cadre of at least four jurors has substantially greater potential for prejudice than respondent acknowledges. When the focus of scrutiny is expanded from the specific verbal exchanges regarding the ties to the overall degree of interest and interaction during the course of the trial, the potential for prejudice is readily apparent.

There was an additional aspect of the improper communications between juror 174 and Hrdlicka that respondent does not address. During their discussion of medical problems and surgeries, Hrdlicka told juror 174 that decedent Stapley's father had undergone two hip replacements and a knee replacement, and that his rehabilitation process was arduous, 37 RT 8874-75. Before juror 174 was dismissed, she informed five other jurors of those surgeries during their lunch conversation, 37 RT 9010-9014. This would also have contributed to a chummy and sympathetic feeling among the jurors, Det. Hrdlicka, and the relatives of one of the victims.

B. The Applicable Standard of Review.

Respondent relies on In re Hamilton (1999) 20 Cal. 4th 273, 305-306 for the standard of review that a presumption of prejudice only arises if the misconduct addressed "the matter pending before the jury...", RB 443. Respondent recognizes that the federal constitutional standard of review imposes a presumption of prejudice where the improper interaction could be "possibly prejudicial" even if it does not relate to the case itself, RB 449, referring to Caliendo v. Warden (9th Cir 2004) 365 F.3d 691. Citing Mattox v. United States (1892) 146 U.S. 140, Caliendo clearly stated that "[w]e and other circuits held that Mattox established a bright line rule: Any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing", 365 F.3d at 696. Caliendo cited Rinker v. County of Napa (9th Cir. 1983) 724 F.2d 1352, 1354 for its observation that the "harm inherent in deliberate contact or communication can take the form of subtly creating juror empathy with a party and reflecting poorly on the jury system", and cited Agnew v. Leibach (7th Cir. 2001) 250 F.3d 1123, 1133 for its observation that because of the extrajudicial contact the jury "had the opportunity to develop confidence in the [witness'] word in ways that were not subject to cross examination or the right of confrontation", Id. at 696.

Thus, the federal courts have recognized that the presumption of prejudice can arise from the extrajudicial communications would favor a particular party in the affected juror's eye. The bright line rule of Caliendo was recently reiterated in Xiong v. Felker (9th Cir. 2012) 681 F.3d 1067, 1077 ["sitting en banc, in Caliendo we relied on Mattox and Remmer as establishing the widely accepted bright line rule that a finding of juror misconduct can rise to a presumption of prejudice that may only be rebutted with strong contrary proof of harmlessness"].

The trial court failed to apply a presumption of prejudice and therefore erred in its denial of the motion for new trial. When the presumption of prejudice is properly applied, reversal is required because the positive rapport developed over the course of the trial between Investigator Hrdlicka as a representative of the prosecution and at least four of the jurors likely resulted in their favoring the prosecution over the defense. Moreover, juror 174 passed on to several other jurors Det. Hrdlicka's report of the travail of Stapley's father in his physical rehabilitation efforts. Appellant urges this court to focus on the settled facts regarding the overall course of interactions, not just the verbal content of the exchanges. With that focus, the presumption of prejudice cannot be rebutted.

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS, HIS RIGHT OF PRESENCE, AND A FAIR PENALTY TRIAL BY THE COURT'S ERRORS IN HOLDING A CRUCIAL PROCEEDING REGARDING AN UNAUTHORIZED JUROR CONTACT IN APPELLANT'S ABSENCE.

A. Respondent's Misdirected Estoppel Argument.

Respondent's first position is that "appellant is barred from making this claim, because he seeks reversal based on his own misconduct", RB 450. This is an untenable invocation of a general maxim that has no application here. If appellant had improperly contacted a juror, the trial court may well have been justified in responding with sanctions such as limiting his telephone access; monitoring his telephone access; or other responses commensurate with the impropriety. However, the improper telephone call did not confer on the trial court the authority to infringe other separate constitutional rights of appellant.

If appellant had made an improper telephone call to a juror, and subsequently claimed that the juror should have been excused because the telephone call may have prejudiced the juror against appellant, respondent's maxim could conceivably apply. However, there is simply no connection in this case between the alleged misconduct on appellant's part and the constitutional violation on the trial court's part. The alleged extra-judicial

misconduct did not extinguish the trial court's obligation to ensure that appellant's constitutional right of presence in court was observed.

Respondent cites People v. Williams (1988) 44 Cal. 3d 1127, 1156, but that case is distinguishable for the reason noted above. Following the guilty verdict, defendant Williams mouthed to the jurors "I'm going to get each and every one of you mother fuckers". This was called to the court's attention after the jury reached a penalty verdict. The court inquired of the foreman whether that remark had been made and whether it had been discussed during jury deliberation. The foreman said that another juror had told him about the remark, but it had been discussed only after the penalty verdict had been reached.

The Supreme Court referred to the general rule that jurors should not be influenced by matters other than evidence presented in court, but commented that "[i]t is not clear...that such a rule applies to the juror's perception of the defendant, particularly where the defendant engages in disruptive or otherwise improper conduct in court", because "[a]s a matter of policy, the defendant is not permitted to profit from his own misconduct", Id. at 1156 (emphasis supplied). Williams merely reiterates the unobjectionable point that a defendant cannot improperly frighten jurors in the court hallways and then complain that the jurors may have been biased by his frightening

conduct. However, the defendant's misconduct in frightening the jurors does not provide a basis for excluding him from subsequent courtroom proceedings in the absence of evidence of further dangerous or disruptive conduct.

Williams relied for its conclusion on People v. Manson (1976) 61 Cal. App. 3d 102, 1057, in which the court allowed a witness to testify regarding threatening gestures made by the defendant during trial and regarding "X" marks on defendant's foreheads and on the foreheads of some of his associates while in court. The Court of Appeal rejected the appellate argument that the jurors may have been prejudiced because "[t]he stigmatic effect of this circumstance, if any, was produced entirely by the voluntary act of appellant", 61 Cal. App. 3d at 1057. The Williams/Manson analysis could conceivably apply if appellant were currently making an appellate argument that the trial court erred in permitting juror 12 to remain as a juror after the colloquy about the telephone call. However, appellant has made no such claim; appellant's claim is that the trial court erred in violating his constitutional right of presence while addressing the issue of juror 12's suitability to continue.

Respondent also cites In re Hamilton (1999) 20 Cal. 4th 273, 305, but that case is distinguishable on the same ground as Williams. In Hamilton, one of the jurors believed that she saw the defendant's sister lurking in an alley

near her home during the course of the trial, but did not immediately report the incident to the court. This Court resolved the claim on the basis that there was no obligation on the juror to report a mere observation of a defendant's relative, and that there was no indication that the encounter had in fact biased the juror. Hamilton was a habeas corpus case, and did not involve in any way the exclusion of the defendant from a court proceeding relating to the extrajudicial contact.

B. Respondent's Unavailing Effort to Distinguish Rushen v. Spain.

Respondent next argues that a defendant does not have a constitutional right to be present at a hearing regarding the possible dismissal of a juror, RB 455-457. Respondent attempts to distinguish Rushen v. Spain (1983) 464 U.S. 114 117 on the basis that it involved an ex parte communication between the trial court and the juror without either the defendant or counsel being present, while "this case does not involve an ex-parte communication – on the contrary, three attorneys represented appellant at the in camera hearing", RB 457. However, as pointed at AOB 485-486, Rushen entailed both "the right to personal presence at all critical stages of the trial and the right to counsel". The fact that both rights were violated in Rushen while only the right of personal presence was violated here does not render Rushen "irrelevant" as respondent contends, RB 457.

Attorney Kelley informed the court that appellant did not need to be present for the hearing without informing appellant of the fact of the hearing or the issue to be addressed. The record reflects that the court broached the issue to Kelley in appellant's absence, and then immediately convened the in camera hearing with the juror, without affording Kelley any opportunity to confer with appellant, and without Kelley making any effort to do so. Given the lengthy record of incompatibility between Kelley and appellant, and the absence of communication between them, appellant had in effect no effective representation at all at the in camera hearing, rendering this case functionally indistinguishable from Rushen v. Spain, supra.

C. Respondent's Unavailing Reliance on United States v. Gagnon and Subsequent Cases.

Respondent relies on United States v. Gagnon (1985) 470 U.S. 522, where a juror became concerned when he noticed that the defendant was sketching the jury during court. The trial court informed the defendants and their counsel of this, and proceeded to interview the juror in chambers. Neither the defendants nor their attorneys objected to that procedure. Here, appellant objected as soon as he heard that the hearing had taken place in his absence. The Supreme Court concluded that defendant's presence was not required "to ensure fundamental fairness" or afford him a "reasonably substantial opportunity to defend against the charge", 470 U.S. at 527.

Gagnon is distinguishable because of the phase of the case -- mid jury deliberations – and the more serious nature of the issue to be addressed with the juror.

People v. Harris (2008) 43 Cal. 4th 1269, concluded that "it is settled that the removal of the juror is not a matter for which a defendant is entitled to be present", Id. at 1310, but appellant believes that this conclusion is incompatible with the right of presence guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

Moreover, Harris is distinguishable on the basis that the juror removal issue in that case did not involve any interaction or communication involving the defendant, and that Harris did not have any actual or useful knowledge about what happened, why, and what to do about it. Here, the situation was very different, since it involved appellant initiating a communication with the juror. Thus, appellant should have been viewed as having actual knowledge about what happened and why, and his presence was necessary to "ensure fundamental fairness" and "to defend against the charge", Gagnon at 527.

If appellant had been present, or if Kelley and/or the court had made a minimum effort to elicit his response to the situation, appellant could have explained that he felt abandoned by Kelley, and that the feeling of abandonment had increased by the end of the trial. Appellant felt that Kelley

was resisting if not thwarting his actual defense, and took it upon himself to insist on testifying to avoid what appellant viewed as fundamental failure of representation on Kelley's part.

Appellant could have further explained that he experienced a feeling of alienation and even desperation because of Kelley's antagonism toward him and his abandonment of appellant's defense. Appellant accurately recognized that the two prosecutors were implacable in their efforts to convict him, and that the trial court was entirely unsympathetic to his complaints about Kelley.

Finally, appellant could have explained that juror 12 had given him friendly smiles on occasions where they happened to make eye contact with each other. Appellant would have explained that he responded to these gestures of friendliness by reaching out to the juror. Appellant could have explained that in retrospect his telephone call may have been misguided and inappropriate, but his motivation for making it was simply to communicate with an apparently sympathetic person in the courtroom, as he felt there were precious few others in that category. Appellant could have let the court and the juror know that his intent was nothing more than what he said to the juror, that she was nice, and nothing remotely like an intent to intimidate, frighten or otherwise influence the juror.

As it stood, the juror acted appropriately and terminated the call as soon as she realized it was appellant. However, she very likely had residual concerns about his communication with her. If appellant had been present, he could have explained by his testimony or through an offer of proof through counsel that his motive may have been misguided but was benign rather than malevolent. A presentation along that line could have had a positive effect to return the juror to her pre-telephone call state of mind.

In sum, where the subject matter of an in camera hearing involves a defendant's own conduct, the defendant is a necessary party to the proceeding and his presence is guaranteed by the federal Constitution. It was violated in this case at a crucial point in the jury deliberations and cannot be viewed as harmless beyond a reasonable doubt.

People v. Harris, supra, denied relief on the basis that "defendant's argument that he could have contributed to the fairness of the proceedings amount to no more than speculation", 43 Cal. 4th 1307, but that is because the defendant had no personal knowledge of the subject matter of the hearing. Appellant, in contrast, was in a unique position to put the telephone call into appropriate perspective. While juror 12 claimed she could remain objective, she must have held some negative attitude toward the phone call, if nothing else, based on her concern as to why appellant made the call. If he had been

present and permitted to make an explanation, her understandably negative reaction could have been dissipated. Instead, appellant was absent from a critical phase of the proceedings and was deprived of the opportunity to defend against the charge. United States v. Gagnon, supra.

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE TRIAL COURT'S ERRONEOUS CURTAILMENT OF APPELLANT'S SKIPPER MITIGATION PRESENTATION.

Appellant sought to inform the jury of his history of compliant and courteous conduct during 15 years of custody, and of crucial importance, that his positive institutional adjustment was attributable to his internal character rather than to the external chains and handcuffs that were imposed on him. The latter component of the presentation was authorized by Skipper v. South Carolina (1986) 467 U.S. 1, because otherwise the jury – unfamiliar with the realities of high security prison life – could have dismissed appellant's mitigating evidence as attributable to the ironclad security arrangements rather than to appellant's own self-discipline.

Respondent first argues that "[a]ppellant has forfeited this claim, because he did not argue this theory of relevance at trial", RB 460. To the contrary, appellant complied with Evidence Code Section 354, in that "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means".

Here, the questions asked by counsel made it clear that the purpose of the evidence about other inmates was to establish that physical restrains did not guarantee compliant custodial behavior. Rather, an inmate like appellant had to be internally motivated to be compliant and courteous, above and beyond the effect of the restraints.

The relevance of the evidence about other violent and undeterable inmates was to enable a jury to give a proper weight to the evidence of appellant's own conduct. That should have been readily apparent to the court by the substance of the questioning.

Respondent next argues that "the testimony was inadmissible under state law – and thus excludable under the Federal Constitution because it was irrelevant and excludable under Evidence Code Section 352...". RB 460. To the contrary, the California Constitution expressly provides that "relevant evidence should not be excluded in any criminal proceedings", Article 1, section 28 (f) (2), Cal. Const. See also People v. Tully (2012) 54 Cal. 2d 592, 1010 ["all relevant evidence is admissible", citing Evidence Code section 351 and Article 1, section 28, Cal. Const.]

Respondent acknowledges that "[a]ccording to Skipper, evidence of the defendant's good behavior in custody is admissible under the requirement that the jury be allowed to consider 'any aspect of a defendant's character or

record... that the defendant proffers as a basis for sentence less than death'" RB 463 (emphasis supplied). Respondent's relevance argument founders because the comparison evidence that appellant proffered was necessary to enable the jury to recognize that appellant's compliant and courteous custodial conduct was in fact good behavior, as opposed to merely normal behavior or even involuntary behavior.

Moreover, the thrust of the evidence was to demonstrate that appellant would not be dangerous in prison, not merely that he would be artificially pleasant and courteous. It was essential for the jury to understand that the degree of security that appellant had been subjected to and would in the future be subjected too did not by itself preclude violent conduct. Rather, appellant had to impose self-discipline to maintain compliant conduct, and the most effective means of demonstrating that was to apprise the jury that other inmates who were subjected to objectively similar physical constraints nonetheless acted out, and threatened other inmates and staff.

Respondent implicitly recognizes that comparative evidence is relevant to the presentation of mitigation evidence in the prejudice portion of his argument, noting that "Anthony Casas, an expert in corrections and prison adjustment" testified that on a scale of one to ten, appellant ranked "as a ten", RB 467, citing 38 RT 9254. That comparative ranking was important to give

the jury some basis for according appropriate weight to appellant's conduct. If the defense had been limited to testimony that on a particular day appellant got up, marched without incident to the yard, spent two well-behaved hours on the yard, etc., the jury would have no way of determining whether that was actually good behavior reflecting appellant's character or compelled behavior reflecting on the effectiveness of prison security. Because the jurors would not have been able to assign a comparative weight as Mr. Casas did, they were deprived of an opportunity to assess the weight of appellant's evidence of nonviolence notwithstanding the custodial restraints.

Regarding prejudice, respondent is correct that the standard of review is whether an error in excluding mitigation evidence was harmless beyond a reasonable doubt, RB 468. Prejudice is apparent in that Officer Coleman's testimony could well have conveyed to the jury exactly the implication that appellant sought to avoid, i.e., that appellant's ostensibly compliant behavior was due to the physical restraints, not to appellant's internal self-discipline:

> Q: During the two to three years...that you had occasion to have contact with Mr. Ng, did you ever feel threatened or in fear of your safety?
>
> A: No. He was always in constraints. 36 RT 8730 (emphasis supplied).

That testimony strongly suggested that the custodial restraints were the primary if not sole guarantor of appellant's good behavior, not appellant's

character. Given that testimony from Officer Coleman, it was essential to present the comparative evidence that constraints were in fact not a guarantee of nonviolent behavior. Trial counsel attempted to do this but was thwarted, 36 RT 8731-32, and the prejudice cannot be deemed harmless beyond a reasonable doubt.

XVI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE ERRONEOUS EXCLUSION OF EVIDENCE REGARDING RACIAL DISCRIMINATION HE ENCOUNTERED IN THE MARINE CORPS.

A. Respondent's Unfounded Forfeiture Argument.

Respondent's first argument is that appellant forfeited this claim because "he bases on it a new theory of relevance and on constitutional grounds that he did not raise at trial", RB 471. This is a make-weight objection because as respondent acknowledges, "the court did not exclude the evidence based on a lack of relevance", RB 472. The relevance of the evidence was recognized by all at the time because "the substance, purpose and relevance of the excluded evidence was made known to the court by the questions asked...or by any other means", Evidence Code Section 354, subd.(a). The point of the evidence to show was that appellant's Marine Corps aspirations where thwarted by racial animus toward Asian Americans, and that he personally suffered harassing behavior from Caucasian Marines.

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B. Respondent's Equally Unfounded Concession Argument.

Next, respondent incorrectly asserts that "defense counsel conceded, 'perhaps you were right, Judge'", and therefore that "it is undisputed that the court correctly excluded this evidence based on lack of foundation", RB 472. Respondent misreads attorney Kelley's sarcastic response to the trial court after a somewhat testy interchange as a "concession". The portion of the colloquy immediately preceding respondent's perceived "concession" is as follows:

Mr. Clapp: With regard to the actual Marines that you had to admonish who had been guarding Charles Ng, did you see those Marines stabbing Charles Ng's feet with these pins?

Mr. Smith: I am going to object, your Honor. He assumes facts not in evidence. It can be asked a different way. Well, I am sorry, I apologize for the last comment. It is assumes facts not in evidence.

Mr. Kelley: May I be heard?

The Court: No. Sustained. You have to lay a foundation before you can get – in other words if he says no, that means some other Marines outside of his presence jabbed Mr. Ng in the leg with needles. That is improper. If there is an objection, it gets sustained. – There is no other way of saying it. "When did you last beat your wife?" That is what they told you in boot camp.

Mr. Kelley: Do you want me to respond, your Honor?

The Court: No. That was my lesson in evidence.

Mr. Clapp: Thank, Your Honor, thank you very much Your Honor. 36 RT 8807-8808 (emphasis supplied).

At that point, witness Chapline was excused and the following colloquy occurred:

The Court: Anything else, counsel?

Mr. Kelley: I have a question. 'Did you see'? Answer "Yes, I"...

The Reporter: I can't hear.

Mr. Kelley: Actually I don't care if this is on the record or not.

The Court: Yes. It assumes that the latter part happened. You have to lay the foundation. Were you there during the second shift? No. If yes, what did you observe. Or, I observed Marines sticking needles in his foot. That is how you get it in. You know he wasn't there or you would have got it in. There is a way to do it properly. But only –

Mr. Kelley: Perhaps you are right, Judge.

The Court: Perhaps? 36 RT 8808-8809

The trial court certainly did not view attorney Kelley's comment as a "concession", but rather as grudging acceptance of a ruling that he disagreed with. That does not constitute a "concession", see People v. Calio, supra.

C. The Trial Court's Errors.

Next, trial court was plainly wrong that the question assumed facts not in evidence. The introductory clause of the question identified the prior testimony that Sergeant Chapline had admonished certain Marines who had

been guarding appellant. The substantive part of the question assumed nothing and called for the witness's personal observations – "did you see those Marines stabbing Charles Ng's feet with these pins?" That form of question is a textbook example of how to elicit a direct observation from a percipient witness.

The trial court offered an example of an improper question that assumed facts that were not in evidence, "when did you last beat your wife", 36 RT 8807. That question ostensibly calls for a response as to the last time that the person beat his wife, but it assumes that there were prior times. The equivalent of that type of improper question in the context here would have been to the effect of, "when was the last time the guards stabbed appellant's feet with needles?" Defense counsel's question contained no such deficiency. The trial court's "lesson in evidence", 36 RT 8808, was plainly flawed.

The trial court made a virtually identical error earlier in the questioning during the following colloquy:

> Q. By Mr. Clapp: While Charles Ng was laying in the hospital with his leg in a cast, did you observe other Marines stabbing him in the feet with needles?
>
> Mr. Smith: Well, I am going to object. It assumes facts not in evidence.
>
> The Court: Sustained. 36 RT 8806.

The question was phrased in the form "did you observe", which was equally proper as far as eliciting evidence from a percipient witness.

Next, the court erred in sustaining an objection to defense counsel's question as to what appellant told the witness about the course of racial harassment:

> [Sergeant Chapline]: I questioned him about an activity that I was made aware of by some nurses on duty by the other shift of Marines that were going – when I became aware of that situation, I questioned Charles about it, and he confirmed it.
>
> Q: And what was that situation?
>
> Mr. Smith: Well, I am going to object. It calls for hearsay, your Honor.
>
> The Court: Sustained. 36 RT 8792-8793.

The trial court erred in failing to recognize that the statement may have called for appellant's out of court statement, but those statements were plainly admissible under Evidence Code Section 1250 ["statement of declarant's then existing mental or physical state"]. Section 1250 provides "[s]ubject to section 1252, evidence of a statement of a declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made admissible by the hearsay rule when "[t]he evidence is offered to prove the declarant's state of mind, emotion, or physical sensation, at that time or any other time

when it is itself an issue in the action; or ...[t]he evidence is offered to prove or explain acts or conduct of the declarant". The crux of Sergeant Chapline's question to appellant was "Are you experiencing racial discrimination in the form of physical harassment by Caucasian Marines?" That called for a response from appellant as to his "state of mind" and "physical sensations", i.e., that he was experiencing racial discrimination through the means of physical harassment, which explained and extenuated his subsequent conduct in running away.

The Comment from the Assembly Committee on Judiciary accompanying section 1250 explains that "[s]tatements of a decedent narrating threats or brutal conduct by some other person may also be used as circumstantial evidence of a decedent's fear – his state of mind – when that fear is itself an issue or when it is relevant to prove or explain the decedents' subsequent conduct". In the context of this case, statements of a declarant narrating racially discriminatory conduct by other persons may be used as circumstantial evidence of the declarant's state of mind, because that state of mind is itself an issue and is relevant to prove or explain the declarant's subsequent conduct. The racial discrimination that appellant experienced in the Marine Corps, where he had hoped to prove himself, was relevant to explain why he committed the armory burglary, and why upon release from

Leavenworth he renewed his relationship with Leonard Lake. The trial court erred in refusing to permit Sergeant Chapline to narrate appellant's statements regarding his mental feelings of racial discrimination.

Finally, the excluded evidence was admissible under the Eighth Amendment guarantee of Green v. Georgia (1979) 442 U.S. 190, recognizing that evidence in mitigation is admissible notwithstanding an apparent barrier in the form of a state hearsay statute. Green vacated a death sentence because the trial court had excluded as hearsay the extrajudicial statement of a codefendant in which the codefendant admitted that he had sent Green on an errand and then by himself killed the kidnap victim. The extrajudicial statement was barred by the Georgia hearsay rule, which contained an exception only for declarations against pecuniary interest, not declarations against penal interest.

The Supreme Court concluded that "[r]egardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment", 442 U.S. at 97. The Supreme Court explained that "[t]he excluded evidence was highly relevant to a critical issue in the punishment phase of the trial, see Lockett v. Ohio 438 U.S. 586, 604-605 (1978)...and substantial reasons existed to assume its reliability". Ibid.

The evidence excluded here must be similarly viewed as highly trustworthy. Presumably unbiased military nurses reported to Sergeant Chapline that the Caucasian guards were harassing and hurting appellant. Sergeant Chapline appropriately inquired of appellant who confirmed this. That evidence was sufficiently trustworthy to cause Sergeant Chapline to admonish the guards and warn them to never do it again.

D. The Resulting Prejudice.

The question then, is whether the exclusion of this evidence viewed in conjunction with the erroneous exclusion of other mitigating evidence and other trial errors can be deemed harmless beyond a reasonable doubt. Hitchcock v. Dugger (1987) 481 U.S. 393, 398-99. Respondent views the excluded evidence of discrimination in isolation, and argues its lack of prejudice – "though sticking needles in appellant's feet – if it occurred – would be deplorable, it would not mitigate appellant's culpability for the unrelated murders of eleven people", RB 473.

The prejudice analysis should be focused on whether the excluded evidence provides an important building block for the jury to understand the adversity that appellant experienced in his life so that the jury would have a factual foundation for viewing appellant as a flawed but not entirely unsympathetic person whose eventual crimes were in some degree mitigated

by the adverse forces that appellant encountered during his earlier life. See Abdul-Kabir v. Quartermain (2007) 550 U.S. 233, 251 [reviewing Eighth Amendment cases regarding the admissibility and consideration of mitigating evidence].

Respondent also argues that "the record gives no indication that the mistreatment alleged here was racially motivated", and that notwithstanding appellant's speculation that race was the motive, "a finding of prejudice cannot be based on speculation", RB 473. That argument is unavailing because (1) Sergeant Chapline was erroneously precluded from testifying as to appellant's description of the mistreatment and its impact on his state of mind; and (2) the evidence that is in the record clearly supports the inference that the harassment was racially motivated.

For mitigation purposes, the point of the evidence was to show the effect that the harassing conduct had on appellant. It was not necessary to independently prove that the Caucasian Marines who harassed him did so because of racial bias. In contrast, a defendant who alleges racial bias in the prosecution's use of peremptory challenges must prove racial motivation, but the constitutional defect to be avoided in that situation is the intangible skewing of the jury composition, Batson v. Kentucky (1986) 476 U.S. 70, not the impact of the prosecutor's conduct on the defendant individually.

Here, the impact of the Marines' harassment on appellant has constitutional relevance independent of the subjective motivation of the Caucasian Marines. Sergeant Chapline was asked whether appellant told him "he thought that the Marines were treating him unfairly due to his race", and Sergeant Chapline confirmed that, 36 RT 8804, albeit without any supporting facts or details because of the trial court's erroneous evidentiary rulings. Under these circumstances, the trial court's erroneous restrictions on appellant's mitigation evidence cannot be deemed harmless beyond a reasonable doubt.

XVII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE COURT'S REFUSAL TO INSTRUCT THE JURY THAT LINGERING DOUBT WAS A LEGITIMATE MITIGATION CONSIDERATION.

Appellant relies on People v. Hartsch (2010) 49 Cal. 4th 472, 511-513, for the proposition that "A capital defendant has no right to instructions on lingering doubt under state law or the federal Constitution", RB 474, also citing Franklin v. Lynaugh (1988) 487 U.S. 164, 172-174. Respondent does not address Oregon v. Guzek (2006) 546 U.S. 517, 527, argued by appellant at AOB 507-508, to the effect that "seven Justices of the United States Supreme Court believe that there is a right to rely on a concept of 'lingering doubt' or 'residual doubt' at the penalty phase proceedings".

Appellant believes that Guzek is incompatible with People v. Hartsch, supra, and Franklin v. Lynaugh. If the defendant is entitled to have evidence of innocence or at least lingering doubt as to guilt considered at penalty phase, it follows that the jury must be instructed that this is an appropriate consideration during penalty decision. Residual doubt does not logically affect the seriousness of the offense, nor does it affect appellant's background or character. Rather, it is a sui generis factor that permits the jury to determine that the prosecution's evidence was sufficient to send a defendant to prison for the rest of his life without parole, but not sufficient to support the death penalty.

Federal constitutional law generally and capital law sentencing specifically requires that the jury be instructed as to theories of defense they may consider in light of the evidence. The Eighth Amendment requires that a defendant not only be able to present evidence to the jury and argue that evidence, but also to have the trial court instruct the jury that the evidence constitutes a legitimate sentencing factor. Abdul-Kabir v. Quartermain, supra.

Abdul-Kabir granted habeas corpus relief to a capital petitioner because the Texas sentencing statute focused the jury on two questions: whether this killing was committed deliberately; and whether the defendant would be dangerous in the future. Petitioner had presented evidence of childhood

deprivation, but the evidence did not address either of the two questions, but instead "provide[d] the jury with an entirely different reason for not imposing a death sentence", 550 U.S. at 259. Here, appellant presented evidence of childhood deprivation, which was encompassed by the jury instructions, and also presented evidence of lingering doubt, which was "an entirely different reason for not imposing a death sentence", but which was not encompassed by the statute.

Buchanan v. Angelone (1998) 522 U.S. 269, 276, also reaffirmed the principle that an Eighth Amendment violation occurs when an instruction "prevents the consideration of constitutionally relevant evidence". In this case there is a likelihood that the jury would not have considered residual or lingering doubt as a mitigating factor and would not have considered the guilt phase evidence challenging culpability, including appellant's testimony, as a mitigating factor. The import of lingering or residual doubt is not intuitively obvious to lay jurors, and requires an explanatory instruction because it does not fit within the scope of the standard penalty phase instructions as given at appellant's trial.

Appellant made an extensive prejudice argument, AOB 512-514, emphasizing that appellant expressly testified in a manner that, if fully credited, would have precluded any liability for the murders. The jury's

failure to reach a verdict on the Cosner count demonstrates that at least some jurors had reasonable doubt as to appellant's culpability for that charge. The Cosner evidence was generally comparable to that relating to the other charges, i.e., that appellant was in Lake's company around the time of the murder, and may have engaged in activities that would have made him as accessory after the fact. The fact that the jury hung on the Cosner count demonstrates that the jury had some question about appellant's culpability. While they were apparently convinced beyond a reasonable doubt that he was guilty of the other eleven charges, there may well have been sufficient residual doubt based on his testimony and on the prosecution's circumstantial evidence to have caused one or more of them to reject the death penalty if they had been specifically apprised that residual doubt was an adequate basis not to impose the death penalty. Under these circumstances, the failure to instruct cannot be deemed harmless beyond a reasonable doubt.

XVIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL BY THE COURT'S REFUSAL TO INSTRUCT OR TO PERMIT COUNSEL TO ARGUE THAT A DEATH VERDICT WAS NOT REQUIRED EVEN IF THE JURY FOUND THAT AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGHED MITIGATING FACTORS.

Respondent argues that "a defendant is not entitled to an instruction that a jury can choose a life sentence when the aggravating circumstances outweigh the mitigating circumstances", RB 475, citing Boyde v. California

(1990) 494 U.S. 370, 377. Boyde rejected the claim that the "shall impose" language of former CALJIC 8.84.2 improperly precluded the jury from declining to impose the death penalty even if the jury found that the aggravating circumstances "outweigh" mitigating circumstances, asserting an unfortunate non-sequitur that "there is no constitutional requirement of unfettered sentencing discretion in the jury", 494 U.S. at 377. Petitioner Boyde was not asking for "unfettered sentencing discretion", but rather for "guided discretion" that avoided the virtual directed verdict impact of the "shall impose" language.

Respondent ignores appellant's argument that where the jury is directed to weigh aggravating evidence against the mitigating evidence, the aggravating evidence will virtually always "outweigh" the mitigating evidence by any common sense standard. The only scenario in which mitigating evidence would logically "outweigh" aggravating evidence entails a showing along the lines that the defendant raised two people from the dead for every victim he was convicted of killing. Otherwise, conscientious jurors will feel compelled to return a death judgment to comply with the weighing instruction. Realistically, there are virtually no capital defendants who get so many medals of honor for their good deeds or who experienced such horrific upbringings as to "outweigh" killing an innocent victim.

Appellant presented considerable evidence in mitigation, but no evidence that he raised 22 or more people from the dead. Under these circumstances, former CALJIC 8.88 stacked the decisional deck against a life verdict at the outset. The directive to weigh the evidence of aggravation and mitigation clearly connotes a comparative process and the result of that comparative process was a foregone conclusion in favor of the aggravating evidence. That skewing factor was reflected in the penalty decision in this case, and violated appellant's rights to due process, a fair trial, and protection against cruel and/or unusual punishment under the State and Federal Constitutions.

Respondent ventures into an even more untenable position in arguing that defense counsel "had no right to argue that the jury could impose a life sentence even if the aggravating factors outweighed the mitigating factors", RB 476. Under respondent's position, counsel could not argue to the jury, "Sure, the aggravating factors outweigh the mitigation factors by some margin, but are not so substantial in comparison with the mitigating factors to warrant the death penalty instead of life without parole." However, CALJIC 8.88 clearly contemplates exactly that possibility, but respondent would foreclose counsel from arguing it to the jury.

Thus, respondent attempts to saddle appellant with the same unconstitutional burden that this Court eliminated in People v. Brown (1985) 40 Cal. 3d. 512, 542. More recently, People v. Brasure (2008) 42 Cal. 4th 1037, 1062, reaffirmed that the "weighing of aggravating and mitigating circumstances" is not supposed to be a mechanical weighing on an "imaginary scale." Referring to Brown, supra, Brasure stated that "we observed that the balancing involved in capital sentencing is not between "good and bad" but between life and death; ([Brown] at 542, fn. 13) – to impose death, jurors must be persuaded not merely that the bad in the defendant's life and crimes outweighs the good, which will ordinarily be the case where the defendant has already been convicted of capital murder, but that the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole". 42 Cal. 4th at 1062 (emphasis supplied).

Respondent's position flouts the teaching of People v. Brasure, et al., and the trial court's refusal of the defense instruction and its restriction on defense argument created a reasonable likelihood that the jury misunderstood its sentencing responsibility. The errors cannot be deemed harmless beyond a reasonable doubt.

XIX. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL ON GUILT AND PENALTY BY PERVASIVE JUDICIAL BIAS AND MISCONDUCT.

Respondent argues that "assuming there was misconduct or bias" on the part of Judge McCartin, "there was no prejudice, because the transfer did not result in an unfair trial", RB 477. Respondent fails to acknowledge that judicial bias constitutes structural error that requires reversal of the conviction without regard to the strength of the evidence consideration or other specific indicia of prejudice. Sullivan v. Louisiana (1993) 508 U.S. 275, 279, citing Tumey v. Ohio (1927) 273 U.S. 510.

Respondent first argues that Judge McCartin's pretrial conduct of the case was not biased because Judge Curtin held an evidentiary hearing and found that Judge McCartin did not commit any misconduct, RB 477. That is an inaccurate characterization of the record, in that Judge Curtin denied the motion to set aside the transfer without addressing any of the evidence of Judge McCartin's efforts to steer the case to Orange County, see AOB 169-173.

Next, Judge Fitzgerald denied the defense motion to remove the case from Orange County and transfer it to San Francisco, at least as to the counts with vicinage in San Francisco, for reasons that caused the Court of Appeal to remove him from further proceedings in the case. Respondent incorrectly

argues that "Judge Fitzgerald had no authority to transfer the case to San Francisco," RB 478, and that contention has been answered at pp. 10 - 14 of the Reply Brief.

Respondent argues that the Court of Appeal's statement that Judge Fitzgerald's conduct reflected "an unusual and inappropriate desire to keep the case....", RB 478, citing Ng v. Superior Court (1997) 52 Cal.App. 4th 1010, 1024, does not by itself establish "that Judge Fitzgerald refused to transfer the case for that reason", RB 479. However, that is an obvious and clear inference from his course of conduct and the Court of Appeal's characterization of it.

Finally, Judge Ryan's bias was readily apparent from the outset of the Orange County proceedings, when he denied the defense request to appoint the San Francisco Public Defender without any hearing pursuant to Penal Code section 987.05 because "it is absolutely unbelievable that it would take Mr. Burt or any other competent death penalty counsel to be able to begin this case competently." 1 RT 23. Judge Ryan then peremptorily appointed the Orange County Public Defender without eliciting any time estimate whatsoever, clearly disparate treatment of the two contenders for appointment to appellant's detriment. 1 RT 32. The Public Defender, Carl Holmes, immediately asked for "a hearing under 987.05", to which Judge Ryan

responded, "Do that with Judge McCartin", again flouting section 987.05. Section 987.05 clearly requires a pre-appointment proceeding to establish an objectively reasonable amount of time to prepare for trial. Judge Ryan demonstrated his bias by unilaterally rejecting the appointment of the SFPD based on his subjective view of the appropriate time for trial preparation, and then peremptorily appointing the OCPD without any objective assurance that it could prepare in less time.

Next, Judge Ryan displayed bias in this rigid view that appellant's repeated expressions of dissatisfaction with attorney Kelley were in effect a smokescreen for what Judge Ryan incorrectly viewed as appellant's unspoken position, i.e., that he would be satisfied only if represented by attorney Michael Burt of the San Francisco's Public Defender's Office. Appellant repeatedly repudiated that incorrect characterization, but Judge Ryan was fixated on attributing it to appellant.

Judge Ryan's bias against appellant was again manifested during the July 15, 1998 hearing regarding pretrial motions, where Judge Ryan wrongly assumed without any factual support that appellant had "fired" a paralegal assistance for the purpose of fomenting delay of trial, 4 RT 984-5. In fact, the record establishes that the appointed paralegal flagrantly defaulted on his

responsibilities and was discharged by order of court, without any fault or complicity on appellant's part.

Judge Ryan was also frequently disdainful toward attorney Kelley. Respondent asserts that "appellant himself has filled volumes of transcript with pejorative comments about Kelley, so his argument is somewhat ironic", RB 481. Appellant was making legitimate complaints about Kelley's failure to represent him effectively. Judge Ryan rejected appellant's allegations based on his biased view of what he believed were appellant's underlying motivations. Separately, Judge Ryan behaved inappropriately toward Kelley on a number of occasions for reasons that are not reflected on the record, but which likely further impaired the jury's perception of the defense. For example, regarding the admissibility of Sergeant Chapline's testimony about mistreatment of appellant in the military hospital, Judge Ryan refused to let Kelley respond and told him, in what must have been viewed as a condescending manner by the jury, "that was my lecture on evidence". 36 RT 8808. Under these circumstances, appellant is entitled to a new trial. Tumey v. Ohio, supra.

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

Appellant's death judgment is unconstitutional and violates the Eighth and Fourteenth Amendments of the United States Constitution, as well as Article I, section 17 of the California Constitution, for the following reasons.

A. Comparative intercase proportionality review of death sentences is constitutionally required.

Equal protection principles mandate that comparative capital sentencing review procedures are necessary to ensure reliability and fairness in capital sentencing. But see People v. Lightsey (2012) 54 Cal.4th 668, 732.

B. The state and federal Constitutions require that the prosecution carry the burden of proof or persuasion at the penalty phase, and that the jury find beyond a reasonable doubt that (1) the aggravating factors have been proved, (2) the aggravating factors outweigh the mitigating factors, or (3) death is the appropriate sentence.

The United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (Cunningham v. California (2007) 549 U.S. 270; United States v. Booker (2005) 543 U.S. 220; Blakely v. Washington (2004) 542 U.S. 296; Ring V. Arizona (2002) 536 U.S. 584 [153 L. Ed. 2d 556, 122 S. Ct. 2428]; and Appendix v. New Jersey [(2000)] 530 U.S. 466, compel this conclusion. But see People v. Bivert (2011) 52 Cal.4th 96, 123-124.)

C. CALJIC No. 8.88 is unconstitutionally vague and ambiguous for using the phrase "so substantial," and it impermissibly fails to inform the jury that it must find death was an appropriate, not just an authorized, penalty.

CALJIC No. 8.88 is unconstitutional for the above stated reasons, and for failing to require the jury to return a verdict of life should it determine the mitigating circumstances outweigh the aggravating ones. The instruction is also defective because it fails to convey to jurors that defendant has no burden to persuade them that death is inappropriate." But see People v. McDowell (2012) 54 Cal.4th 395,444; People v. Taylor (2010) 48 Cal.4th 574, 658.

D. The death penalty law is unconstitutional because of its overbreadth.

Penal Code section 190.2 is unconstitutionally overbroad in that it fails to narrow the class of capital eligible defendants, and Penal Code section 190.3, factor (a) is unconstitutionally overbroad in that it permits the jury to consider the circumstances of the crime as an aggravating factor [citation]." But see People v. Vines (2011) 51 Cal.4th 830, 891.

E. The death penalty law is unconstitutional for permitting the jury to consider evidence of adjudicated criminal activity under section 190.3, factor (b).

The death penalty law unconstitutionally permits a jury to consider adjudicated criminal activity as an aggravating factor, but see People v. Gonzales and Soliz (2011) 52 Cal.4th 254, 334. It also fails to require the jury to first decide whether the prior criminal activity was true beyond a reasonable doubt by unanimous vote. But see People v. Abilez (2007) 41

Cal.4th 472,534. Further, permitting the jury to consider prior adjudicated criminal activity as aggravating evidence unconstitutionally allowed it to impose the death penalty based on unreliable, undiscussed, or undebated evidence, notwithstanding the instructions that no juror could consider such evidence unless he or she found beyond a reasonable doubt that the defendant had committed the crime or crimes. But see People v. Avena (1996) 13 Cal.4th 394, 429.

F. The state and federal constitutions require that inapplicable sentencing factors be deleted from the jury instructions, and that the jury be instructed that some factors are mitigating only.

The CALJIC instructions given in this case are constitutionally deficient for the above reasons. But see People v. Mills (2010) 48 Cal.4th 158, 210.

G. The jury instructions for section 190.3, factors (d) and (g) are not unconstitutional for including the adjectives "extreme" and "substantial".

The jury instruction that define mitigating circumstances with the restrictive adjectives "extreme" and substantial" are unconstitutional under the Eighth Amendment as construed in Eddings v. Oklahoma (1982) 455 U.S. 104. But see People v. Lightsey, supra, 54 Cal.4th at 731–732.)

H. The jury instructions failure to require specific written findings regarding which aggravating and mitigating factors were found and considered in returning a death sentence violated

appellant's constitutional rights to meaningful appellate review and equal protection of the law.

Written findings as to aggravating and mitigating factors are constitutionally necessary. But see People v. Homick (2012) 55 Cal.4th 816, 903.

I. The death penalty law contravenes international treaties and fundamental precepts of international human rights as incorporated into the Eighth Amendment.

The primary international human rights guarantee violated by the California capital sentencing law is the International Covenant on Civil and Political Rights, ratified by the United States in 1992. But see People v. Brasure (2008) 42 Cal.4th 1037, 1072, and declined to reconsider it here.

CONCLUSION

Wherefore, for the foregoing reasons, appellant requests that this Court reverse the judgment.

Dated:

Respectfully submitted,

ERIC S. MULTHAUP
Attorney for Appellant

CERTIFICATE OF WORD COUNT

Eric Multhaup declares that this Reply Brief consists of 39,607 words.

Dated: September 9, 2013

ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: People v. Ng., Orange Co. No. 94ZF0195, Cal. Supreme Court No. S080276

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

APPELLANT'S REPLY BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

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I declare under penalty of perjury that service was effected on September 9, 2013, at Mill Valley, California and that this declaration was executed on September 9, 2013, at Mill Valley, California.

ERIC S. MULTHAUP