IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S OPENING BRIEF

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

ERIC S. MULTHAUP
State Bar No. 62217
20 Sunnyside Avenue, Ste. A
Mill Valley, CA 94941
(415) 381-9311

Attorney for Appellant
Charles Ng

TOPICAL INDEX

ARGUMENT

Trial Site Selection Issues

TABLE OF AUTHORITIES

California Cases

Federal Cases

Other State Cases

Statutes

Constitutional Provisions

Treatises

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

I. Calaveras County Justice Court Proceedings

The first judicial action in this case consisted of the issuance of search warrants on the application of San Francisco Police Detective Irene Brunn, and the issuance of an arrest warrant for Appellant, in June 1985, shortly after Leonard Lake's suicide in San Francisco Police custody and appellant's flight to Canada. I CT Cal J 1-11.[1] There followed some litigation involving news

[1] For convenience and consistency of reference, appellant cites to the primary Orange County Clerk's Transcript as "CT", and to the Orange County Reporter's Transcript as RT. (There are other series of Orange County Clerk's Transcripts that have separate designations, such as the sealed Penal Code section 987.9 documents and those subsidiary series are identified in the brief when cited). The Calaveras County Justice Court Clerk's Transcript is cited as "CT Cal J", and the Calaveras County Superior Court Clerk's Transcript is cited as "CT Cal S". The Calaveras Justice Court Reporter's

media access to the search warrant affidavits and returns, which resulted in a number of protective orders, IV CT Cal J 1062.

On August 2, 1985, attorney Ephraim Margolin entered an appearance on appellant's behalf for the sole purpose of assisting him to obtain counsel of his choice, Garrick Lew, IV CT Cal J 1072, who was subsequently appointed.

On October 16, 1985, criminal complaint #C-85-1094 was filed in Calaveras County Justice Court alleging conspiracy and substantive felony counts relating to both victims who resided in Calaveras County and also to victims who resided in San Francisco County. IV CT Cal J 1194-1199.

On January 14, 1987, the Calaveras County Justice Court appointed San Francisco Deputy Public Defender Michael Burt as second counsel based on a Harris motion reflecting that attorney Burt had previously been appointed to represent appellant on related criminal charges filed in San Francisco County. V CT Cal J 1469-1470.

On September 23, 1988, following extensive litigation regarding discovery matters, the Calavaras County Justice Court removed attorneys Lew and Burt as counsel for appellant for lack of jurisdiction – "to allow the Defendant to fight his case in this jurisdiction without first submitting himself

---

Transcripts is cited as "RT Cal J", and the Calaveras Superior Court Reporter's Transcripts cited as "RT Cal S."

to the jurisdiction of the court can only lead to abuse and illogical results". VI CT Cal J 1983.

In September 1991, appellant was extradited from Canada to Calaveras County, and the District Attorney applied for an order to transfer appellant to the California Department of Corrections for pre-trial custody pursuant to Penal Code section 4007. VI CT Cal J 2030. On September 26, 1991, the Calaveras Co. Justice Court signed an Order to that effect, VI CT Cal J 2037-2038.

On October 4, 1991, attorney Ephraim Margolin filed a Sealed Motion for Appointment of Michael Burt to represent appellant in the Calaveras County proceedings pursuant to Harris v. Superior Court. VI CT Cal J 2054. On October 23, 1991, a motion was filed by attorneys Margolin, Burt, and Lew pursuant to Penal Code section 987.05 regarding trial readiness and appointment of counsel. VII CT Cal J 2148. The Public Defender of San Francisco filed a declaration urging the Calaveras County Justice Court to appoint the San Francisco Public Defender in the Calaveras County proceedings in "accord with the intent and purpose of [Penal Code] section 987.2(e)". VII CT Cal J 2233. Instead, the Calavaras County Justice Court

appointed local attorneys Thomas Marovich and James Webster to represent appellant, effective October 24, 1991. See VII CT Cal J 2252.[2]

On August 13, 1992, Attorneys Webster and Marovich filed a Motion to Appoint Conflict-Free Counsel to represent appellant in bringing a Marsden motion to vacate their appointment based on numerous grounds, including the interference with the attorney-client relationship resulting from appellant's incarceration at Folsom State Prison. XIV CT Cal J 4924.

On September 22, 1992, Attorneys Webster and Marovich filed a Motion to Recuse the Attorney General from participating in the preliminary hearing because of the conflict of the Attorney General's prosecutorial function and its custodial function as attorneys for Folsom State Prison. XV CT Cal J 5093-5096. The preliminary hearing was held between October 6, and November 12, 1992, at which time appellant was held to answer. XVI CT Cal J 5439.

II. Calaveras Superior Court Proceedings

On November 20, 1992, Information No. 3124 was filed in Calaveras Superior Court, charging appellant in Count I with the July 25, 1984 burglary

[2] The Justice Court's refusal to appoint Attorney Burt to represent appellant resulted in extensive litigation regarding appellant's right to effective assistance of counsel, to counsel of choice, and to self representation. To avoid duplication, the chronology as to each of these issues is set forth in the specific arguments.

of the Dubs' residence in San Francisco, accompanied by a venue allegation that the property taken in the burglary was brought into Calaveras County; in Count II with the July 25, 1984 murder of Shawn Dubs, accompanied by a burglary murder special circumstance allegation; in Count III with the July 25, 1984 murder of Deborah Dubs, accompanied by a burglary murder special circumstance allegation; in Count IV with the July 25, 1984 murder of Harvey Dubs, accompanied by a burglary murder special circumstance allegation; in Count V with the November 2, 1984 murder of Paul Cosner, accompanied by a personal weapon use allegation and a robbery special circumstance allegation; in Count VI with the January 1985 murder of Clifford Peranteau; in Count VII with the February 24, 1985 murder of Jeffrey Gerald; in Count VIII with the April 15, 1985 murder of Michael Carroll; in Count IX with the April 1985 murder of Kathleen Allen; in Count X with the April 1985 murder of Lonnie Bond, Sr.; in Count XI with the April 19, 1985 murder of Robyn Stapley; in Count XII with the April 1985 murder of Lonnie Bond, Jr.; and in Count XIII with the April 1985 murder of Brenda O'Connor, accompanied by a multiple murder circumstance allegation. I CT Cal S 3-9.

On December 18, 1992, the Honorable Claude Perasso, sitting by assignment, appointed attorneys Webster and Marovich over appellant's objection. I CT Cal S 385. Attorneys Webster and Marovich filed a Motion

for Appointment for Counsel to assist appellant with respect to representation issues, II CT Cal S 533, and on January 22, 1993, Judge Perasso appointed attorney Margolin for that purpose. II CT Cal S 570.

The case proceeded over the next several months with attorneys Webster and Marovich filing various types of pre-trial motions, and attorney Margolin filing various motions with respect to representation issues. On March 12, 1993, attorney Eric Multhaup was appointed to assist attorney Margolin with respect to Harris and Marsden issues. III CT Cal S 1119.

On October 21, 1993, Judge Perasso issued a Minute Order with respect to In-Camera Hearing regarding the discharge of attorneys Webster and Marovich, and set the matter for December 3rd, 1993, for a hearing as to replacement counsel pursuant to Penal Code Section 987.05. XV CT Cal S 5297.

On December 3, 1993, the prosecution filed a Statement of Disqualification as to Judge Perasso based on his conviction for driving under the influence on September 29, 1993. Judge Perasso voluntarily recused himself. XV CT Cal S 5391. The Judicial Council assigned retired Orange County Judge Donald McCartin to the case, XV CT Cal S 5410, and on January 21, 1994, Judge McCartin granted appellant's Marsden motion and discharged attorneys Webster and Marovich. In the course of that hearing,

the parties stipulated to a change of venue with respect to Counts VIII-XIII (the counts relating to victims who were not San Francisco residents) and appellant asserted his vicinage right to be tried in San Francisco on Counts I-VII. XV CT Cal S 5506. The matter was referred to the Judicial Council for trial site selection by agreement of the parties subject to the assurance by Judge McCartin that appellant would be permitted to submit factual materials to the Judicial Council as to the multiple benefits of trying all of the charges in San Francisco.

On January 27, 1994, Calaveras County Superior Court appointed attorneys Margolin and Multhaup to represent appellant at a Penal Code section 1033 hearing regarding choice of venue, XV CT Cal S 5515, and the parties submitted voluminous materials to the Judicial Council for consideration in the trial site selection process, with appellant urging that all counts be tried in San Francisco County. XV CT Cal S 5536. The Judicial Council informed Judge McCartin that it would not consider factual materials submitted by a party to the proceedings, but would consider only materials submitted by the trial court itself. Judge McCartin neither re-submitted appellant's materials under his own auspices nor informed counsel for appellant that the Judicial Council had refused to consider the materials submitted by counsel for appellant. XV CT Cal S 5545. The Judicial Council

then proposed Orange County and Sacramento County as possible trial sites, based largely on Judge McCartin's recommendation of Orange County. XV CT Cal S 5546.

On April 5, 1994, appellant revoked his agreement to permit selection of alternative trial sites as to any counts upon learning of the breach of the prior agreement regarding Judicial Council consideration of appellant's factual materials. XV CT Cal S 5589. Counsel for appellant filed various objections to further proceedings on trial site selection. XVI CT Cal S 5618. On April 8, 1994, the Honorable James Cleaver denied all defense motions, and sent all counts to Orange County for trial. XVI CT Cal S 5704. After further litigation regarding that trial site selection process, Judge McCartin ordered the Warden of Folsom Prison to transport appellant to the Sheriff of Orange County on September 8, 1994. XXI CT Cal S 7319.

III. Orange County Superior Court Proceedings

The San Francisco Public Defender filed a motion for appointment to represent appellant on all counts. 1 CT 3. On September 23, 1994, the prosecution filed a response stating, "the People believe that the Court could properly exercise its discretion by choosing to appoint the San Francisco Public Defender" pursuant to Penal Code Section 987.2(g), "provided that the assigned attorney, presumably Michael Burt, can satisfy the Court that he has

no scheduling conflicts which would prevent him from preparing and being available in a reasonable time for pretrial motions and trial". 1 CT 49-50. Judge Ryan denied appellant's motion to appoint the San Francisco Public Defender because of the Public Defender's estimate of a need for two years to prepare for trial. The Orange County Public Defender was appointed instead. 1 CT 143-144.

On January 13, 1995, the Orange County Public Defender filed a motion to transfer the case to San Francisco, in light of the bankruptcy in Orange County and vicinages of several counts in San Francisco. 2 CT 253. Also, included were renewed motions to appoint Michael Burt to represent appellant and to relieve the Orange County Public Defender. The court denied all motions regarding venue, vicinages, and representation. 2 CT 603.

Following more than a year of pre-trial motions regarding discovery and conditions of appellant's confinement, on August 2, 1996, Judge Fitzgerald granted a Marsden motion, discharged the Orange County Public Defender, and appointed Attorneys Pohlson and Peters to represent appellant. 6 CT 2058. Appellant sought writ relief from that appointment, and on September 27, 1996, this court granted appellant's petition for review and transferred the case to the Fourth Appellate District, Division Three, with directions to issue an Order To Show Cause. 7 CT 2107. The Court of

Appeal vacated the discharge of the Orange County Public Defender, and disqualified Judge Fitzgerald from further proceedings in the case. 7 CT 2143. The case was then assigned to Judge John Ryan on February 24, 1997. 7 CT 2160.

On June 20, 1997, appellant filed a Marsden motion to discharge the Orange County Public Defender. 9 CT 2927-2940. The motion was denied on the basis that the court was "satisfied this is 'Harris Revisited' and the basis for Defendant's Motion is that he wants DPD Michael Burt appointed". 9 CT 2942.[3]

On September 12, 1997, the court held further proceedings regarding representation with Attorney Michael Burt present who stated his availability for appointment. 11 CT 3631. The Orange County Public Defender raised the issue that appellant was unable to cooperate with Deputy Public Defender Kelley under Penal Code section 1368, and on January 23, 1998, there were discussions regarding the scheduling of a section 1368 trial. The Orange County Public Defender moved for appointment of independent counsel to represent appellant in the Section 1368 proceedings. 11 CT 3815. On

[3] This Marsden motion was one of several filed by appellant to discharge the Orange County Public Defender, particularly Deputy Public Defender William Kelley. To avoid duplication, the details regarding the basis for this and the subsequent Marsden motions are set forth in appellant's Arguments III-A and V, infra.

February 6, 1998, the court appointed psychiatrists to interview appellant regarding the Penal Code Section 1368 issues. 12 CT 3970.

After further proceedings regarding representation questions, appellant filed a motion to represent himself under Faretta v. California on March 31, 1998. 18 CT 6444. On April 20, 1998, the court denied the Section 1368 trial based on the submissions of declarations and pleadings, found that appellant was competent, and reinstated the criminal proceedings. On April 21, the Court denied the Faretta motion on the basis that appellant in fact wanted Michael Burt to represent him. 19 CT 6552.

On May 8, 1998, appellant renewed his Faretta motion, 19 CT 6677, and it was granted on May 15, 1998. 19 CT 6713. Appellant's self representation status was revoked on August 21, 1998, and the Orange County Public Defender was re-appointed. 22 CT 7567. On August 26, 1998, the Public Defender moved to continue the trial date based on a number of circumstances that had impeded trial preparation. 23 CT 7576. On August 28, the motion for continuance was denied, September 14 was set for jury selection, and appellant's renewed Marsden motion was denied. 25 CT 8421.

A First Amended Information was filed on September 10, 1998, 25 CT 8443-8446[4], and jury selection began. 25 CT 8453. There were a number of motions in limine heard regarding evidentiary matters and opening statements were given on October 26, 1998. 33 CT 11120. The case was argued and submitted to the jury on February 8, 1999. 35 CT 11988. After various requests for read-backs of testimony, the jury returned guilty verdicts on all counts, except Count IV relating to Paul Cosner, on which they could not reach a verdict. 36 CT 12225-12236.

The penalty trial began on March 8, 1999, and the case was submitted to the jury on April 26, 1999. 39 CT 13065. On May 3, 1999, the jury returned a death verdict. 40 CT 13235. Following the filing of numerous motions attacking the verdicts, challenging the representation orders, and requesting disqualification of Judge Ryan, appellant was sentenced to death on June 30, 1999. The court denied a motion to reduce the sentence under Penal Code Section 190.4(e), denied a final Marsden motion, and dismissed Count 4 relating to Paul Cosner pursuant to Penal Code Section 1385. 57 CT 19599.

---

[4]. The First Amended Information deleted the prior Count I, the July 25, 1984, burglary of the Dubs' residence in San Francisco.

STATEMENT OF FACTS

INTRODUCTION AND OVERVIEW

The Amended Information charged the following twelve counts of murder and multiple murder special circumstances:

Count I – Murder of San Francisco resident Harvey Dubs on approximately July 25, 1984;

Count II – Murder of Deborah Dubs on same date;

Count III – Murder of Sean Dubs on same date;

Count IV – Murder of San Francisco resident named Paul Cosner on approximately November 2, 1984;

Count V – Murder of San Francisco resident Clifford Peranteau on approximately January 18, 1985;

Count VI – Murder of San Francisco resident Jeffrey Gerald on approximately February 24, 1985;

Count VII – Murder of Michael Carroll on April 14, 1985;

Count VIII – Murder of Kathleen Allen on same date;

Counts IX – Murder of Calaveras County resident Lonnie Bond, Sr., on approximately April 1985;

Count X – Murder of Lonnie Bond, Jr. on approximately the same date;

Count XI – Murder of Brenda O'Connor on same date;

Count XII – Murder of Robin Stapley, on same date.

These twelve charges encompass six separate incidents, and for coherence of presentation, appellant will summarize all of the prosecution's evidence related to each of the six incidents as a separate segment of the statement of facts. In this way, the Statement of Facts will reflect the comparative strength of the prosecution's case as to each of the incidents.

There is also some evidence that applies to the case generally, and that is summarized following the summary of counts specific evidence.

THE GUILT PHASE

I. The Prosecution's Case

A. Evidence Relating to Counts I-III, The Dubs Murders in July 1984.

Irene Brunn testified that she had been a San Francisco Police Inspector for more than 25 years and in 1984 was working in Missing Persons. 13 RT 3064[5]. She investigated the disappearance of the Dubs family -- Harvey, Deborah and their 16-month old son, Sean. Harvey Dubs was last seen at 5:30 on July 25, 1984, when he left work. Deborah's last contact was a telephone call with her friend, Karin Tucks, at 5:45 on July 25. Inspector Brunn searched the Dubs' apartment to see if any property was missing, and

[5]All references to the Reporter's Transcript in the Statement of Facts are to the Orange County Reporter's Transcripts, not Calaveras County.

noted that two pieces of stereo equipment were missing from the sound system. Also missing was a G.E. video cassette player/recorder. 18 RT 4505. The Dubs' vehicle, a Volkswagen Rabbit, was also reported missing, and was subsequently recovered at a San Francisco airport parking lot on August 1, 1984. 13 RT 3069.

On June 4, 1985, Inspector Brunn met Claralyn Balasz, known as "Cricket", who was a long-standing girlfriend of now-deceased Leonard Lake, and who was also the owner of the rural property in Wilseyville where Lake had built his hidden bunker. Inspector Brown led a police contingent to the Wilseyville property to search for appellant with Cricket's permission. Inspector Brunn identified two pieces of stereo equipment that matched items missing from the Dubs' residence. 13 RT 3078. She identified People's Exhibit 13 as a photograph of the Sony cassette player with the same serial number as the Dubs' missing player. 13 RT 3079.

On cross-examination, Inspector Brunn acknowledged that fingerprints from appellant were never found in the Dubs' apartment. 13 RT 3117.

Stan Petrov testified that he once owned a business called Petrov Graphics, and in July 1984 employed Harvey Dubs. 14 RT 3393. Harvey Dubs stopped working on July 25, 1984, without any notice, which was "totally out of character". Petrov explained that "Harvey was extraordinarily

conscientious and would always let me know when something was going on that disrupted his business day". Petrov never heard from him again. 14 RT 3395.

Karen Tuck testified that Deborah Dubs was her best friend. 14 RT 3402. She last spoke to Deborah Dubs on July 25, 1984 at about 5:45 in the afternoon. Deborah told her that she was expecting someone to come over to talk to Harvey about video equipment, as Harvey was trying to start a business out of their home. Someone arrived at the Dubs during the telephone conversation, which they then concluded. Karen was unable to reach Deborah the next day. 14 RT 3405.

Dorice Murphy testified that she had lived at 175 Yukon Street in San Francisco for 45 years, and in July 1984 lived some 15 feet across a narrow alley from the Dubs' residence. 14 RT 3410. At some time around 5:45 p.m. on July 25, 1984, she noticed a stranger, "an Asian man walking down the Dubs' carrying a suitcase and he was straining to carry the suitcase". Another man came out of the driver's side of a car that had backed up Yukon Alley and the Asian man put the oblong shaped suitcase in the trunk of the car. 14 RT 3414.

Eleven months later, on June 5, 1985, she identified appellant's photo in a six-person photo spread. 14 RT 3421.

On cross-examination, she acknowledged that she had told her husband that the car she saw in the alley on July 25, at 5:45 p.m. was the Dubs' car. However, she explained that "I didn't know because I did not have my glasses on". 14 RT 3423. Her husband had looked out the window and said "that is not the Dubs' car" and walked away. 14 RT 3424. She denied ever telling the police that the other person was Negro, and denied never describing the other person as 6 feet to 6 feet 4 inches tall. 14 RT 3429. She was certain that the Asian male she saw was not wearing glasses.[6] She denied telling the police that she saw the other man at the Dubs' house the next day on July 26, 1984, and again on August 10, 1984. 14 RT 3430. She denied following a car that she thought was driven by the other fellow up Portola Drive. She denied telling the police that she saw both people coming out of the Dubs' apartment. 14 RT 3437. She denied telling the police officers that the second man stayed in the driver's seat. Inspector Brunn testified to her initial statements to the contrary. 18 RT 4508-4510.

George Tuck testified that he and his wife Karen were friends with Harvey and Deborah Dubs, and that after the Dubs could not be reached by telephone, he went to their house on Friday, July 27. 14 RT 3454. At the entrance, he saw a key on the key ring stuck in the lock. He went inside but

[6]Appellant has been extremely myopic since childhood and is virtually helpless without corrective lenses.

there was nobody there. In Harvey Dubs' bedroom, he saw some spaces where something had been removed. 14 RT 3457.

Barbara Speaker testified that she lived at 156 Yukon Street in July 1984 and at one point learned that the Dubs family was missing. 14 RT 3489. She lived below the Dubs' apartment. The Dubs were "noisy neighbors" because they had a baby and he made a lot of racket, and the sound of footsteps on the wooden floors were noticeable. 14 RT 3491.

On July 27, 1984, she heard footsteps around 11:30 a.m. as she was getting ready to go to school. As she left, she saw a person she had never seen before closing the Dubs' door. 14 RT 3492. The man turned around, was apparently startled, and came down the stairs passed her carrying a flight bag and duffle bag. 14 RT 3493. He was an Asian male, late 20s. 14 RT 3494. A car came around the corner very fast, pulled over, and the Asian man jumped into it. The car was a Volkswagen Rabbit, which she believed belonged to the Dubs' family. 14 RT 3496. The person driving the car had a full beard and was not Harvey Dubs. 14 RT 3496.

The police showed her a 6 pack of mug shots on June 6, 1985, eleven months after the incident, and she picked appellant's photo. 14 RT 3501.

Lauren Bradbury testified that in July 1984 she worked for Petrov Graphic Type World, owned by Stan Petrov. 15 RT 3570. She was

acquainted with Harvey Dubs and his family as co-employees. One morning in late July 1984, she received a telephone call from someone who said his name was James Bright. The person said that Harvey Dubs was not going to be into work that morning because of a family emergency which required him to go to Washington. 15 RT 3572. This seemed odd to Ms. Bradbury because Harvey Dubs did not have family, but was an orphan from New York. She asked, "which Washington" and the person answered, "Washington State". Ms. Bradbury knew that Deborah Dubs was from the Bay Area. Ms. Bradbury asked a number of questions "because it was odd the things that they were saying", particularly because it was unusual for Harvey Dubs to "leave town and leave us stranded at the last minute". The man on the telephone became very irritated with her and ended up hanging up when she asked for his phone number. 15 RT 3574. She never saw any of the Dubs after that.

The night before that telephone call she left work at her usual time of 5:00 p.m. and Harvey Dubs left at the same time which was early for him. Dubs explained to her that he had put an ad in the newspaper to sell some video equipment and was meeting somebody. Ms. Bradbury saw Deborah Dubs waiting in a car to pick him up as they left the office building. 15 RT 3576.

On cross examination, she confirmed that the man on the telephone claiming to be James Bright did not have an accent and sounded like a Caucasian male. 15 RT 3579. She described being played a tape by investigators in September 1998 and stated that the voice on the tape [Leonard Lake] was "quite similar" to the voice she heard over the telephone. 15 RT 3582.

Detective Copeland testified that various papers with the Dubs name on it were found in Trench 2 at Lake's Wilseyville property in the same general area that various papers with appellant's name and address on them were also found. 20 RT 4750.

B. Evidence relating to Count IV, the Murder of Paul Cosner in November, 1984.

In November 1984, Inspector Brunn was assigned the missing person case of Paul Cosner, whose last contact was on the evening of November 2, 1984, when he was going out to meet someone who responded to an ad he had placed to sell a car. That car was a bronze colored Honda Prelude, license number 592ZWZ. 13 RT 3071. The license plate itself, People's Exhibit 60, was subsequently found on Lake's Wilseyville property. 13 RT 3196. She also found a sun visor that may have come from Cosner's car. Ibid.

On July 2, 1985, Detective Copeland discovered the body of Paul Cosner on the Heale Property, about 2 miles from Lake's Wilseyville property. 13 RT

3204. Also found buried was an envelope with a return address of "Philo Motel", which Lake had managed, Cosner's driver license, People's 69, and other documents relating to Cosner including business cards. 13 RT 3208.

Marilyn Namba testified that she was Paul Cosner's girlfriend in 1984, and they lived together at 1918 Filbert Street in San Francisco. 17 RT 4035. She last saw him around 7:00 p.m. on November 2, 1984. 17 RT 4036. They spoke by telephone and he said that he had to go out and deliver the car that he was selling, and after which they had planned to see a movie together. The car was a gold Honda Prelude which she identified as People's Exhibit 1. 17 RT 4038.

Perry McFarland testified that he worked for the Dennis Moving Company in 1982 thru 1986, and was acquainted with appellant, who also worked there[7]. 17 RT 4098. Appellant attended church with him a couple of times and they had a mutual interest in martial arts. 17 RT 4099. Some time around Christmas 1984, appellant introduced McFarland to Lake, who called himself Tom (17 RT 4012), to help McFarland renovate a bathroom. Lake spent two days working on the project, after which McFarland drove Lake to Wilseyville. Lake told McFarland that he had a Honda Prelude but could not use it because he needed to get his own plates on the car. The following day,

[7]Appellant's employer, Dennis Goza, testified that appellant worked on October 29, 1984, and then not again until November 7, 1984. 16 RT 3745.

appellant called McFarland and said that Tom [Lake] had stolen some photographs of his McFarland's wife, and returned them the following day. 17 RT 4016.

Richard Gryzbowski testified that he is a firearms examiner for the Bureau of Alcohol, Tobacco and Firearms, and in 1985 was employed by the San Francisco Police Department crime laboratory. 17 RT 4129. In June 1985, he examined a Honda Prelude in connection with the Paul Cosner disappearance. He found two bullet holes, one in the right headliner above the right side of the windshield and one was in the right front door panel. One was "directly behind the sun visor" so that when the sun visor was in an up position, you "couldn't see the bullet hole in the headliner". The headliner was a replacement, not the original one. 17 RT 4130.

The second bullet hole was located in the right side of the panel above the speaker, just above the window crank area. He recovered one bullet from each location, .22 long rifle bullets that were severely damaged. He also identified People's Exhibit 178, a different sun visor with a hole in it. That matched the hole in the headliner in the Honda Prelude.

He gave his opinion that the bullet in the headliner was fired "somewhat from behind, from the back, most likely from the backseat, somewhat slightly over the headrest because the headrest on the left and right

seat and front seat, this was positioned in such a way that it would have come above the headrest from the back seat toward the front". 17 RT 4135. He acknowledged that in theory it could have been fired from the front seat, but it would have been "very awkward".

Regarding the bullet in the right door panel, his opinion was "that I have to assume, if the door was closed, that the bullet also ha[d] to originate from the backseat", but "if the bullet originated when the door was opened and the car was in a stationery position, it would come from anywhere on the right side". 17 RT 4135-4136. He concluded that "with the door closed, it would suggest that the bullet was also fired from the back". 17 RT 4136.

Gryzbowski also testified that a comparison of shoe prints found in the Cosner apartment did not match shoes that were seized from appellant's apartment. 17 RT 4140.

C. Evidence Relating to Count V, the Murder of Clifford Peranteau in January, 1985.

Cecilia Smith testified that she worked for the Dennis Moving Company from 1983 to 1989 in an administrative position. 13 RT 3290. Appellant worked for the company during 1984 and 1985, and she had contact with him almost every day. Leonard Lake submitted an employment application in September 1984, 13 RT 3308, but was not hired. All employees were issued a uniform consisting of blue pants, white shirt with an

emblem on it, and a cap with a logo on it as depicted in People's Exhibit 62, which was found at Lake's Wilseyville property. 13 RT 3196, 3293.

Clifford Peranteau also worked for Dennis Moving Co., but left the company in January 1985. Ms. Smith identified People's Exhibit 97 as a letter from Peranteau telling her to send his last paycheck and W2 form to P.O. Box 349, Mokelumne Hill, California 95245. 13 RT 3296.

She identified People's Exhibit 98 as a photograph of a 1984 Christmas breakfast for the Dennis Moving Co. employees in which Peranteau, Jeffrey Gerald and appellant were depicted. 13 RT 3299. She did not recall one way or another whether appellant wore the Dennis hat and shirt, as it was not required. 13 RT 3307.

She described appellant as "very quiet" and "shy" and never disrespectful toward her. 13 RT 3310.

Dennis Goza testified that he owned the Dennis Moving Company, located at 16 California Street in San Francisco. Appellant applied for a job with him in September 1984, with an address listed of 136 Lennox Way in San Francisco. Appellant was accompanied by another man who also applied for employment under the name Leonard Blake, Exhibit 119. Blake was medium height, a little disheveled in appearance, with bushy hair and a beard. Blake listed Balazs Construction in Wilseyville as his prior employer. Goza

hired appellant, who worked for him for approximately nine months, through June 1, 1985. 15 RT 3731. Appellant was the only Asian among 18 to 20 employees.

In January 1985, Goza had another employee named Clifford Peranteau who last worked on January 18, 1985. 16 RT 3745. Appellant worked on January 18 and 19, but not January 20, and returned to work on Monday, January 21.

Goza received a letter, Exhibit 97, following Peranteau's disappearance which said "Dennis, sorry to leave on such short notice, but a new job, place to live, and honey all came at once. Please send my check for the last three days I worked and my W2 to my new address below. Thanks Cliff", with an address listed at PO Box 349, Mokelumne Hill, California 94245. 16 RT 3749. Police document examiner Lloyd Cunningham testified that Leonard Lake had forged the letter. 20 RT 4929.

Kenneth Bruce testified that he worked for the Dennis Moving Company in 1984 and 1985. 16 RT 3847. He was a close friend of Clifford Peranteau and they socialized together. He had frequent contact with appellant around the freight elevators and loading docks. Appellant, on some occasions, used some "sick" phrases such as "no gun, no fun"; "no thrill, no kill"; and "daddy die, mommy cry, baby fries", 16 RT 3851. Bruce also said

that appellant talked about guns and knives at work, and one occasion brought a butterfly knife to work. 16 RT 3854.

Bruce held a Super Bowl Party at his house, but Peranteau did not come without any word, and was never seen again. 16 RT 3856.

Cynthia Tanner testified that she was Clifford Peranteau's girlfriend in 1984 and 1985, and had been for some eight years. 16 RT 3858. She broke off the relationship with him in December 1984. They previously had been sharing an apartment, and she still maintained contact with him. She saw him twice after they broke up and some of her possessions where in the apartment they shared. At one point she heard that he had not shown up for work and had disappeared in mid January 1985. When she went to the apartment, she noticed that "mostly everything was missing". 16 RT 3860.

Hector Salcedo testified that he worked for the Dennis Moving Company from 1982 thru 1986 and was a close friend of Cliff Peranteau. 17 RT 3980. On Friday night of Super Bowl weekend, he was out with Peranteau and others and dropped Peranteau off at his home on Wallard Street. Both intended to work the following day. Peranteau did not show up at 8:00 a.m. as expected. Salcedo called his house several times and went to his house after work, but no one answered the door. 17 RT 3984. Peranteau

had a motorcycle, depicted in People's 172. Within the week after Peranteau disappeared, Salcedo noticed that the motorcycle was missing. 17 RT 3985.

Salcedo occasionally worked with appellant and reported that on occasion appellant used the phrases "no kill, no thrill"; "no gun, no fun"; "baby fries, daddy dies, momma cries" but "didn't seem like there was nothing really crazy about him at the time". 17 RT 3987.

Salcedo described one day in December of '84 or January of '85 when he was at Peranteau's house late in the afternoon after work and appellant came to the residence. Appellant showed them a bag of marijuana, said he had a friend with a "plantation", and testified that if they would go help him on the plantation, they would be able to get some marijuana. Salcedo never went with him. Appellant said that the friend was "a couple hours away in the hills". 17 RT 3989

William Gross testified that in 1985 he was living in the town of West Point in Calaveras County close to Wilseyville. In April 1985, he bought a motorcycle from Leonard Lake, 17 RT 4020, which was identified as Clifford Peranteau's. 17 RT 4022.

D. Evidence Relating to Count IV, the Murder of Jeffrey Gerald in February, 1985.

Dennis Goza testified regarding his employee by the name of Jeff Gerald who last worked on February 22, 1985, and never returned. Appellant

worked on February 22nd, but not the 23rd or the 24th and returned to work on February 25. 16 RT 3745.

Terri Kailer testified that in February 1985 she and her three-year old daughter were sharing an apartment with Jeffrey Gerald. On Sunday, February 24, 1985, Gerald received a phone call and told her that he was going to go to a bus station to meet appellant to do a moving job on the side. 17 RT 4042. She had answered the telephone twice that morning and the person calling had a distinct accent and had identified himself in previous calls as Charlie Ng. 17 RT 4042.

She never saw Gerald again and filed a missing person report a few days later. On February 27, 1985, she came home from her job and noticed that Gerald's door was ajar, which was unusual. She noticed that several things were missing including his clothing, and his guitar and amplifier. 17 RT 4045.

She identified People's 175 as telephone records from her apartment and noted a 66 minute telephone call on February 24, 1985, to a number in New Jersey.

On cross examination she acknowledged she had never told any of the law enforcement officers with whom she spoke that there were prior telephone calls from somebody who she identified as Charles Ng. 17 RT

4052. At one point she described the person's accent to the police as being Hispanic or Mexican. 17 RT 4060.

Roger Gerald testified that he was Jeffrey Gerald's father and last heard from him in February 1985. He would have expected to hear from him if he was alive. 17 RT 4096.

Ray Houghton testified that he was a high school friend of Jeff Gerald and in 1985 was in a band with Gerald called "Crash 'N Burn" 17 RT 4116. He identified Exhibit 53 as the guitar that Gerald had in February 1985. Gerald failed to show up at a scheduled band practice on February 24, 1985.

Detective Copeland found a metal social security card with the name Jeffrey T. Gerald on the Wilseyville property, People's 52. 13 RT 3177. He identified People's 53 as a guitar case and guitar found in the spare bedroom at the Wilseyville property 13 RT 3178.

E. Evidence Relating to the Counts VII and VIII, Murders of Michael Carroll and Kathleen Allen in April, 1985.

James Baio testified that in 1985 he was a good friend of Kathy Allen, and last saw her on April 15, 1985. 13 RT 3268. On April 14, 1984 at 5:00 p.m. she had called him and said that her boyfriend, Mike Carroll, had been gone for two days and called her to say that he had gotten into some trouble in San Francisco and was going to the Tahoe area. He wanted her to meet him in the Tahoe area and he was going to send somebody to pick her up. 13 RT

3271. She did not appear upset or act as if anything was wrong. Later that day at about 6:00 p.m. Baio called Allen at the Best Inn in Milpitas, and Allen said she was in a hurry and the person who was picking her up was in the room with her. She described him as "kind of a weird guy [who] wanted to take pictures of her." 13 RT 3275. Baio asked her to call when she got to wherever she was going, but never heard from her. 13 RT 3274.

Andrea Techaira testified that she worked for the Milpitas Safeway store in April 1985, with a co-worker named Kathleen Allen, who was also her friend. 13 RT 3318. The last time she saw her was April 14, 1985, when Allen received a phone call in the front lobby of the store and reported to Andrea that "Mike had been shot and might be dead". Allen said she was going to be picked up and taken to Tahoe to go where Mike was, but she was never seen again. 13 RT 3320, 3325.

Monique Bobbitt testified that she worked at the Milpitas Safeway in 1984 and 1985, knew Kathleen Allen, and recalled her last day of work there on Sunday, April 14, 1985. 13 RT 3327. Allen reported a telephone conversation to her in which she had been told that "her boyfriend had been shot and hurt and that she was going to go to Tahoe to be with him". 13 RT 3328. Bobbitt saw Allen leave the store and go to a copper colored Honda, depicted in Exhibit 1, driven by a white male with curly hair. 13 RT 3332.

John Gouveia testified that he is Michael Carroll's foster brother, and that Carroll lived with him in Milpitas in 1985. Gouveia was acquainted with Kathleen Allen, Carroll's girlfriend. Prior to Carroll's disappearance in early 1985, he received a telephone call from someone who identified himself as Charles Ng and who asked to speak to Michael.

After Carroll disappeared, Gouveia received a letter from Kathy Allen to the effect that she and Carroll had moved to Tahoe, but they did not have a phone and their car was not working. 13 RT 3345.

Fred Demarest testified that he worked for Safeway in Milpitas in 1985 as a store manager. 14 RT 3382. From the phone records of Lake's Wilseyville phone, he identified the Safeway phone number on page 3, specifically a telephone call on April 14, 1985, the last day that Kathleen Allen worked there. Mr. Demarest testified that he received a telephone call from her on April 15th in which she requested an extended leave, which he granted. She told him that her boyfriend had found a good job in the Tahoe area and she wanted time to go up there with him. 14 RT 3388.

He identified People's 103 as a letter he received in early May from Kathleen Allen, dated May 6, 1985, asking him to clean out her locker and to forward her W2 form. The return address was a post office box in Wilseyville, California. 14 RT 3390.

George Wesley Blank testified that in 1985 he lived in San Jose, California and was acquainted with Leonard Lake. 15 RT 3583. Mr. Blank was a mailman and met Lake through their mutual friend, Charles Gunnar. In April 1985, he received a phone call from Lake in which Lake asked for help in picking up a car that had been stranded in Milpitas, California. Lake told Blank that he would send a young man named Charles to the bus depot with keys to the car. Blank got the keys, and brought the car, a 1974 Capri, license plate 421LHB, to his home. Lake subsequently came to his home, and asked Blank to fix the car up and try to sell it. Lake later sent Blank the pink slip that listed Michael Carroll as the owner. 15 RT 3592-3599

On May 8 or 9, Blank received a letter from Lake that included the car's pink slip, with a return address of "CB 151 Pecks Lane". The owner's name or the pink slip was Mike Carroll, People's 112.

Debra Blank testified that she is George Blank's daughter, and in April 1985 received a telephone call from someone who identified himself as a friend of Leonard Lake named Charles. On April 16, 1985, Debra met the caller at the bus station, made contact with an Asian man in his 20s about 5'6" tall, who gave her an envelope with keys and directions inside. 15 RT 3616. In July 1985, she picked appellant's photo from a photo spread, while

acknowledging that she had seen appellant's photo in the newspaper on several prior occasions. 15 RT 3619.

Calaveras County Investigator Crawford testified he obtained Kathleen Allen's checks from the Safeway Credit Union for March-May 1985, and identified a check dated May 2, 1985, People's 117, made out to Randy Jacobsen. 15 RT 3636. Mr. Jacobsen's body was subsequently found buried on Lake's Wilseyville property. 13 RT 3132

Detective Copeland identified People's Exhibit 22 as a video tape titled "M Ladies, Kathi, Brenda" which was found buried in the ground at Lake's Wilseyville property in a plastic container. The video was marked 22-A and the transcript 22-B, and was played to the jury. 13 RT 3140.

Detective Copeland identified People's Exhibit 33 which were documents found buried in a 2-gallon plastic bucket that had Kathleen Allen's name on them, 13 RT 3158, including identification documents and checkbook. He also identified People's Exhibit 34, consisting of documents found in the same plastic container that related to Michael Carroll, including a Bank of America Versatell card, a driver's license, and other documents. 13 RT 3162. He clarified that the Carroll documents were found in a different container than the Allen documents.

Diane Allen testified that Kathleen Allen was her sister. 15 RT 3669. She recognized her sister, Kathleen, on the "M Ladies" videotape. She identified defendant's Exhibit U, a gold chain with a floating heart, as a necklace that Kathleen used to wear all the time. 15 RT 3671. She last heard from Kathleen in March 1985, 15 RT 3672.

In April 1985, appellant worked on April 13, not April 14 or 15, when he requested a day off, and returned to work on April 17, 1985. 16 RT 3754. His next day off was Monday, April 22, 1985, when he asked for a day off and stayed off through April 27, returning to work on April 29. Appellant called Goza and asked for time off because his mother and father were in a car accident in Southern California and because neither spoke good English, he wanted to help them with the accident and attendant paperwork. 16 RT 3756.

F. Evidence Relating to Counts IX-XII, the Murders of Lonnie Bond, Sr., Brenda O'Connor, Lonnie Bond, Jr., and Robin Stapley, in April or May of 1985.

Detective Copeland testified that a Wilseyville residence known locally as the "Carter House", situated near to Lake's property was rented to Lonnie Bond and R. Scott Stapley. 13 RT 3358. Brenda O'Connor and Lonnie Bond, Jr. also lived at the Carter house, which had a "well worn path" between it and the Lake's residence. 13 RT 3359.

Tori Lewis testified that in 1985 she went by her maiden name of Doolin and was Robin girlfriend. 18 RT 4267. They lived together on Felton Street in San Diego in April 1985.

She last saw Stapley on April 19, 1985 when he left in his green Chevy truck (plate "AHOYMTY") to take a load of Brenda O'Connor's possessions up to Wilseyville. 18 RT 4274. Stapley and Lonnie Bond were working together to manufacture methamphetamine at the cabin in Wilseyville. 18 RT 4275. She identified a letter in Stapley's handwriting that she received the following Wednesday, postmarked Wilseyville. 18 RT 4277.

She had previously met a man named Charles Gunnar at the Bond cabin in Wilseyville. The man showed up at her San Diego apartment accompanied by an Asian male the same day she received the letter from Stapley. 18 RT 4281. Gunnar/Lake was accompanied by an Asian man. She identified Gunnar as Lake and the Asian man as appellant. 18 RT 4284.

Lake explained to her that he had gone over to the cabin and found all of them dead, with blood all over the place. Lake had taken the bodies, burned them "Indian style", buried them and then cleaned the house. 18 RT 4285. Lake said he wanted all of Stapley's possession to take back with him to make it look like Stapley had moved out so that no one would come looking for him. Lewis gave him a 10-speed bicycle, explained to him that she could

not open his safe where the pink slip to the truck was. Appellant did not say anything during the encounter. 18 RT 4287.

Sandra Maynard testified that in 1985 she was working in the Rufus Cruz Realty Company in Wilseyville and managing the "Carter House" off Blue Mountain Road. 18 RT 4325. In January 1985, she rented it to Lonnie Bond, who was accompanied by Brenda O'Connor and a 2 year old. In March 1985 she visited the residence, which shared a common private driveway with two other homes. When she tried to leave there was a locked gate across the exit driveway. She went back to another house that was occupied, and found someone who introduced himself as Charles Gunnar and he let her out. 18 RT 4328.

In May 1985, Charles Gunnar called her and said her tenants had skipped out but had left their car and pink slip with him because Lonnie Bond owed him money. She went out, found no tenants, although there were some personal possessions there like dishes and clothing. 18 RT 4329.

Sometime after Lonnie Bond moved in, Gunnar/Lake contacted her to complain about Bond regarding "gunshots being fired and difficulties with the gate". 18 RT 4334. Gunnar wanted the gate locked and Bond was not doing that.

Detective Copeland testified that Brenda O'Connor was on the "M-Ladies" videotape taken in Lake's bunker. 13 RT 3140.

Tom Peck testified that in March and April of 1985 he worked at the Accuracy Gun Shop in San Diego. 18 RT 4467. On March 30, 1985, he sold a .22 caliber Ruger pistol to Robin Scott Stapley, People's 199. Stapley actually obtained the gun on April 16, 1985. 18 RT 4472.

Wood Hicks testified that he was a California highway patrol officer in April 1985, and on April 23rd at approximately 6:40 in the morning responded to a traffic accident in Kern County. 19 RT 4715. There was a large semi stopped on the roadway and a blue Chevrolet pick-up with a personalized license plate AHOYMTY. The driver of the pick-up truck was an Asian male who identified himself as Charles Ng, 19 RT 4717, and who gave an address of 1513 Beatty Street in San Leandro. 19 RT 4719. The pick-up truck was registered to Robin Stapley. He identified appellant in the courtroom. 19 RT 4723.

Kenneth Moses testified that he was a retired San Francisco police officer and worked for years in the crime scene investigation unit, specializing in fingerprints. 19 RT 4732. He testified that he matched fingerprints from two bodies found in Wilseyville with exemplars from Bond and Stapley obtained from the California Department of Justice. 19 RT 4737-

4738. The bodies had been found buried near but not on Lake's property. Both decedents had their hands tied or handcuffed, and were killed by gunshot. 17 RT 4176-4178.

G. The Extended Search of Lake's Wilseyville Property.

Det. Copeland of the Calaveras County Sheriff's Department testified that he participated in the search of the Wilseyville property on June 4, 1985, along with Calaveras County officers Norman Varain and Steve Matthews, and San Francisco detectives Irene Brunn and Tom Eisenmann. 13 RT 3126. The investigation of the property lasted approximately five weeks and involved four other agencies and some 12 officers. Copeland and Matthews were specifically assigned to inventory, mark, and seize all items of evidence from the Wilseyville property. He identified photographs of the excavation on the property which consisted of trenches dug by backhoes. He did not find any bodies of people named as victims in this case, 13 RT 3130, but did find four bodies of persons not charged as victims in this case. 13 RT 3131. Three decedents were identified as Maurice Rock, Randy Jacobsen, and Charles Gunnar; the fourth was never identified. 13 RT 3132.

He identified People's Exhibit 21 as a diagram of the "work shop or bunker" that was separate from the two-bedroom house. There were three rooms in the bunker. The first room that could be entered had a wall with

some cinder block construction and some plywood framing which when unscrewed swung open to expose a passage way into the back part of the bunker. 13 RT 3134. In the back there was a living area which consisted of a bed, a desk, and some dressers and inside of that was a smaller room called the cell, about 6-1/2 x 3-1/2 feet also with a wooden door. Inside the cell was a small platform structure with a foam pad on it, apparently used as a bed and a 5-gallon plastic bucket on the floor with a roll of toilet paper, a shelf on one wall, a couple of gun cases and some computer equipment. There were latches on the outside of the door to the cell. In the wall of the cell, there were no windows to the exterior of the cell, but there was a small square opening that had a two-way mirror mounted in it which permitted a person on the outside to look in, but the person in the cell could not look out. 13 RT 3137.

He testified that he found a document on a shelf of room 2 in the workshop entitled "Rules" that listed approximately five or six rules, People's Exhibit 24. 13 RT 3145. He also found a set of handcuffs retrieved from one of the trenches; and another set retrieved from a burn site. Detective Copeland testified that a photograph of a bedspread on the M Ladies tape was similar to a bedspread seen in the Wilseyville residence in June 1985. 13 RT 3153. The bedspread was depicted in People's Exhibit 27. He also identified

People's Exhibit 29 as a blue and black negligee that resembled one worn by a victim on the M Ladies tape. 13 RT 3155.

He found four pieces of paper at the site that had appellant's name on them. He also found a video tape found at site 9 of the Wilseyville property consisting of "a tape...of Leonard Lake discussing his philosophies and fantasies", People's Exhibit 81, some of which had been played by the defense during the opening statement. 13 RT 3223.

Other items that were found in the excavation included a Ruger mark .22 caliber pistol, a silencer, and a pack of 12 bullets, 13 RT 3227, four photographs from 136 Lennox Avenue, San Francisco, 13 RT 3233, and photographs of the Wilseyville bunker under construction. 13 RT 3235.

Detective Copeland described a cupboard in the workshop area of Lake's bunker that contained glassware and chemicals consistent with the manufacture of methamphetamine. RT 3278. There was also a substantial quantity of marijuana recovered. 15 RT 3646.

Det. Copeland testified that the driving distance from Lake's Wilseyville residence to appellant's Lennox apartment in San Francisco was 165 miles and took approximately 3-1/2 hours. 13 RT 3375.

He also found a journal of Leonard Lake's found in a barrel buried at LC-9 with entries for 1983-84, 15 RT 3648; a letter signed Cheryl Lynn

O'Koro; remains of Cheryl O'Koro, presumably murdered by Lake; magazine advertisements by "Charles Gunnar" for the sale of Jeffrey Gerald's car, Robin Stapley's truck, and other items associated with the decedents. Charles Gunnar's body was also found buried on Lake's property. 15 RT 3728, 3658.

Dr. Boyd Stephens testified that he has been the Chief Medical Examiner for San Francisco since 1971. 17 RT 4162. In June 1985 he went to the Wilseyville property to look at human remains that had been unearthed. He found four bodies intact, and numerous fragments of bones and teeth, many of which had burn characteristics. 17 RT 4165. Three of the four bodies were identified as Maurice Rock, Randy Jacobsen, Charles Gunnar, and the fourth was an unidentified male.

In June 1985, Fern Ebling was present at her mother's house along with Cricket. Cricket asked Fern and her mother to go up to Wilseyville during the night to collect some items. 18 RT 4531. Fern's mother Gloria did go up with Cricket. Fern did not recall that Cricket was panicked at that time, but acknowledged telling investigator Kathy Sakoguchi that "she was panicking about some videotapes and some stuff that was up there". 18 RT 4534.

H. Evidence Relating to the Search of Cricket's San Francisco Residence.

Inspector Brunn executed a search warrant for Cricket's house at 151 Pecks Lane in South San Francisco. 13 RT 3085. Among the things

recovered were a receipt from Lake to Balasz for a gun found under the couch, along with a box of .38 special ammunition. They found slides and assorted photographs (2016) and a letter from Sheryl O'Koro in a chest of drawers (2002). They found a whale pendant in a Dodge vehicle in the garage, license 1FPL868 (2032). 13 RT 3090. He also identified a number of defense exhibits as material given to him by Balasz. 13 RT 3095. Also seized was a book that was hollowed out inside and contained a gun. 13 RT 3104.

I. Evidence Relating to the Search of Appellant's San Francisco Apartment.

San Francisco police inspector Ken King, conducted a search at 136 Lennox Way on June 7, 1985. 16 RT 3885. He found a Dennis Moving Company check for $619.25 payable to appellant; a First Interstate Bank card in the name of Lonnie Bond, 16 RT 3888; a Cross pen and pencil set with engraved initials belonging to Peranteau, 16 RT 3889; a map of San Francisco cut into six pieces with a circle around Yukon Street on which the Dubs lived, 16 RT 3890.

Inspector King said that he was looking for video equipment reported missing from the Dubs' residence when he conducted the search of 136 Lennox Way and found two G.E. video cassette recorders that were similar to that reported missing, but he was never able to positively identify them as

belonging to the Dubs. 17 RT 3950-3952. The voice on the telephone answering machine was Lake's. 17 RT 3972.

He found some ammunition that had a "head stamp" of two overlapping rings, similar to cartridges from a clip recovered in Calaveras County. 17 RT 4137.

J. Evidence Relating to Lake's Death in Police Custody on June 2, 1985.

John Kallas testified that he has been a resident of South San Francisco since 1954, and was a reserve police officer for 28 years. He was present at the South City Lumber Company on June 2, 1985. 12 RT 2976. He saw an instance of petty theft in which an Asian male, carrying a large gray colored vise, bypassed the check out counter and carried the vise out of the store, passing within two feet of him. Kallas approached the sales counter, and asked if anyone had just sold a vise, and then remarked that "if no one sold a vise, then you got ripped off". 12 RT 2980. Kallas left the store and saw the Asian male about 50 feet away, standing by the passenger side of a tan colored Honda, which Kallas identified as being depicted. 12 RT 2981. The store clerk called to the Asian male that he wanted to talk to him, but the man walked away up Spruce Street. 12 RT 2984. Kallas approached the rear of the Honda, saw that the trunk was ajar, and that the vise was in the trunk

when the clerk opened it. Kallas went back in the store, asked if anybody had called the police, and then did so himself. 12 RT 2985.

While he was on the phone, a bearded man came up to him, whom Kallas identified from a photo as Leonard Lake. 12 RT 2986. After Kallas got off the phone with the police, the bearded man asked if he could pay for the vise, and Kallas referred him to the store clerks. 12 RT 2987. Kallas made a purchase of his own, and then went to the police station to make a report. He identified appellant's photo in a photographic line-up a day or two after the incident. 12 RT 2988.

Daniel Wright testified that he has been a South San Francisco Police Officer for 15 years, and investigated a petty theft at the South City Lumber Company on June 2, 1985. 12 RT 2994. When he arrived at the lumber store parking lot, he was met by John Kallas who directed him toward a tan Honda parked in the parking lot. Officer Wright ran the license plate number, 838WFQ, which his dispatcher reported as registered to Lonnie Bond. Officer Wright also looked in the trunk of the Honda and saw a vise with a price tag of $75.00 on it. 12 RT 3002. Officer Wright searched the rest of the trunk and found a backpack with a gun case in which he found a Ruger semi-automatic weapon with a silencer, serial #1270329. 12 RT 3004. He ran the

gun serial number and found that it had been registered to four different people including R. Scott Stapley. 12 RT 3005.

At that point, Officer Wright was approached by a 35-year-old balding male with a beard, identified by photograph as Lake who told Officer Wright that "everything was alright; that he had taken care of the bill – the vise that his friend had taken". 12RT 3007. Lake identified himself as R. Scott Stapley, and said the car belonged to Lonnie Bond. 12 RT 3009. Officer Wright asked Lake whether he could search the vehicle, and Lake said, "Go ahead, you might as well. You already have." Officer Wright then removed the gun from the case, ran the serial number, and arrested Lake for possession of a firearm that had a silencer. Lake was handcuffed and transported to the police station. 12 RT 3010. He had the vehicle towed to a lot, and interviewed two other witnesses, Azzopardi and Linker. As he was heading back to the police station, he was contacted by radio and told to go to the PKS towing lot where the Honda was. There he found a stun gun that had turned up in the inventory of the vehicle. 12 RT 3011.

Officer Wright then checked the vehicle identification number on the Honda and it came back registered to a missing person. 12 RT 3014. Eventually, San Francisco homicide investigators took possession of the Honda. 12 RT 3015.

Gary Hopper testified that he worked for the South San Francisco Police Department for 32 years, reaching the rank of detective, and has been retired for less than a year. He was called into the station on June 2, 1985, regarding a person who identified himself as Robin Stapley who had a gun with a silencer in his vehicle. 12 RT 3027. When Detective Hopper made contact with Robin Stapley, who was Leonard Lake, at the station, he was "on the floor in convulsions". 12 RT 3028. Lake was taken to the hospital where he died a few days later of cyanide poisoning.

K. Evidence relating to Appellant's Rental of a Post Office Box in Pioneer, California, in December, 1984.

Michael Kimoto testified that he had his wallet stolen at a beach near Watsonville, California in 1983, including his driver's license and social security card, which he identified in court. 16 RT 3790. The parties stipulated that the following items were seized from the appellant's person in Calgary, Canada, on July 6, 1985: a wallet containing a driver's license and social security card in the name of Michael Kimoto. 16 RT 3790. Kimoto never opened a post office box in the city of Pioneer, California. He looked at the documents identified as People's Exhibit 122, saw his name on them, but denied it was his signature. 16 RT 3792.

Arlene Lucke testified that she worked for the Pioneer Post Office for some 25 years, which is about 25 minutes from Wilseyville. 16 RT 3799.

She identified People's 123 as an application for a post office box dated December 12, 1984, originally opened by an Asian man, who she remembered because "it was the first Oriental that had ever rented a post office box". 16 RT 3802. She identified the person as appellant. Eventually, Randy Jacobsen added his name to the post office box. No identification was required of either person. 16 RT 3804.

Lloyd Cunningham compared a stipulated sample of appellant's handwriting, People's Exhibit 238, with a post office application in the name of Michael Kimoto, People's Exhibit 123. He gave the opinion that appellant had authored most of the post office box application, People's 123. 20 RT 4895.

L. Expert Testimony Regarding Human Remains Recovered from Lake's Wilseyville Property.

Gerald Vale testified that he is a forensic dentist, also called a Forensic Odontologist. 18 RT 4400. He worked with Dr. Sperber, another Forensic Dentist in an effort to determine whether any dental remains from the Wilseyville property belonged to infants under the age of 3 years old. There were four specimens that qualified. 18 RT 4403.

He "quite laboriously" compared the tooth fragments with x-rays of missing children, but concluded that "there was not sufficient information there to make identification of any individuals". 18 RT 4406. In his opinion,

three of the specimens may have come from the same person, but that a fourth was from a different individual. 18 RT 4407.

On cross-examination, he stated his recollection that he received some of the tooth specimens by Federal Express or may have even taken some from the coroner's office in San Francisco. 18 RT 4408. He acknowledged that there were some differences of opinion among experts as far as the identification of bones being jawbones or ear bones. 18 RT 4416. Dr. Vale acknowledged that he disagreed with "quite a few" of the conclusions reached by his predecessor, Dr. Oliver Harris, who is working with Dr. Stephens earlier. 18 RT 4435.

He had x-rays of Harvey and Debbie Dubs, Lonnie Bond, Paul Cosner, Michael Carroll, Kathy Allen, and "did not find any [tooth] fragments that [he] could match against these x-rays". 18 RT 4437. Apparently Dr. Harris had reached a conclusion that a tooth with a "fused" root had likely come from Kathy Allen, but Dr. Vale could find no support for that conclusion. 18 RT 4441.

Dr. Walter Birkby testified that he is a forensic anthropologist. 19 RT 4598. His job is to "look at human remains, either skeletal or decomposed or whatever condition they are in and try to determine everything that he can about their being", such as "are they male or female; how tall were they, age

of death, previous trauma to the body, that type of thing." 19 RT 4598. In 1993, he reviewed bone fragments at the San Francisco Medical Examiner's office in conjunction with Dr. Roger Heggler in order "to come up with the least possible number of individuals who are represented in the fragments; to make a determination, if possible, the age and/or sex of the material." 19 RT 4603.

Their approach was to sort bones into categories, such as right arm bone, or left arm bone, and see how many fell into each category, which yield a minimum number of individuals involved. There were a number of unidentifiable fragments that they could not characterize. 19 RT 4607. As a result of the investigation, they came up with a count consisting of four adults, one child, and one infant.

On cross-examination, he acknowledged that he had read an affidavit of Dr. Heggler before he examined any bones. 19 RT 4619. He acknowledged that he "usually tr[ies] to work without knowing what the other conclusions were", but "it doesn't always work out that way." 19 RT 4621. He acknowledged that he might have previously testified that he did not have any information regarding the number of persons represented prior to his own examination. He relied on the Petrosal bones, a very hard bone from the middle ear, to find that there was a minimum of 5 people. 19 RT 4622. He

acknowledged that more modern identification of human remains depended largely on mitochondrial DNA, even with burned fragments. 19 RT 4628. Defense counsel pointed out some mistakes in the categorization of various bone fragments. 19 RT 4641.

Dr. Birkby testified that the only skeletal part they found of an infant was a piece of a first rib. 19 RT 4651. When asked what the primary bones used to determine the age range of human remains were, he mentioned the sternal ends of ribs 4 and 5, none of which he had, the pubic symphysis, which wasn't available in this case, and teeth, but he was "excluded from examining the teeth", in favor of the odontology team. 19 RT 4669. Birkby acknowledged the possibility of mistakes in his categorization and offered the thought, "I don't walk on water." 19 RT 4672.

He did conclude that there were a minimum number of two females among the remains, 19 RT 4675, based on two female patellae, 19 RT 4676. He acknowledged that Dr. Heggler had initially identified a particular fragment as coming from an adult, but Dr. Birkby believed it had come from a child. 19 RT 4679.

M. Evidence Relating to Appellant's Contacts with Lake in 1984-85.

Fern Ebling testified that she is the half sister of Leonard Lake, and last saw him on June 1, 1985, when he came to her home in San

Francisco to help her with a minor home repair. To her knowledge, Lake was living in Wilseyville at that time. She visited there on Memorial Weekend the year before. 18 RT 4515.

In August 1984, she rented an apartment at 3877 17th Street in San Francisco, but did not move in until shortly after Labor Day. Lake obtained her permission for a friend of his named "Mike" to live in the apartment during August. "Mike" was "an Asian male in his late to mid twenties, about 5'6" with an average build, described as an "ex-Marine Buddy", 18 RT 4518, and was subsequently identified as appellant. The last time she saw appellant was at the 1984 Thanksgiving dinner at her mother's home in San Bruno.

Fern described appellant as very quiet and non communicative at the family Thanksgiving gathering in 1984. Lake was clearly the dominant person between the two of them. 18 RT 4557.

On March 29, 1985, she bought a gun for Lake at this request, a .22 Ruger pistol, which was subsequently seized from appellant when he was arrested in Calgary, Canada, on July 6, 1985. 18 RT 4527.

N. Evidence Relating to Lake's Philosophy, Personality, and Prior Crimes.

Fern Ebling testified that Lake showed her guns that he had when he was living in Meyers Flat in Northern California. 18 RT 4539. Lake

confided in her that he carried cyanide because he was never going to let himself be returned to prison. 18 RT 4540

Lake had told her that it was very traumatic for him when his mother left him with his grandmother and went to Seattle without him. 18 RT 4542. Lake had also confided that he had negative feelings toward his half-brother Donald, whom he did not respect and whom he characterized as lazy. Lake once said that "people like Donald should be lined up and shot". 18 RT 4544. She described an incident in late 1982 or early 1983 when Donald Lake was living with his mother, and Leonard Lake picked him up saying he had a job house sitting in the mountains. That was the last time she ever saw Donald. 18 RT 4545. Fern's mother, Gloria, later received a typewritten letter purportedly from Donald saying that he was going off to Reno with some friends. 18 RT 4546.

She also recalled an incident where she had come home with her husband and found that Lake had left a room full of marijuana drying and hanging all over the place. 18 RT 4547. Lake said that in an "act of vengeance" he had raided a marijuana farm and intended to sell it. 18 RT 4555.

Lake had told her about the bunker he was building, as a place to hide from nuclear war. She characterized him as a "survivalist". 18 RT 4550.

Lake was a camera nut who took large numbers of pictures of women. 18 RT 4551.

O. Evidence Relating to Canadian Jailhouse Informer Maurice LaBerge.

Raymond Munro testified that he is a 30 year veteran of the Royal Canadian Mounted Police and worked as an investigator for the Canadian Government for the extradition proceedings involving appellant. 20 RT 4755. In November 1988, Maurice LaBerge testified at an extradition hearing that Sergeant Munro attended regarding certain drawings that appellant had made while in prison, and identified as People's Exhibits 223 through 230. 20 RT 4761. LaBerge had been killed in a single vehicle auto accident a few months prior to trial and Sergeant Munro read a portion of LaBerge's extradition testimony to the jury. 20 RT 4763. Sergeant Munro acknowledged that LaBerge had a very extensive criminal history. LaBerge first met appellant in early 1986 and was placed in an adjacent cell. LaBerge gave appellant the nickname "Slant", and appellant called LaBerge "froggie, uncle, or grasshopper". 20 RT 4779. They went to the same exercise yard each day, and appellant gave LaBerge a "cartoon caricature... either depicting what we had talked about or an off-shoot of that". When LaBerge had accumulated 12 or 15 of these, he "would seal them in an envelope and send them to [his]

lawyer". 20 RT 4781. With respect to cartoon Exhibit 224, appellant explained that he was worried about a videotape the police had found relating to Kathy Allen and Brenda O'Connor. Appellant told LaBerge that the video showed a female complaining that it was too warm, at which point appellant flicked opened a butterfly knife and cut her t-shirt off.

LaBerge described the cartoon, Exhibit 224, "a caricature of a man who is to be Leonard Lake and he is holding a whip in his right hand, fondling himself with his left, and saying, 'Oh, I love you Kathi, I really do.' There is a female bound hand and foot in what appears to be a bed or a small table which shows appellant coming behind the videotape recorder sitting on a tripod saying, 'Rice is ready. Dinner time.'". 20 RT 4784.

Regarding cartoon 226, titled "Remains Claiming Section", LaBerge described it as depicting Boyd Stephens, the coroner, with bags of remains. 20 RT 4785. LaBerge described Exhibit 228 as a photograph of a caricature of two men, Lake and Slant, throwing a body into a barbeque or blazing fire, and explained that "this particular cartoon came as a result of the discussions we had had about the procedure that appellant and Leonard Lake followed in taking these people and killing them and then burning them". 20 RT 4786. He described People's Exhibit #230 as a cartoon which shows an individual

in a jail cell with bars on the window labeled "San Quentin Years Later". 20 RT 4787. LaBerge dated that July 10, 1986.

The parties stipulated that LaBerge committed a home invasion in 1981, sexually assaulted a 15 year old boy while armed with a handgun. 20 RT 4790. The stipulation included conflicting statements and testimony from LaBerge about whether he did or did not commit the sexual assault.

On cross examination, Sergeant Munro described the 42 crimes that LaBerge had committed, his lenient treatment for many years up until his incarceration, the time of his incarceration with appellant for the home invasion robbery, and the benefit he obtained from being a witness against appellant. 20 RT 4810. Sergeant Munro personally gave LaBerge the $36,000 in several cash payments obtained from the RCMP Witness Protection Program. 20 RT 4825.

Sergeant Munro testified that he was called to the accident scene north of Calgary earlier in 1998 when LaBerge died in a single vehicle auto accident where $23,000 was found strewn around the scene. 20 RT 4835. At that point LaBerge was still a "protectee" in the witness protection program. LaBerge was also an informant in a Canadian murder prosecution of Daniel Gingras. 20 RT 4865.

II. The Guilt Phase Defense

A. Evidence of Lake's Early Upbringing.

Sylvia Showalters testified that she is Leonard Lake's sister and spoke to attorney Kelley in Kentucky in 1987. 21 RT 4987. Her mother's name was Gloria May Ebling and her father's name was Elgin Leonard Lake. 21 RT 4987. She is five years younger than Leonard, and a year older than Donald. She was raised in the San Francisco Bay Area until she was approximately four years old, when her mother moved with her and Donald to Seattle. 21 RT 4989. Her mother had told her that Leonard did not want to go with them to Seattle. However, as they were about to leave on the train, Sylvia heard Leonard scream, "Take me with you; I want to go; I want to go". 21 RT 4993.

When the mother and children moved to Seattle, Leonard Lake was left with a grandmother named Lillian Lasty. After her mother returned to the Bay Area, Leonard continuing living with grandmother Lasty rather than with her mother. She and Leonard visited their mother from time to time. 21 RT 4995. As time went by, Leonard and his mother were "pretty friendly and cordial with each other'. 21 RT 4996.

B. Evidence of Lake's Murder of His Brother Donald.

Karen Roedl, Lake's ex-wife, testified that Lake told her about his brother Donald's train accident as a youth. Lake told her that the accident had caused mental problems for Donald, which contributed to Lake being brought up by grandparents because his mother had to take care of Donald. Lake was resentful toward Donald. 21 RT 5049.

Chester Richardson testified that he knew Lake and Donald in Mendocino County when Lake was managing the Philo Motel.

When Lake spoke about his childhood, he said that his mother could not take care of both him and his brother, and that he (Leonard) was the one she put in an orphanage. 21 RT 5114. Lake told him and his mother that Donald was "mooching" off his mother and hurting her, and "it would be best for his mother if he was dead". Eventually he voiced "an interest in killing his brother". 21 RT 5115.

Lake told Sephry Bergern that he did not like his brother Donald because "Donald was a stupid person, and stupid people didn't deserve to live". 21 RT 5136.

C. Evidence of Lake's Paramilitary Survivalist Conduct and Sadistic Philosophy As An Adult.

Sylvia Showalters described Lake's conversation with her about survivalism in the years around 1973, including his hoarding supplies. 21 RT

5001. Karen Roedl testified that Lake had a .9 mm gun during their marriage and gave her a small one which she gave back. He read books about survivalism and talked about it occasionally, but was not doing anything active about it. 21 RT 5050.

Anthony LaTronica testified that he has been an education coordinator for Mendocino College for some 23 years. 21 RT 5068. In 1976, he was a full-time teacher of animal science classes for people interested in becoming a farmer or rancher. He identified a photo of Leonard Lake as a former student who took seven classes from him, 21 RT 5070, including one about butchering animals. Leonard Lake was "a very bright kid and he was very inquisitive". 21 RT 5072.

Mark O'Lague testified that he had lived on the island of Oahu since 1973 and serves in the United States Navy. In 1977 or 1978, he was living in Redwood Valley near Ukiah at Greenfield Ranch. 21 RT 5144. He worked for a program that provided insulation for low income houses. In that context, he met Leonard Lake as the crew leader for a crew of installers and saw him on a daily basis for about a year. 21 RT 5146. Lake had a scam in which he would get more materials than necessary for the weatherization projects and bring the excess materials back to the house he was building for himself on the Greenfield Ranch. 21 RT 5147.

He described Lake as very perverted with strong sexual interest. 21 RT 5148. He left his books of photographs sitting around with pictures of nudes in them. He told Mark that he would "love to take photographs of [Mark's friend] Kathy and I together" in sexual acts, which Mark did not do. 21 RT 5150.

Lake had at least seven different firearms. Once when they were preparing for a summer solstice party at Greenfield Ranch, Lake shot a pig with "a real nice looking Ruger .22", and butchered the animal in the barn. 21 RT 5151. Lake brought Cricket to the ranch several times and introduced her to Mark.

Richard Reeves testified that he was 18 years old in 1977, lived with Leonard Lake on Greenfield Ranch, and worked on Leonard Lake's insulation work crew. 21 RT 5157. Reeves was supposed to take care of the goats, chickens, fruit trees and gardens. Lake lived a lifestyle as "somewhat of a survivalist", dressing in military camouflage clothing and reading books about survivalism. 21 RT 5161.

Lake stole surplus equipment from a hospital where the office for the North Coast Opportunities project was. When Lake's girlfriend at the Ranch asked him about it, Lake said, "I didn't steal it. I am just redistributing the wealth of the earth".

Alison Harlow testified that she bought a piece of property on the Greenfield Ranch in the early 1970s. 22 RT 5253. She spent many weekends there camping out on the land, and had friends who lived there as caretakers -- Tim, known as "Otter", and Morning Glory Zell. Leonard Lake and Tanya Lipshutz were her neighbors to the south. Sometime in early 1981, Otter and Morning Glory gave Lake permission to move a trailer onto her land and live there. Lake proposed building a permanent structure on her land, which she did not favor. Then in April 1981, she received a call from a neighbor who said that Lake had some heavy equipment on her property and was digging a large hole. She told him to stop and went up to see what was going on. 22 RT 5261. Lake described his project as a "Pagan and stronghold". 22 RT 5262. Eventually she received a letter of apology from Lake and one from Cricket also. On cross examination, she described some earlier situations in which Lake had been helpful to others and that to her it seemed that he wanted "to use his militarism and his survival skills at the service of other people". 22 RT 5267.

James Henwood testified that he lived on Greenfield Ranch for 21 years, where he was employed by the Greenfield Ranch Association as a caretaker. 22 RT 5273. He met Lake in the course of his work there and viewed him as "a sleazy dirt bag". 22 RT 5275. One incident that contributed

to this view was that the Greenfield Ranch Bylaw prohibited discharging firearms except in self defense. One day he heard 40 or 50 shots and, grabbed his rifle and drove down to investigate. He found Lake and two others whom he berated for breaking the Association's Bylaws. 22 RT 5278. The next day Lake and one of the other people who was shooting came up to him and offered to sell him a .38 caliber Smith and Wesson Revolver.

One time, Lake hired Henwood to move some dirt from an excavation on Alison Harlow's property. 22 RT 5284. Lake's reputation in the Greenfield community was that "he always was willing to help out and gave quite heavily of himself to community events and community doings, but nobody really liked him". 22 RT 5286.

Robert Tognoli testified that he lived on Greenfield Ranch since 1978. 22 RT 5290. His parcel was close to Lake's and Lake's appeared to be "quite orderly" with an "orchard and a garden with a windmill". 22 RT 5292. Lake talked several times about building a bunker as protection against the city hordes who would come when civilization went down. Lake said he had buried supplies of food, water, ammunition, and guns. 22 RT 5293. Tognoli viewed Lake as a "lonely guy". 22 RT 5295.

Once, Lake had a going away party for himself, and threw some type of inflammatory fuel onto a fire that burned a number of people's clothes. 22

RT 5298. Local people felt they needed to be on guard toward Lake. Lake told Tognoli that he was a combat soldier in Vietnam who "did all kinds of horrible things". 22 RT 5299.

Obberon Zell testified that he lived on the Greenfield Ranch from 1977 to 1985 and was known as "Otter" at the time. 22 RT 5303. When Zell moved onto the ranch, Lake was the most knowledgeable about homesteading, farming and animal husbandry. 22 RT 5307. On one occasion when Lake told a story about his military past, Lake's described Vietnam as a green verdant paradise when he flew into it, but when he flew out later it was full of craters and devastation. Lake claimed to be "so pained by that contrast of the paradise versus the devastation that he wanted to dedicate himself to healing the earth instead of causing destruction". 22 RT 5313. At the same time, Lake developed a reputation in the community of being a thief. 22 RT 5315.

Robert Glover testified that he had lived in Philo in Mendocino County for 77 years. He suffered a mini stroke a couple of years earlier which affected his memory. 22 RT 5337. Glover was a captain for the volunteer fire department for some 30 years and Lake joined at one point. 22 RT 5340. At one time they were preparing to do a controlled burn for training purposes and Lake made some kind of spontaneous combustion chemical to start the fire. 22 RT 5343. Lake was the manager of the Philo Motel in 1982-83. There

were a couple of occasions where Glover saw Lake and an Asian male in Jacks Valley Store, north of Philo. 22 RT 5344.

Eldena Martin testified regarding her acquaintance with Lake, and described a visit to his house in Myers Flat, California, in the early '80s where he kept a pile of guns in the bedroom. 22 RT 5429. At one point, she was staying at Leonard Lake's place with her daughter, and she put on a videotape which turned out to be a surreptitious video of a women getting ready for bed. 22 RT 5431. The last time she visited Lake in Myers Flat, he told her that he was a fugitive, and had disguises and fake identities. She became concerned and ended the relationship. At one point Lake showed her a cyanide capsule and said he was a fugitive but could not stand being cooped up, and would rather take the capsule than go to prison. 22 RT 5436. Lake mentioned his "Miranda" Project, but never explained what it was. Lake had asked her to marry him on several occasions. On cross examination, she acknowledged that Lake never used any force or violence against her and treated her with respect. 22 RT 5440. Lake did talk to her about some bizarre sexual acts involving bondage of women. 22 RT 5442.

Ernie Pardini also testified that Lake asked to photograph his daughters, ages four and six at the time, and Pardini declined. 23 RT 5676. Lake took some pictures of Pardini's wife working in their garden without their

knowledge or permission. Lake conveyed his ideas and plans for building an underground bunker or structure where he could defend himself in the case of a "natural holocaust". 23 RT 5678.

Around Pardini's wife, Lake "was always making sexual innuendos, not necessarily directed at her, but in her presence, that made the Pardinis very uncomfortable. 23 RT 5681.

One day Pardini found his wife upset to the point of tears. She explained that she had been working in the garden and that Lake had been harassing and criticizing her all day, telling her that she was stupid and that what she was doing was totally wrong. 23 RT 5681. Pardini was angry and told Lake that whatever his wife wanted to do in the garden was her business and to leave her alone, accompanied by some physical threats. Lake's response was, "Oh, I would never fight with you" because "I am a coward", and "if somebody wanted to fight with me, I would just come back and shoot them later". Pardini didn't feel threatened because Lake "wasn't a very physically threatening presence" and instead told Lake that if he tried to shoot him, Pardini "was going to stick the gun in a place where – ". 23 RT 5682.

Pardini saw Lake shooting at human silhouette targets, where he did "war maneuver type target shooting where he would run and hide behind a tree and jump out and shoot at one and run and do a kind of roll from, come

up behind the bush and shoot again kind of war games". Lake confirmed that he was a survivalist. 23 RT 5684.

James Stewart testified that in 1984 he lived at 198 Carl Street in San Francisco, also known as the Pink Palace. 24 RT 5759. Lake introduced himself as Charles Gunnar, and Stewart worked for him on occasion, 24 RT 5761, including a job in October 1984 at a ranch in the Sierra foothills. On that trip he met Louie Balazs, Cricket's father. 24 RT 5765.

Lake usually wore military type clothing and once made a statement that he was building a bomb shelter/tool shed. Lake "seemed to be a survivalist waiting for maybe Armageddon". 24 RT 5770.

Carolyn Richardson, nee Williams, testified that she is Leonard Lake's cousin. 24 RT 5880. She first met Leonard at Thanksgiving in 1984 at her grandmother's house, attended by some 10 people, including her grandmother, her cousins Fern and Patty (Lake's half sisters), her aunt Gloria, and a friend of aunt Gloria's. There was no Asian male there. 24 RT 5881.

Lake was 16 years older than she. After Thanksgiving dinner, she visited him twice at his house in Wilseyville in the Spring of 1985. Nothing unusual happed during those visits. They corresponded and had additional contact in May 1985 when she stayed at Wilseyville for about 10 days over

Memorial Day weekend. No one else was on the property during that second visit. 24 RT 5886.

At one point she and Lake went to say hello to neighbors who lived at the end of the road, and the neighbors referred to Lake as "Charles". Lake explained to the man "that he worked for the FBI and he didn't like to have the FBI know his real name". 24 RT 5891.

Lake made negative references about Brenda O'Connor, saying that she was really stupid, smoked, and was not a good mother. 24 RT 5892. Lake was driving an orange Honda at the time of both of her visits. He had a blue pick up truck on his property and another car that he was tearing apart. He had flown to San Diego and had driven the pick up truck back to Wilseyville. 24 RT 5897.

During her visit, they checked three or four post office boxes in the various towns around Wilseyville. 24 RT 5900. Lake said that he had weapons, food, money, and coins buried on his property because he was "something of a survivalist so he buried them for the coming of the Apocalypse". Lake said at one point that he considered himself racist and that he did not like blacks.

She did see eyebolts at the foot of his bed. Lake told her at one point that one of his friends was a little kinky.

Lake photographed her while she visited him up there. She was 23 and Lake was 39 at the time of the visit. They had a sexual relationship and some of the pictures he took of her show her partially clothed. She never met Cricket or appellant. 24 RT 5905.

Mark Novak testified that in the early 1980's he was in the army and in 1981 was introduced to a man who identified himself as Tom Meyers. Novak later learned that Meyers' actual name was Leonard Lake. 26 RT 6328. Novak met Lake through a mutual friend named Tom Moore who had an interest in survivalism. Novak had received orders to be shipped to Hawaii and in route to his departure, stopped in Ukiah and visited Lake, who was then living in a trailer. 26 RT 6330. Novak spent three or four days there during which time they made a goat pin, linked some PVC pipe for water, and dug a big hole in the ground for a bunker. Lake described his philosophy that "the world is going to end in a nuclear holocaust" and so "he better be prepared". 26 RT 6331. Novak never saw Lake again after he reported for duty in Hawaii.

D. Evidence of Lake's "Miranda Project."

Lake had a longstanding plan to emulate in real life the kidnap/sex/death plot of the John Fowles' novel The Collector. The jury was read Lake's February 18, 1983, journal/entry,

> "Awe, the Collector. Has it really been near 20 years I have been carried this fantasy and Miranda? How fitting. My lovely little village in Humboldt. My lovely little prisoner of the future. I suppose in my way, I am the same wimp as the hero, and in my way just as crazy. I have no doubt that we wimps have been compensating for our inability since the dawn of history. Sad really. Still, how can we die if we never live. They have to sleep some time". 29 RT 6969-6970.

John Kohn testified that he is a screenwriter and in 1965 wrote a screenplay from a book called The Collector, authored by John Fowles. 25 RT 6125. Mr. Kohn novel's screenplay plot, in which the protagonist was a repressed bank clerk who was an amateur butterfly collector and one day won a lot of money in a football pool. He bought a remote house in the country that had a cellar. He then kidnapped a beautiful girl named Miranda who was a bank customer and imprisoned her in his cellar. The captive Miranda eventually died from pneumonia and the book concluded with the bank clerk stalking another girl. 25 RT 6128.

The jury also heard Lake's tape recording of his "philosophy", 27 RT 6669. See 32 CT 10432 et seq.

E. Evidence of Lake's Cruel, Kinky, and Controlling Behavior Toward Women.

Chester Richardson, Lake's cousin, testified that at a family Thanksgiving dinner in 1982, Leonard Lake told the family that he would commit suicide before he would ever allow himself to be captured by the FBI. 21 RT 5025.

1. Karen Roedl, Lake's first wife.

Karen Roedl testified that she was the first wife of Leonard Lake. 21 RT 5027. She met him through an uncle who lived in South Carolina, and they struck up a friendship while Lake was stationed in North Carolina in the Marines. They dated in the 1965-66 time period. Lake then did a tour of duty in Vietnam. They discontinued the correspondence and then struck up the relationship after he returned in 1968, when she contacted him because of family problems she was having. 21 RT 5029. They married in 1969. Ms. Roedl viewed herself then as "pretty naïve" and acknowledged that she was looking for someone to take care of her and direct her. 21 RT 5030. After a year of marriage, he went back to Vietnam and she lived with his grandparents, the Lastys, in Galt. 21 RT 5031. Lake occasionally referred to being raised by his grandparents instead of his mother, and that he didn't like that much. Lake didn't express resentment directly to his mother, but expressed "resentment toward the situation". 21 RT 5032.

When Lake returned from Vietnam in the 70's, he was sent to a psychiatric ward of the hospital. Eventually they found a place to live together in San Jose. Then "certain things started happening in regards to his request on what we do", such as "wife swapping" and their marital relations concerning "the playfulness of things like, you know, playful bondage and

stuff became serious into being tied up where I could not get loose. Some other just sort of fighting type, you know, little physical fitting things became me being slapped and hit while I was tied up. And during that timeframe he would, you know, be constantly telling me that I was supposed to be telling him that I liked it, and so it became more of a, instead of mutual sexual things, it became more of him doing things to me, I guess". 21 RT 5037.

At this time she was working as a dancer in a bar, and Lake came to the bar each evening to pick up her tips and he also took her check on paydays so that he controlled the finances.

She physically separated from him in October or November 1971, and obtained a divorce the following year. The separation was caused by an incident when Lake saw her leaving the bar where she worked with another person who was a regular, and he threw her clothes out of the house and boarded it up. Later, Ms. Roedl caught him breaking into her house three times. 21 RT 5039.

2. Ms. L., 16 year old rape victim.

Ms. L. [otherwise unidentified per court order] testified that she was 16 years old in 1984 when her mother hired Leonard Lake to help her move from an ad Lake had on a bulletin board. 21 RT 5051. Lake asked her mother if he could take some photographs of her and her mother agreed. During the first

session or two he took normal photos of her. Then one night, Lake showed her a photo album of a young girl taking her clothes off and asked her if she wanted that. Ms. L. declined, but "somehow he got pictures of me" – "I think it was that night, I'm not sure if he gave me something to drink, but I don't have any memory of how he got those pictures". Lake started blackmailing her with the pictures, telling her that unless she did more of them, he would show the ones he had to her mother. 21 RT 5053. She complied. She described herself as "very, very naïve and shy".

On one occasion, he tied her to a bed at his house. Initially, "he pretended that he was just going to take pictures and he took pictures and then he raped me of my virginity". She "kept screaming for him to stop and I was going to tell just over and over again". He told her that nobody would believe her because he had pictures of her in provocative poses. 21 RT 5057. He then blackmailed her into further sexual relations, up until the time he moved to Ukiah in approximately 1975. 21 RT 5058.

3. Charla Nielsen.

Charla Nielsen testified that she was living in Ukiah in 1977 and 1978. She met Lake through a senior citizen lady in her church who telephoned her and told her that Lake wanted to meet her. She initially declined but the church lady was persistent and so she spoke to him on the phone. They had a

relationship in which she considered him her boyfriend, although she never told him where she lived. "Somehow I didn't quite trust him, but yet I liked him". 21 RT 5077. They went to where he lived at the Greenfield Ranch. When they discussed religion, Lake said that he was a Pagan.

She asked Lake about his family life and he said he didn't have a family and that he was an orphan, raised in an orphanage. Lake said he had no mother, father, brothers, or sisters, and that they abandoned him when he was a little boy. 21 RT 5079. Lake described Charles Gunnar as his "best friend" and "blood brother". Part of their pact was that "whoever Leonard married would have to go sleep with Charles first, and whoever Charles married would have to sleep with Leonard first". 21 RT 5080. Leonard pressed her about her financial assets as well as firearms, but she would not tell him. Lake asked her to marry him, but never told her he loved her. Lake described a fantasy about having a complete harem of women who took care of his every need. 21 RT 5082. She identified photographs of Lake and Gunnar.

Ms. Nielsen was a Mormon, and they had lots of discussions about religion. Lake disappeared in about 1978 and re-appeared in 1981. Before he left, he sent her a letter in which he said, "you marry me and I'll make passionate love in front of your Bishop, all your ward members". 21 RT

5084. Lake insisted that she give him her address, and she gave it to him. Lake came over and said, "this is the last time I'm going to ask you to marry me" and "if you don't say yes, then you'll never see me again". A day or two after that, Lake tried to break into her house, as observed by a neighbor lady. She never heard from him again but offered the following, "I want to say I liked him very much. He treated me with respect, and there were parts of him that I just couldn't understand". 21 RT 5086. She described herself during that period as "very shy", "easily led", "vulnerable", and "real happy to have a new boyfriend". 21 RT 5087.

4. Mrs. M.

Mrs. M. testified that she met Leonard Lake in the early 1970's through a personal ad in the Berkeley Barb. 21 RT 5092. She had a relationship with him for several months from October 72 until June 73, which "metamorphosed several times". 21 RT 5093. At first Lake was "sweet", "very gentle", "very caring", "genuine concern and someone you'd like to know". This lasted for about 3 months. Then "it got kinky". She was 28 years old then, but in her own words "stupid". Then "our sexual behavior came aberrant, with her consent, and involved bondage, prostitution, and swinging, "lasting for about 2 months", then, she withdrew from the sexual relationship and they became "roommates".

When she told Lake that she did not want to continue with the prostitution, he "became very irate with me because we had rented an apartment and telephone and materials to furnish the apartment" and "we had not made back the cost of the expenditure to do this". 21 RT 5100.

Lake always wanted to be in control. Lake took surreptitious photographs of her while she was sleeping nude and refused to give her the negatives back. The relationship ended when they had an argument and Lake somehow tripped her onto the floor and pinned her down with his boot. 21 RT 5012. It was a real warning bell to her that Lake never brought his own friends around to introduce to her. Lake did say that he would like to make a "snuff film" because "it would create a passion for a woman that would be unequal". Lake also told her at one point that he "had cyanide in a tooth in his mouth". 21 RT 5104. Lake told her that he wanted to have an underground bunker so that in case of Holocaust or war he could retire with his family and friends and protect them. 21 RT 5105.

5. Tonya Levy.

Tonya Levy testified that in the early '70s she lived at Greenfield Ranch near Ukiah. It was a kind of extended commune where people could buy land from a large parcel at $100 an acre. 21 RT 5109. In 1974, she met Leonard Lake when Lake was teaching classes about alternative energy at a

country living festival in Ukiah. Her plans to build a house and garden on the property had come to a stand still and she was looking for a partner to help her. She described herself as "naïve". 21 RT 5111. She had spent a year trying to build a house, as well as working as an occupational therapist. They came to an agreement in which she sold him half of the property. After she deeded the property to him, he became more forthcoming about some of the things he was up to" including theft. He became "less charming".

Mrs. Levy developed a "bad feeling about it" because "he was a troubled person". She described "two sides of him", on one hand "charming" and "extremely helpful", but at the same time "he would do things to alienate people and not seem to know he was doing that". 21 RT 5113.

At the end of the summer of 1986, Ms. Levy sold her remaining half of the property to him. She saw him subsequently because she had other friends who were living in the same area and she liked the area. She described a period in their relationship that included "normal friendly sex" with "no dominance or S&M". 21 RT 5119. Leonard had some firearms on the ranch. She broke off the relationship with Lake because "he was very manipulative" and "he got violent with me once and I started to become afraid of him". 21 RT 5120.

6. Zephyr Bergera.

Zephyr Bergera testified that she has lived on Greenfield Ranch in Northern California for 26 years. She described Greenfield Ranch as a communitarian operation where everybody owned their own parcel but had restrictions about not using pesticides, not firing guns, etc. In the 1970s, she knew both Leonard Lake and Tonya Levy as people who lived on the ranch. 21 RT 5133. Lake presented himself as a photographer who liked to take pictures of nude people and he asked her several times to pose for him, but she refused. 21 RT 5135. Lake was interested in taking nude photographs of her then 10 year old daughter.

Lake refused to abide by the rule of not using a firearm except in self defense. Lake target practiced and was subsequently asked to leave the ranch. 21 RT 5137. He also violated a restriction against moving large quantities of dirt with a bulldozer. Lake talked about a "Miranda Project", but Zephyr thought it related to Miranda Rights as a legal concept.

Lake told her that he was combat soldier and involved in combat in Vietnam. She last saw him around 1980 or 1981 and may have talked to him once after he married Cricket. 21 RT 5140.

7. Laverne Smith.

Laverne Smith testified that she lived with Theresa Silveria after high school. At one point Theresa went to live with Richard Reeves at the Greenfield Ranch and Laverne visited her there. 21 RT 5169. She met Leonard Lake on the property. Lake drove her around the area on an all terrain vehicle and showed her a "bunker" while it was being built - a kind of underground structure. She recalled him talking about a "Miranda Project". Lake also talked about nuclear war and his survivalist efforts.

At one point Leonard offered her $100 if she would have sexual intercourse with Charles Gunnar. 21 RT 5178. She declined.

Lake also told her that he kept a cyanide pill and "would never be taken alive". Lake asked many times if he could photograph her nude. 21 RT 5180. She declined.

At one point, Lake took her to a nudist colony of some kind where they went into a hot tub and then had dinner. She last saw him in 1979 and described Lake as having two sides, one which was "very nice" but another that was "very controlling" and cold without any emotion. Lake, in many conversations, said he wanted a "submissive woman". 21 RT 5183.

8. Valerie Hammon.

Valerie Hammon testified that she was 18 years old in 1980 and attended the Renaissance Faire in Marin County. 21 RT 5206. She was with her boyfriend, Dale, and another couple. There was a booth at the fair where she had her picture taken with a goat that had been dressed up as a unicorn. 21 RT 5207. Leonard Lake took the picture. Lake later approached her at the fair saying he was going to make a calendar with the goat with 12 different girls, one for each month, and asked whether she was interested. 21 RT 5209. Lake arranged for an overnight with her boyfriend and Cricket. He said he wanted to take pictures of her in snow around Lake Tahoe, but Lake and Cricket tried to persuade her to take nude shots. 21 RT 5218.

9. Herlino Heras.

Herlino Heras testified that she was 14 years old in 1980 and attended the Renaissance Faire in Marin County where there was a unicorn stand. 21 RT 5222. She had her picture taken with the goat and Lake asked her parents if they would let her do some modeling. 21 RT 5224. Lake followed up and took her, along with her parents, to a place for some photographs. Lake told her that he wanted to take some more pictures at his farm in Calaveras County, and was adamant that he did not want her parents to come. 21 RT 5226. Eventually this idea fell through.

10. Pamela Ann Hays.

Pamela Ann Hays testified that she lived in the Ukiah area until 1985. 22 RT 5321. She had a consignment shop that sold furniture and vintage clothing. She met Lake in a bar on State Street where people would gather after work. He started dropping by her store a lot during the day and at some point asked to take her picture, as well as pictures of her friends. Lake proposed taking some professional photos that she could give to her boyfriend, Gary. 22 RT 5234. When she mentioned this to her boyfriend, he got upset and said he didn't want her to be anywhere alone with Lake. She said she was going to do it anyway and they met to do it one evening. 22 RT 5326. Lake showed her some photo albums and some of them were very nice professional black and white photos but others were of nude girls between the ages of 10 and 12. 22 RT 5327. Lake was very persistent in trying to persuade her to take her clothes off for nude photos. 22 RT 5238. He did the same thing with her younger sister to the extent that she asked the local sheriff to keep an eye on her sister because of Lake's unwanted attention. 22 RT 5331.

11. Kim Sarlo.

Kim Sarlo testified that she was an art student at the City College of San Francisco in the early 1980s and answered an ad on a bulletin board for a

photography student who was looking for a model to test equipment. 22 RT 5361. The name was Donald Lake. She called and agreed to meet him at an apartment on Feldon Street in San Francisco. She met the person at the apartment and it was Leonard Lake. 22 RT 5364.

After photographing her in a white t-shirt for a few minutes he asked her to take off her clothes. She said no and told him that she wanted to go home. He said fine, but then pulled out a gun. He took out the bullets and handed her the gun. 22 RT 5365. Then he pulled out a shotgun. She asked if he had a license for the gun and he said he had a lot of guns and knifes. He seemed "very calm", "very matter of fact". She said, "I'm leaving", got her purse, changed back into her shirt and left. Lake kept insisting that he pay her and she said, "I don't want any money." She saw him once again, after she called him, because she had left photographs that she had bought. They met in a public place and he gave them back. 22 RT 5367.

12. Mrs. C.

Ms. C. testified that she has lived in Washington state since 1984, but in the late 1970s lived in Redwood Valley near Greenfield Ranch. Her parents' property shared a boundary with Greenfield Ranch. 22 RT 5371. She was a teenager when Lake came to their house once to ask permission to park his truck in their property because the road to Greenfield Ranch was

impassable many times in winter. Lake wanted to park his truck on their property and then drive his 3-wheel motorcycle to the ranch. Her parents allowed him to do this and saw him periodically. Her parents eventually had Lake do odd jobs around the property. She and Lake once spent a number of hours building a fence together and a friendship developed. They began a sexual relationship before she was 16 years old. 22 RT 5374. At some point, her parents found out that she had some sort of relationship with him and forbid her to see him, but she continued anyway.

She went away to a boarding school and they continued corresponding. The summer of 1982, she was away at college and she began receiving letters from him under the alias Ted White. In 1984 Lake was driving an orange and white VW van with the license plate GUNNAR. She had met Gunnar earlier and knew him to be Lake's best friend. 22 RT 5384.

Lake had talked to her about having a "shelter" and urged her to come and be his companion, and get other women to do the cooking and cleaning. Lake thought that the end of the world was coming and that only a few would survive, which was his reason for the shelter. 22 RT 5388. On cross examination, she acknowledged that she loved Leonard Lake.

13. Pamela Burford.

Pamela Burford testified that in 1984, she lived on Carl Street in San Francisco at the "Pink Palace". She met a man who called himself "Steve" moving a refrigerator either into or out of the apartment next to her. She identified "Steve" as Lake from a photograph. 23 RT 5644.

After she saw Lake with the refrigerator, he came to her door, said that she was "beautiful" and asked if he could take photos of her. She was then and still is married to man named Michael, who was there that day. She agreed to let him take pictures of her at Golden Gate Park, one of which was Exhibit 583. 23 RT 5646-5647. Lake asked if he could photograph her without clothes and she declined. A month and a half later he came by unannounced and dropped off a bag of marijuana through their window. 23 RT 5649. The only thing Lake said was, "Here, here is this, enjoy. There's more where that came from". 23 RT 5651.

Some months later he appeared at her workplace, an A&W Root Beer stand, and asked her to let him take her home. 23 RT 5652. She declined because her husband dropped her off and picked her up. Lake left, and her husband picked her up as usual. When she got into the van, her husband was upset and asked her whether she was leaving him, and explained that everything she owned was gone. They went home and her home had been

burglarized and her clothing and jewelry had been taken. 23 RT 5656. She identified a yellow two-piece bathing suit that had been taken in the burglary, 23 RT 5658, and that had been subsequently found at Lake's Wilseyville property.

F. Evidence of Lake's Murder of His Best Friend, Charles Gunnar.

Victoria Johnson testified that she was married to Charles Gunnar, in 1979. 21 RT 5189. Lake was their best man at the wedding ceremony. They separated in December 1982, but had continuing contact because of their children. She last had contact with Charles in mid-1983. Lake told her that Charles was alive, but that he [Lake] was acting as the middleman in communications. 21 RT 5193.

There was also some conversation about Gunnar being dead and Lake urging her to stop the divorce proceedings because she didn't "have to worry about him coming back again". Lake said, "I'm not going to say he's dead", "but be assured that he is not coming back". 21 RT 5201. At some point in 1981, Lake told her that he would not be seeing Charles Gunnar anymore because he was "into some clandestine activities and he needed to stay underground". She last saw Lake at a garage sale Lake was holding in San Francisco, and noticed that he was selling some things that belonged to her.

21 RT 5203. Lake explained that he was selling the items to get money for Charles Gunnar, who was not present.

Eldena Martin testified that she lived in Morgan Hill, California, between 1980 and 1985. She became acquainted with Charles Gunnar as the father of children who went to school with her children. She was also acquainted with Victoria, Gunnar's wife. 22 RT 5422. At one point in the summer of 1983 she tried to contact Gunnar at his residence to return some children's clothes. When she called, Leonard Lake answered the telephone. They had a friendly conversation, and she made arrangements to drop the clothes off. Lake said that Gunnar had gone away and "moved up north with a female he had met". She began to see Lake socially and they had 15 or 20 dates. 22 RT 5424. Lake moved to a place in Myer's Flat in Northern California. She visited him there. At one point when he had spent the night at her house she discovered a gun in his shaving kit. 22 RT 5426. Lake used cash for all their expenses. On one occasion, he needed to pay a bill with a check and asked her to write the check and he reimbursed her in cash. 22 RT 5427.

She asked him on many occasions where Charles Gunnar was because she was concerned for his children. Lake vaguely reassured her that Gunnar was living in a small town, was not interested in the children, and that Lake

had made arrangements for them. She asked Lake to contact Gunnar so that she could talk to him, but he refused. 22 RT 5429.

Carol Wilson testified that in 1983 she lived near Morgan Hill, California and knew both Charles Gunnar and Leonard Lake. 24 RT 5911. She joined a clown group that Gunnar headed, and from time to time babysat his children. 24 RT 5912. There was a time in 1983 when Gunnar and Lake left to go to the Lake Tahoe area, but only Lake returned. Lake told Carol that Gunnar had met a girl and wanted to stay awhile to get to know her. 24 RT 5913.

Gunnar's body was found buried on Lake's Wilseyville property. 13 RT 3132. The cause of death was several gunshot wounds to the head and chest. 25 RT 6143.

G. Evidence of Lake's Exploitive and Controlling Treatment of Appellant.

Ernie Pardini testified that Leonard Lake was his next door neighbor in 1982 when he lived in Philo, California. Pardini lived in a mobile home with his family and Lake lived in a house on the same property, 100 feet away, and he saw Lake and Cricket on a daily basis. 23 RT 5665.

Appellant also lived there in early 1982.

Pardini observed that on an occasion that Pardini helped Lake move from the Philo Motel to the house adjacent to Pardini's trailer, "had been

really reprimanding appellant regularly throughout the whole time", that when they were working, Lake "spoke to him [Ng] in a very degrading and domineering manner, like rode him hard the whole time". 23 RT 5673. Lake spoke to appellant in a disparaging way "most of the time" and appellant "seemed very timid around Leonard almost – I guess kind of a hurt look in his eyes like he was trying to win approval and wasn't quite successful". 23 RT 5675. Never once did Pardini hear appellant talk back to him. When appellant was around Pardini's family, appellant was "very polite, spoke very low, very gentlemanly".

Lake ordered appellant around "like a slave" and appellant "always very, seemed very subservient and willing to do whatever Lake said", "like a lost child trying to win his father's approval." 23 RT 5685.

On occasion Pardini saw appellant in possession of a firearm, but did not see him shooting them like Lake. 23 RT 5696.

Sandra Bonecher testified she celebrated New Year's Eve 1981 at the Philo Motel with Cricket, Leonard Lake, her roommate Sue, and appellant, whom she recalled as "an extremely shy person, very, very quiet". 24 RT 5821.

H. Evidence of Lake's Dominant or Sole Role in the Charged Offenses and Other Crimes.

Joe Sundberg testified that in 1985 he lived in Milpitas, California, with his brother John Gouveia and his step-brother, Michael Carroll. 22 RT 5414. At one point, two men appeared at their house saying they were going to pick up some items for their step-brother Michael, and one of them said that Michael had written a letter to them that they would be doing this. Sundberg identified one of the men as Lake from a photograph. 22 RT 5415.

Sundberg gave Lake and the other man accompanying him some of Carroll's possessions that were being stored, and told them to leave. 22 RT 5417

Sundberg did not like the way the person looked and was very offended by the way Lake leered at his wife and daughter.

George Mucks testified that he lived in Wilseyville from 1979 to 1996 and ran an organization call "Lodestar", a Church camp for organized camping groups. He met a man who he knew as Charles Gunnar and Cricket. He identified Gunnar as Leonard Lake. 23 RT 5510. He never saw appellant in the area.

There was a date, February 25, 1985, confirmed by a police report, when he heard shots going through his trees. He and his boss were concerned because there were often many children at the camp and they went up to

Lonnie Bond's house on the adjacent property. Bond and another guy said that they were just shooting into dirt. 23 RT 5514. After leaving the Bond's, Mucks and his boss went over to Gunnar's, banged on the door, and after awhile, Lake came out. He had a sheet wrapped around his arm and otherwise appeared to be naked. The sheet looked like it had a significant amount of blood. Mucks asked, "what is that all about", and Lake said that he had cut himself on a circular saw. 23 RT 5518. That day he saw a light brown or beige Honda parked on Lake's property.

Part of Mucks' job was to check the level of water in the camp water tanks which involved him climbing up a ladder to the top and looking in. Lake frequently asked Mucks why he "needed to go up to the tanks all the time". 23 RT 5520. Mucks noted that he could see right into Lake's house from the top of the tanks.

There were Asian church groups that came to the camp, but otherwise "there are hardly ever Asians in our area". 23 RT 5523

Robert Barufaldi testified that in 1984 he lived in San Francisco. 23 RT 5545. He placed an ad in a magazine about sex with men. Somebody who identified himself as Tom answered the ad by telephone came and then to his house. He tentatively identified the person as Lake. 23 RT 5547. The

two talked, had sex, and Lake asked him to go to his country place. 23 RT 5549.

He subsequently received a letter from Tom giving him instructions where to meet. Robert did not go, but then received a call from Lake who was "very, very, very angry" and complained about being stood up. At that point, Robert made up his mind not to see him again. 23 RT 5551. Robert described Tom as "very creepy". 23 RT 5554.

Verna Parker testified that she was a neighbor of Paul Cosner and lived in the same building. 23 RT 5571. She last saw Cosner on a Friday, and the following Monday her landlady told her that she needed a key for the exterior door. 23 RT 5573.

The last time she saw Cosner he was backing his car out of the garage while another man she had never seen before was standing in front of the garage door. When he stared at her, she "didn't like the way he looked" and "felt very uncomfortable". She identified the man as Lake. 23 RT 5576. After Cosner backed his car out of the garage, Lake leaned into the window of Cosner's car and they started talking. 23 RT 5578.

Peggy Whitley testified that she lived in Wilseyville through 1990. 23 RT 5585. She worked part time at the post office and met Leonard Lake in 1979 or so, as well as Cricket. Lake had first introduced himself as Leonard

Lake, but some years later as "Charles Gunnar", but "it didn't mean anything to me". 23 RT 5586. At the time she did not realize that Gunnar was the same man she had met some years earlier as Leonard Lake. She attended three yard sales that Lake had put on. She bought some fairly expensive kitchenware from him the first time. 23 RT 5589. 23 RT 5590. Mail addressed to Sheryl O'Koro was delivered to Gunnar's address. She never saw Lake associated with any Asian male. She was familiar with the Lodestar camp.

Betty Banks testified that she had previously lived in Mokelumne Hill about 15 miles from Wilseyville. She was the office manager of an advertising newspaper. On one occasion, Charles Gunnar, whom she identified as Lake, came into the newspaper office and placed an ad. He also placed ads by telephone on occasion in 1985. 23 RT 5604. She identified a number of receipts for ads Gunnar placed including a 1973 Plymouth Fury and a 1979 Honda Civic.

She recalled Lake as having "a very cold nature" that made her "[want] to be extremely careful when I dealt with him". 23 RT 5611. She thought Lake had a very unpleasant smell comparable to what dogs and cats smell like when they roll on a dead thing. 23 RT 5612. She also described it as a "wild animal smell".

Philip Minton testified that he met Charles Gunnar [whom he identified as Leonard Lake] at a friend's house near Wilseyville. 23 RT 5618. His friends lived near Lake and he visited Lake's house on occasion. At that time he was a doctor with a general practice in Jackson, California, and on one occasion on February 25, 1985, treated Lake for a gunshot wound to his fingers at his office in Jackson. 23 RT 5622-3. Lake reported that he received the gunshot within the last twelve hours.

Dr. Minton at one point hired Lake to do some work at a home he was building in Pine Grove. 23 RT 5626. On one occasion when Dr. Minton visited Lake's property in Wilseyville, Minton saw Lake was building some kind of structure and made an attempt to look at it. Lake "didn't want me to go over and examine it". 23 RT 5630. Lake described an interest in survivalism. On one occasion when Dr. Minton was at Lake's house, Lake told Dr. Minton how much he liked the Southerns as neighbors, and how much he did not like the Bonds, his other neighbors. 23 RT 5631.

At one point, Lake offered to sell Dr. Minton chemical glassware, but Dr. Minton told him that doctors had no use for that, and, jokingly, that he might be better off trying to sell it to drug manufacturers in the Wilseyville area. Dr. Minton said that never saw Lake either with appellant or with Cricket. 23 RT 5639. On the occasions that he was at Lake's property, Lake

definitely tried to keep him in certain areas and away from other areas. 23 RT 5640.

The parties stipulated that James Southern would testify that he worked for Lake, building the cinderblock building for which Lake paid him in firewood; that Lake had a yellow Volkswagen bus; that Lake complained about the Bonds; and that he never saw any Asian man around Lake's property. Further, Lake had introduced himself as Charles Gunnar and that he [Lake] had been a pilot in Vietnam where he dropped bombs and had killed a lot of innocent people. 23 RT 5704. Lake told Southern that he believed it was okay to kill someone "if they were bugging you". 23 RT 5704. Southern told Lake that he believed in the bible and that it was wrong to kill, but Lake told him that "it should be just like in the old western days; you should be able to kill someone and forget about it". 23 RT 5705.

Tanya Right, testified that she lived with her mother in the Wilseyville area in 1984. She met Leonard Lake when her mother asked her to pick up a TV that she had bought from him. 24 RT 5713. She went to Lake's residence on Blue Mountain Road with a girlfriend during the daytime. She went to an open door and saw him talking on the phone. Lake "acted nervous" and "had a button on his 501 jeans that was undone". 24 RT 5715. Lake was pacing back and forth and got off the phone after about 10 minutes. Tanya thought

she noticed dried blood on the step going into the house. 24 RT 5717. Lake brought out the TV and Tanya gave him a check for $225.00, Exhibit 587.

Before she and her girlfriend left, Lake said that they could borrow some videos if they wanted except certain ones "your mother and father wouldn't appreciate". 24 RT 5721. She never saw anyone else at the house other than Lake.

Tamara Dougher testified that she knew Leonard Lake as "Allen Dray", Exhibit 565-A, whom she met at the Pink Palace boarding house in San Francisco. She lived there with her husband, Pierre, and was introduced to Lake by her next door neighbor, Maurice Rock.

She periodically prepared meals for Rock because she knew he took drugs and was sick. In the summer of 1984, Maurice Rock disappeared. She knew he was gone because she did not hear his guitar playing through the walls. 24 RT 5745. Rock had told her that they were going up to Allen's ranch to pick marijuana, and cook drugs with him. 24 RT 5747. Lake asked Tamara six or eight times if he could photograph her and at one point she agreed. However, when Lake came to her apartment with his cameras, she had "this very strange feeling" and told him that she did not want to do it. 24 RT 5750.

On another occasion, Lake gave her a letter with four marijuana cigarettes in it, and indicated that he would pay her with drugs or marijuana if she let him photograph her. 24 RT 5752.

A few months after Rock disappeared, Lake approached her at a bus stop and asked if she changed her mind about the photographs. Lake said that she could make money with the photographs because he knew someone who was involved in publishing a military magazine. She saw Lake about 10 times at the Pink Palace, but never with an Asian male. 24 RT 5756.

James Trotter testified that he has lived in San Francisco since 1980 and in 1983 lived on 19th Avenue in a rooming house that was run by his brother. 24 RT 5784. Some time in 1983 an individual who identified himself as Allen Dray [Lake] rented a room in the basement where Trotter's brother had built a kind of music studio. Trotter talked with Lake on occasion and once had lunch with him at a restaurant, but nothing more. 24 RT 5788. There was a period during January through October 1983 when Dray [Lake] associated with an Asian male [not appellant]. Lake moved out at some point in late '83 and moved back again in early '84 approximately. 24 RT 5790.

I. Evidence Regarding Lake's Hostile Relations with the Bonds and Stapley.

Curtis Everett testified that he was an acquaintance of Lonnie Bond and Scott Stapley, initially in San Diego, and also after he moved to Winton in

Merced County. 25 RT 6161. Bond and Stapley were manufacturing methamphetamine in Paso Robles and in Wilseyville. 25 RT 6165.

Cody Landers testified that he met Brenda O'Connor in March or April of 1985 when O'Connor was staying at a friend's house. 25 RT 6180. At some point, Cody and his girlfriend gave Brenda a ride up to Wilseyville where her boyfriend Lonnie Bond was. Brenda said she was afraid of going back to Wilseyville because of a neighbor who "kept approaching her" and who was "asking if he could take pictures of her and her baby naked". 25 RT 6182. When they arrived, Lonnie Bond questioned Brenda about a check that was supposed to have been at the post office. Inside their house there was another person sitting at a table splitting up three pounds of marijuana. He identified the person as Lake. 25 RT 6183.

Marsha Bock testified that she lived in Winton, California in 1985, and was married to Curtis Everett. 26 RT 6350. She was also acquainted with Lonnie Bond, Brenda O'Connor and Robin Stapley. In approximately April 1985, she and her husband went to a motorcycle gathering in Yuma, Arizona. 26 RT 6352. She last saw Lonnie Bond on the early morning of April 18 when he left their house, along with another man named Chuck. She had tried unsuccessfully to dissuade him from going up to Lake's residence to settle a score. Bond said that Gunnar/Lake had constantly said how he was

going to have "Brenda" and Bond "didn't like that". 26 RT 6355. Marsha had a bad feeling that she would never see him again and begged him not to go. Bond said that he was taking a .22 pistol with him. They made an arrangement to meet in San Diego the following Tuesday, but Bond never showed up and she never saw him again. 26 RT 6359.

J. Evidence of Prior and Continuing Criminality by Lake and Cricket.

Denise Dutil testified that in 1982 and 1983 she lived at the Hill Crest Home and Day Care Center, a juvenile court school. She knew one of the teacher's aides as Claralyn Balazs. 23 RT 5446. They were acquaintances but not particularly close. There was one occasion where she went to Lake Tahoe with Claralyn and her father, some time in the winter of '82-'83.

Tina Marques testified that in the 1980's she attended the Hill Crest School when she was 16. 23 RT 5470. She met Claralyn Balazs who was a teacher's aide in her math class. At one point, Claralyn came to Tina and said that a friend of hers was a photographer, had seen a picture of Tina, and thought she could be a model. Claralyn then brought Leonard Lake to her house, but introduced him as Charles Gunnar. She ended up having three photo sessions at her home in San Mateo. She had her clothes on in all of the sessions. 23 RT 5473. She cut off contact with Lake when she became concerned about his strange and scary behavior. 23 RT 5474.

Marion Dornan testified that she lived in Morgan Hill during her teenage years. At one point she was walking home from a friend's house and Leonard Lake (introducing himself as Charles Gunnar) approached her and asked if she knew anyone who might baby-sit for his nieces. She volunteered to do it. She did some babysitting and then Lake asked if he could take some photographs of her including nude photos. She refused to do any nude photos but agreed to pose clothed. She met Lake at a residence in Morgan Hill, where he gave her clothes to wear for the photographs, and asked her to change in the master bedroom, not in the bathroom. Lake surreptitiously videotaped her changing clothes. 23 RT 5482. Lake introduced her to Cricket as his girlfriend, and asked her if she would come to Lake Tahoe with the girls and Cricket to baby-sit, and when she declined "he got rather upset and walked away". 23 RT 5487.

Colleen Poliakoff testified that she lived in the Bay Area in 1981 and 1982 and had a friend named Scott Rosner. 23 RT 5529. At some point he met a girl that Scott was dating who was introduced as Lyn Balazs. Some time in 1982 or 1983, Lyn suggested that she accompany Lake to Wilseyville for an outing which she did. Lake wanted to take pictures of her in camouflage clothes holding weapons, but she declined. 23 RT 5536. At one point during the weekend, Lake asked whether she had told anyone that she

was going up for the weekend and Colleen responded that she had, at which point, Lake "just seemed to get very defensive about it" and "got mad". Lake told her that he had a "fantasy" about "taking somebody and keeping them as a sex toy type slave thing". She took it like he was kidding, but he talked very seriously about it. 23 RT 5537. When Cricket and Scott Rosner stopped dating, Cricket was angry at him. 23 RT 5539. Sometime after that she was at Cricket's parent's house with Lake and Cricket and overheard them discussing a plot to drug, kidnap and kill Scott Rosner. 23 RT 5540. The last time she saw Cricket was in 1983 or 1984. 23 RT 5541.

Ernie Pardini testified that Lake, on several occasions, invited Pardini and his wife over to watch videos that he had made of Cricket and other people, and from Lake's demeanor Pardini understood that they were "obscene". Cricket had told Pardini that Lake had taken videos of Cricket with other men at the Philo Motel. 23 RT 5687.

Wesley Doidge testified that he used to work for the San Mateo County Probation Department as a clerk in the same building where Claralyn Balazs worked in the San Mateo County Girls Daycare Center. 24 RT 5729. She was a teacher's aide and spoke to her on a weekly basis. They discovered that they had a mutual friend. At some point, she offered to sell him a firearm, which he declined. 24 RT 5731. On one occasion, she invited him to go up

to the mountains with her "to engage in heavy automatic weapons there", including target practicing. She spoke of Leonard Lake as her "ex" who was up at the Wilseyville cabin. 24 RT 5734. She invited other people from the Probation Department up to the mountains as well, and mentioned a "swing party" to another co-worker. 24 RT 5736.

Sandra Bonecher testified that she has lived in San Francisco for 19 years and has known Cricket for at least 20 years. 24 RT 5812. Through Cricket she met Leonard Lake. There was a time after the case broke in the newspapers that Cricket appeared at her apartment, and she asked if she could store some things with Sandra. Cricket was "extremely upset" and "in tears". Cricket said that the items had come from Wilseyville. 24 RT 5814. Later Cricket explained that these were some of Lake's papers, calendar pages, and diary pages.

She acknowledged a statement she had made to a defense investigator that Cricket had said she "was going to put this off on Charles Ng because she just didn't believe that Leonard Lake could be involved with it". 24 RT 5818.

Detective Copeland acknowledged receiving from Agent Ragan, at the Drug Enforcement Administration Office in Sacramento, a Mac-10 automatic pistol with silencer, registered to Claralyn Balazs. 24 RT 5939.

Claralyn Balazs testified she obtained an immunity agreement from the State of California including complete use immunity and transactional immunity as to any crimes involved Dubs' family, Cosner, Peranteau, Gerald, Carroll, Allen, the Bond/O'Connor family, Charles Gunnar, Randy Jacobson, Tom Meyers, Donald Lake, Sheryl O'Koro, Maurice Rock, and Robin Scott Stapley. 27 RT 6578.

Edward Erdelatz testified that in 1984/1985 he was a detective with the San Francisco police department, on homicide detail. 27 RT 6582. On two occasions he went to Claralyn Balazs' apartment at 156 Pecks Lane in South San Francisco. The first time she was there he obtained property from her voluntarily and the second time he served a search warrant and obtained other property. 27 RT 6586. He confirmed that he obtained the necklace with a small heart attached from her on one of these occasions. 27 RT 6588. He also identified two video tapes that had been rented to Harvey Dubs that were seized from her residence. 27 RT 6591.

K. Forensic Evidence.

Dr. Gregory Golden testified that he is a forensic dentist, 24 RT 5958, and has testified as an expert regarding the identification of bodies based on dental characteristics. He examined dental evidence in the case, and opined that five fragments in this case could have come from children

between the age of six months to seven years. 24 RT 5968. There were no duplicate teeth fragments, i.e., that prove more than one child victim. 24 RT 5969. Rather, the stronger likelihood was that they were only from one child. He acknowledged there was a difference of opinion between himself and other dentists in the case whether another tooth fragment was likely from a young child. 24 RT 5994.

The parties entered a lengthy stipulation regarding DNA evidence, specifically that a fragment of a charred child's liver found on the Wilseyville property was analyzed for DNA in comparison with the named child victims, Sean Dubs in Count I and Lonnie Bond, Jr. in Count XI, and the charred liver fragment was not that of either victim. 25 RT 6119.

The Department of Justice also obtained DNA samples from the relatives of Brenda O'Connor (Count XII), Kathleen Allen (Count VIII), Maurice Rock, an uncharged victim, and Sheryl O'Koro another uncharged victim. That DNA was compared with DNA extracted from bone and tissue fragments from the Wilseyville property designated as the 300 Series, and a match was found only with Sheryl O'Koro. 25 RT 6121.

Dr. Salvkin testified that he is an expert in cranial facial tooth development, having been a professor at USC and currently the director of NIH Research Division in that area. 26 RT 6205. He was asked by Dr. Vale

to examine certain tooth fragments and tried to determine the age of the tooth without cutting them, which would have been helpful as far as revealing the "lines of ritzeus which are formed in enamel". 26 RT 6210. He examined certain specimens that he identified as generally coming from someone in young adulthood. 26 RT 6212.

Philip Walker testified that he is a professor of anthropology at the University of California Santa Barbara. 26 RT 6230. Early in the case he was contacted by Dr. Vale to take a look at some fragments of some jaw fragments regarding their origin. Dr. Vale brought some specimens to his laboratory in Santa Barbara. On the "minimum number of individuals" list that Dr. Vale had, one specimen was listed as having come from an infant, defined by Dr. Brikby as between birth and two years of age. 26 RT 6235.

He examined a petrasol bone, Defendant's Exhibit 615, a very hard inner ear bone. Dr. Walker agreed that the fact that there were five left and five right petrasol bones recovered indicate they were the remains of five different individuals, and perhaps as many as 10. 26 RT 6238. He compared the petrasol from a child known to be 3-1/2 years old with the other petrasol bones for comparative age determination. The two child petrasol bones that were collected as evidence in this case "plot out exactly the same place, virtually the same place as a 3-1/2 year old child". 26 RT 6244. His opinion

was that the child bones were older than 3-1/2 years, "because when bones are cremated, they shrink, so they get smaller". 26 RT 6246. Dr. Walker's opinion was clear that as far as petrasol bones, (there were none recovered belonging to any infant). Rather, the youngest petrasol bones most likely came from a child of about four years old. 26 RT 6249.

Donnie Mambretti testified that she is a finger print analyst for the California Department of Justice. 26 RT 6361. She worked with Angelo Rinte lifting fingerprints from Lake's house in Wilseyville in 1985, on June 6, 7, and 12. 26 RT 6362. She found more than 80 identifiable latent prints in the house, and the house next door. Of all these, there was only one that belonged to appellant on a wine bottle that was found on a shelf in the kitchen of Lake's house in Wilseyville. 26 RT 6365. There were at least 25 prints taken from the bunker, of which 17 belonged to Lake, and none to appellant. 26 RT 6367. There were prints from Lake in both of the two hidden rooms. Both Lake's prints and Lonnie Bond's prints were found on chemical glassware in the bunker. 26 RT 6369.

She also found two of Cricket's fingerprints in the house, one on the bathroom mirror and one on an A&W root beer mug.

Dr. Gene Hiegel testified that he is a chemistry professor at California State University, Fullerton. 27 RT 6445. He was asked by defense counsel to

determine whether bones would dissolve in some combination of nitrate acid and hydrochloric acid. Dr. Hiegel took beef bones bought in a grocery store, smashed them with a hammer into small pieces and put each piece into acid solutions of various contents. 27 RT 6447. The mixture of hydrochloric acid and nitrate acid produces a different liquid called aqua regia, which is very strong. The reactions occurred faster when the solution was heated. The aqua regia dissolved everything, protein, and minerals and structure while the diluted hydrochloric acid dissolved the minerals, but not the protein. 27 RT 6450.

Judy Suchey testified that she is a professor at California State University, Fullerton, specializing in Forensic Anthropology. She studies human skeletal remains, both prehistoric or Native American and contemporary skeletons, including identification of bones and bodies. She has given training lessons to law enforcement regarding the excavation or recovery of skeletal remains and the identification of individuals. She expressed criticism regarding the excavation of Lake's property by law enforcement. 27 RT 6465.

She agreed with Dr. Birkby's conclusion that based on petrosal bones there were a minimum of four adults and a child among the remains. 27 RT

6513. She also believed that the rib 1, and rib 2 fragments were of a child rather than an infant. 27 RT 6516.

The parties entered stipulations with respect to handwriting authorship on various documents, 27 RT 6543, e.g., that Leonard Lake wrote the words, "whore, druggie, betrayed her race" on page 11 of a letter regarding Sheryl O'Koro. 27 RT 6544. Further stipulations included the finding that Lake probably wrote the Michael Carroll signature on Document Q-4, and that he did write the Michael Carroll signature on Q-5. 27 RT 6550. Lake wrote the Clifford Peranteau signature on Q-3. The parties stipulated that Leonard Lake endorsed on Donald Lake's disability checks. 27 RT 6559. The only questioned signature that was likely written by appellant was the "Mike Kimoto" signature on the post office documents. 27 RT 6560.

Dr. Boyd Stephens, called by the defense, testified that he did the autopsies of Robin Scott Stapley and Lonnie Bond, which were found in sleeping bags buried in Wilseyville. 27 RT 6645. The ball gag that was found around Lonnie Bond's neck was generally available in the '80s in stores "that were oriented toward sexual activities, and this includes pseudo masochism, bondage and domination". 27 RT 6647.

Regarding Stapley, one gunshot fractured several of his teeth. Based on the absence of injury to the soft tissue of the lips, Dr. Stephen's formed the

opinion that "the gun was up in the mouth rather than just firing with the mouth open". 27 RT 6652. Stapley also had a ball gag attached to his body. Dr. Stephens was unable to determine in what order the two men were killed, or the specific timeframe of the two killings. 27 RT 6662.

L. Evidence Impeaching Maurice LaBerge.

Charles Darwent testified that he has been a practicing lawyer in Calgary, Alberta, Canada, for some 23 years. 24 RT 5997. Darwent was Maurice LaBerge's defense attorney in 1982 regarding the McLaughlin robbery, as well as other matters. 24 RT 5998. Darwent was aware that LaBerge testified as an informant in a criminal prosecution of Daniel Gingras. Darwent stated that it would be an ethical breach for a Canadian lawyer to put a client on the stand to deny commission of the crime where the client had privately admitted commission of the crime. Darwent was shown an excerpt of LaBerge's testimony against Gingras in April 6, 1989, in which LaBerge said that he had told Darwent that he had committed the McLaughlin crimes. Darwent denied that LaBerge had ever admitted committing the crime to him before or after he called him as a witness at the McLaughlin trial. 24 RT 6003.

The parties stipulated that Sam Lister would testify that in 1983 he was a California Department of Justice Agent; that he interviewed Maurice

LaBerge on March 5, 1993; and that during the interview LaBerge stated that he did not always record the notes of his conversations with appellant on the same day that he had the conversation. 27 RT 6621.

M. Evidence of Appellant's Background and Upbringing.

Alice Shum testified that she is appellant's maternal aunt. 26 RT 6289. She came to the United States in 1973. In approximately 1979, appellant was sent from Hong Kong to study at the University of Norte Dame, San Mateo, California. 26 RT 6291. Appellant lived with Alice from before he actually started school and then he lived in the Norte Dame dormitory, and lived at her house during summer vacation. 26 RT 6293. At some point during that first summer, she asked Charles to get a driver's license so that he could provide his own transportation and not rely on her to drive him around, which he did, Exhibit 215, listing her address in San Leandro as his address. During that summer, appellant bought a car and after about two months he got into an accident backing into a pole and another accident in which he backed into a neighbor's car. 26 RT 6296. Alice avoiding riding with him because she "was really scared the way he drove".

After he joined the Marines he remained in contact via letters and telephone calls.

Appellant was out of California from 1982 through 1984, and when he returned he stayed with her for a week or more before moving to San Francisco. Eventually, appellant moved to Lenox Street in San Francisco where she visited him on occasion. 26 RT 6301. She occasionally took home cooked meals to him and alerted him to a job opening at a moving company that she heard about from a co-worker.

In June 1985, appellant called, told her he wanted to go on a vacation and asked to borrow $200 against his pay. He had previously borrowed money from her and had paid her back every time. 26 RT 6305. She met him at a BART station to give him the money, drove him to his Lenox Street apartment, and then took him to the airport. Appellant did not act or seem nervous at all or act unusual. 26 RT 6307.

N. Appellant's Testimony.

Charles Ng testified on his own behalf that he knew Cliff Peranteau from working with him at the Dennis Moving Company in 1984-1985. Prior to that job, appellant worked at the China Bazaar in San Francisco Chinatown. 30 RT 7160.

He acknowledged that he was receiving correspondence and photographs from Lake while he was at Fort Leavenworth prior to July 1984. 30 RT 7161. Appellant knew that Lake was a fugitive at that time and that his

cousin was acting as the intermediary in the correspondence. Appellant knew Lake as a "survivalist" meaning that the end of the world was near and Lake was building survival shelters, and stocking supplies and weapons in anticipation of a social breakdown. 30 RT 7163. Appellant believed that Lake was a Vietnam veteran based on what Lake and Mark Novak had told him, along with appellant's reading of written material about Vietnam. Appellant knew Lake as his military superior and as a patriot because he had fought for his company and as a person he looked up to. 30 RT 7166.

Appellant was reminded of the testimony of Ernie Pardini that Lake used appellant as a "Chinese Houseboy". Appellant felt as though Lake was helping him out with a place to stay and work and he didn't want to make him angry. Appellant did not feel comfortable in the United States as a Hong Kong born foreigner. 30 RT 7168. Appellant described certain chants that he was taught in the Marine Corp such as "no pain, no gain" as motivating factors. When he worked at The Dennis Moving Co., people called him "the crazy Marine" and viewed him as odd because he did not like to do things they did like drugs, drinking, and sports. He did try to participate by engaging in verbal horseplay where they would say a phrase and would finish it, "after they were saying, 'no gun,' and I am saying, 'no fun', that kind of thing, and then just in that jocular type of locker room talk". Otherwise, there

was nothing in these sayings such as "no kill, no thrill", it was "just a saying". 30 RT 7174.

Appellant worked for the Dennis Moving Co. on January 18, 1985. He worked 10 hours that day. Cliff Peranteau did not work on January 19, although appellant and Salcedo worked four hours overtime. 30 RT 7178. Appellant worked on the several days following Peranteau's disappearance, and had nothing to do with his disappearance. 30 RT 7180. While he had a driver's license, he did not drive because he was not good at it. When he went to Wilseyville to see Lake, he took a Greyhound Bus from San Francisco to Stockton and called Lake, who picked him up there.

Lake sometimes stayed at appellant's apartment at 136 Lenox Avenue, and kept clothing, tools, ammunition and marijuana there on occasion. The marijuana found there belonged to Lake. Lake sometimes used appellant's answering machine with a message in his own (Lake's) voice when he put ads in newspapers. Lake kept a toothbrush at appellant's apartment, as pointed out in photograph 525. Lake left a pen and pencil set belonging to Cliff Peranteau at appellant's apartment even though appellant said he particularly did not want it. 30 RT 7188.

Lake sent appellant photos of the bunker under construction while appellant was in Fort Leavenworth, which Appellant associated with his

survivalist activities. He had no idea Lake was making a sex slave cell. 30 RT 7190.

On the property in Wilseyville, appellant was never in the secret bunker. He was in the tool shed and in front of the bunker. Lake told appellant that there was a secret chamber, but "that was my domain", and didn't want appellant to intrude into it. 30 RT 7192.

Regarding the cartoon that has appellant sitting in a San Quentin cell with a picture on the wall with the name Peranteau, appellant explained that he and LaBerge were in solitary confinement in adjacent cells, and for amusement they made cartoons together – "he would draw part of the cartoon and slide it over to me, and I would embellish it and send it back, and that is kind of human thing between him and me at the time with respect to some of these cartoons". 30 RT 7196. Appellant also took correspondence courses to pass the time.

When the idea of a particular cartoon was LaBerge's, appellant drew a small frog in the cartoon because that was appellant's nickname for LaBerge. 30 RT 7201.

The reason that there was a phrase, "no kill, no thrill" in one of the cartoons was that LaBerge had read some of the police reports by the Dennis Mover's employees who reported that appellant had said that.

Appellant denied that he had ever been to Peranteau's apartment. Notwithstanding Hector Salcedo's testimony, he did know that Peranteau smoked marijuana because he did it during his work breaks. 30 RT 7203. Appellant had introduced Lake to Peranteau one time when they were riding the streetcar together from work. 30 RT 7207.

When appellant rejoined Lake in July 1984, Lake was different – "he was more secretive, he was more paranoid. He was more security conscious. He doesn't want me to know a lot of things he was doing or involved in at that time." 30 RT 7213. Appellant was using alias names such as Tom Meyers, and Gunnar.

Appellant testified that Lake directed him to open a post office box in Pioneer and to put Donald Lake down as an additional person to receive mail. 30 RT 7216.

Appellant acknowledged a felony conviction for burglary and theft of government property while in the Marines. He received a three year sentence which he served at the Disciplinary Barracks at Fort Leavenworth. 30 RT 7217.

Appellant expected to be deported when he was released from prison because he was not a United States citizen. He has no idea why he wasn't, and thought it was "just probably bureaucratic snafu". 30 RT 7218.

He said it was ludicrous that he would kill Jeff Gerald to advance his position in the Dennis Moving Company, and denied ever calling Terry Kailer. 30 RT 7221.

On February 25, 1985, Appellant worked eight hours. Gerald did not work on that date. About this time, Lake shot himself in the finger and required medical attention from his cousin and from a doctor. Appellant testified that it was highly unlikely that he would have gone to Wilseyville on Sunday, February 24, knowing he had to work an eight hour day the following day because the work was exhausting. 30 RT 7226. Appellant was at work all day on February 27, when someone burglarized Terry Kailer's apartment and took Jeff Gerald's belongings. Regarding Terry Kailer's testimony that the caller had a Mexican accent, appellant said he could not manage that. 30 RT 7227.

Appellant lent LaBerge Lake's diary to read and LaBerge kept it for a week while in jail. Appellant denied making any other incriminating statements to LaBerge about the Dubs or other victims. 30 RT 7233.

Regarding the Dubs' VCR player found at appellant's residence, appellant explained that Leonard Lake brought that and left it at his apartment so that appellant could copy videos for him because television reception was really bad in Wilseyville. 30 RT 7235.

Appellant acknowledged that he went to the Dubs' apartment and took property at Lake's request. Lake drove appellant to the apartment on Yukon and gave him a key and told him to go open the door, and get a duffle bag and a flight bag that were sitting inside the door. The witness, Barbara Speaker, was correct in identifying appellant going into the apartment. 30 RT 7244. Appellant denied making a series of sexually graphic comments about the Dubs' to LaBerge.

In June 1985, appellant took a vise out of the hardware store "because Leonard Lake told me he needed a new vise for his workshop in Wilseyville and he didn't want to pay for it". 30 RT 7253. When asked whether appellant would do "just about anything Leonard Lake told you to do", appellant answered "no". Appellant stated that there was a line he wouldn't cross relating to "either hurting, killing somebody, something serious, I won't do it". 30 RT 7254.

Lake told appellant that he got the car that turned out to be Paul Cosner's Honda "from some drug dealers he dealt with, illicit business". 30 RT 7260. Appellant denied any involvement with the killing of Paul Cosner, and denied he ever used Cosner's identification, though Lake "was desperate in need of always trying to look for ID's, alternative source of ID that could pass for him". 30 RT 7261.

Appellant testified that he went to Canada out of fear, particularly because he did not know the full range of criminal activities in which Lake was involved in. He knew the car was stolen, and he was concerned about being deported. 30 RT 7262. Appellant also knew that he had been involved in the burglary at the Dubs' apartment and that he had marijuana of Lake's in his own apartment. 30 RT 7263. The firearm he had when he was arrested in Canada had been obtained for target shooting. Lake left the Chinese ammunition in appellant's apartment. Appellant's firearm was not fitted for a silencer, although Lake's was. Appellant's pistol "was a target pistol, nothing more". 30 RT 7268.

Appellant was not involved in killing Lonnie Bond or Stapley, but Lake asked him to help arrange the dead bodies so that they were tied up and bound "like the biker style", "to appear to be killed by rival drug dealers or biker-type people'. 30 RT 7272. Appellant tied them up and put gags on them. Appellant helped bury the bodies as well. 30 RT 7273. Appellant worked eight hours on April 18, eight hours on April 19, and seven hours on April 20. When Appellant saw Bond, he was dead and lying under the rear porch of Lake's house. 30 RT 7274.

Appellant had nothing to do with the First Interstate Bank Versatel card of Lonnie Bond's that was found at his apartment in San Francisco. 30 RT 7278.

Regarding the M Ladies videotape, appellant explained that "the tape was Leonard Lake's idea", and appellant was assisting him "to gain compliance and cooperation of Kathy Allen". Appellant knew that Lake wanted to keep her as a prisoner, "basically somebody that he is going to keep for awhile to fulfill his fantasy". 30 RT 7282. It was not appellant's impression that Lake planned to kill her. Appellant understood that she was not there willingly at the outset, and did not know whether she would eventually become willing. At one point on the tape, appellant said "this is surprisingly cooperative" because he thought she "would do most of the things that people would do in that circumstance, maybe starting to run away or trying to fight or something like that". 30 RT 7283. Kathy Allen was the first female that appellant had assisted Lake in capturing. Appellant was neither able to confront Lake verbally nor to refuse his directions. Regarding Lake's threats to kill her, in reference to burying Carroll, appellant was referring to a conversation that occurred yesterday, killing Michael Carroll. 30 RT 7287. Appellant denied calling John Gouveia for Michael Carroll and using the name "Chuck". Appellant never used the name Chuck. 30 RT 7288.

Appellant did not work on either April 14 or 15, and the evidence shows that Kathy Allen was picked up by a Caucasian male at 7:30 on April 14. Lake told Kathy that she would be released in 30 days on May 15. By deduction, the M Ladies tape was made on April 14 or 15. 30 RT 7289. Appellant did not work on April 16, but worked eight hours on the 17th, 18th, 19th, and 20th. When Appellant left Wilseyville to go back to work, Kathy Allen was alive. 30 RT 7291. Appellant denied there was any agreement between himself and Lake to kill Kathy Allen. 30 RT 7295.

Appellant introduced Lake to Perry McFarland and Lake did some remodeling work at the McFarland residence. McFarland complained that Lake had stolen a photograph of McFarland's wife and appellant told Lake that McFarland was angry and might cause Lake some problems. 30 RT 7318. Appellant returned the photo.

Appellant was with Leonard Lake driving Robin Scott Stapley's truck at 6:40 a.m. Tuesday, April 23, 1985 when he got into an accident. 30 RT 7321. On April 24, he and Lake arrived at the home of Tori Doolin. Appellant heard Lake tell Doolin that the bodies had been burned Indian style, but that was not true. 30 RT 7324. Appellant denied telling LaBerge that he put a gun in Stapley's mouth and shot him. 30 RT 7330. Some of the

statements LaBerge attributed to appellant were just implausible, like shooting off a .357 magnum pistol inside Lake's home. 30 RT 7334.

Regarding the Brenda O'Connor and the M Ladies tape, appellant understood that Lake was doing the same thing as he had done with Kathy Allen. Lake had told appellant that he did not like O'Connor for a number of reasons. Appellant knew that Lake intended to make O'Connor a prisoner and appellant intended to help "by projecting this solidarity with Lake that there are two persons involved, that Brenda will comply and that she will also not try to run away". 30 RT 7339. Appellant never intended to hurt her, kill her or help Lake kill her.

Appellant acted aggressively on the videotape "because Lake like[d] Kathy Allen but hate[d] Brenda O'Connor, so he kind of set the tone, these two contrasts between Brenda and Kathy Allen, and by the time this Brenda O'Connor portion of the M Ladies tape, I already got the wind of how Lake liked this thing to come out". 30 RT 7342. Appellant knew that Lake enjoyed dominance over women, as he had engaged in that type of activity with Cricket. When Brenda said to Lake, " [apparently using the " Gunnar" alias], What are you going to do to us? Why are you doing this?", Leonard responded, "Because we hate you". Appellant did not hate her, but also did not object because he was like "putting on an act rather than natural type of

thing, so I know Leonard Lake is doing the same thing as making his speech and monologue, and I am not in the position during the camera session to interfere and interject and confront him with anything". 30 RT 7343. Appellant behaved in a certain way because the camera was on.

Regarding appellant's response to Brenda O'Connor's statement, "You're not taking my baby away from me?", appellant said, "It is better than the baby is dead, right?" When asked why he said that, appellant answered, "I don't know why I said that", but "it was just in the heat of the moment". He made the comment "we're pretty coldhearted" as part of the effort to intimidate her. 30 RT 7345. When Lake made the remarks about Brenda cooking for them, working for them, and having sex with them, appellant thought that Lake was "making the same kind of remarks that are idle threats that are instrumental in controlling and cooperating Brenda". 30 RT 7346. On the tape, Brenda asked Lake if he was going to keep her there for the rest of her life, and Lake said, "To be honest with you, I probably won't keep you here for more than a few weeks", which appellant believed. 30 RT 7348.

Regarding photographs 35E and 35F, both of Brenda O'Connor looking as though she was about to cry, appellant notes that they were taken outdoors with the grass behind her, and he was not present. 30 RT 7354. He

never had any agreement with Lake to kill anyone and he never intended to kill any of them. 30 RT 7356.

Regarding appellant's initial contact with Lake in 1981, appellant was in Philo when Lake was arrested for illegal weapons violation. 30 RT 7389. From appellant's point of view, Lake seemed "pretty concerned and considerate of me" when he first arrived." The relationship changed after awhile and Lake became more bossy. Appellant stayed by choice, and even stayed after his aunt and mother visited him. 30 RT 7391. The prosecution introduced a letter written by appellant while in Leavenworth, Exhibit 243, in which he states his love for Cricket and Cinder, Cricket's dog. 30 RT 7395.

After the shoplifting incident on June 2, 1983, appellant went to Cricket's house, told her what had happened and she drove the two of them to the hardware store to check. Appellant ducked down so that nobody would see him, and Cricket told him that she saw Leonard with police. 31 RT 7597. Later, he heard that Lake had swallowed a cyanide pill, appellant talked to Cricket's mother who was "pretty distraught and hold me to, to try to get away."

PENALTY PHASE

I. The Prosecution Case

A. Evidence Regarding Appellant's Misconduct in the Marine Corps.

The parties stipulated that appellant was convicted on July 15, 1982, by military court martial of conspiracy to steal government property on October 10, 1981; theft of government property and burglary of government property. The parties further stipulated that on November 14, 1981, appellant escaped from lawful confinement on a military facility and remained absent until April 29, 1982. 34 RT 8401.

B. Evidence of Appellant's Arrest in 1982.

Steven Satterwhite testified that he is a Sonoma County Sheriff Detective, and that on April 29, 1982, he worked for the Mendocino County Sheriff's Department in Ukiah. He arrested appellant near Philo on the Indian Creek Ranch. 34 RT 8409. After Det. Satterwhite arrested appellant, he searched a structure there including a room that had two photographs of appellant and some mail addressed to someone named Richard Lee. He also found a .38 caliber revolver in a chest of drawers, 34 RT 8412, two loaded rifles under a table, and a Browning .9 mm. pistol in a desk. 34 RT 8414. Other weapons recovered included nunchakus, two Chinese throwing stars,

and a billy club. 34 RT 8416. Leonard Lake was present at the time of the search, as was Cricket. 34 RT 8418.

C. Evidence of Appellant's Arrest in Canada.

Sean Doyle testified that on July 6, 1985, he was a school teacher who worked part time as a security guard at Hudson Bay Company, a department store. 34 RT 8337. Doyle was working with his partner looking for shoplifters when he saw appellant put a tin of salmon into his bag. Appellant put several other food items into the bag and then left the store without paying at a cash register. Doyle went up to him after he had reached the street and told him that he was under arrest. Doyle took the bag and walked appellant back into the store without any resistance.

After re-entering the store, appellant attempted to get something from the fanny pack he was wearing, and Doyle's partner, George, shouted, "he has got a gun" and a struggle started. Doyle "kicked out his feet and shouldered him at the same time and we fell to the ground". 34 RT 8341. Doyle put his hands around the trigger guard, but appellant kneed him pulled the trigger. Doyle tried again to control the gun and appellant bit him on the wrist. Doyle was on top of appellant when the gun went off again, injuring Doyle's hand. Constables then arrived from the Calgary Police Department and took appellant into custody. 34 RT 8346.

Donald Bishop testified that he is a staff sergeant with the Calgary police and on July 6, 1985, responded to a shoplifting incident at Hudson Bay Company where he encountered appellant. 34 RT 8357. When he arrived, Doyle and the other guard were "trying to subdue the accused who was proned on the floor at the location". Doyle and his partner were on top of appellant, face down, and Bishop did not see a gun. Bishop had his partner secure appellant's right arm while Bishop extracted the gun. The gun was a semi-automatic .22 caliber pistol.

D. Victim Impact Evidence.

Sharon O'Connor testified that she is Brenda O'Connor's mother and Lonnie Bond's grandmother. 34 RT 8380. Brenda was the youngest of seven children, born on February 24, 1965. She identified a photograph of a family gathering for her 30th wedding anniversary on October 24, 1984.

Sharon O'Connor was very close to her daughter Brenda and her death was "very hard". 34 RT 8385. Her grandson was "the sweetest little guy". It was very hard on the family not having any remains because they could not have a funeral, although they did have a memorial. 34 RT 8387.

Sandra Bond testified that she is married to Art Bond who was Lonnie Bond's brother. 34 RT 8389. The death of Lonnie Bond, Jr. affected her

family a lot because her son is close in age and "they were supposed to grow up together". 34 RT 8390.

Robert McCourt testified that he is Clifford Peranteau's younger brother. 34 RT 8392. He described his brother as "a nice guy", "liked anybody and everybody". Their mother was emotionally distraught and in denial. 34 RT 8395.

Jeffrey Nourse testified that he is Deborah Dubs' cousin. 34 RT 8427. They enjoyed a very close relationship, more like brother and sister. Harvey Dubs was a very quiet, very caring and very loving human being. 34 RT 8429. He and the rest of his family missed the Dubs dearly. 34 RT 8430.

Karen Tuck testified that she knew Deborah Dubs from childhood, that Sean Dubs was her godson, and that Deborah Dubs was godmother to her eldest son. Ms. Tuck and her family deeply missed the Dubs.

Roger Gerald testified that he was Jeff Gerald's father and described him as loving, humorous and non-violent. 34 RT 8436. It has been very difficult for his family to deal with his death. 34 RT 8437. Denise Gerald, Jeff's sister testified to Jeff Gerald's good qualities. While she never visited him in San Francisco, his death is an absolute loss. 34 RT 8443.

Diane Allen, Kathleen Allen's sister, testified that she was the younger sister and described her as "everyone's friend", who "wanted to take care of

people". Her death "destroyed my family" and "killed my mother". She said that her sister's death destroyed life and that "it was not fair" because "she was a good person". 34 RT 8448.

Dwight Stapley testified that he is Scott Stapley's father. 34 RT 8449. Scott was their youngest child. He and his wife followed the legal proceedings from the beginning to end and spent over $65,000 that he was going to live on in retirement. 34 RT 8452.

Lola Stapley testified to her close relationship with Scott. 34 RT 8455. His death "absolutely devastated" her and she spent three years in counseling. She misses the family holidays. 34 RT 8458.

II. The Defense Case

A. Expert Testimony Regarding Appellant's Character and His Mental State.

1. Dr. Stuart Grassian.

Stuart Grassian testified that he is a psychiatrist with extensive experience in evaluating the effects of stringent conditions of confinement. 35 RT 8519. He was then in private practice and also on the faculty of the Harvard Medical School. Dr. Grassian reviewed appellant's prison records from Leavenworth, from Canada, from Folsom, and from Orange County Jail. He also read statements from a number of his family members, from Folsom

guards, and from other inmates. He also reviewed psychological testing. There was never an instance of reported violence or attempted escape since 1982. 35 RT 8526.

Dr. Grassian described the effects of appellant's incarceration in solitary confinement for most of the preceding 13 years. When Dr. Grassian interviewed appellant in 1994 at Folsom he found "very profound, very pronounced obsessional thinking", typical of the effects of solitary confinement. 35 RT 8531. Appellant was also "quite depressed, quite apathetic" during parts of his incarceration. Appellant was severely impaired as far as his ability to cooperate with his attorney because of a lack of concentration, an inability to complete a thought, and obsessional focus on minutia. 35 RT 8533.

When appellant was in the general population in Canada for approximately six months, he was "kind of a model prisoner", 35 RT 8535, and "what was so noticeable was his very powerful need to respond to authority, to comply with authority". 35 RT 8536. Appellant had no write-ups at Leavenworth, three write-ups for very minor conduct in Canada, and write-ups for other minor things at Folsom, including possession of a manila envelope clasp. 35 RT 8540. In Orange County, there were write-ups for

infractions such as having styrofoam cups in his cell, too many magazines, all "very trivial matters" and nothing relating to any violence. 35 RT 8542.

While in Canada, appellant became a sponsor of two Korean orphan children. 35 RT 8544. Overall, Dr. Grassian emphasized appellant's traits of being docile, compliant, and passive. 35 RT 8548. He also reviewed psychological testing by Dr. Nievod and summarized the diagnosis of dependent personality disorder with traits of avoidant personality disorder, anxiety, and severe chronic depression. 35 RT 8549. Dr. Grassian characterized appellant as having a severe dependent personality disorder, 35 RT 8553, explaining that appellant "yearns for authority figures" and "will easily become their lackey". 35 RT 8554. Appellant was "morbidly shy" as a child, and was punished if he expressed any emotion. He was very susceptible to the United States Marine Corps motto of "Semper Fi" ("always faithful"), i.e., always subordinate to the higher authority. 35 RT 8555. However, because appellant was Asian, he was not accepted by some of the caucasian Marines and was instead victimized to some extent. Dr. Grassian expressly stated that appellant did not show any psychopathic tendencies at all. 35 RT 8560.

Dr. Grassian described appellant's dependency on Michael Burt, whom he viewed as a rescuing figure or father figure, which made it "really hard for

Mr. Ng to really let go of that and to be able to effectively participate with other attorneys". 35 RT 8564.

Dr. Grassian described a category of sadistic psychopathic killers, such as Charles Manson, or James Jones, a category that included Leonard Lake and contrasted them to appellant, who was always a follower. 35 RT 8568. Dr. Grassian concluded, "I think Charles Ng could have ended up going in any direction. That is just who he was, passive, a follower, just yearning for somebody to lead him". 35 RT 8569.

Dr. Grassian reviewed the Canadian prison cartoons that depicted violence, and commented that "the content of those drawings much more tells us about the relationship with LaBerge then it tells us about what happened back in California". 35 RT 8587. Dr. Grassian also noted that appellant took great efforts to educate himself while in prison.

2. Dr. Paul Leung.

Dr. Paul Leung testified that he is a psychiatrist based in Portland, Oregon, and licensed to practice in California as well. 37 RT 9084. Dr. Leung has qualified as an expert in Asian culture, Asian family structure and related issues in the courts of California. Dr. Leung reviewed statements by various lay witnesses and reports by Drs. Douglas Liebert, Gary Davis, James Missett, and Abraham Nievod. 37 RT 9089. Dr. Leung described the general

family structure in Hong Kong families with the father being the authoritative provider and the mother being a homemaker. The children were regarded as "properties of the parents". At the time of appellant's upbringing, physical force was a very common means of discipline both at home and at school. 37 RT 9094. He viewed the statements regarding appellant's discipline as a child as "a bit more harsh than usual stories you would hear from that time in Hong Kong". 37 RT 9095.

For a male child in a family, "the individual [would] occupy a very special position in the family, i.e., the parents would have high expectations." 37 RT 9096. Dr. Leung described appellant's recollections of the beatings he received from his father, the fear he felt toward him, and "just the guilt that he couldn't meet up to that expectations". 37 RT 9098. Dr. Leung described appellant's family as "very typical middle class Hong Kong family". 37 RT 9102.

Appellant's father sent him to "one of the best boys schools in Hong Kong" and had very high expectations. 37 RT 9103. When appellant failed to meet those expectations, appellant knew that "Daddy is going to beat the heck out of you". 37 RT 9104. Dr. Leung referred to the various evaluations that diagnosed appellant as having a dependent personality disorder and other personality problems. 37 RT 9106. Dr. Leung reviewed the symptoms of a

dependent personality disorder and gave his opinion that the Hong Kong family structure would have worsened that disorder because young children were not encouraged to make independent decisions. 37 RT 9111.

On cross examination, Dr. Leung acknowledged that it would seem inconsistent for a person with a dependent personality disorder to be a leader in a conspiracy to commit theft. 37 RT 9119.

3. Anthony Casas, correctional expert.

Anthony Casas testified that he was currently a criminal justice consultant, and had previously worked for the Department of Corrections for 23 years. 38 RT 9195. H had qualified as an expert in correctional matters and prison adjustment in the various states and in numerous counties of California. 38 RT 9200.

Casas testified that the primary factors for evaluating an inmate's adjustment are his pattern of disciplinary violations, whether he is refusing to do what he is told, whether he is doing well on a job, and whether he is involved in gangs. 38 RT 9210. Appellant had no disciplinary violations at Leavenworth. Appellant made efforts to further his education and completed courses in philosophy and psychology. His work record was good, and he got one particularly positive recommendation for being part of a group of inmates sent in fix a hot water overflow on the tier. 38 RT 9217. All of his job

performance evaluations were positive and "in fact some of them were glowing reports". 38 RT 9218. He specifically requested to be reinstated in the Marines after he finished serving his time. 38 RT 9219.

Regarding appellant's Canadian incarceration, he had a total of three disciplinary violations. One was for passing a bowl of rice to share with another inmate, another was being in possession of a martial arts kick pad, and the last was using offensive language. Based on his experience as a warden at California prisons, Mr. Casas characterized these offenses as "very minimum". 38 RT 9223. Appellant was never found in possession of weapons. In Canadian prison, he took college correspondence courses, including a biology course and a psychology course, 38 RT 9229, won a Athabasca University Course Award for Administration, 38 RT 9230, demonstrating that appellant was "attempting to better himself". He also completed courses in English and Microeconomics. 38 RT 9232.

Appellant was kept in virtual solitary confinement for almost all of his six years in Canadian prison. Mr. Casas noted a memorandum from the warden at Saskatchewan Penitentiary that "while in segregation, Mr. Ng has been a model inmate and has never created any security concern". 38 RT 9234. The warden then questioned how much longer he would be able to

keep appellant segregated and expressed surprise that he had not received a legal challenge to this sequestration. 38 RT 9234.

Mr. Casas said that appellant's ability to put up with the isolation positively demonstrated that he was able to maintain control even though he was feeling "depressed and stressed and isolated". 38 RT 9236. At Folsom, Mr. Casas discussed appellant's violation for a disciplinary report for when a razor blade was found screwed behind a light switch plate, and a disciplinary violation for possession for a metal clasp from a manila envelope. 38 RT 9240. Mr. Casas gave his opinion that he would not have found any disciplinary infraction based on the evidence. 38 RT 9242. Appellant was disciplined for possession of origami paper, which Casas also described as not serious. 38 RT 9244. Mr. Casas was informed of the favorable testimony from the Folsom Correctional Officers and described that as "unusual" and confirmation of his positive institutional adjustment. 38 RT 9246. Mr. Casas commented that appellant developed a case of scabies during his period of isolation at Folsom, which indicated that he was internalizing his frustrations rather than acting out. 38 RT 9247.

Regarding appellant's Orange County Jail record, there was one disciplinary violation for possession of contraband described as a "possible escape tool" but there was no indication that appellant ever tried to escape.

The item in question, according to appellant, was a tip from an Afro-comb. 38 RT 9249. Mr. Casas disagreed with the characterization of the "small piece of plastic" as a "poking weapon" because while it could be used to poke somebody in the eye or ear, the person who poked was not going to kill anybody with it and would probably get himself killed. 38 RT 9251. Casas' overall opinion was that "there is no question in my mind that Ng has adjusted well up to this time", and, that if given life without parole, "in my opinion Ng would have a good adjustment." 38 RT 9252.

4. Dr. Abraham Nievod.

Dr. Nievod testified that he is a psychologist with a law degree from the University of San Francisco, and specializes in clinical and forensic psychology. 38 RT 9279. He has qualified as an expert in a number of federal and state jurisdictions. Dr. Nievod was first contacted in 1993 by attorneys Margolan and Multhaup to do testing and interviewing along with Dr. James Missett, a psychiatrist. Two other mental health officials were also appointed to provide an opinion, Dr. Douglas Liebert and Dr. Gary Davis. 38 RT 9289. He also read a report by Elise Taylor.

Dr. Nievod reviewed Lake's "philosophy tape" and the M Ladies tape, 38 RT 9291, as well as other reports about appellant's conduct in the military and in prison. Dr. Nievod described the test results from the 1993 MPI,

primarily that, "Mr. Ng has a very high score on schizoid, avoidant and dependent personality disorder", with the dependant personality disorder the most prominent. 38 RT 9311. In lay terms the schizoid person just simply doesn't know how to relate to people", has difficulty with long term relationships. 38 RT 9312. An avoidant person is someone who "avoids close relationships with lots of people, not because they are a loner, but because they are afraid of being rejected as they get into that situation". 38 RT 9313. Dr. Nievod said that avoidant personalities were often linked with dependant personalities because the person would avoid most people but try to find one person to attach himself to - "as long as a dependant personality is attached to or can model his or her behavior on this focal figure, they feel safe". 38 RT 9314. Appellant also scored high on the compulsive scale and on the anxiety scale, 38 RT 9316, and low on the narcissistic, anti-social, and aggressive/sadistic scales. 38 RT 9317.

Dr. Nievod described appellant as having dysthymic depression extending back into childhood, 38 RT 9326, and noted that he scored high on the "self defeating" scale which means that he "expects to fail at things and he does". 38 RT 9336. Dr. Nievod noted that there was a clear consistency between Dr. Liebert's test results in 1993 and his own retests in 1996 and 1998. 38 RT 9339.

Appellant's most significant personality disorder is dependant personality disorder, accompanied by significant traits of schizoid and avoidant personality features.[8] 38 RT 9341. He explained that individuals with a dependent personality disorder may make decisions on their own, but "what is propelling them is their feeling that they can't make it on their own". 38 RT 9350. When appellant was being taped with Lake on the M Ladies tape, he knew the difference between right and wrong, but participated in Lake's scheme to maintain his relationship with Lake. 38 RT 9351.

Dr. Nievod described how appellant floundered at Notre Dame College in Belmont because of the freedom and independence which he was not used to. Instead he sought out a Marine Corps recruiter in part to please his father, and partly because it was a much more structured environment. 38 RT 9359. Dr. Nievod addressed the armory theft, and described how it was consistent with appellant's dependent personality. 38 RT 9374. Dr. Nievod was asked about appellant's 1981 statement that he was going to take advantage of his cohort in the theft, Armeni, and kick his ass if he had too. Dr. Nievod referred to the interview with Armeni himself who disavowed being pressured by appellant. 38 RT 9380. Dr. Nievod thought the best explanation was

---

[8] Dr. Nievod stated that the FBI "Behavioral Studies Unit" report on appellant was consistent with and confirmed appellant's personality disorder. 39 RT 9462.

appellant was trying to prove his loyalty, and he eventually took the blame because Armeni was married with family. Armeni was thereafter acquited. 38 RT 9383.

Dr. Nievod contrasted appellant's high anxiety test scores with Lake's apparent lack of anxiety, which is typical of psychopaths who "are completely emotionless about what they do". Dr. Nievod referred to Lake's demeanor on the M Ladies tape and the philosophy tape where he was "flat and emotionless". 38 RT 9409.

Dr. Nievod opined that if appellant had not met up with Leonard Lake, nor anyone else like him, "he wouldn't have done this at this level". 38 RT 9419.

When appellant got out of Leavenworth, he had unsuccessfully sought reinstatement into the Marines, but also believed that he would be deported. When neither of these happened, Leonard Lake was the most obvious person for him to turn to. 38 RT 9424. Appellant described his happiness at being in Philo with Lake before being arrested because he "found the family that really treat me as part of the unit", and they "treat[ed] him like their own son". 38 RT 9427.

Regarding the M Ladies tape, Dr. Nievod said that appellant knew right from wrong, and was not coerced by Lake. 39 RT 9464. Rather, appellant's participation in the M Ladies tape was "evidence of that personality structure"

he had previously described. Dr. Nievod reviewed Lake's techniques for manipulating Kathy Allen and Brenda O'Connor as demonstrated on the M Ladies tape, including isolation, keeping them in the dark about his true intentions, and making them dependent. 39 RT 9471.

Regarding Kathy Allen, Dr. Nievod pointed out that appellant's first words on the tape were "what should I do?" "what should I have her do next?", i.e., asking for orders and direction from Lake. 39 RT 9483. Regarding Brenda O'Connor, Lake was a different character and "really angry at this woman". 39 RT 9487. Lake wanted to reach "that moment where she is totally dominated". 39 RT 9488. In the O'Connor segment, appellant at one point said, "that is wise", which echoes something that Lake had said during the Allen segment. Appellant again echoed Lake when he interjected "it is part of the game". 39 RT 9491. When appellant used a knife to cut off Brenda's blouse, Dr. Nievod's view was he did it "to please Lake and show to Lake that he can become more involved instead of just taking orders", "kind of like a false bravado". 39 RT 9495. Lake referred to appellant as "kid", asking whether he was ready for a shower. 39 RT 9499. Appellant then asked Lake whether to have Brenda take a shower with leg irons on, i.e., "waiting for Lake's orders". 39 RT 9502. Shortly afterward, Lake became angry at appellant for not following orders. 39 RT 9504. Dr.

Nievod testified that appellant was a bit player in Lake's plan and a "necessary evil" to "help him". 39 RT 9506.

Dr. Nievod also described LaBerge, an older and more experienced Canadian prisoner, as another authority figure for appellant. 39 RT 9509. Dr. Nievod described Michael Burt as an additional authority figure in appellant's life, an idealized relationship that never materialized. 39 RT 9515.[9]

B. Lay Testimony About Appellant's Background and Character

1. Alice Shum, appellant's aunt.

Alice Shum testified again that she is appellant's aunt, his mother's youngest sister. 35 RT 8589. She lived with appellant's family during part of his childhood in Hong Kong, where several family members lived, apparently crowded into two rooms. She saw appellant receive beatings from his father as a young boy for bad grades or not finishing his homework. 35 RT 8593. Appellant seldom fought with others as a young boy and did not have many friends. Appellant was "quiet, did not talk too much, liked to talk a lot with his second oldest sister; usually just quiet". He was always very close to

[9] Dr. Nievod reviewed defendant's Exhibits 715 thru 717 as blow ups of cards that appellant created for attorney Burt. 39 RT 9608. These were accompanied by a very expansive message, "The more I think of you, the more I need you" and "I will never let go of you in my heart". 39 RT 9609.

Betty, another sister. As far as Mrs. Shum knew, appellant never took any martial arts classes, although he was a Bruce Lee fan. 35 RT 8596.

When appellant came to the United States, he visited her and played with her young sons – "he really liked little kids". 35 RT 8601. While in prison, appellant sent her cards on Mother's Day and Christmas among other occasions, and Defense Exhibit 687 was offered as an example. Appellant also sent birthday cards to her sons and sent origami foldings to her.

Before his arrest, appellant was very responsible as far as repaying money that he had borrowed. 35 RT 8606. On cross examination, Alice testified that appellant's father worked long hours to pay for a private school education. 35 RT 8612.

Regarding her view of appellant as a responsible person, she acknowledged hiring an attorney, Garrick Lew, to represent him on a shoplifting incident in 1984. This was at his mother's request. 35 RT 8621.

2. Ray Guzman, fellow Marine.

Ray Guzman testified that he met appellant at infantry training school at Camp Pendleton. 36 RT 8755. He and appellant socialized after their duty hours, going out for Chinese food. Appellant never drank or smoked. 36 RT 8756. They went to movies together, often Kung Fu movies in downtown Honolulu, and would sometimes stop at a martial art school to watch people

practice. On occasion appellant asked another person to hold up a pen or pencil and kicked it out of the person's hand. Guzman never saw appellant in a fight with anyone else. 36 RT 8757. He viewed appellant as quiet. He was surprised to learn of the armory theft.

Guzman, appellant and the other Marines learned chants in training like, "no gun, no fun", "no kill, no thrill" and "bravo company, kill, kill, kill". 36 RT 8759.

3. Hugh Daugherty, fellow Marine.

Hugh Daugherty testified that he met appellant in the Marine Corp in late 1982 when he was in charge of operating an anti-tank missile launcher, and appellant was his helper. Their unit would go out and play war games and they would mock up shooting an enemy tank with a dummy missile. 36 RT 8764. Appellant "basically did everything I told him to do" and rated his performance at "above average". Daugherty became aware at one point that appellant had been accused of theft of government property and was guarding appellant earlier in the day that he walked away. 36 RT 8766. Generally, appellant "seemed to be a loner, very quiet to himself, did his own thing". Daugherty saw him practicing martial arts, but never saw him drinking alcoholic beverages, using drugs, or chasing women. 36 RT 8767.

On cross examination, he was asked about an occasion when he bumped into appellant on liberty, and appellant asked Daugherty if he wanted to go with him. When asked on redirect whether it was unusual for a Marine to be interested in firearms, Daugherty answered "that is basically it, all we really do is play with guns". 36 RT 8772.

4. David Burns, fellow Marine.

David Burns testified that he first met appellant at the Kaneohe Marine Corp Air Station in 1981. 36 RT 8773. He was a sergeant at the time, and explained the Marine motto of "Semper Fidelis", which involved the oath to protect the United States. 36 RT 8774. When asked whether recruits were demeaned and physically broken down, Burns responded that "they break you down as into putting your civilian beliefs of questioning authority and questioning orders basically on the farthest back burner you can think of". 36 RT 8777. When asked how appellant responded to order, Burns said that he was "outstanding". When he became aware that appellant was involved in a theft of weapons he was surprised because "it was out of character". 36 RT 8778. Burns observed appellant in an anti-tank class where he did quite well. He occasionally observed appellant practicing martial arts, but never saw him in a fight, and described him as "very quiet". 36 RT 8781. Appellant's

interest in martial arts was viewed as a positive thing because Marines are taught hand to hand combat. 36 RT 8787.

5. Acquaintances formed while in prison.

Charles Farnham testified that he has known appellant for a year in the county jail based on their common hobby of origami. 36 RT 8817. Farnham wrote appellant a letter and they have corresponded and spoken on the phone. Appellant spoke to him and comforted him when his father passed away recently. 36 RT 8818. Appellant also coached him about origami. Farnham described appellant as "a very close friend" who provided emotional support to him. 36 RT 8821.

Ron Peterson testified that he has known appellant for about 2-1/2 years, also based on their mutual interest in origami. Peterson's wife is from Hong Kong, and she and appellant have discussed mutual interests. Peterson described him as "an interesting guy" with "a great sense of humor". 36 RT 8824. Peterson described cards that appellant had drawn or painted and sent to him, and added that if appellant were executed it would cause a sense of loss to Peterson, who valued him as a friend, a person, and as an artist. 36 RT 8828.

Isaac Chang testified that he met appellant in prison in Canada in 1990 when Chang was a seminary student doing an internship. 36 RT 8830. The

chaplain asked Chang whether he wanted to visit a Chinese inmate and Chang spoke to him in both Chinese and English. Chang also visited him twice at Folsom state prison. Chang described appellant as "depressed, unhappy, loneliness, isolated." 36 RT 8833.

Betty Karkendall testified that she met appellant through correspondence in 1982 and 1983 when he was in prison. She had a son that was murdered and after that began communicating with prison inmates through a prison ministry to deal with her grief. 36 RT 8837. She viewed appellant as "very giving" who sent her "many, many gifts". She described an abusive relationship with her husband, and found comfort in the letters that she received from appellant. 36 RT 8841. After appellant got out of Leavenworth, they met in Oklahoma and appellant "seemed very nice just the way he was in the letters". They did have a sexual encounter after their first meeting because both were lonely and looking for affection. 36 RT 8843. She cared a great deal for appellant then and still does, although she has not continued corresponding with him because of her concern about her huband's reaction. 36 RT 8846.

6. Herbert Shum, appellant's cousin.

Herbert Shum testified that he is appellant's cousin. 37 RT 9064. Appellant came and visited Herbert and his younger brother Andrew when

they were young, around seven or eight. Appellant "was always just fun to be with when we were little", and he created a number of "happy memories", taking them out for ice cream or for walks. He maintains contact with appellant via his mother, Alice. 37 RT 9067. Herbert confirmed his affection for appellant "because I know he cares".

7. Bernie Chung, appellant's cousin.

Bennie Chung testified that appellant is his cousin, five years younger, whom he knew when both were growing up in Hong Kong. They grew up together, going to swimming lessons and family gatherings. Bennie remembered appellant as "a normal kid, just like any other kids", 37 RT 9076, "a part of my childhood", such that "if he were to be put to death, it is going to be a life long effect on me". 37 RT 9079.

8. Alice Ng, appellant's sister.

Their parent's conduct of criticizing their children and praising other children in the hope of motivating their own children made them feel inferior to others over all the years. 38 RT 9173.

Alice described appellant as being curious and naughty as he was growing up, mentioning the time in which appellant walked on a ledge outside of their sixth floor apartment. There was another incident in which appellant mixed some chemicals and caused an explosion during chemistry

class, which got him suspended from school even though it was an accident. 38 RT 9174. Alice described appellant as particularly good and gentle with younger children in the neighborhood. 38 RT 9175.

As far as family discipline, their mother reported to the father what transgressions the children had made during the day and their father would punish them at night. The children became anxious when they heard the whistling of their father as he approached home, and they would try to hide from him. The father often spanked appellant with a feather duster cane, which was a common practice for Chinese families in Hong Kong. Appellant received the brunt of the physical punishment from their father. 38 RT 9176.

Alice recalled an incident in which the father threw away a doll that appellant was very attached to because the father was concerned that this attachment would make him become a sissy. Appellant was tremendously upset and pained by this incident. On another occasion, appellant came home to find that a pet chicken that he had been raising had disappeared, and was told that it was slaughtered and being prepared for dinner. This incident bothered appellant tremendously as well. 38 RT 9178.

Appellant was doing very well with an art class in Chinese brush painting, but after he left his paint set at school at one occasion, their father discontinued the painting lessons. Alice observed little positive

reinforcement for appellant as he grew up. The father was financially generous as far as having his wife's extended family live with them for many years with no complaint, but the father "seemed not to know how to support his own children emotionally". 38 RT 9179.

9. Betty Ng, appellant's sister.

The parties further stipulated that Dr. Terry Gock obtained a statement from Betty Ng, on May 14, 1996, in Ottawa, Canada. Betty related that their father worked late into the evenings, and the mother worked part time to support their household, which consisted of several in a crowded two-room apartment. They moved into a larger apartment about the time when she and appellant turned 10 years old and some relatives moved out. Betty recalled a very sad period when her sister Alice spent almost a year in the hospital with a back ailment.

As a young child, appellant was quiet and shy and would hide under the sofa when visitors came. He was also curious in a mischievous way. 38 RT 9181. Appellant became depressed and withdrawn as a teenager, particularly after the fire accident in chemistry class. Betty described the three children "as having been brought up like flowers in a greenhouse" without any opportunity for independent action or socializing, and entirely dependent on

their parents for all decisions. 38 RT 9182. All three children turned out to be immature and overly reliant on others for their decisions.

While appellant often misbehaved from their parent's perspective, he was "kind at heart", very gentle with younger children, and very fond of pets. 38 RT 9183.

As the only son, appellant had more pressures to perform and excel and was expected to be the "showpiece of the family". Betty described both parents as very critical of all the children and compared them unfavorably to other children in their presence. 38 RT 9186. Betty confirmed the pattern of discipline in which the mother would recite their transgressions when their father came home, and the father would then beat them with a cane, leaving welts on their hands and legs. She had to put antiseptic medication on herself and appellant many times because of the bleeding caused by the father's beatings. 38 RT 9187. Betty recalled two occasions in which the father tied appellant's hands to a window bar to prevent him from running away as he beat his son with a feather duster cane. The maternal grandmother once got on her knees to beg the father to stop beating appellant. 38 RT 9188. Betty confirmed the incidents from childhood in which the father threw away appellant's doll and stopped his Chinese brush painting class after appellant left his paint set at school. 38 RT 9190.

Betty described a period during high school when she and appellant were sent to attend high school in England. They were boarded with an uncle who was difficult, stingy with food and money. 38 RT 9191. Appellant told Betty that he would make a fresh start and study hard in England, but "with a constant barrage of criticism and maltreatment from his uncle, he once again became quiet and withdrawn". 38 RT 9192.

Eventually their mother came to visit, saw the appalling conditions that the uncle was keeping the children in, and took them away. While in England, appellant told Betty that he wanted to join the military service, because the authority and status of people in uniform seemed to appeal to him and he also wanted his father to be proud of him. 38 RT 9193.

By stipulation, the defense presented that declaration of Betty Ng along with three cards and origami made by appellant. Betty's declaration described his caring and kind nature and their upbringing together, 39 RT 9655, and a plea for his life. 39 RT 9658.

10. Kenneth Ng, appellant's father.

Kenneth Ng testified that he is appellant's father and has followed his case over the many years. 39 RT 9614. Kenneth was born in Rangoon, Burma, and his family moved to Hong Kong when he was two. In 1942, when the Japanese took over Hong Kong, his family moved to China. They

moved back to Hong Kong when he was about 12. His mother died when he was young, and his father remarried. 39 RT 9616. Kenneth Ng did not have much education, but he felt that it was very important to provide a good education for his children. He made a big effort to get them into private schools in Hong Kong. 39 RT 9618. Mr. Ng worked very hard as a camera salesman at that time to provide for his family, and often worked into the evening in his sales efforts. 39 RT 9620.

He explained that Alice could not come testify because she is so busy in Calgary with she and her husband running an insurance company, and Betty was expecting a second baby in a couple of days. 39 RT 9622. He felt a high degree of shame for himself and his family because the media described Charles "just like a monster". 39 RT 9622. Mr. Ng expressed his sadness for all the families of the victims as well. 39 RT 9623.

He did discipline appellant when he was young. When appellant did not do his homework adequately or get a good grade, Mr. Ng was "very angry" and "beat him with a stick" and "made sure it was really hard". The reason was "because I want him good". Sometimes he tied appellant up so that he could not run away and then beat him. 39 RT 9625.

He acknowledged that looking back, there might be a better way of teaching children. At the same time, he beat appellant because he loved him

and wanted him to be good. 39 RT 9626. He and appellant did not have a close relationship "because he's so scared of me or something like that". 39 RT 9627.

As a youth, appellant had no formal training in martial arts at all, but he was "just learning by self like exercising, what do you call that gymnasium stuff". Mr. Ng did not allow appellant to practice martial arts exercises because it distracted from studies.

11. Oi Ping Ng, appellant's mother.

Oi Ping Ng testified that she is appellant's mother and described him as very shy and quiet when he was young. 39 RT 9660. Appellant did not have many playmates as a youth because she did not allow him to go alone to other children's houses. She was very protective of him because "we only have one son" and "I do not want him to go into any bad learning's, so whatever he learns, I follow it." 39 RT 9662. While appellant tried to practice martial arts at home, she discouraged it because she thought it might make him fight with other children, but "he never fought with anyone". 39 RT 9664.

Appellant learned Chinese style painting in school, and at one time his teacher took his artwork for an exhibition. He stopped his art lessons when he left his art supplies at school one day. She agreed that almost all decisions for appellant were made by either her or her husband. Appellant loved pets and

he raised a chicken at home. However, her mother (appellant's grandmother) thought that the chicken was smelly and suggested that they kill it, which they did, to appellant's sorrow.

When appellant's father beat him, he insisted that appellant not cry admonishing, "if you cry more you get strike more". 39 RT 9667. Appellant sent cards and origami for Mother's Day, Father's Day, and other holidays. 39 RT 9674. Ever since appellant has been in jail, she "never had a good day" and is "thinking of him all the time". If he is put to death she would be 'very sad". 39 RT 9676. .

C. Evidence from Correctional Officers Regarding Appellant's Compliant Conduct in Custody and Positive Institutional Adjustment.

Alene Meads testified that she worked for the California Department of Corrections for 11 years, and from 1987 through May 1998 as an Administrative Segregation Officer in protective custody. 36 RT 8631. The inmates in Administration Segregation were those who had to be protected from the other inmates because they would be killed if they were amongst the other inmates", including "notoriety, big cases". 36 RT 8633. Most of the prisoners were sentenced but they also had "safe-keeper" detainees who had not yet been tried, but who for whatever reason could not be held in a local county jail. 36 RT 8635. She had contact with appellant who was on walk-

alone status in a solitary cell by himself where "he was not permitted at any time to have any contact with – by contact, I mean physical contact when there is no barriers with any other inmates". 36 RT 8636. She described a small concrete area where appellant could walk or run around the area by himself and "a lot of times he helped us out; he would sweep out there, you know, clean up, something to do". 36 RT 8642. She worked on appellant's unit for approximately three years, and she never knew him to possess a weapon.

She described appellant as "a Class A inmate; because if I would have had the whole unit of 120 inmates like he was, I wouldn't have been stressed out and had to resign eventually from my job because of it". At one point she was assaulted by an inmate, but she never felt any fear from appellant, and he never exhibited any aggression toward her. 36 RT 8651. Appellant "always spoke to me very cordially, a lot of respect". She conducted numerous unannounced searches of his cell for weapons, but never found any.

When appellant first arrived as a safe keeper, he was allowed to do Origami paper folding, and then for some reason the court stopped him from doing it.

Other inmates yelled at him in a derogatory manner when they went by his cell, including numerous threats, but appellant never retaliated or used foul language. 36 RT 8654.

William Conedy testified that he also worked for the California Department of Corrections Office at Folsom, and was appellant's Block Officer in 5 Block and 7 Block. 36 RT 8662. 5 Block housed the most dangerous and violent inmates. C.O. Conedy never had any problems escorting appellant around the tier, was not aware of any misconduct on appellant's part while he was at Folsom, and described him as a well behaved inmate. 36 RT 8671. Conedy never saw appellant in possession of any piece of metal or anything that could be reused to remove the light plate in his cell.

Joe Ditman testified that he was a correctional officer at Folsom Prison for 11 years, 36 RT 8675. Ditman worked the visiting area of the facility. Appellant was never allowed to have any contact visit with any non-legal visitor. 36 RT 8680. During the year and a half that Ditman worked the visiting room, appellant never acted out or did anything of a violent nature. He never swore, was rude to a guard or had any weapon. 36 RT 8684.

James Tinseth testified that he has been a correctional officer at Folsom Prison for 15 years and he acted as a "handler" who escorted appellant from Folsom to Calaveras County. 36 RT 8691. For each trip, Tinseth gave him a

full body search, then chained him up with additional leather restraints. 36 RT 8692. Tinseth had to pick him up and put him in a van to go to court. Appellant never acted out, and was always courteous and compliant. 36 RT 8694. Appellant sat in a cage in the back of the van, and Tinseth sat outside the cage. A Plexiglas barrier between the driver's area and the cage area prevented any air conditioning from getting to the back, and it got "pretty hot, real hot" during the summer. 36 RT 8697. When they reached Calaveras County, Tinseth picked him up and took him out of the van and took him into the back of the court. RT 8699. The first time they took the trip, appellant was "real nervous" and "was throwing up most of the way" on the winding mountain roads.

Maurice Geddis testified that he was a correctional counselor whose responsibilities were to liaison between the administration and a particular inmate. Earlier when he was a correctional officer, he was one of the handlers who took appellant from prison to court. 36 RT 8710. Geddis recalled at least three times that appellant was sick and vomited on the trip. Appellant was always compliant and courteous.

Gerald Coleman testified that he was a 20 year veteran of the Department of Corrections and worked in the Folsom Library from May 1991 till January 1995. 36 RT 8723. When appellant filled out a request for library

access, Coleman brought him to the library and gave him books. Appellant was courteous, never mouthed off, and never had any contraband or weapons when stripped searched. 36 RT 8729.

James Kaku testified that he was employed by the Orange County Sheriff's Department and for awhile supervised inmate workers who were in housekeeping duties in the area where appellant was housed, Modular J. 36 RT 8737. He had one contact a day with appellant at meal times, and he behaved "regularly" and was polite, respectful, and compliant. 36 RT 8738. Appellant was a "model inmate". 36 RT 8739.

Deron Redding testified that he was also an Orange County Sheriff who was the Modular J "prowler", whose job was to walk around the modular to check on "all different sorts of things", including medication, and other matters. 36 RT 8743. He had daily contact with appellant and found him "quiet and respectful", never in any conflict or fight with staff or inmates. 36 RT 8744.

Bradley Chapline testified that he had custody of appellant at the army medical center in Hawaii and then transported him to Leavenworth. 36 RT 8788. During this period, he had contact with him 12 hours a day, 7 days a week. Appellant was quiet, well educated and never caused problems. 36 RT 8791.

Chapline discussed with appellant the difficulties that minorities faces to advance in the Marine Corps at that time. 36 RT 8787.

Chapline confirmed that in basic training Marines learned chants including "no kill", and "no fun, no gun". 36 RT 8800. When Chapline left appellant at Leavenworth, he wished him well because he thought he had the material to make a good Marine. 36 RT 8801.

On cross examination, Chapline said that appellant explained the armory break was "to get even with the Marine Corp" and "to prove just how good he was". 36 RT 8803. Chapline explained that in Hawaii at the time of appellant's service, there were extreme tensions between the caucasian military and the local Asian American population, and there was resentment among Marines toward Asian Americans in uniform. 36 RT 8806. Chapline had to admonish caucasian Marines who were poking appellant's feet with needles while they were guarding him in the hospital.

John Mitchell testified that he was employed at the Saskatchewan Penitentiary in Canada from 1975 to 1989. 38 RT 9140. He had contact with appellant during a period of time where he worked in an area that published the Inmate Newsletter, ran the Inmate Grievance Process and other programs. During the three to six month period he saw appellant on a daily basis, he had no negative interactions with appellant. 38 RT 9143.

Appellant was the editor and typesetter for the institutional newsletter and in that capacity would receive information, prepare it for print, submit it to Mitchell for proofreading and distribution. Mitchell described appellant as "certainly a good employee" who never caused any concern. While Mitchell always had concerns given the nature of the prison population in the maximum security prison, "It is always nice to have an inmate that is very professional in what he is doing". 38 RT 9150. On cross examination, Mitchell was asked whether appellant had particular respect for him because of Mitchell's military service, he answered, "I think Charles basically respected authority". 38 RT 9159.

III. Prosecution Rebuttal

The parties stipulated that on November 1981, appellant signed a written statement about his involvement in the October 1981 Marine Corp Armory Theft in Hawaii, Exhibit 264. 40 RT 9777. Appellant also signed a second written statement, Exhibit 265.

On June 19, 1998, appellant was interviewed by Dr. Leung and expressed concern about his attorneys having adequate knowledge about psychology and mental illness, during which conversation he referred to the diagnostic and statistic manual by its initials "DSM". 40 RT 9778.

On April 15, 1999, the court ordered appellant to submit to a psychiatric examination by a psychiatrist retained by the prosecution. The court ordered that the examination would be conducted without any lawyers being present. Appellant refused to speak with the psychiatrist retained by the prosecution without his lawyer being present.

On April 10, 1999, appellant told psychiatrist Paul Leung that he had no time to discuss his Marine Corp enlistment with his parents and that he knew they would object.

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. Summary of Facts.

1. The Calaveras County proceedings preceding the venue hearings.

After appellant was extradited from Canada to Calaveras County in September 1991, the Calaveras County Justice Court appointed local counsel to represent appellant, notwithstanding appellant's motion to appoint the San Francisco Public Defender, who had previously been appointed to represent him on a murder charge in San Francisco, pursuant to Penal Code section

987.2(g)[10]. The appointment of local counsel (Marovich and Webster) generated a host of problems, and in January, 1993, Judge Claude Perasso, sitting on the Calaveras County Superior Court by assignment of the Judicial Council, appointed independent counsel (Margolin and Multhaup) to represent appellant on Harris and Marsden matters, with the goal of resolving the representation imbroglio and moving the case toward trial.

There ensued a series of evidentiary hearings regarding appellant's Marsden claims, from which emerged a convergence of opinion by mental state experts, some retained by the defense and others independently appointed by the Court (Evidence Code section 730), that appellant was incapable of cooperating with local counsel because of an unusual combination of circumstances regarding his mental state and his prior and continuing relationship with attorney Michael Burt at the San Francisco

---

[10] Penal Code Section 987.2(g) provides in pertinent part that "where an indigent defendant is first charged in one county and establishes an attorney-client relationship with the public defender,...and where the defendant is then charged with an offense on a second or subsequent county, the court in the second or subsequent county may appoint the same counsel as was appointed in the first county to represent the defendant when all of 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 involves evidence which would be cross-admissible;
(2) The court finds that the interests of justice and economy will be best served by unitary representation;
(3) Counsel in the first county consents to the representation.

Public Defender's office.[11] Judge Perasso concluded on October 21, 1993, that the total breakdown in the attorney-client relationship between appellant and local counsel was involuntary and non-manipulative on appellant's part, and was the product of appellant's dependent personality disorder and his attachment to the long existing attorney-client relationship with Michael Burt. VII RT Cal S 2046.[12]

Judge Perasso issued a conditional ruling to discharge local counsel, and calendared a section Penal Code section 987.05 hearing to consider the appointment of the San Francisco Public Defender as well as other Bay Area attorneys. However, when the prosecution filed a Code of Civil Procedure section 170.1 challenge based on Judge Perasso's August, 1993 conviction for

---

[11] Michael Burt had appeared on October 24, 1991, at the initial Calaveras County arraignment to request appointment on behalf of the San Francisco Public Defender. 7 CT Cal J 2252. That request was rejected because Burt's time estimate of eight to ten months to prepare for the preliminary hearing was viewed as excessive. The Justice Court then appointed local counsel Webster and Marovich without any on-the-record hearing as required by Penal Code Section 987.05 as to their readiness estimates. That appointment was based solely on ex parte off-the-record telephone communications between the court and counsel, in patent violation of, inter alia, Penal Code sections 190.9 and 987.05. The preliminary hearing eventually took place in November, 1992, after a passage of time well in excess of that estimated by Burt. 13 CT Cal J 5439.

[12] Now that I've heard from the last two experts, the Court's experts, if you will, that everybody agrees, and the opinion is, that the motion to withdraw made by Messrs. Webster and Marovich and the motion to – under Marsden to relieve them must be granted."

driving under the influence. Judge Perasso recused himself on other grounds. XV CT Cal S 5391. The Judicial Council appointed Judge Donald McCartin, a semi-retired Judge from Orange County, to sit in Calaveras County. XV CT Cal S 5410.

2. The intertwining of trial site selection with the appointment of replacement counsel.

At a status conference on January 21, 1994, Judge McCartin conditionally relieved local counsel Webster and Marovich, with the discharge to become final upon appointment of replacement counsel. XV CT Cal S 5306. Appellant, through his Harris-Marsden counsel, reiterated his request for appointment of the San Francisco Public Defender and Michael Burt. Judge McCartin, however, wanted to establish a trial site before appointing counsel, given that the case could never be tried in Calaveras County because of its small size and the enormous publicity already generated. Appellant asserted that San Francisco was the odds-on, overwhelmingly leading contender because of 1) the pendency of interrelated charges there; 2) the San Francisco vicinage of six of the pending Calaveras counts; 3) the convenience of scores of prosecution witnesses who worked and resided in San Francisco; and 4) the continuity of counsel in light of Attorney Burt's nearly nine years of ongoing representation in both the San Francisco and Calaveras proceedings.

Judge McCartin, however, wanted the matter to be handled by the Judicial Council, and urged the parties to come to an agreement in an attempt to streamline the trial site selection/appointment of counsel process, so the case could move toward trial. On January 21, 1994, the parties stipulated to a change of venue as to counts I, and VIII-XIII only, VII RT Cal S 2158, with the provisos that (1) appellant's vicinage rights on counts II-VII would be honored; and (2) that as to counts I and VIII-XIII, counsel for appellant would be permitted to submit factual materials for consideration by the Judicial Council and by potential transferee counties as to the numerous factors that favored San Francisco as the most appropriate venue for all counts. VII RT Cal S 2157.

All counsel for appellant (including Harris-Marsden counsel and conditionally relieved trial counsel) submitted materials to the Calaveras Court Clerk for transmittal to the Judicial Council pursuant to the January 21st agreement. XV CT Cal S 5516-5520; 5536; 5543. These materials emphasized the San Francisco vicinage for counts II-VII; the witness convenience factors favoring San Francisco; as well as the logic and law of consolidating appellant's representation with the San Francisco Public Defender (Penal Code section 987.2(g), and Harris v. Superior Court (1977), 19 Cal.3d 786). The record of the January 21st hearing is crystal clear that

appellant's agreement to refer the non-San Francisco counts to the Judicial Council was explicitly premised on the assurance that the Judicial Council and the transferee courts' would consider the materials submitted by appellant.

3. The breakdown of the trial site selection agreement.

The bargained-for and agreed-upon procedure fell apart almost immediately with respect to those aspects which constituted the essential consideration for appellant's agreement to the Judicial Council referral in the first place. Unbeknownst to appellant, senior attorney John Toker at the Judicial Council informed Judge McCartin by letter of March 4, 1994, that the materials submitted by counsel had been received by his office (although apparently misplaced for a month) but that he would not consider any of the materials submitted by the parties, but would only consider case-related matters submitted by the Court itself. XV CT Cal S 5545. Judge McCartin failed to either submit the San Francisco-related information to that Judicial Council in a form that the Council could consider and rely on, or to convey the Judicial Council's position to appellant. Instead, Judge McCartin permitted the Judicial Council to pursue inquiries about transferee counties without consideration of any of the materials submitted by appellant, with the result that San Francisco was not designated as a possible trial site.

Judge McCartin then issued a minute order on stating that the Judicial Council had proposed Sacramento and Orange counties (but not San Francisco), as potential transferee counties, and a McGown hearing was set for April 8th, with any surveys of the prospective counties to be presented at that time. XV CT Cal S 5546.

4. Appellant's unsuccessful remedial efforts.

Counsel for appellant, incredulous that San Francisco was not on the list of transferee counties, called John Toker at the Judicial Council to find out what had happened, and learned for the first time that appellant's materials, on which he had staked his conviction that San Francisco would be the odd-on favorite if not shoo-in trial site candidate, had been both administratively ignored and physically lost. Mr. Toker added that he had contacted the presiding judge of San Francisco Superior Court, but had not told the presiding judge about any of the considerations contained in appellant's materials. Mr. Toker agreed generally that matters relating to vicinage and witness convenience were in fact relevant to his trial site selection efforts, but asserted that he could not utilize materials coming from any source other than the referring court itself. XV CT Cal S 5547.

Counsel for appellant immediately filed a motion for a hearing "to remedy the series of mishaps and misunderstandings, which resulted in the

Judicial Council's selection of two possible trial sites without either knowledge of or consideration of any of the relevant materials prepared by the parties and forwarded to the Judicial Council with the express authorization of this Court". XV CT Cal S 5549. Appellant pointed out the obvious injury to his interests in that "the action of the Judicial Council was undertaken in ignorance of significant and relevant information, and in violation of the explicit expectations of the parties established at the January 21, 1994, hearing before this Court and relied on by defendant as a critical part of the procedures set up to find a trial site expeditiously" (ibid.). This motion, which included a request for the appointment of the San Francisco Public Defender to handle further trial site selection matters, was denied by Minute Order of March 21, 1994. XV CT Cal S 5563.

Appellant then filed a Revocation of Agreement to Permit Selection of Alterative Trial Site, XV CT Cal S 5588, that was denied on April 8, 1994, by Judge McCartin.

Appellant also made a motion per attorneys Margolin and Multhaup that vicinage of counts II-VII was San Francisco, and that those counts should be transferred to San Francisco immediately. XVI CT Cal S 5594. Appellant also made a motion per attorneys Webster and Marovich to suspend all proceedings relating to change of venue because there was no stipulation to

any change of venue on January 21, 1994, as to counts II-VII. XVI CT Cal S 5618, 5631. At the April 8, 1994, hearing the Attorney General confirmed that "it was our understanding that the Defendant, on January 21st , stipulated to change of venue on the non-San Francisco counts, but expressly refused to stipulate – by Mr. Webster's representation, refused to stipulate to change of venue as to the San Francisco counts". XVI CT Cal S 5697; VII RT Cal S 2172.

5. The McGown proceedings.

Judge McCartin had set April 8 for the hearing as to the suitability of the two prospective transferee counties at a hearing pursuant to McGown v. Superior Court (1977) 75 Cal.App.3d 648. Counsel for appellant had filed a continuance motion prior to April 8 on the ground that it was physically and logistically impossible to have completed any surveys regarding the suitability of suggested counties within the 30 days since the announcement of the new counties to the date set for hearing. XVI CT Cal S 5599. Thus, no evidence was available or submitted regarding the unsuitability of either Sacramento or Orange counties, notwithstanding appellant's serious reservations about both. VII RT Cal S 2311. Moreover, appellant offered to present affirmative evidence of the overwhelming factors favoring San Francisco, but the court refused all such evidence on the basis that the

applicable Rule 842, Cal. Rules of Court, barred any consideration of a county not suggested by the Judicial Council. Appellant then revoked his agreement to transfer any counts, on the ground that the January 21 agreement had been abrogated in all material respects from appellant's perspective.

Notwithstanding appellant's revocation of his consent to transfer any counts anywhere, the court transferred all counts to Orange County. The Third District Court of Appeal denied appellant's petition for writ of mandate/prohibition, and this court denied his petition for review on August 18, 1994, (S040193).

6. The post-transfer revelation of the undisclosed machinations by Judge McCartin to avoid a transfer to San Francisco and to affect a transfer to Orange County.

Following the April 8, 1994, hearing, counsel for appellant filed various motions to vacate the change of venue order on multiple grounds, including a Motion to Set Aside the Agreement or Stipulation regarding venue of January 21, 1994, filed on May 10th, 1994, XVI CT Cal S 5743, accompanied by a notice that appellant's attorney intended to call Judge McCartin as a witness at the hearing, relating to a conversation between attorney Webster and Judge McCartin following the hearing of April 8, 1994.

Per attorney Webster, Judge McCartin had told attorney Webster that when he had initially been contacted by the Judicial Council to sit on the case

following the prosecution's recusal of Judge Perasso, he (McCartin) had just undergone back surgery, and was not favorably disposed toward presiding over a very lengthy case in a distant jurisdiction. However, the Judicial Council staff person "had told him that venue would have to be moved from Calaveras County and that it was going to either Orange or Los Angeles County anyway". XVI CT Cal S 5833 (emphasis supplied). Counsel argued in the motion that the change of venue order should be vacated because of fraud and concealment of the prior determination of the Judicial Council to transfer the case to Orange County or Los Angeles County, even prior to any request or inquiry from the court or the parties, and prior to consideration of any input from counsel regarding the appropriate trial site selection. The undisclosed decision by the Judicial Council, known only to Judge McCartin, was not conveyed to any counsel for appellant at the January 21, 1994, hearing. To the contrary, Judge McCartin urged all counsel to agree to send the case to the Judicial Council accompanied by any informational materials viewed by the parties as relevant to the selection of trial sites, as if the Judicial Council had not already determined that the trial site would be Orange County or Los Angeles County. XVI CT Cal S 5801.

As the June 22, 1994, hearing date for this motion approached, council for appellant filed a Statement of Disqualification pursuant to the

Code of Civil Procedure section 170.1, XIX CT Cal S 6429, because of Judge McCartin's anticipated testimony at the hearing. On June 22, the Judicial Council assigned Judge Harold Bradford of Alpine County to hear the Motion. XIX CT Cal S 6681. Judge Bradford denied the disqualification motion on June 28, 1994, XIX CT Cal S 6718-6722. The motion to set aside the transfer was heard on June 30, 1994, by the Hon.Thomas Curtin.

Judge McCartin testified that he was contacted by a Judicial Council staff person named Chris Hoffman in December 1993, who asked whether he would be willing to accept an assignment to the Ng case, either for pretrial motions or for all purposes. When Judge McCartin pointed out the relative remoteness of San Andreas in Calaveras County, Ms. Hoffman told him that the case almost certainly would be moved, "so it's probably going to be north or it's going to be south." Judge McCartin added, "And whether she said Orange or Los Angeles County, or Orange, Los Angeles, -- she may have added another county, or she indicated that the district attorney preferred the case publicity-wise to go south and the defense attorneys wanted the case to go to San Francisco or go north. And that was it." VIII RT Cal S 2394. He acknowledged the portion of his declaration in which he stated that Ms. Hoffman had said, "it was her understanding that the district attorney wanted the case to go to Orange County and the defense wanted it to go to San

Francisco." VIII RT Cal S 2395. Judge McCartin disclaimed any foreknowledge or assurance that the case eventually would be sent to Orange County, VIII RT Cal S 2397. However, when he was explaining his effort to elicit a stipulation to refer the case to the Judicial Council on January 21, 1994, he characterized his communication with Ms. Hoffman just as attorney Webster had described it in his motion – "[t]he only information that I had, going back to that, is just the offhand remark by Chris Hoffman that she thought the case was going to be south." VIII RT Cal S 2404.

Judge McCartin also acknowledged that he did not tell any attorney for appellant of the response from John Toker at the Judicial Council that he would not review or consider any materials sent by the parties in the course of his site selection process. VIII RT Cal S 2412- 2414. Instead, Judge McCartin set the matter for the McGown hearing knowing that defense counsel would have had no input regarding the selection of potential transferee counties. He also acknowledged that shortly after being contacted about taking the case, he cleared with the Orange County Court Administrator that Orange County would accept the case if requested. VIII RT Cal S 2424. He also contended (falsely, per stipulation of the parties) that upon hearing from the Judicial Counsel that Sacramento and Orange Counties were proposed, he instructed

Calaveras Clerk Mary Beth Todd to ask the parties whether they would agree to venue in Sacramento. VIII RT Cal. S2425-27.

John Toker, senior administrative staff attorney at the Judicial Council, testified as to the conversations that he had with Judge McCartin regarding the change of venue, as memorialized on his intake form. He initially asked Judge McCartin by telephone whether there were any counties that should not be considered for transfer because of publicity or other reasons, and Judge McCartin had responded, "downtown Los Angeles." He asked Judge McCartin if there were any counties that he [Judge McCartin] would like to recommend for transfer, and Judge McCartin responded, "Orange County." When asked whether there were any other factors relevant to the selection of trial sites, Judge McCartin did not supply any, VIII RT Cal S 2455-2456, notwithstanding the multiplicity of reasons favoring San Francisco County.

Mr. Toker also told Judge McCartin in a subsequent telephone call that he (Toker) could not review and consider the materials sent from defense counsel regarding San Francisco as a potential transferee county, but rather that "it was for the court to review the papers and on that basis of its determination tell me whether this should be a factor one way or the other." VIII RT Cal S 2463. Mr. Toker sent Judge McCartin a letter on March 4, 1994, stating that it was up to the court to advise him if there were any factors

such as those contained in the defense pleadings that should be considered in the site selection process. There was no response from Judge McCartin. VIII RT Cal S 2480.[13]

Mr. Toker agreed that factors such as vicinage and witness convenience were important considerations in trial site selection, but only if the information came from the transferring court. VIII RT Cal S 2513. He had told Judge McCartin that if he [Judge McCartin] "thought that the vicinage argument was appropriate and should be acted on, he should just tell me to try to place the case in San Francisco," VIII RT Cal S 2516, but Judge McCartin did not do so.

Mary Beth Todd, Calaveras County Clerk, testified that she assisted Judge McCartin while he was sitting in Calaveras County. On February 18, 1994, she received a telephone call from John Toker that Orange County "has agreed to accept the case, with the understanding that Judge McCartin would try it." VIII RT Cal S 2557.

---

[13] Judge McCartin testified to a contrary scenario in which he claimed to have touted the virtues of San Francisco and had even "emphasized" San Francisco in a conversation with Toker – "I think I made it a point somewhere along the line – not that conversation – to Mr. Toker to make sure they contact San Francisco, because I certainly knew Mr. Margolin wanted to go to San Francisco. And I certainly emphasized it in one of my conversations." VIII RT Cal S 2415.

Attorney Webster testified that Judge McCartin told him during the brief conversation on April 4, 1994, outside the courtroom, that he was told in December that the case would be transferred to Orange County or Los Angeles County. The parties stipulated that Judge McCartin had never asked them for a stipulation that venue be transferred to Sacramento County, as Judge McCartin had testified. VIII RT Cal S 2606.

Judge Curtin denied the motion on the basis that (1) prior to the January 21, 1994, hearing, there had not been any decision that the case would be transferred to Orange County; and (2) that the actual determination as between Sacramento and Orange County was made by Judge Kleaver at the April 8, 1994, McGown hearing. VIII RT Cal S 2640. Judge Curtin did not address the evidence or consequences of Judge McCartin's conduct in the interim between those two hearings, in which Judge McCartin told John Toker at the Judicial Council that the only county he recommended considering was Orange County. In addition, Judge Curtin did not refer to or consider the testimony of John Toker that he would have made specific efforts to "place the case" in San Francisco if Judge McCartin had given him any indication that there were legitimate factors weighing in favor of venue in San Francisco. Judge McCartin resumed the bench and denied additional motions by appellant. XIX CT Cal S 6733-6737.

Counsel for appellant filed a petition for Writ of Mandate in this Court on August 31, 1994, S0401878, which was transferred to the Third District Court of Appeal. Following a summary denial, this Court denied review on September 29, 1994, S042283.

7. The failure of Orange County to provide relief.

Appellant repeatedly sought relief from the Orange County Superior Court following the transfer of all counts to that court, but to no avail. 2 CT 230 [motion to change venue to San Francisco; lack of Orange County jurisdiction, assertion of San Francisco vicinage rights]; 2 CT 603 [denied]; 7 CT 2403 [motion to transfer counts II-VII to San Francisco], 25 CT 8636 [motion to preclude trial on re-numbered San Francisco counts I-VI] for lack of jurisdiction].

B. The Trial Court's Errors.

1. Appellant was deprived of due process by the unilateral abrogation of the crucial components of the trial site selection agreement.

At the time of the January 21, 1994, status conference, appellant had not moved for a change of venue, and there was no advance indication that trial site selection was to be considered at the hearing. Penal Code section 1033(a) is explicit that a pretrial change of venue order may be entered only

upon motion of the defendant.[14] At the same time, it was implicitly recognized by the court and counsel that trial would not be held in Calaveras County because of pretrial publicity and prejudgment by the small population of that county. At the January 21, 1994, hearing, Judge McCartin emphasized the need to get the case out of the doldrums it had reached in Calaveras County and onto a trial track. To that end, Judge McCartin conditionally re-appointed local counsel Webster and Marovich. VII RT Cal S 2118.

The court then opened discussions regarding trial site selection:

> "And, basically, cutting right through it, sort of, with regard to - I'd also like to touch on venue. It seems to me that we all know that the case isn't going to end up in this particular county, so it seems to me that that's something we should address, although it isn't formally." VII RT Cal S 2103.

Counsel for appellant urged the immediate appointment of the San Francisco Public Defender because that would resolve a number of problems that had been plaguing the case from the outset. Counsel pointed out that it would resolve the Harris issues which had derailed the case for some five years, would satisfy the federal constitutional vicinage rights on more than half of the counts, and would permit consolidation of all counts in one county

---

[14] Penal Code section 1033(b) permits a change of venue on the court's own motion or on the motion of any party, to an adjoining county only, when it becomes apparent during jury selection that it will be impossible to secure a jury within the county.

for judicial economy. VII RT Cal S 2105-08. The trial court, in contrast, wanted to find at least a tentative trial site first, upon recommendation of the Judicial Council, before appointing new counsel.

After further discussion, the court made its proposal:

> "So if you gentlemen would stipulate, we'll just hammer this off to the Judicial Council and then see where it goes. And the vicinage, if it ends up where undoubtedly the defense feels it should go and they want it to go - and I understand the prosecution isn't enamored with that situation, why and where . . . .
>
> "Seems to me that let the Judicial Council. It may be that San Francisco or one of these counties won't want it, won't take it, and you never know how they're going to react, because that puts everything to rest." VII RT Cal S 2136.

Defense Attorney Marovich cautioned that if the agreement were to come to fruition, "one thing that would have to be very clear, that there would be no waiver of anything," referring to case law holding that a stipulation to change of venue waives vicinage rights in the original county of venue VII RT Cal S 2137. The court responded:

> "I think that's loud and clear, that there's absolutely no waiver of vicinage whatsoever. I mean, that's a given. And that can be raised both in the San Francisco case and also if it should become pertinent with regard to this, that there is absolutely no waiver whatsoever, that vicinage will be pursued if it in fact becomes necessary." Ibid.

Counsel for appellant thus agreed to a referral to the Judicial Council subject to three conditions: 1) that it applied only to Counts I and VIII-XIII

(the non-San Francisco counts); 2) that it would not constitute a waiver of vicinage rights with respect to Counts II-VII, the San Francisco counts; and 3) that counsel for Appellant would be permitted to submit relevant informational materials to the Judicial Council for consideration in the trial site selection process - "I simply don't want them to make a decision without having information before them . . . [because] I think [a] decision . . . when they don't have access to the materials that were developed would be inappropriate and probably illegal." VII RT Cal S 2148.

The parties then proceeded to discuss what materials would be submitted to the Judicial Council, and it was clearly contemplated by all that Appellant's vicinage pleadings would be included. VII RT Cal S 2155. Counsel for Appellant re-clarified, and the court agreed, that the stipulation for change of venue applied only to the non-San Francisco counts (Counts I and VIII-XIII):

Mr. Webster:	Just to make sure the record is absolutely clear that we are not stipulating to a change of venue on counts II-VII.
The Court:	Correct. VII RT Cal S 2158.

The court explained its interest in facilitating an agreement for reference to the Judicial Council: "The only thing I'm facilitating today is to get this particular case somewhere it can be handled instead of out in --. I

don't want to offend all the locals. Instead of out in the hills or boondocks. We can get it into a metropolitan area where Mr. Ng wouldn't have to be transported back and forth and all the security problems. It would just be – we know where we're going to go, with the exception of the vicinage." VII RT Cal S 2141. The clerk clarified that the parties should send their informational materials to her to submit to the Judicial Council, rather than send them directly. VII RT Cal S 2160.

Appellant's interest in participating in this agreement was clear. From appellant's perspective, once the Judicial Council understood the overwhelming connections between the referral counts and San Francisco County, it would put San Francisco at the top of the list of potential candidates for a host of practical and legal considerations. Similarly, once San Francisco was apprised of the same materials and realized the array of advantages accruing if it were to accept the case, it would accept all of the pending counts. In sum, appellant viewed this procedure, as suggested by Judge McCartin, to be an expeditious means of resolving his representation questions, the vicinage issues regarding counts I through VII, and the overall problems of case management, all in one multi-purpose package.

At the same time, appellant understood that while there was no guarantee that the Judicial Council would recommend San Francisco alone or

even San Francisco primus inter pares, as to the non-San Francisco counts, at least the San Francisco counts would be transferred there. Thus, appellant understood that he had not bargained for a guaranteed transfer directly to San Francisco of all counts, but rather for the right to present information to be considered in the decision-making process of the Judicial Council and the prospective transferee courts. The crux of the agreement from appellant's perspective was the court's assurance that the relevant factual materials supplied by appellant would be reviewed and considered by the Judicial Council and by the courts involved in the trial site selection process.

As noted above, the agreement was breached, unbeknownst to appellant, even before he had submitted his materials for transmission to the Judicial Council. The Judicial Council had informed Judge McCartin almost immediately that it would not consider any materials submitted by the parties, unless specifically designated by the court as appropriate for consideration, which Judge McCartin did not do. Instead, Judge McCartin failed to disclose the breach of agreement until after the Judicial Council completed its work in ignorance of appellant's materials. Judge McCartin's chronology of the pertinent events was set forth during the April 8 hearing:

> "I got a call within a very short time, within the following week . . . and then I went into the fact that we had sent transcripts of the record and getting all of this [information] together. And he said, 'I'm not going to look at it,' because he said 'I am supposed to only contact these courts

> and not get into vicinage and all these other factors.' He says it's not proper for him to consider any of this information". VII RT Cal S 2267.

Thus, within a week of January 21, Judge McCartin was informed that the fundamental consideration upon which appellant had agreed to the trial site selection procedure had been rendered a nullity, but failed to disclose this breakdown in the process to appellant.

Further, Judge McCartin wrongly contended that there were no conditions under which the Judicial Council would consider additional information regarding trial site selection even if suggested directly by Judge McCartin. "So whether it came from me or the court or that wasn't going to make any difference". VII RT Cal S 2267. That comment appears to be an effort by Judge McCartin to suggest a "no harm, no foul" defense to his failure to have informed defense counsel of the initial Judicial Council rejection of the materials supplied by counsel. In fact, Judge McCartin's position was contradicted by John Toker, in his March 4 letter to the supervising Calaveras County clerk:

> "This is to acknowledge that the package of documents in the case of People v. Ng, Calaveras County no. 3124, was received in my office, presumably in early February. However, it was not found by me until March 4.
>
> "As I advised you earlier, it would be inconsistent with our ministerial role in change of venue matters for this office to review any papers in a case for legal or judicial purposes. Instead, we must rely on

information from the court, based on its own review of any pertinent evidence." (emphasis supplied.) XV CT Cal S 5545

Thus, as of January 28, 1994, the trial court had been informed that the consideration appellant had insisted upon and was granted in return for entering the trial site selection agreement had been nullified. The court had permissible two options available: 1) to abrogate the agreement in entirety for want of consideration; or 2) to transmit the relevant information to the Judicial Council in the manner specific by staff attorney Toker. The court did neither, and simply permitted the Judicial Council and transferee courts to blunder forward in ignorance of the factors regarding continuity of representation, vicinage, witness convenience, and others that appellant had so diligently sought to apprise them.

a. Appellant's initial consent to venue referral as to counts I and VIII-XIII was vitiated by the subsequent failure of consideration and the trial court's failure to so inform appellant.

A criminal defendant cannot, consistent with due process, be inveigled into giving up valuable rights based on an illusory promise of consideration which is subsequently nullified. This fundamental principle has been repeatedly applied in the host of cases affording a defendant relief from a plea agreement in which the anticipated consideration was subsequently abrogated or otherwise dishonored.

The application of this principle requires reference to the contract principles operative in the jurisdiction of the plea -- "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contact principles". People v. Shelton (2006) 37 Cal. 4th 759, 767. See Santobello v. New York (1971) 404 US 257, 261-62; Buckley v. Terhune (9th Circ. 2006) 441 F. 3rd 688, 695. Buckley cited Ricketts v. Adamson (1987) 483 U.S. 1, 6 for the proposition that "California Courts are required to construe and interpret plea agreements in accordance with state contract law." Id. at 695.

Appellant in this case entered into an agreement directly comparable to a plea bargain, but with respect to the resolution to the certain specified issues regarding venue for some of the charged counts. By application of the same principles of due process that govern the judicial review of plea bargains, the same California contract principles must apply to this Court's review of this "venue bargain".

The applicable rules for determining whether there was adherence to a bargained-for agreement in the context of a criminal case is found in standard California Contract Law. "All contracts, whether public or private, are to be interpreted by the same rules...", Cal Civil Code Section 1635. The reviewing court must further look to the plain meaning of the agreement's

language, Civil Code Section 1638, 1644. If the language is ambiguous, it must be interpreted in accordance with "the 'objectively reasonable' expectation of the promisee." Buckley at 695, citing Civil Code section 1649. If the ambiguity remains, " the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Civil Code section 1654.

Here, the terms of the venue agreement were crystal clear as of the conclusion of the January 21, 1994, court session. The material terms were:

1. Counsel for both parties would stipulate to the referral of Counts I and VIII-XIII to the California Judicial Council for trial site recommendations;
2. Counsel for appellant would be permitted to submit for consideration all relevant evidence relating to the particular suitability of San Francisco County as a trial site;
3. The Judicial Council would give full and fair consideration to the proper materials in the course of making its trial site recommendations; and
4. The agreement did not include a stipulation as to change of venue with respects to Counts II-VII, as appellant asserted and

the trial court recognized his claim of vicinage in San Francisco County as to those counts.

Given the clarity of the agreement, the materiality of the multiple breaches is equally apparent. The Judicial Council refused to consider appellant's submissions regarding trial site selection; the Judicial Council lost the documents in the process; and Judge McCartin did not inform appellant of the anticipatory breach by the Judicial Council when he himself learned of it. Perhaps most egregiously, John Toker of the Judicial Council clearly explained to Judge McCartin that if he [Judge McCartin] "thought that the vicinage argument was appropriate and should be acted on, he should just tell me to try to place the case in San Francisco," VIII RT Cal S 2516, but Judge McCartin did not do so. Judge McCartin had the last clear chance to either provide the consideration that appellant had agreed upon or tell appellant that there was no consideration, but he did nothing.

The remedy for breach of a plea agreement in contract law terms is either the opportunity to withdraw the plea, (i.e., rescission of the contract) or specific performance. Buckley, supra, at 699. Appellant sought both remedies in a trial court, but received neither. At this juncture, the only remedy to restore appellant to the status quo ante is to vacate his convictions

and return the parties to the pre-breach posture in Calaveras County as of January 21, 1994.

The contract principles of fraud are equally applicable to plea bargains as to the underlining charges and should be similarly applied to the venue bargain in this case. See e.g. United States v Ritsema (7th Circuit 1996) 89 F.3d 392, 402 ["once the court signed off on the agreement at Ritsema's first sentencing in 1993, it became bound by the terms of the agreement and could not, absent proof of fraud or breaches of plea bargain, set the agreement aside"].

b. Appellant's consent to the Judicial Council referral was vitiated by Judge McCartin's failure to disclose that the Judicial Council had already been informed that the prosecution wanted the case transferred to Orange County and that the Judge McCartin had affirmatively recommended only Orange County.

As set forth in the summary of facts, Judge McCartin knew from his prior conversations with Judicial Council staff that the Judicial Council was already aware that the prosecution sought a transfer of the case to Orange County, and that Judge McCartin was informed of this preference prior to the January 21, 1994, hearing. If Judge McCartin had disclosed his earlier discussions with Chris Hoffman of the Judicial Council at the January 21, 1994, hearing, counsel for appellant would never have agreed to the stipulation as to the referral to the Judicial Council. Nor would counsel have

agreed to the referral if apprised that Judge McCartin would affirmatively recommend transfer to Orange County without any comparable recommendation regarding San Francisco. See People v. Mancheno (1982) 32 Cal.3d 855, 860 ("The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to the implementation of the bargain itself.")

Analogous principles have been applied in a plea bargain situation more factually akin to the agreement in this case in, inter alia, People v. DeVaughn (1977) 18 Cal.3d 889. DeVaughn had pled guilty, based on the trial court's assurance that it would issue a certificate of probable cause (Code section 1237.5) permitting him to appeal the voluntariness of his statements taken following an arrest which the defendant claimed had been illegal. However, the California Supreme Court held that a voluntariness issue did not fall within the Penal Code section 1237 purview of "constitutional, jurisdictional or other grounds going to the legality of the proceedings." While defendants had bargained for the right to raise the legality of the extrajudicial statements in the appeal following guilty plea and sentence, "[d]efendants in the instant case . . . cannot raise in this appeal claims that their extrajudicial statements were involuntarily induced." DeVaughn next

held that "[t]hey may, however, attack on this appeal the validity of their pleas on the ground that because it was beyond the power of the trial court to bargain with defendants to preserve for appellate purposes the issues of involuntariness, they were improperly induced to enter such pleas" (18 Cal.3d at 896). DeVaughn concluded that "the judgments must be reversed because defendants' pleas were induced by misrepresentations of a fundamental nature" (ibid.; emphasis supplied).

The analogy here is compelling. DeVaughn bargained for the right to present an appeal and have it considered by a reviewing court, following his guilty plea. Appellant here bargained to have the Judicial Council and potential transferee courts consider his proffered information favoring, if not compelling, the selection of San Francisco as the trial site. DeVaughn was not guaranteed relief on the appeal he bargained for, but was guaranteed that the procedural vehicle would be effectuated. Similarly, appellant here was not guaranteed a transfer to San Francisco, but rather was assured the information he supplied favoring that transfer would be fairly considered by the Judicial Council.

Just as DeVaughn's plea was "induced by misrepresentations of a fundamental nature" (18 Cal.3d at 896), appellant's agreement to refer the case to the Judicial Council was vitiated by equally fundamental express and

implied misrepresentations, rendering the eventual ruling void. See also People v. Truman (1992) 6 Cal.App.4th 1816 [defendant is entitled to withdraw guilty plea based on trial court's illusory promise as to the appealability of defendant's 995 motion].

As soon as Judge McCartin was apprised of the Judicial Council policy and practice to consider relevant information regarding issues such as vicinage, witness convenience, etc., only when transmitted by the transferring court, he had a duty to inform appellant of this breakdown, and his failure to do so must be viewed in the nature of fraudulent concealment of material information. See also People v. Williams (1969) 269 Cal.App.2d 879, 885 ("Appellant should have been afforded an opportunity to withdraw his plea of guilty when it proved that the court's representation to appellant was not entirely correct"); Puckett v. United States (2009) ___ U.S. ___, 2009 Westlaw 763354 '[where the government breaches a plea bargain," the defendant is entitled to seek a remedy, "either rescission or specific performance]; United States v. Packwood (9th Cir. 1988) 848 F.2d 1009, 1011 ("Plea bargains are contractual in nature and must be measured by contract law standards . . . [and] implicate important due process rights . . . so the process must be fair").

"Courts have traditionally viewed such bargains using the paradigm of contract law", such that "courts should look first to the specific language of the agreement to ascertain the expressed intent of the parties," and then "[b]eyond that, the courts should seek to carry out the parties' reasonable expectations," People v. Nguyen (1993) 13 Cal.App.4th 114, 120. People v.Walker (1991) 54 Cal.3d 1013, 1024. California case law is clear that subsequent developments, unknown to the parties at the time the agreement was entered, cannot be permitted to nullify the previously conferred consideration, without affording the defendant an opportunity to withdraw from the agreement. See, e.g., People v. De Jesus (1980) 110 Cal.App.3d 413 (defendant who had pled guilty pursuant to a plea bargain was entitled to be sentenced by the same judge unless internal court administrative practices rendered that impossible, in which case the defendant was entitled to withdraw his plea).

Due process has been held to preclude judicial abrogation of an agreement to a defendant's detriment in other related contexts. Knox v. Collins (5th Cir. 1991) 928 F.2d 657 vacated a Texas death sentence where the trial court had promised to give a jury instruction describing when a defendant would be legally eligible for parole release if given a life sentence, i.e., after 20 years at the earliest. Based on this promise, defense counsel

declined to exercise peremptory challenges against prospective jurors who thought a convicted murderer could be back on the streets within five to ten years, in the expectation that these misconceptions would be rectified by the court's promised instruction on the mandatory 20-year minimum. The Fifth Circuit held that the court's "failure to fulfill that promise denied Knox an intelligent exercise of peremptory challenges and violated due process," 928 F.2d at 662. Knox noted that a defendant was not constitutionally entitled to either voir dire or jury instructions regarding parole, but that where a particular agreement was made in the trial court for both, the court was obligated by due process to honor the agreement.

Similarly, regardless of whether appellant had an independent constitutional entitlement to present informational materials to the Judicial Council and to the courts involved in the trial site selection process, once the trial court assured him of that right in consideration for his consent as part of a comprehensive agreement, the court was obligated to honor this commitment as well.

c. Appellant revoked his consent to any transfer when Judge McCartin refused to remedy the breakdown of the initial agreement.

The error in this case is rendered more egregious by the trial court's refusal to provide relief after appellant independently discovered what had in

fact occurred. Immediately upon receipt of the March 7 minute order indicating that only Sacramento and Orange Counties were on the Judicial Council's list of recommendations, counsel for appellant began investigating to determine why San Francisco had not been included, and soon learned of the many ways in which his bargained-for expectations had been ignored or nullified. Appellant responded by requesting remedial efforts to make the initial agreement work, notwithstanding the fundamental foul-ups which had occurred and when relief was denied, revoked his consent to change of venue on Counts I and VIII-XIII. XVI CT Cal S 5743. Counsel for appellant argued for revocation at the April 8, 1994, hearing:

> "I would submit to you that we have no choice but formally, as formally as I can make it, [to] revoke the agreement we entered into under false pretenses and/or annul it. Because my view now is that the proper word is 'a nullity,' and I ask that you grant that motion." VII RT Cal S 2308.

Based on this record, the purported order transferring the case to Orange County was itself a nullity because entered without the agreement of the defendant. Appellant's initial agreement was induced based on "misrepresentations of a fundamental nature" (People v. DeVaughn, supra). When that consideration was nullified, appellant was just as entitled to revoke his agreement as was DeVaughn to withdraw his plea under fundamental principles of due process. Because Penal Code section 1033(a) unequivocally

limits a pretrial order changing venue to those circumstances in which the defendant moves for the order, or explicitly agrees to it, the court was then without jurisdiction to enter a change of venue order in this case.

2. Appellant was deprived of due process by the Court's refusal to continue the McGown hearing to afford appellant an opportunity to conduct inquiries and present evidence regarding the unsuitability of the suggested counties.

Appellant was deprived of due process and a fair hearing by two arbitrary and mutually reinforcing acts of the Superior Court: 1) its refusal to permit Appellant any reasonable opportunity to develop and present evidence regarding the unsuitability of the two proposed counties; and 2) its refusal to permit appellant to present affirmative evidence regarding the overwhelming suitability of a third county, San Francisco.[15]

McGown v. Superior Court (1977) 75 Cal.App.3d 648 issued a peremptory writ of mandate directing the trial court to vacate an order transferring venue as improperly entered after the court denied a continuance to permit the defendant an opportunity to investigate the suitability of the prospective transferee counties. In McGown, the Judicial Council had recommended certain counties for possible transfer, and the defendant requested a continuance of the transfer decision hearing so that he could

[15] Petitioner's argument regarding the trial court's arbitrary and erroneous application of rule 842 is contained in Part B-3 below.

investigate whether there had been prejudicial publicity in the most likely transferee county. The court denied the continuance motion and selected one county based on its impressions of comparative suitability, 75 Cal.App.3d at 651.

The defendant petitioned for a writ of mandate on the basis that he should have been granted a continuance and permitted to present evidence regarding the suitability of the various counties, addressing such issues as the amount of the publicity in each; the pre-judgment factor in each; and other relevant factual matters. The court of appeal held as a predicate to its decision on the continuance issue that "rule 842 [Cal. Rules of Court] impliedly requires the court in which the action is pending to conduct an evidentiary hearing before deciding where the cause should be transferred" (id. at 652). That holding was compelled by the "interest of justice" language in rule 842, which invoked the "basic premise that justice requires that the parties be afforded a meaningful opportunity to be heard and produce evidence" (ibid.). The Court of Appeal concluded that "respondent court abused its discretion in denying Appellant's motion for a continuance to present evidence directed to the issue of pretrial publicity in Stanislaus County; this ruling denied Appellant a meaningful hearing on the transfer issue" (id. at 653-654.)

In this case, the trial court labeled the April 8 proceeding a McGown hearing but robbed it of any substance by setting it within such a short time frame that appellant was unable to prepare and present evidence of the unsuitability of the two counties suggested by the Judicial Council. No less than in McGown itself, the court's arbitrary denial of a continuance precluded "a meaningful hearing."

The chronology demonstrating the indisputable need for a continuance is as follows. After the agreement of January 21, counsel for appellant promptly submitted the materials setting forth the reasons why San Francisco was by far the preferable trial site. XV CT Cal S 5516. Counsel was obviously unable to conduct studies regarding other possible transferee counties until notified of the Judicial Council's suggestions on March 7, 1994. On that date, Judge McCartin issued a minute order setting April 8, 1994, "for evidentiary hearing on the motion for change of venue," citing McGown v. Superior Court, supra, and indicating that "counsel are directed to have any surveys they wish to introduce into evidence completed prior to the date set for the hearing." XV CT Cal S 5548. Counsel for appellant received this minute order shortly afterward, and this was of course the first notice that Sacramento and Orange Counties had been selected as possible transferee counties. Counsel immediately began filing motions directed to 1) the

absence of San Francisco on the list and 2) the inability to be prepared for a hearing as to the designated counties by April 8. XVI CT Cal S 5594.

As set forth in appellant's pleadings, counsel for appellant had contacted and arranged with the National Jury Project, a well known organization experienced in conducting demographic surveys in change of venue contexts, to undertake the necessary surveys, obtained the project's estimate for the cost of such a survey regarding Orange and Sacramento Counties, and applied for funds for that purpose from the Penal Code section 987.9 judge assigned in this case. However, as counsel for appellant clearly indicated in the Motion for Continuance of McGown Hearing, the director of the National Jury Project stated that based on their years of experience and completion of scores of similar surveys, it would necessarily take them some 60 to 90 days to complete surveys in this case from the date that funds were authorized. Thus, there was no conceivable way in which counsel could have demographic surveys of Sacramento and Orange Counties completed within the less than 30 day period between receipt of the court's March 7 communication and the April 8 hearing. Counsel elaborated on the impossibility of preparation within the designated time frame during argument on the motion to continue:

> "I asked Terry Waller, the executive director, to come up with a budget for this after we had a number of conversations about what issues we

wanted to see done. We sort of boiled down the issues to publicity, one; number two, pre-judgment, which is a separate issue from publicity; and number three, the demographics. So he [sic] gave me a budget. I turned that into an application, ran it by Margolin, filed it with the 987.9 judge.

"Here's the point I want to make during the course of this thing. The bottom line is Terry Waller says 'We've done 20 of these in the last 5 years. It takes us 60 to 90 days to get it done from the day we get the green light.'

"If on March 8, by instantaneous transfer of information and funds by the 987.9 judge we couldn't have been ready for today, even if all the preliminary stuff had occurred instantaneously and it didn't. And we were moving along.

"The point we want to make here is that the McGown hearing is the point of the case is that it's an evidentiary hearing. And today, we've heard lots of impressions, grounded in experience Judge McCartin's impressions, your own impressions coming here today, the district attorney's impressions, but that doesn't substitute for the hard core evidence on the issues of publicity, pre-judgment, and demographics in response to Mr. Ng's ethnicity in the county." VII RT Cal S 2325-2326.

At an earlier point in the proceedings, the court had suggested that counsel had not proceeded with sufficient diligence to be prepared for the April 8 hearing. "It seems to me that between January 27 and now, most certainly more could have been done than simply contacting the 987 money judge, as we're calling him . . . . In other words, nothing's happened. That's my difficulty." VII RT Cal S 2323. As counsel subsequently pointed out, counsel could not have known (except through clairvoyance) during the period January 27 through March 7 that Sacramento and Orange Counties

would be the designated counties.[16] Not until shortly after March 7 were the transferee counties revealed, enabling counsel to move into action regarding preparation for the evidentiary hearing. Prior to March 7, counsel could not have undertaken any more groundwork, because a survey of, say, Siskiyou County would be dramatically different from a survey of, say, Sacramento County.

Counsel for Appellant filed a motion to continue the McGown hearing prior to the April 8 hearing, and emphasized the factual issues to be investigated and their importance to the determination "to see the level of publicity in the two sites that were suggested by the Judicial Council, to see what the current pre-judgment rate is in each of these counties, and to get an idea of the county's position as far as racial factors which might adversely affect the fairness of the trial." VII RT Cal S 2271. Counsel summarized the presentation that the defense would hope to make if a continuance were granted, "Our presentation, which we would plan to do in the 60 to 90 days, would be, if the facts develop as we see them, we would show Sacramento has high negatives on one or more of these [factors], Orange County has high

[16] At the time, counsel for appellant believed that the trial site selection process was proceeding pursuant to the parties' agreement, and that Judge McCartin was acting in good faith with respect to his assurances that San Francisco County would be given fair consideration as a trial site. The subsequent hearing of June 30, 1994, revealed that belief to be unfounded.

negatives on one or more of these, and there are a host of factors which favor San Francisco." (Ibid).

The court then stated that if a survey was necessary, perhaps the parties could simply submit the results to Judge Kleaver (the judge assigned for the McGown hearing itself):

> "I'm not telling Judge Kleaver what to do, but it seems to me we could take it under submission. And if that were a factor, factor it into his final determination, and cover that loose end." VII RT Cal S 2280.

In sum, in his haste to move the case out of Calaveras County, which he characterized inter alia as "no-man's land", VII RT Cal S 2278, and "the boondocks" ,VII RT Cal S 2258, the court characterized the demographic surveys, which were essential to a meaningful McGown hearing, as mere "loose ends". As a matter of law, Judge McCartin's firmly held belief that there was not a great deal of publicity in Orange County in no way resolves its suitability as a trial site. In particular cases, an ordinary amount of publicity can generate an unacceptably high pre-judgment rate among the potential venire, and the particular facts of the case can make a county otherwise untainted by publicity unfair based on racial considerations. See, e.g., People v. Williams (1989) 48 Cal.3d 1112. Moreover, McGown specifically addressed the need for objective evidence regarding prejudicial aspects of a potential transferee county, even if those aspects would not be

sufficient in themselves to independently require a change of venue pretrial publicity which is not sufficient to require a change of venue from Stanislaus County may be sufficient to persuade respondent court that the cause should not be transferred to Stanislaus County, 75 Cal.App.3d at 653; emphasis supplied.

The motion to continue was denied and the decision to transfer the case to Orange County was made on precisely the type of impressions and surmises found inadequate in McGown. Moreover, the court's surmises and impressions were manifestly wrong on important points. Judge McCartin extolled the virtues of Orange County as a trial site, emphasizing as a positive point that "there are a lot of Asians in Orange County.".[17]

---

[17] "Now, with regard to the polling and so forth, . . . I don't think it's improper, but the coverage in this particular case, as far as Southern California, is nil. I think I stated that before. So I can't really think that any polling is going to come up with anything as far as Orange County. . . .

"As for Orange County, they have a I know they have a large Asian, so to speak. I don't know if it's five or eight percent, but there are a lot of Asians in Orange County. I can state that clearly for the record . . . . And if you want it [polling] on Orange County, I think it's a waste of everybody's time, publicity wise, because I assume I'm fairly knowledgeable on what's in the papers down there with all the criminal matters, I don't even remember basically seeing anything, maybe one article and so forth, but it seems to me that you can certainly cover that." VII RT Cal S 2275.

If an actual McGown hearing had been permitted, defense counsel could have presented objective California census data showing that in 1994, Orange County's population included 2.9% Asians of Vietnamese origin, by far the largest Asian minority group, and only 1.7% of Chinese ancestry. See http://factfinder.census.gov/home [U.S. Bureau of the Census, 1990 Census of Population and Housing].

In contrast, San Francisco County in 1994 had a population that included 18% Chinese-Americans, and 1.3% Vietnamese Americans. All other Asian groups were substantially smaller than the Chinese American group. Had Judge McCartin afforded a legitimate opportunity for a meaningful McGown hearing, counsel could have presented this data and persuasively argued that "Asians" (1) Orange County had a neglible Chinese American population compared to San Francisco; and (2) that the dominant Vietnamese-American population in Orange County was likely to harbor divergent cultural traditions and ambivalent current attitudes toward Chinese Americans, both of which militated against venue in Orange County.

Judge McCartin may well have believed that Orange County had "a lot of Asians," but Asians are not fungible in terms of cultural outlook and experience. An evidentiary hearing on this issue would have helped educate Judges McCartin and Kleaver regarding the substantial Chinese-American

population in San Francisco, and its long history of assimilation including a legacy of discrimination. See Yick Wo v. Hopkins (1886) 118 U.S. 356 [reversing the Supreme Court of California and determining that the discriminatory application of a San Francisco laundry-licensing ordinance against Chinese businesses violate the federal equal protection guarantee].

In contrast, the Vietnamese-American population of Orange County was comprised primarily of refugees who arrived in the 1970's and 1980's from a completely different cultural background and with a very different assimilation experience.

Judge Kleaver, sitting for the McGown hearing itself, based his ruling entirely on 1) his observation that "there were two or three Sacramento television station trucks outside" the courtroom that morning, noting that "that suggests something", VII RT Cal S 2318, and 2) his reliance on Judge McCartin's observations. "There is the indication we have had earlier during the course of the day about Orange County and its -- I won't call it disinterested in what goes on in the north state, but that almost sounded like what it was". VII RT Cal S 2319.

In sum, the McGown hearing was a sham, in which Judge McCartin substituted his misguided and mistaken observations for actual evidence as to the suitability of Orange County, and Judge Kleaver, relying on Judge

McCartin's observations as to the desirability of Orange County, knocked Sacramento County out of the box by referring to three Sacramento television crews present at the proceedings of April 8. This proceeding fell woefully short of what California law and due process require for an informed and reliable decision as to a proper trial site. Where state statute and accompanying court rules guarantee a particular procedural right to a defendant, the arbitrary deprivation of that right constitutes a denial of federal due process. Hicks v. Oklahoma (1980) 447 U.S. 443; Rust v. Hopkins (8th Cir. 1993) 984 F.2d 1486, 1493; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295. Appellant was deprived of due process by the arbitrary denial of any meaningful opportunity to present evidence regarding the unsuitability of Sacramento and Orange Counties.

3. Appellant was deprived of due process by the Court's arbitrary and erroneous application of Rule 842, Cal. Rules of Court to preclude evidence or consideration of San Francisco as an alternative choice.

From the very beginning of these trial site selection proceedings, appellant proceeded on the basis that if administrative or judicial authorities considered the merits of a transfer to San Francisco, the overwhelming array of factors favoring San Francisco would make the result a virtual foregone conclusion. However, through a series of mishaps, misunderstandings, and misrepresentations, San Francisco was not included in the list of possible trial

sites as designated by the Judicial Council. Appellant argued to the court at the April 8, 1994, hearing that rule 842, Cal. Rules of Court, authorized transfer to a county other than those designated by the Judicial Council "in the interest of justice." Rule 842 provides:

> "When the court in which the action is pending determines that it should be transferred pursuant to section 1033 or 1034 of the Penal Code, it shall advise the Administrative Director of the courts of the pending transfer. Upon being advised the Director shall, in order to expedite judicial business and equalize the work of judges, suggest a court or courts that would not be unduly burdened by the trial of the case. Thereafter, the court in which the case is pending shall transfer the case to a proper court as it determines to be in the interest of justice."

Rule 842, adopted effective March 4, 1972, in no way restricts the transfer to the courts suggested by the Judicial Council, but rather authorizes a transfer to any court "as it determines to be in the interest of justice." Judge Kleaver, however, froze San Francisco out of this phase of the trial site selection process by an erroneous and restrictive interpretation of rule 842 pursuant to which only the designated counties, Sacramento and Orange, were under consideration:

> "[T]here was some suggestion earlier that the court is not bound by the designated counties provided by the AOC in its determination of the county to which transfer will be done. I respectfully disagree with that conclusion." VII RT Cal S 2299.

* * *

"If, in effect, what that means is that following the providing of two or three or four, however many suggested courts by the AOC, that the trial court then has discretion to send the case any place it wants, what in the world is the purpose of the designation of courts all about? There would be no purpose to it. It would, in effect, open up a McGown hearing to 57 California counties as being prospective counties to which venue could be transferred. And I suggest that leads to foolishness, looking at the other side of the coin." VII RT Cal S 2329

The court's analysis was unsupportable on its face and directly contradictory to the plain meaning of rule 842, as indicated in the Judicial Council report preceding its enactment.

First, the interpretation proposed by appellant would not render irrelevant the Judicial Council's suggestion of certain counties. Certainly those counties would be considered as front runners, but that should in no way preclude a defendant from presenting a compelling case as to another county.

More importantly and dispositive of this issue is the Judicial Council's report explaining rule 842 and its meaning. The 1971 Judicial Council Report to the governor and Legislature recommended the adoption of legislation and court rules to govern procedures for transfer of venue in criminal cases. Senate Bill no. 787 implementing the Council's legislative recommendations was passed by the Legislature and signed by the Governor. The legislation requires the Judicial Council to adopt rules of practice and procedure to implement the transfer process, and the Judicial Council included its proposed

rules in the 1971 report. As contained in the 1971 report, rule 842 consisted only of the first two sentences of its current form, concluding with the provision that the director of the Administrative Office of the Courts shall "suggest a court or courts that would not be unduly burdened by the trial of the case." A subsequent report by the Judicial Council, recommending adoption of the implementing rules 840-844, made it crystal clear that section 842 was never intended to restrict the courts' transfer to the suggested counties:

> "It was the intention of the Judicial Council when it approved the proposed rules in November 1970 that the court, after receiving suggestions from the Director, would retain discretion in determining where to send the case. It is not clear, however, from the language of proposed rule 842 whether the trial court would be restricted to those courts which had been suggested, or whether, as was intended, it could transfer the case to another court. In order to clarify this matter it is suggested that a sentence be added to proposed rule 842 to the effect that, after receiving the names of suggested courts from the Director, 'the court in which the case is pending shall transfer the case to a proper court as it determines to be in the interest of justice.' It is recommended that rules 840-844, inclusive, attached hereto, which incorporate the above changes, be adopted effective on the date SB 787 is effective." (Emphasis supplied.)

The clarifying sentence was specifically added to make explicit the intent that the transferor court "could transfer the case to another court," not "restricted to those courts which had been suggested" (Judicial Council Report, p. 4).

Thus, the court in this case was 180 degrees wrong in its application of rule 842, notwithstanding the clarifying sentence added by the Judicial Council in order to avoid precisely the problem which arose in this case. Appellant was substantially prejudiced because of the court's refusal to even consider San Francisco as a possible trial site – the "application of the Defense to offer evidence of the suitability of San Francisco County as a venue transfer county, in addition to consideration of Orange and Sacramento Counties, is denied as being beyond the scope of the McGown hearing and the considerations available to the court under rule 842". VII RT Cal S 2335-2336.

This patent misapplication of rule 842 to appellant's prejudice constitutes an independent violation of his due process rights. The package of legislation and implementing rules encompassed within SB 787 specifically conferred on a defendant the option of a transfer to a non-designated county. That right was arbitrarily abrogated in this case. Appellant was doubly prejudiced by the cumulative adverse effect of the rulings which precluded him from presenting evidence of the unsuitability of Sacramento and Orange Counties, and from any consideration, much less the presentation of evidence, regarding the desirability of San Francisco County. The McGown hearing was reduced to a charade with a predetermined formality.

4. Appellant was deprived of due process and the effective assistance of counsel by the court's refusal to appoint trial counsel prior to trial site selection.

A fundamental premise of the effective assistance of counsel was violated in this case when the Calaveras County Superior Court conducted all trial site selection proceedings in the absence of any lawyer who could conceivably be trial counsel in this case. Attorneys Webster and Marovich had been relieved as trial counsel, and attorneys Margolin and Multhaup had been appointed for the limited purposes of Marsden and Harris issues. The court, in its January 27 order, unilaterally expanded the scope of their appointment to include these trial site selection purposes. When the March 7 order was issued, excluding San Francisco from consideration, attorneys Margolin and Multhaup filed a Motion for Appointment of the San Francisco Public Defender for Limited Purpose of Trial Site Selection Hearings. XV CT Cal S 5549. Counsel pointed out that Webster and Marovich were precluded from effectively advising or representing appellant regarding trial site selection because of the complete breakdown in their communications almost a year previously (the subject of much of the subsequent Marsden hearings), and attorneys Margolin and Multhaup were not sufficiently familiar with the facts of the prosecution's case or any contemplated defense so as to effectively evaluate the proposed alternatives. Attorneys Margolin and

Multhaup, therefore, were limited in their effectiveness to presenting evidence as to the desirability of San Francisco. As the court rulings successively and completely eliminated San Francisco from consideration, appellant was left without effective representation for trial site selection purposes.

Counsel for appellant had offered the eminently sound alternative of appointing the San Francisco Public Defender for the limited purpose of trial site selection proceedings, because that office, through its designated attorney Michael Burt, was already trial counsel in interrelated charges pending in San Francisco (see Ng v. Superior Court, supra, 4 Cal.4th 29) and, because of his nine years of continuous representation, had the best grasp of the overall case strategy of any of the attorneys involved. The court denied that motion by written order prior to the April 8 hearing, and denied it when renewed by counsel at the hearing, VII RT Cal S 2301. On April 8, counsel described the inherent impossibility of adequately representing appellant under these circumstances:

> "I [Margolin] was railroaded into a situation in which I very well may have made a mistake originally by entering into a stipulation in venue I had no business entering into, because it was not mine to make.
>
> "I am not trial counsel. I do not know whether, as I am now, I can proceed. I don't think I can . . . . I myself got to the Webster/Marovich brief and read it this morning. There was no time really to respond to anything that happened, and it happened in fast profusion. And if I am confused, I cannot even talk to my client. I didn't have time, but I cannot even talk to my client who must be confused seven times over.

"So you have a client who doesn't know what's going on, you have a lawyer who's not a trial lawyer, and we are supposed to conduct a hearing because we're appointed." VII RT Cal S 2301.

The prejudice to appellant is analogous to that condemned in Brooks v. Tennessee (1972) 406 U.S. 605. There, the Supreme Court found that a state procedural rule violated federal due process by requiring a defendant to testify, if at all, as the first witness in the defense presentation. The Supreme Court held that the forced decision deprived defendant of due process and the effective assistance of counsel because counsel could not effectively evaluate the desirability of the defendant's testifying in light of the actual presentation of other defense evidence.[18]

In this case, the infringement of the right to counsel is far more pronounced. The court below forced appellant into a situation of a crucial hearing regarding the trial site in the case without any attorney sufficiently knowledgeable and able to communicate with appellant regarding the overall

---

[18] "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense -- particularly counsel -- in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense." (Id. at 612-613.)

trial strategy in the case. Just as Brooks found a due process violation in precluding trial counsel from presenting their other defense evidence before finally deciding whether the defendant should testify, the court in this case deprived appellant of due process by forcing a trial site selection without a trial attorney able to evaluate the defense case strategy with respect to the choice of county.

This case is highly unusual because of the interrelationship between appointment of counsel and trial site selection. In the overwhelming majority of cases, the attorney who successfully moves for a change of venue follows the case to the transferee county for trial. Thus, the defendant has a continuity of representation from the time that the determination to seek a change of venue is made through trial. In this case, that crucial continuity of counsel was disrupted by the breakdown between appellant and attorneys Webster and Marovich in May, 1993. As counsel for appellant argued, the court put the cart before the horse in attempting to find a trial site before appointing trial counsel. Judge Perasso had been approaching the question in the proper order, scheduling a Penal Code section 987.05 hearing for appointment of counsel prior to any trial site selection proceedings. His replacement put the cart before the horse in an apparently over-zealous effort to get the case out of "the middle of nowhere" to a metropolitan county. In

the process, the court deprived appellant of multiple statutory and constitutional rights, including the effective assistance of counsel.

5. Appellant was deprived of due process by the trial court's refusal to set aside the change of venue order when the testimony at the June 30, 2008, hearing established that Judge McCartin had defaulted on his obligation to either (1) provide the information to the Judicial Council about the factors favoring San Francisco, or (2) offer appellant an opportunity to rescind the venue referral stipulation for lack of consideration.

The evidence stated at the June 30, 1994, hearing established that Judge McCartin sabotaged the January 21, 1994, hearing; covered up the sabotage effort at the April 8, 1994, hearing; and successfully orchestrated a transfer to Orange County. Judge McCartin's testimony at the June 30 hearing acknowledged certain deficiencies in his conduct of the proceedings but asserted that he made a number of remedial efforts. However, those assertions were contradicted either by the testimony of independent witnesses such as John Toker, or by stipulation of the parties.

Judge McCartin claimed to have directed Mart Beth Todd to solicit a stipulation from all counsel to transfer the case to Sacramento after the Judicial Council offered Sacramento and Orange; the parties stipulated that never happened. Judge McCartin claimed that he had emphasized to John Toker that there were a number of reasons supporting or forming transfer to San Francisco. Toker testified that Judge McCartin recommended only

Orange County, and offered no grounds favoring a San Francisco transfer. Judge McCartin further testified that when he received word from the Judicial Council that the only two transferee counties offered were Sacramento and Orange, he called John Toker and asked whether Toker had done everything he could to get San Francisco to take it. Judge McCartin himself repudiated that assertion and amended his testimony to say that he merely asked Toker if he inquired whether San Francisco was willing to take the case, a much different contention. Finally, Toker testified that if McCartin had given him all the facts about vicinage and counsel issues in San Francisco, and had said that those factors favored San Francisco, Toker would have used his best efforts to move the case there – if Judge McCartin "thought that the vicinage argument was appropriate and should be acted on, he should just tell me to try to place the case in San Francisco", VIII RT Cal S 2516, but that Judge McCartin did not do so. Judge McCartin so clearly breached the venue agreement that the transfer to Orange County was entirely void.

6. Appellant was deprived of due process by the change of venue as to Counts II-VII, for which no stipulation for venue referral to the Judicial Council was ever made.

There was no basis whatsoever to support the change of venue of Counts II-VII to Orange County because the parties never agreed to a change of venue as to those counts, and to the contrary insisted on the San Francisco

vicinage as to those counts throughout the proceedings. See Argument II, below.

C. The Resulting Prejudice and Requirement of Reversal.

The only remedy consistent with due process is the reversal of all counts of connection because they were tried in a county that had no legitimate jurisdiction over any of them. Just as the remedy for breach of a plea bargain is to vacate the conviction and return to the status quo ante, the remedy for the breach of the change of venue agreement as to counts I and VIII-XIII, and for the entirely unauthorized change of venue as to counts II-VII, is to vacate the Orange County convictions and return the case to Calaveras County for further proceedings.

Appellant was prejudiced by trial in a county that had a negligible Chinese-American population compared to San Francisco, where the census demographics virtually assured the absence of any Chinese-American on the venire. That assurance was fulfilled.

In contrast, appellant had a realistic prospect of some Chinese-American representation on a San Francisco jury. This was particularly important given that his guilt phase defense and his penalty phase mitigation relied heavily upon evidence of Chinese cultural traits and experiences, including deference to authority and filial piety; racial discrimination in both

employment and military spheres; and culturally-prescribed manners of self-expression.

The arbitrary transfer of all counts to Orange County was tantamount to a judicial exclusion of Chinese-Americans from the jury venire. If the prosecutor had sought to exclude Chinese-Americans individually from the jury by peremptory challenge, that exclusion would have given rise to a remedy under People v. Wheeler (1978) 22 Cal 3d 258 and Batson v. Kentucky (1986) 476 U.S. 79. The trial court accomplished the same unfair result by a single stroke, and appellant is similarly entitled to a remedy of reversal.

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.

A. Summary of Facts.

Counts I-VII charged offenses relating to victims who lived in San Francisco County at the times of their disappearances, and who were never heard from again. The prosecution speculated that the San Francisco victims were either forcibly kidnapped or inveigled to go to Lake's rural residence in Wilseyville in Calaveras County, where they were killed and buried. None of

the remains found in Calaveras County were identified as the San Francisco victims. Under these circumstances, vicinage for counts I-VII was certainly found in San Francisco County; whether it was also found in Calaveras County was far more problematic, in light of the absence of any specific evidence that the San Francisco victims had ever been brought to Calaveras County, much less any evidence that they had been killed there.[19] There was no other county in which vicinage could conceivably lay.

As noted above in Argument I, when Judge McCartin was assigned to the case in January 1994, then pending in Calaveras County, he instituted change of venue proceedings as to counts VIII to XIII, in which the victims were from either Calaveras County or elsewhere (not Orange County). Counsel for appellant did engage in discussions with the court regarding change of venue proceedings as to counts VIII-XIII, but expressly and repeatedly refused to waive vicinage as to counts I-VII. However, Judge McCartin orchestrated the transfer of all accounts to Orange County over appellant's multiple objections, while at the same time purporting to

[19] There was some property of the Dubs family found in Lake's Wilseyville residence. Appellant was charged in count I with the burglary of the Dubs residence in San Francisco. Appellant did not argue below that the burglary charge lacked vicinage in Calaveras County based on the presence of the property. The vicinage motion was directed solely toward the charges of murder involving San Francisco victims, counts II-VII.

acknowledge that appellant had not waived his right to assert vicinage in San Francisco as to counts I-VII[20].

Immediately upon transfer, counsel for appellant filed an Objection to Orange County Jurisdiction, alleging numerous procedural defects in the transfer process generally, and asserting appellant's vicinage right to trial in San Francisco on counts II-VII. Judge Ryan declined to rule on the Objection, stating in a minute order that the Objection had previously been ruled by another superior court judge, apparently referring to Judge McCartin sitting in Calaveras County, and indicated that the objection should be directed to that court or a higher court. I CT 91.

---

[20] MR. MARGOLIN: Originally, we agreed to a change of venue out of Calaveras with the express understanding that we do not waive Defendant's vicinage rights. I said it for the record, you confirmed it, the D.A.'s agreed with it, and today we started the proceeding by asking what really happened. I think that you need to put in order form your conclusions which you articulated at the beginning of this session. That if there is a change of venue, that the change of venue is without any waivers whatsoever.

I brought to your attention what the D.A. wrote to the San Francisco presiding judge, that he may argue in the future that our consent to leave Calaveras venue constitutes a waiver of vicinage claim as to six Counts.

THE COURT: Mr. Margolin, if we haven't determined that -- I thought I beat that to death at the last hearing, but I apparently didn't, because there's some ambiguity, but if we haven't accomplished anything else in two days, we've certainly got that in the record. I think we're beating a dead horse on that. VIII RT Cal J 2264-2265.

On January 13, 1995, the Orange County Public Defender filed a motion to transfer the case out of Orange County on a number of grounds, including lack of vicinage and lack of venue, but that motion was denied on February 24, 1995. 2 CT 603.

On April 22, 1997, the Public Defender filed a renewed motion to transfer Counts II-VII to San Francisco for vicinage, 7 CT 2403. That motion was heard and denied on May 9, 1997. 2 RT 208-209.

On September 24, 1998, the Public Defender filed a motion to preclude the prosecution from presenting evidence as to the San Francisco counts, now designated Counts I-VI, based on vicinage objections. 25 CT 8636.

On November 24, 1998, the Public Defender filed a motion for acquittal on Counts I-VI on the ground of lack of vicinage. 34 CT 11447. That motion was denied on November 30, 1998. 34 CT 11499.

B. The Applicable Law.

1. The Sixth Amendment guarantees a defendant the right to trial by a jury drawn from the state and district where the crime was committed.

A criminal defendant has a right under the Sixth Amendment to the United States Constitution to be tried by "an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." (U.S. Const., 6th Amend.) While

this Court has concluded that this vicinage clause was not incorporated against the states through the Fourteenth Amendment, the United States Supreme Court has never explicitly addressed this issue. Compare Price v. Superior Court (2001) 25 Cal.4th 1046, 1059, with Stevenson v. Lewis (9th Cir. 2004) 384 F.3d 1069, 1071 ["The Supreme Court has not decided whether the Fourteenth Amendment incorporated the Sixth Amendment's vicinage right. Neither have we."] Because the right to trial by a jury drawn from the vicinage of the crime is fundamental to the American scheme of justice, appellant urges this court to reconsider Price, and to conclude that the right of vicinage is incorporated in the Fourteenth Amendment and is binding on the state.

a. The Guarantees of the Bill of Rights that are "fundamental to the American scheme of Justice" have been incorporated against the states through the Fourteenth Amendment.

The Fourteenth Amendment's prohibition on state action that deprives an individual of due process of law has been interpreted as incorporating many of the guarantees of the Bill of Rights against the states. Duncan v. Louisiana (1968) 391 U.S. 145, 148. The rights enumerated in the Fifth and Sixth Amendments are applicable to the states where right "is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; whether it is basic in our system of

jurisprudence; and whether it is a fundamental right, essential to a fair trial." Id. at pp. 148-149, citations and quotations omitted. The Supreme Court has, to date, continued all of the guarantees of the Bill of Rights to be applicable to the state, with the sole exception of the Sixth Amendment provision that criminal prosecutions must be commenced by a grand jury indictment rather than some other form of accusatory pleading.

b. The right to trial by a jury drawn from the state and district in which the crime was committed is fundamental to the American scheme of Justice, and was therefore incorporated and applicable to the states through the Fourteenth Amendment.

Trial by jury is a quintessential Sixth Amendment guarantee applicable to the states for two reasons. It provides both for the "interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and [for] the community participation and shared responsibility that results from that group's determination of guilt or innocence." Williams v. Florida (1970) 399 U.S. 78, 100. This combination of community commonsense and community participation in determinations of guilt or innocence is thwarted, if an accused is tried by a jury that is not drawn from the community where the crime occurred.[21] That concern regarding the

[21] The American colonists were particularly sensitive to this problem, and noted in the Declaration of Independence their repudiation of the English

arbitrary separation of the place of trial for the offenses from the place of commission of the offenses was the driving force that resulted in the federal vicinage guarantees.

At the same time, both the United States Supreme Court and this court have recognized that the Sixth Amendment's vicinage language does not literally impose a requirement that the jury be drawn from the immediate neighborhood in which the alleged crime occurred. Williams, 399 U.S. at p. 96; Price, 25 Cal.4th at p. 1061. Rather, the clause refers to the "state" and "district" of the crime, with the latter term having been interpreted by some courts as referring to federal judicial districts. See Price, 25 Cal.4th at p. 1068. This language reflected "a compromise between broad and narrow definitions of [vicinage], and . . . left Congress the power to determine the actual size of the 'vicinage' by its creation of judicial districts." Williams, 399 U.S. at p. 96.

c. This Court's erroneous analysis of the vicinage guarantee.

From the fact of this administrative compromise, this Court concluded that "designation of a specific area within a state from which a jury was to be drawn was not considered so fundamental to the right to jury trial that it was intended to be protected by the vicinage clause." Price, 25 Cal.4th at p. 1061.

---

practice of "transporting us beyond Seas to be tried for pretended offences." Price, 25 Cal.4th at p. 1060, fn. 9.

Price effectively concluded no vicinage limitation should be considered fundamental to the American system of justice for purposes of incorporation under the Fourteenth Amendment. Id. at p. 1064. It reasoned that the location from which the jury is drawn has "no bearing" on how the prosecutor and judge will behave, that one county's juries offer as much protection against "government oppression" as another, and that contemporary jurors are not expected to have "knowledge about the defendant, the witnesses, and the crime itself," thus rendering local perspective essentially irrelevant. Id at p. 1065.

This analysis, however, errs in several respects. First, it treats the Framers' practical determination of the logistical question of how to define vicinage in operational terms as an implicit relegation of vicinage to a second tier right. In fact, the Framers did impose an explicit geographic limits requirement in the text of the Amendment.[22] The Sixth Amendment expressly requires that a criminal be tried in the judicial district within the state where the offense occurred. If the Framer's had merely required that a crime committed in Massachusetts be tried in Massachusetts, rather than in New Hampshire, Connecticut or any other contiguous state, there would be little

[22] United State Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...(emphasis supplied)

force to the argument a state defendant has a right to be tried anywhere more specific than within the state where the crime was committed. However, the Constitution requires trial in the judicial district within the state where the offense was committed. At the federal level, the judicial district is either coextensive with the state, e.g., Rhode Island has only one federal judicial district, or is a designated area within the state as in California.

However, Price implies that vicinage would have a better shot at being characterized as a fundamental right if it had been included in the Bill of Rights without any specific parameter. That is not a logical inference, because other guarantees of the Bill of Rights have similar specific parameters and are deemed fundamental, e.g. double jeopardy (other than some more elastic phrase as "multiple jeopardy.")

Second, Price gives short shrift to the role of community commonsense and community responsibility in the operation of a jury, despite the characterization of these factors as an "essential feature" in the jury's functioning in Williams. (399 U.S. at p. 100.) This aspect of Price fails to acknowledge the empirical reality that California includes a wide spectrum of very different and even antagonistic cultural and political segments, and fails to acknowledge this court's own recognition that there is regional variation in the administration of criminal justice in California that reflects regional

diversity. People v. Yeoman (2003) 31 Cal.4th 93, 165 ["To give the district attorney of each county the discretion to decide whether to seek the death penalty does not render such decisions arbitrary, even in the absence of statewide standards for, or oversight of, such decisions."]

The fact that the Framers agreed to delineate vicinage according to the available and identifiable criteria of "state" and "district" of the crime (rather than some more subjective and inchoate terms such as "neighborhood") in no way supports the conclusion in Price that the location from which jurors were drawn had "no bearing" on the proper fundamental fairness of a trial. (See Price, 25 Cal.4th at p. 1065.)

d. The recognition of the fundamental nature of the vicinage guarantee in other cases and commentary.

The vicinage clause of the Sixth Amendment reflects a fundamental value: the right to be tried by individuals who reflect the common sense of the community and who have a community stake in the decision they render. As the Third Circuit explained in an extensive discussion of the origins of the vicinage clause, this right had been "an important general rule for the trial of criminal cases" for centuries. Zicarelli v. Gray (3d Cir. 1976) 543 F.2d 466, 475. Indeed, "local juries predate impartial ones by several centuries." (Engel, The Public's Vicinage Right: A Constitutional Argument (2000) 75 N.Y.U.L.Rev. 1658, 1674.) Early legal commentators such as William

Blackstone, Edward Coke and Matthew Hale were quite explicit in their emphasis on the importance, in Hale's words, of drawing the jury from "the Neighborhood of the Fact to be inquired, or at least of the County or Bailywick." Id. at pp. 1676-1677.

Coke, for his part, suggested that a jury that pronounced judgment on matters outside their community would create a mistrial. (Id. at p. 1676.) There is a consensus among contemporary commentators that the right to a jury drawn from the region of the crime is "one of the oldest institutions of the common law." (Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue (1944-1945) 43 Mich. L.Rev. 59, 60.)

This longstanding practice of drawing jurors from the community, then, is an "essential feature" of the operation of the jury even if the specific scope of jury vicinage has varied over time. (See Williams, 399 U.S. at p. 100.) Moreover, even if it is true that jurors in contemporary trials are "supposed to obtain their knowledge only from evidence produced in open court" rather than relying on pre-existing knowledge, this reality only speaks to one of the historical justifications for the vicinage requirement. (See Blume, Supra, 43 Mich. L.Rev. at p. 60.) Drawing jurors from the area of the crime continued to be important in England well after it stopped being the case that the jurors were expected to know about the crime. Kershen, Vicinage (1976) 29 Okla.

L.Rev. 801, 813 [noting that "Despite this change in emphasis, the jury of the vicinity of the crime was continued as the normal petit jury in England"].

In colonial America, despite the fact that a "diversity" of approaches existed with regard to the specific limits of vicinage, colonists "consistently" attacked provisions allowing for trial in England because they "depriv[ed] the accused of a trial by his peers from the vicinage of the crime." Id. at p. 814.

When it came to the drafting of the Sixth Amendment, at least one commentator has suggested that the terms "state and district" were substituted for "vicinage" because members of the Senate behaved that the word "vicinage" was "too vague because it did not specifically identify any particular geographical territory recognized as a political or governmental unit." (Id. at p. 823, internal quotations omitted.) Other senators were concerned that the term "vicinage" might be interpreted as referring simply to a county, an area that was thought to be too narrow. (Id. at p. 826.) Critically, however, the decision to define vicinage in terms of "districts" and to allow those districts to be subsequently defined by Congress was a practical means of implementing the essential guarantee of a localized jury in the text of the Amendment "as a fundamental right of criminal defendants." (Id. at p. 828.)

Because the right to a jury drawn from the district and state of the crime is fundamental not only to the American system of justice but to the English common law antecedents of that system, it should be deemed binding on the states through the enactment of the Fourteenth Amendment. (See Duncan, 391 U.S. at p. 148.)

2. Appellant was also denied his right under Article I, Section 16 of the California Constitution to be tried by a jury from a county having a reasonable relation to the offense or to other crimes committed by the defendant against the same victim.

In addition to the Sixth Amendment right discussed above, a California criminal defendant also has an "implicit vicinage right" under Article I, section 16 of the California Constitution. (Price, 25 Cal.4th at p. 1071.) Article I, section 16 states that jury trial is an inviolate right and shall be secured to all, but in a civil case three-fourths of the jury may render a verdict. . . . In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. (Cal. Const., Art I, § 16.)

Though this language makes no explicit reference to vicinage, it "has long been construed as encompassing" such a right. (Price, 25 Cal.4th at p. 1071.)

Under this implicit right, a defendant has a right to trial by a jury drawn from "a county having a reasonable relationship to the offense or to other crimes committed by the defendant against the same victim." (Id. at p. 1075.) Such a relationship may exist with respect to multiple counties, for example, when there is "repeated abuse of the same child or spouse in more than one county." (Ibid.) Price also suggests that the implicit vicinage requirement "does not require the state to move the defendant, victim, and other witnesses from county to county for trial after trial, limited only by the number of counties in which the crimes occurred. These crimes may be tried together while preserving the substantial features of a jury trial." (Id. at p. 1080 (conc. opn. of Chin, J.).

On the other hand, it is emphatically not the case that "a crime may be tried anywhere." (Id. at p. 1075.) There must be in fact some sort of "reasonable relationship" to the offense or other acts committed by the defendant against the same victim to support vicinage. (Ibid.)

C. The Trial Court's Errors.

Appellant's jury was drawn from Orange County, which is located in Southern California and sits in the federal Central District of California. However, the crimes that took place in counts II-VII were initially charged in Calaveras County, and were committed in whole or in part in San Francisco

County, which sit in the federal Eastern and Northern Districts, respectively. None of the victims in counts II-VII were from Orange County, and there were no other connections to Orange County in the facts alleged on these counts.

Orange County simply had no connection to the offenses charged in counts II-VII. The victims were not from Orange County, and it was not alleged that appellant had committed any crimes against them or anyone else while in Orange County. On this basis, a "reasonable relation" between the jury vicinage and the offenses at issue did not exist. Only if "a crime may be tried anywhere" – a position this Court rejected in Price – could vicinage have been appropriate in Orange County. (See Ibid.)

Notwithstanding the straightforward principle set forth in Price, the trial court expressly refused to consider whether there was a "reasonable relationship," or even any relationship, between counts II-VII and Orange County. Rather, the trial court adopted a patently untenable approach to the whole vicinage issue. The trial court's final ruling on vicinage was the denial of the Penal Code Section 1118.1 motion for acquittal on November 30, 1998. The court explained its view that vicinage for counts II-VII appeared to exist in Calaveras County; that the Calaveras charges were sent to Orange County pursuant to Penal Code Section 1033; and that Penal Code Section 1033

provided in part that "all proceedings before trial shall occur in the county of original venue." Therefore, according to the trial court, the motion regarding vicinage must be adjudicated as if it were being brought in Calaveras County, and since vicinage did lay in Calaveras County, appellant had no basis for relief.

To ensure that counsel for appellant has accurately encapsulated the contrary-to-fact premise of the court's ruling, it is set forth in its entirety:

> The Court: And I did state earlier that 1033(A) of the Penal Code states that, "When a change of venue is ordered, it shall be for the trial itself. All proceedings before trial shall occur in the county of original venue except when it is evident that a particular proceeding must be heard by the judge who is to preside over" – "the judge." That is why this court believes, because logic would also prevail, that this court has to treat the jurisdictional issues, whether you call it jurisdiction, venue or vicinage as if the motion was raised in Calaveras County.
>
> Denied. Thank you. 21 RT 4854.

The Court's view was patently untenable. It boiled down to the fiction that because the case came to Orange County by change of venue order, the court was permitted to pretend that the motion was to be adjudicated as if the case was being tried in Calaveras County. The court thus ruled that vicinage was proper in Calaveras County – where the case was not tried -- and refused to consider whether it was separately and independently proper in Orange County – where is was tried.

Suppose the case had been initially charged in San Francisco County, and the trial court unilaterally transferred the case to Orange County because he liked the climate better. That patently arbitrary transfer would be entirely immune from vicinage challenge under the illogic employed by the Orange County court. Because the case had been initially pending in San Francisco County, the vicinage objections lodged after the transfer had to be determined under the fiction that the objection was being addressed in San Francisco, and would therefore be deemed meritless.

That was the court's final ruling on vicinage, and was patently erroneous. However, for the sake of completing the analysis, counsel for appellant also reviews the court's prior rulings, which all tracked the same inherently untenable fiction that the court would rule on the motion as if it were being brought and heard in Calaveras County. On May 9, 1997, the court denied the Public Defender's renewed motion to transfer counts II-VII to San Francisco for vicinage on the same ground that the issue was whether Calaveras County had vicinage, not whether Orange County had vicinage:

> The Court: Okay. As a point of law I have to disagree with your initial analysis that I have to consider Orange County as the site. These pretrial motions, pretrial motions and change of venue cases I believe are to be completed in the county that the case is being moved from. So for all practical purposes, this is a motion that Calaveras County was not a proper county as far as vicinage is concerned. I am not considering whether Orange County is or not. 2 RT 206.

The Public Defender objected to the court's "premise", but the court concluded, "Calaveras County certainly had vicinage." 2 RT 209.

On September 24, 1998, the Public Defender filed a motion to preclude the prosecution from presentation evidence as to Counts II-VII for lack of vicinage, and on October 8, the trial court denied the motion on the same grounds:

> I believe my rulings on the prior occasions were sound. I think my duty is to look at his case as a Calaveras County Judge would look at this case, never indicating I was a Calaveras County Judge. In other words, did they have jurisdiction, venue and vicinage? And I found, and even went back through the record to show why I am not going to do that again now. Your motion is denied." 7 RT 1545.

Thus, the court expressly refused to determine whether there was any proper vicinage in Orange County, and instead repeatedly rested his rulings on the untenable fiction set forth above.

The District Attorney acknowledged throughout the Orange County proceedings the appellant had <u>not</u> waived his vicinage claims as to Counts II through VII, and that it was an "important issue". 2 RT 183.

The trial court clearly erred in failing to recognize the absence of vicinage in Orange County.

D. <u>The Denial of Appellant's State and Federal Constitutional Rights To Be Tried By a Jury Drawn From the District In Which the Crime Occurred Constituted Structural Error, and Reversal is Therefore Required</u>.

Where the fundamental structure of a criminal trial is compromised, due process requires that the conviction be vacated and the case remanded for a new trial, with no prejudice analysis necessary. See People v. Harris (1994) 9 Cal.4th 407, 427; Sullivan v. Louisiana (1993) 508 U.S. 275, 279. In Harris, for example, mischaracterization of the standard of reasonable doubt constituted structural error, denying "a basic protection whose precise effects are unmeasureable, but without which a criminal trial cannot reliably serve its function." (Harris, 9 Cal.4th at p. 427, internal quotations omitted.)

Since there was no precise way to quantify the impact of such a fundamental flaw and since it compromised such a basic aspect of the American judicial system, reversal was the only acceptable outcome. (Ibid.)

The denial of the Sixth Amendment right to a jury drawn from the vicinage of the crime constitutes structural error, and therefore requires reversal irrespective of any prejudice analysis. See Alvarado v. State of Alaska (1971) 486 P.2d 891, 899, fn. 20. In Alvarado, the Supreme Court of Alaska considered the situation of a defendant who was tried on charges of committing rape in a remote village of Alaska. (Id. at p. 893.) The jury in Alvarado was drawn entirely from individuals who lived within 15 miles of Anchorage, a city more than 400 miles away from the scene of the crime and an area that presumably was home to few residents familiar with the customs

of the remote village. (Id. at p. 896.) Selecting jurors exclusively from this area, the court concluded, denied the defendant the Sixth Amendment and due process right to a jury "drawn from a fair cross section of the community." (Id. at pp. 898-899.) In reaching this conclusion, moreover, the court emphasized that "we need not insist upon a showing that Alvarado was a member of the group excluded from representation on his jury panel, or that he was prejudiced by the exclusion of that group." (Id. at p. 899, fn. 20, emphasis added.) Rather, the wholesale exclusion of jurors from the community where the crime was committed was enough, in itself, to create a risk "the panel will consequently fail to represent a fair cross section of the community." (Id. at p. 903.)

Prior to being overruled by Price on other grounds, People v. Jones (1973) 9 Cal.3d 546, 553-554, also made it clear that a prejudice analysis was not necessary when the right of vicinage had been violated. Jones noted the dramatic cultural differences between the native village and the city of Anchorage in Alvarado, but clarified that these contrasts were merely dramatically illustrative of one of the purposes of the constitutional rule and do not represent an indispensable factor in its application. In our view, the rule quite simply is that a criminal defendant is entitled to a jury drawn from a

jury panel which includes jurors residing in the geographic area where the alleged crime occurred. (Id. at p. 554.)

Therefore, the court did not engage in a prejudice analysis and noted that even if the area from which the jury had been drawn was racially identical to that in which the crime occurred, reversal was still required. (Id. at p. 712.)

Mareska v. State of Indiana (1989) 534 N.E.2d 246, 250 reached a similar result. In Mareska, the defendant was tried for disorderly conduct that had occurred in Starke County, Indiana, but outside the limits of the city of Knox. (Id. at p. 247.) He was tried and convicted by a jury composed solely of Knox voters, a procedure that he contended violated his right to trial by a jury from the vicinage of the crime. (Id. at pp. 248-249.) The Third District concluded that it was "inescapable that the city court jury selection system violated Mareska's Sixth Amendment right to an impartial jury drawn from the district where the alleged crime was committed." (Id. at p. 250.) Without performing any prejudice analysis, the court then concluded that "The proper remedy to cure the unconstitutional jury trial would be to remand this case for a new trial before a properly impaneled jury."[23] (Ibid.)

[23] The defendant in Mareska had in fact already been retried by a properly constituted jury by the time the Court of Appeal issued its decision, so it was ultimately not necessary to order a new trial in that case.

Here, therefore, where the appellant was tried on counts II-VII by a jury drawn from a vicinage that had no relationship whatsoever to the facts alleged in those counts, structural error occurred and a new trial is required. No prejudice analysis is required to reach this conclusion, because the error is a structural defect, one that undermines a basic component of the American approach to criminal trials. Additionally, for the reasons that are discussed in more detail in 2.b., infra, the use of a harmless error analysis to evaluate the effect of the denial of the vicinage right would render the right essentially unenforceable. Therefore, the denial should be treated structurally, and reversal should be required.

This court should treat the denial of appellant's vicinage right under the California Constitution as a structural error for the same reason that a denial of other basic trial features, such as an instruction on reasonable doubt, should be treated structurally: because the footprint of such a denial may be profound but will rarely lend itself to quantification through harmless error analysis.

Failure to treat this denial as a structural flaw would, in almost all cases, amount to a determination that the right is a hollow one, incapable of enforcement. It would undermine the Price court's rejection of the notion that "a crime may be tried anywhere" by placing a virtually insurmountable burden of proof on the defendant. (Id. 25 Cal.4th at p. 1075.) A defendant

will typically be hard pressed to demonstrate prejudice on the basis of purely speculative comparisons between the jury in his case and the jury he perhaps could have had if the vicinage right had been observed and the jury had been drawn from some other community. As a result, courts will be free to ignore the vicinage requirement and free to try crimes "anywhere," knowing full well that the resulting verdicts will be immune to vicinage-based challenges.

Despite rejecting a Sixth Amendment-based vicinage claim, Price was clear in emphasizing that under the California Constitution a defendant must be tried by a jury drawn from a location that has a "reasonable relationship or nexus" to the crime. (Ibid.) Unless a vicinage violation is deemed a structural error, it may be ignored with impunity. Therefore, this Court should treat the violation of appellant's vicinage rights under the state and federal Constitutions as a structural defect, and should reverse his convictions on counts II-VII. That is the standard of reversal for proof of a constitutional violation with respect to racial discrimination in the selection of the grand jury that brings a criminal charge against a defendant. The Supreme Court has made it abundantly clear that reversal of a subsequent conviction by a racially unbiased petit jury is required where proof of discrimination in the grand jury selection had been established. Vasquez v. Hillery (1986) 474 U.S. 254. The same standard of reversal should apply here, because in both

cases the underlying constitutional violation does not necessarily manifest itself in identifiable indicia of prejudice among the jurors who eventually returned a verdict. Rather, reversal is required to remedy the constitutional defect in the procedure by which the defendant was brought for adjudication by the eventual jury.

E. If the Harmless Beyond a Reasonable Doubt Standard is Applicable, Reversal is Required.

In this case, there are identifiable consequences that were incurred by appellant because of the trial of counts I-VII in Orange County rather than San Francisco County. Many of the adverse consequences were set forth in the venue argument above, relating to the very different ethnic composition of San Francisco versus Orange County, and the virtually certainty that the Orange County jury would be devoid of any Chinese-American jurors of appellant's ethnicity. One of the foundations of the vicinage right is the assurance to the defendant of a jury representing the community where the offenses occurred and San Francisco and Orange County are distinctly different with respect to the relevant demographic factors. San Francisco County has a large and long-standing minority population of Chinese-American residents, who have a distinct history of early discrimination followed by long-term assimilation. That history is reflected in the attitudes of the majority residents of San Francisco County toward Chinese-Americans.

In contrast, Orange County and its county seat of Santa Ana have no comparable history of co-existence between the Anglo settlers and the Chinese minority. Rather, Orange County experienced a dramatic population expansion following World War II and an even more dramatic influx of Vietnamese immigrants in the mid 1970s. Orange County currently has the largest Vietnamese population outside of the Republic of Vietnam. U.S. Census 2000. The attitudes of Vietnamese residents of Orange County toward Chinese-Americans and the attitudes of Anglo Orange County residents towards Asians generally is necessarily quite different from the attitudes of San Francisco of the Anglo and Chinese populations. The attitudes of San Francisco residents of both Anglo and Chinese origin are likely to be more responsive and understanding of the difficulties of immigration and assimilation experienced by someone of Chinese ancestry such as appellant, compared to jurors in Orange County. Thus, appellant was both prejudiced with respect to the virtual certainty that there would be no jury members of Chinese ancestry on the Orange County juror, and by the likelihood that the Orange County juror would be as a general matter less culturally attuned and responsive to his circumstances as a person of Chinese ancestry.

It is conceivable that there may be some cases where a defendant was tried outside the judicial district of vicinage, but in a county that so clearly mirrored the social and demographic characteristics of the county of vicinage that actual prejudice would be difficult to specify. This case is quite different in terms of the manifested advantages that accrued to appellant from being tried in Orange County rather than San Francisco County. For this reason, the convictions on counts I-VII must be reversed because of a vicinage error cannot be shown harmless beyond a reasonable doubt.

F. Reversal is Required as to the Death Penalty as Well as the Six Counts that Were Improperly Tried in Orange County.

Reversal is required as to counts VII-XII as well, for two reasons. First, as noted in Argument I above, the change of venue proceedings were fraught with judicial error and misconduct, with the result that none of the counts tried in Orange County were either there by consent of the parties or by virtue of a vicinage connection. None of the counts VII-XII had any connection with Orange County sufficient to establish vicinage, and thus none of the convictions are valid.

In addition, even if counts VII-XII are not deemed to be invalidated based on lack of vicinage reasons, the death penalty returned in Orange County must be vacated because it was predicated on convictions for all of

the San Francisco and other counts. Assuming that the standard of harmless beyond a reasonable doubt applies to this determination as well, the invalid conviction of five murders must necessarily have been properly influenced the penalty jury toward a death judgment. Under this circumstance, the death verdict must be reversed. Chapman v. California (1967) 386 U.S. 18.

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. Overview of Facts Regarding the Rulings on Representation.

Appellant sets out this overview of the course of judicial decisions regarding appellant's representation to provide a context for the specific Sixth Amendment claims presented in this argument. The overview also provides a context for the other representation claims in the following arguments. Counsel for appellant has set forth this chronology of judicial actions regarding representation with particular reference to two guideposts – Penal Code section 987.2(g)[24] and Penal Code section 987.05.[25] The first

---

[24]Penal Code section 987.2(g) provides "[n]otwithstanding any other provision of law, where an indigent defendant is first charged in one county and establishes an attorney-client relationship with the public defender..., 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 county to represent the defendant when all of 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 first county, or involves evidence which would be cross admissible.

(2) The court finds that the interests of justice and economy will be best served by unitary representation;

appointments of counsel in Calaveras County comported with the letter and spirit of these two statutes, consisting of the appointment of attorney Garrick Lew as lead counsel for appellant because of Lew's prior representation of appellant (See Harris v. Superior Court (1977) 19 Cal.3d 786), followed by the appointment of the San Francisco Public Defender and Deputy Michael Burt as Keenan counsel pursuant to Penal Code section 982.2(g). V CT Cal J 1469-1470. The Calaveras Justice Court subsequently vacated those appointments on September 23, 1988, because appellant was still detained in Canada while extradition proceedings were pending. VI CT Cal J 1983.

Different trial counsel were appointed on four subsequent occasions, and every one of those appointments was made in violation of Penal Code section 987.2(g), Penal Code section 987.05, or both, with predictably counter-productive results, including substantial delays in the case, significant disharmony between attorneys and client, and compounding Sixth Amendment violations. In September 1991, the government of Canada

---

Counsel appointed in the first county consents to the appointment.

[25] Penal Code section 987.05 provides in pertinent part: "In assigning counsel in felony cases, ...the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed ...within the time provision prescribed in this code..., 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....In the case where the preparation time for the preliminary hearing or trial is deemed greater than the statutory time, the court shall set a reasonable time period for preparation."

extradited appellant to California, and pro bono counsel for appellant filed a motion in Calaveras Justice Court to re-appoint the San Francisco Public Defender pursuant to Penal Code section 982.2(g) and Harris v. Superior Court Supra. Deputy San Francisco Public Defender Michael Burt had been appointed in 1985 to represent appellant regarding a murder charge filed in San Francisco County. The San Francisco Public Defender filed a declaration specifically requesting appointment under Penal Code section 987.2(g), VII CT Cal J 2233. The Public Defender had also filed a statement regarding time estimates and trial dates in compliance with Penal Code section 9870.5. VII CT Cal J 2148. However, at the hearing held on October 23, 1991, the Calaveras Justice Court refused to appoint the San Francisco Public Defender on the basis that the Public Defender's estimate of time necessary to prepare for the preliminary hearing was – eight to ten months – was too long.

At that point, the Justice Court should have addressed concerns about reasonable preparation time for the preliminary hearing by directing other lawyers, specifically including the Calaveras County Public Defender, to make independent time estimates pursuant to Penal Code section 987.05. Had the court followed that statutorily mandated procedure, the court would have had an independent basis for evaluating the reasonableness of the Public Defender's estimate.

Instead, the Justice Court immediately appointed two out-of-county attorneys, Thomas Marovich and James Webster, based on an informal, off-the-record telephone call, without requiring any time estimates for pre-trial preparation from appointed counsel or any other semblance of compliance of Penal Code section 987.05. II RT Cal J 917.[26]

Of course, the San Francisco Public Defender's estimate was not only reasonable, it was shorter than the time that attorneys Webster and Marovich actually required to prepare for the preliminary hearing. Not surprisingly, the attorney-client relationship between appellant and attorneys Webster and Marovich was difficult, because appellant maintained his position that the San Francisco Public Defender should be appointed to ensure continuity of counsel and coordination of defenses as between San Francisco and Calaveras charges. The preliminary hearing was held in November 1992, past the time estimate initially given by San Francisco Public Defender Burt, and on December 18, 1992, the Honorable Claude Perasso, sitting by assignment,

---

[26] During a subsequent hearing regarding that initial appointment, attorney Webster explained that neither he nor co-counsel had been in court at the time of their appointment, but had instead been asked by telephone prior to the October 24, 1991 hearing whether he would accept appointment if the Harris motion was denied. Webster said he would. However, he had no knowledge of the April 27, 1992 preliminary hearing date until after he was appointed and after it was set – "evidently after the court proceedings [on October 24, 1991], where the April 27th date was set, I received another phone call from the Court indicating that I had, in fact, been appointed and that April 27th was set," but, "I didn't have anything to do with making the date."

appointed attorneys Webster and Marovich over appellant's objection and notwithstanding appellant's objection to their appointment and his request for the appointment of the San Francisco Public Defender. I CT Cal S 385. At that point, attorneys Webster and Marovich requested that Judge Perasso appoint counsel to assist appellant with a Marsden motion, and on January 22, 1993, Judge Perasso appointed attorneys Frey and Margolin for that purpose. II CT Cal S 570.

In October 1993, Judge Perasso held an in-camera evidentiary hearing on a motion to discharge attorneys Webster and Marovich pursuant to Marsden and based on the consensus of evidence presented at that hearing, issued a Minute Order indicating an intent to discharge attorney Webster and Marovich, and set a date of December 3, 1993 for proceedings pursuant to Penal Code section 987.05 regarding replacement counsel. XV CT Cal S 5297. The prosecution then moved to disqualify Judge Perasso who recused himself, and the Judicial Counsel assigned Judge McCartin. Judge McCartin conditionally discharged attorneys Webster and Marovich on January 21, 1994, but refused to appoint the San Francisco Public Defender or other trial counsel. Judge McCartin then embarked on the pervasively flawed trial site selection proceedings discussed in Argument I, supra. Immediately upon the transfer to Orange County in September 1994, counsel for appellant filed a

motion to appoint the San Francisco Public Defender to represent appellant in all the charges that had been transferred to Orange County, and the Orange County Public Defender filed a declaration concurring as to the appointment of the San Francisco Public Defender in accordance with Penal Code section 987.2(g). 1 CT 11–12. The prosecution filed a statement that "the Court could properly exercise its discretion by choosing to appointment the San Francisco Public Defender" pursuant to Penal Code section 987.2(g) "provided that the assigned attorney, presumably Michael Burt, can satisfy the Court that he has no scheduling conflicts which would prevent him from preparing and being available in a reasonable time for pre-trial motions and trial." 1 CT 49-60.

The Orange County Superior Court denied appellant's request to appoint the San Francisco Public Defender based solely on Deputy Burt's estimate that it would take two years to prepare for trial. Instead, the Court appointed the Orange County Public Defender without eliciting any pre-trial preparation or trial date estimates pursuant to Penal Code section 987.05. 2 CT 143-144. Had the Court appointed attorney Burt, the case would have gone to trial in less than half the time that it actually took to begin trial with the Orange County Public Defender representing appellant. The Orange County Public Defender subsequently filed motions to be relieved and to have

the San Francisco Public Defender and Michael Burt appointed, all denied. 2 CT 603.

For more than a year, appellant cooperated as best he could with the Orange County Public Defender and the deputies assigned to his case, but friction developed with designated lead counsel William Kelley. After two years of representation by the Orange County Public Defender, appellant filed a Marsden motion based on dissatisfaction with attorney Kelley that was granted on August 2, 1996, and two other Orange County private attorneys were appointed, again without any compliance whatsoever with Penal Code section 987.05. 6 CT 2058. However, the order discharging the Public Defender on Marsden grounds was reversed by the Court of Appeal, Ng v. Superior Court (1997) 52 Cal.App.4th 1010, and the Public Defender was re-appointed over appellant's objection. In September 1997, the court held further proceedings regarding the possible appointment of attorney Michael Burt, but no decision was reached. 11 CT 3631. Following further friction and dissatisfaction between appellant and attorney Kelley, appellant filed a motion to represent himself on March 31, 1998. 18 CT 6444. On April 21, 1994, the court denied the Faretta motion on the non-sequitur basis that appellant in fact wanted attorney Burt to represent him. (That was the same reason relied on by the court to deny appellant's prior Marsden motion, --

"this is 'Harris' Revisited' and the basis for defendant's motion is that he wants DPD Michael Burt appointment." 9 CT 2942).

Appellant renewed his Faretta motion on May 8, 1998, and the court granted it on May 15, 1998, 19 CT 6713, but with the onerous and unconstitutional conditions that are the subject of this Argument.

Appellant represented himself for three months coping as best he could with the conditions imposed by the trial court. However, on August 21, 1998, the court unilaterally revoked appellant's self representation and re-appointed the Orange County Public Defender. 22 CT 7567. That ruling is the subject of Argument IV infra.

Appellant filed a renewed Marsden motion, based on his irreconcilable conflict with attorney Kelley, which was denied on September 21, 1998, and which is the subject of Argument V, Infra. The court's refusal to appoint the San Francisco Public Defender and attorney Michael Burt at any point in the proceedings is the subject of Argument VI, Infra.

In sum, after the initial appointment of counsel was rescinded, the San Francisco Public Defender was never appointed at any further stage of the proceedings pursuant to Penal Code section 987.2(g),[27] and there was never

[27] For sake of completeness, Michael Burt was given a temporary appointment as co-counsel with the Orange County Public Defender for the limited purpose of negotiating as to section 987.2 arrangements, 11 CT 3701,

any compliance with Penal Code section 987.05 as to any of the other attorneys who were subsequently appointed. This clear pattern of noncompliance with California statutory framework regarding the appointment of counsel necessarily contributed to the specific rulings that violated appellant's Sixth Amendment right to counsel.

B. Summary of Facts Regarding Appellant's Faretta Invocation.

On March 31, 1998, appellant filed a motion in the Orange County Superior Court, to exercise his right to self representation under Faretta v. California (1975) 422 U.S. 806; People v. Canfield (1992) 2 Cal.4th 1357; and the Sixth Amendment. 18 CT 6444-6445. Appellant also asked to exercise this right of self representation prior to the commencement of his competency hearing scheduled for trial on April 20, 1998.

On April 17, 1998, the trial court stated that since criminal proceedings had been suspended pursuant to Penal Code section 1368, the court would defer hearing the Faretta motion until criminal proceedings had been reinstated. 3 RT 614. Defense counsel did not object, but read into the record a statement by appellant in which he objected to being forced to proceed with current counsel in spite of his numerous objections and the affidavits of

---

but the appointment was rescinded when the court and Burt could not agree as to terms. See Argument VI, infra.

counsel attesting to "irreconcilable conflicts." 3 RT 615-616. The court denied the motion. 3 RT 616.

At the 1368 hearing on April 20, appellant again objected to representation by Deputy Public Defender Kelley, arguing that counsel suffered from a conflict because they did not want to relinquish their appointment and have Mr. Burt replace them. The court replied that in his view attorneys Kelley and Merwin would prefer to be off the case. 3 RT 704.

Appellant explained that one source of the distrust and hostility between him and Kelley was Kelley's unwillingness to assist him in putting on evidence of their incompetence. He complained that the court "seem[ed] to vouch for their credibility from day one . . ." and had denied him a meaningful hearing of his claims of incompetent representation. 3 RT 705. Appellant stated if the court would not dismiss the Public Defender, he had no choice but self representation. 3 RT 706. The court provided appellant with a Faretta form, which he read and initialed. 3 RT 706.

The court asked whether appellant understood the inadvisability of self representation, and appellant replied that he did. The court warned that he would not receive any special privileges or treatment because of pro per status, and that he would have to follow all the technical rules of procedure and evidence. The court explained that many motions drafted by the Public

Defender had not yet been submitted to the court and that appellant would be taking responsibility for these motions. 3 RT 707. The court warned the appellant that he would be at a great experience disadvantage, never having acted as an attorney, never having examined or cross-examined witnesses, vis-à-vis the experienced prosecutors. 3 RT 707-708. The court also explained that appellant would be constrained by his circumstances in jail, that he would be given no extra privileges at jail and no extra time to prepare, and that he would "get exactly what all the other pro pers get at the county jail.... [n]o more, no less." 3 RT 709. The court pointed out that appellant would surrender any right to argue his own ineffectiveness on appeal, 3 RT 710, and that if he later changed his mind, he might not be permitted to obtain a postponement while he obtained an attorney. 3 RT 711.

The court then asked appellant whether he wanted to represent himself because of an irreversible, insolvable breakdown in the attorney-client relationship, and appellant responded that this was "part of the answer." 3 RT 711.

The court asked whether appellant would be prepared to go to trial on September 1, and appellant said that he would not, but that neither would the Public Defender. 3 RT 711-712. At that point the court stated, "So all you have said in number 16 [referring to the Faretta form] is what you have been

saying all along, that you want Mr. Burt to represent you." 3 RT 712. Appellant acknowledged that he had no alternative, even though he did not have the "confidence and knowledge to proceed," he could not trust his current counsel and could not put his life in their hands. 3 RT 714.

The court responded that appellant's purpose was either (1) to have Burt appointed; or (2) to delay, either of which would have the same effect because Burt also wished to delay the trial. 3 RT 713.

The prosecutor argued that appellant's motion was "timely" according to the view of the Ninth Circuit, and the court responded that if the purpose of the Faretta motion was to delay the proceedings, it would be untimely even under Ninth Circuit precedents. 3 RT 715. The prosecutor asked the court to make a factual finding based upon the record that the purpose of appellant's motion was to "use this Faretta basis as groundwork for further delays and further challenges on the attorney representation issue." 3 RT 715-716. After further discussion, the court gave the Public Defender's office and appellant until the following morning to consider their positions. 3 RT 721.

The following day, April 21, 1998, appellant reiterated his request to represent himself, and refused to accept the Public Defender as advisory counsel, as the prosecution had urged. 3 RT 731. The court concluded that it was clear that appellant wanted Burt to represent him on the Calaveras

County charges, and that he did not want to represent himself, "He has made that clear. And I don't think he would dispute that." 3 RT 732. The court expressed concern that if given pro per status, appellant would be entitled to advisory counsel and would likely ask for Keenan counsel, which would place the court in exactly the same position and nothing would be solved. 3 RT 733. The court noted the extensive work the Orange County Public Defender had already done on the case. 3 RT 734. The court stated that appellant's Faretta petition was "not a sincere invocation of his right to self representation." 3 RT 735.

Appellant objected that he "unequivocally" wanted self representation. 3 RT 739. He could not work with the Orange County Public Defender, but that did not mean that he could not work with anyone. 3 RT 739. The court responded that no one else could be ready, "That is the problem. That is further delay. So the reason for your request is to obstruct justice and further delay the proceedings. And I think I have the duty to prevent that when I can and should." 3 RT 740.

During proceedings on May 8, 1998, appellant submitted, through counsel, a renewed Faretta motion to the court. 4 RT 743. The court reiterated that it had found at the previous hearing that appellant did not want to represent himself. 4 RT 746. The court asked appellant what, if anything,

had changed. Appellant argued that his desire to be relieved of attorneys Merwin and Kelley existed independently of his desire to have Burt represent him. 4 RT 764. The court then denied the renewed Faretta motion. The court cited additional delay and the obstruction of justice. 4 RT 767. It was clear to the court "that all we would do is start the circle all over again; that is, get into fights as to who is going to be his advisory counsel, who is going to be the investigator, and Mr. Burt would be on the plane back and forth and back and forth, and we'll have a little dance here, a little dance there, and nobody is going to represent." 4 RT 767.

The court next considered appellant's motion to have the court recuse itself from hearing the Faretta motion. 4 RT 771. Appellant had argued that given the court's "repeatedly expressed biased views and predispositions relative to my representation matters," the court should recuse itself and transfer the matter to another court for a "full and fair determination." 4 RT 771. The court also denied that motion. 4 RT 771.

On May 15, 1998 appellant renewed the Faretta motion, stating that he unequivocally wanted to represent himself, and that he was now prepared to accept anyone the court chose to appoint as advisory counsel. 19 CT 6707. The trial court responded that "the situation has changed on the Faretta issue because for the time you have indicated that you are willing to represent

yourself, you want to do that, and correct me if I am wrong, and you are asking this court because of the complexity of the case that you would like counsel to do some legal work for you and to make some recommendations to you," which is "what an advisory counselor is for." 4 RT 817-818. The court then granted self representation and appointed the Orange County Public Defender as advisory counsel. 4 RT 835-836.[28]

However, the court then also appointed the Orange County Public Defender, over its vigorous objection, as standby counsel, and directed the Public Defender to "do exactly what you have been doing, and that is putting all your resources toward trying this case in Mr. Ng's interest and you are going to do that as standby counsel." 4 RT 838. See 19 CT 6713.

On May 26, the Orange County Public Defender filed a motion to withdraw as advisory or standby counsel, 19 CT 6719-6728. At the hearing

---

[28] The trial court's insistence that the grant of self representation was contingent on appellant accepting the unwanted services of the Orange County Public Defender as advisory counsel was certainly an unwise decision, but by itself may not have fatally tainted the grant of self representation because appellant's overwhelming conflict was with Deputy Public Defender individually, not the Public Defender as an institutional litigant. Cf. People v. Stankewitz (1982) 32 Cal 3d 80. The May 15, 1998 grant of self representation may have worked out successfully if the Public Defender had assigned another deputy such as Lewis Clapp to work directly with appellant as advisory counsel, and if the trial court imposed no further burdens on the self representation, but unfortunately the trial court drastically magnified the problem by appointing the Public Defender as full-speed ahead standby counsel as well.

of May 27, 1998, Public Defender Carl Holmes argued in support of the motion to withdraw as standby counsel because of the court's directive to continue preparing for trial even though "the defendant representing himself desires to pursue an avenue antithetical to ours." 4 RT 858. Public Defender Holmes noted that the court had directed the Public Defender to "go down both roads", one as standby counsel and one as advisory counsel. Public Defender Holmes described the crux of the problem that the trial court had created with the directive that the public defender proceed as standby counsel:

> "It is unclear to me exactly how the court is defining these roles of advisory and to stand-by. If, as stand-by counsel I am to prepare the case the same as if I was still attorney of record, that means that at least I believe I am ethically bound then to make the decision that I deem appropriate and to prepare the defense regardless of Mr. Ng's opinion.
>
> There have been occasions where, when I was counsel of record before Mr. Ng was pro per, where I made the decision and pursued a road over his objection because I felt ethically bound to do so.
>
> So that raises a question, if Mr. Ng is representing himself, we could, in effect, be working against him in this stand-by role.
>
> In an advisory, it is my understanding that I am to do just that. Be available to Mr. Ng to give him advice, if he wants it. And then whether or not he chooses to follow it is up to him." 4 RT 858-859 (emphasis supplied).

Holmes noted that "if he is truly pro per, my feeling is he should be allowed to make that decision, and no matter that I advise him otherwise". 4 RT 860. Deputy Public Defenders Kelley and Denise Gragg offered a proposed solution to the conundrum posed by Holmes, and urged the court to "let us stay stand-by and work this case up just the way we were before the

Faretta" and "give Mr. Ng an independent investigator and an independent law clerk, or paralegal...". Attorney Gragg explained that under those circumstances "if Mr. Ng's self representation falls apart, we will be ready to do it", but "we won't have to help him do things that are self destructive." 4 RT 874. In other words, the Public Defender's position was that its ethical conflict should be resolved by assigning the Public Defender the single task of preparing for trial, and affording appellant some other attorney as advisory counsel.

Appellant complained that the Orange County Public Defender was in effect arguing for an arrangement that provided appellant with the appearance of self representation but simultaneously precluding him from actually exercising it -- "we just want to have somebody placate him [appellant], to make him believe he is representing himself." 4 RT 893. Public Defender Holmes recognized that the proposed solution might well alleviate the Public Defender's internal conflict from having to perform two mutually incompatible functions, but would not alleviate the conflict with appellant's self representation -- "next week we'll be here with another motion alleging essentially that he has not been given – in fact, de facto he is not his own counsel because the Public Defender is running the show" and "he is absolutely right." 4 RT 898 (emphasis supplied). The court refused to

appoint a different advisory counsel, and re-directed the Orange County Public Defender to continue independent preparation for trial as stand-by counsel irrespective of appellant's self representation efforts. 4 RT 930-931.

On June 8, 1998, appellant also filed a motion to discharge the Public Defender as standby counsel. 19 CT 6799. The prosecution filed a response, 20 CT 6852, and at the hearing on June 17, the court reminded appellant of his May 15 statement that he would take anybody including the Orange County Public Defender as advisory counsel. Appellant correctly pointed out that there was a significant difference between advisory counsel vs. standby counsel, and at the time that he had accepted the Public Defender as advisory counsel he had not been informed that the court would also appoint the Public Defender as stand-by counsel to pursue investigation and trial preparation matters that were incompatible with his self representation.

In light of the considerable discussion among the court and counsel at the earlier May 27 hearing regarding appellant's ability to verbally express himself to the court, appellant asked attorney Merwin to read a written statement on appellant's behalf that began, "I am making progress toward to effectively represent myself, though it is slow." 4 RT 948. Appellant "unequivocally reaffirm[ed] my previous request to represent myself and agree to do my best to cooperate with the Public Defender as my advisory

counsel." At the same time, appellant stated, "I request the court order the Public Defender to stop its pro-active role as my stand-by counsel and merely 'stand by'", and then enumerated a number of areas of specific conflicts. 4 RT 949. Appellant referred to difficulties arising when two sets of investigators attempted to interview the same lay witnesses, and when both appellant and the Public Defender made conflicting demands on the prospective expert witnesses. 4 RT 950. The court responded, "I know what your position is, Mr. Ng" and "whatever it is you're asking for is denied." 4 RT 950.

The court admonished appellant that the "Public Defender has to do what the Public Defender believes is in your best interests as a stand-by counsel and as advisory counsel" but "they will not be interfering with your right to proceed in pro se, not at all" because "there is just no conflict there." 4 RT 950-951.

The case was set for further proceedings on July 17, 1998, and in the interim, the Public Defender fired the paralegal assistant that the Public Defender had hired to assist appellant because the paralegal had failed to perform as required. 20 CT 6915; 6922. Notwithstanding this unforeseen and unfortunate setback (which was in no way attributable to appellant directly or indirectly), appellant made his best efforts to prepare for trial in

pro per. In early August, appellant filed several motions, relating to venue, the legality of various searches, and a trial continuance. 20 CT 7003; 7033; and 7143. In addition, appellant filed a motion for disclosure of impeachment evidence regarding Canadian informant LaBerge. 21 CT 7177. Appellant filed additional motions regarding his difficulties in pursuing his avenues of self representation because of the stun belt he was forced to wear, among other impediments, 22 CT 7554-7557, accompanied by a sealed report of Dr. Nievod, dated June 16, 1998.

At the same time, there were continuing conflicts between appellant's efforts and those of the Public Defender with respect to lay and expert witnesses. One mental state expert, Dr. Nancy Kaser-Boyd, had been working on the case for more than a year as of July 1998, and had developed a substantial rapport with appellant. However, both appellant and the Public Defender were directed by Judge Millard to share previously retained experts, and to separately apply for their own funding as to each expert. At a confidential 987.9 hearing, attorney Kelley candidly told Judge Millard, "We can't use the same experts" because "[t]he experts themselves are having difficulty with the position this puts them in." RT 987.9, p. 45.[29] Kelley reiterated the difficulty conflict between the Public Defender's role as standby

[29] This is a separately paginated volume of Orange County Reporters Transcript with the designation "987.9" on the cover.

counsel, appellant's self representation, RT 987.9, p. 51-52, which the court duly acknowledged, but declined to ameliorate. The court asked appellant, "So do you have any problem with that, Mr. Ng?", and appellant dutifully replied, "Not at this time, Your Honor", but that "[I]f problems come up, I guess I will let you know." RT 987.9, p. 51. Clearly, appellant was doing his best to go forward in spite of the difficulties inherent in the arrangement imposed by the Court.

Further problems of an extremely serious nature erupted when Dr. Kaser-Boyd resigned from the case based on the court's directive that she work simultaneously for both the Public Defendant and for appellant. She expressed her continuing interest in working on the case in a July 30, 1998 letter to appellant, but explained that she could not because of "an inherent conflict of interest" resulting from "the Judge's most recent ruling that you and Mr. Kelley [sic] should share experts":

> "This is a completely untenable position for an expert witness. I cannot 'serve two masters', and I believe I will not be the only expert who expresses this concern. To say that this is possible invites all kinds of possible conflicts and violations of psychological ethics." Sealed 25 OC CT 8558.

Notwithstanding this setback and loss of a key expert, appellant continued his efforts to prepare for trial, and complied with Judge Millard's fairly complex system for obtaining funding authorization for other experts to

testify at the guilt trial. Appellant sought and obtained authorization for Drs. Nievod and Grassian to prepare for and appear at the trial scheduled for September 1. See V CT 987.9 1580 – 86 (Nievod)[30]; VI CT 987.9 2049 – 56 (Grassian). Throughout August 1998, he applied for and obtained additional authorizations for investigators to interview and subpoena witnesses for guilt and penalty trial. See VI CT 987.9 2046 – 48; VI CT 987.9 2067–69.

On August 21, 1998, during a hearing on the defendant's motion to continue the trial, the trial court unilaterally revoked appellant's pro per status based on the finding (without any evidentiary inquiry, see Argument IV, infra) that "the defendant is not preparing for trial, but doing everything to avoid trial in the near future," 5 RT 1067, and re-appointed the Public Defender as counsel of record.

Five days later, the Orange County Public Defender, in its capacity as appellant's newly reinstated trial counsel, filed its own motion to continue the trial, 23 CT 7573, but the court did not relieve the Public Defender for purportedly dilatory tactics. One ground presented in support of the Orange County Public Defender's August 26, 1998 motion to continue trial was that "a primary mental health expert resigned[ed] from the defense team" because

[30] This is a separately bound and paginated set of Orange County Clerks Transcripts that have roman numeral volume designations and the identifier "987.9 material" on the cover of each volume.

of the inherent conflict in trying to simultaneously work for appellant in pro per and also for the Public Defender as stand-by counsel pursuing their separate litigation agendas, 23 CT 7576. Attorney Kelley explained:

> "As a result of Ng being granted right of self representation a key psychologist hired in this case has resigned. Essentially, the problem arose when the psychologist was being given directives from me (as stand-by counsel) and Ng (as his own attorney). Ethically the expert could not perform antithetical tasks. The 987.9 court refused to order that the expert could only work for either Ng or me. The expert, thereafter, resigned. This expert was hired in 1996, and prior to Ng slipping into his mode of non-cooperation with the defense team, the expert has developed fruitful information about the case and Ng's mental state.
>
> I am going to attempt to get this expert to reconsider her position and return to the case. However, if she does not a new expert will have to be found and educated on the case." 23 CT 7596.

The sealed record in this case reflects the very specific prejudice that appellant experienced while ostensibly pro per because of the public defender's conflicting demands on certain experts. Attorney Kelley confirmed at the September 21, 1998 Marsden hearing that Dr. Kaser-Boyd had resigned from the case because Kelley had her "developing information [he] believe[d] to be pertinent to the defense of the substantive case," but that Mr. Ng was "having her go in a different direction," which put her in a "dilemma". Sealed RT 1483. As noted above, the trial court's insistence that appellant and the Public Defender share experts during the trial preparation phase was inherently unworkable, and resulted in the resignation of one of the principal

experts who had been working on the case for more than a year. Notwithstanding the diligent efforts of both the Orange County Public Defender and appellant to work within the inherently conflicted system imposed by the Orange County Superior Court, RT 987.9, p. 50-52 (July 21, 1998), the restrictions were unconstitutional impairments of the right of self representation from the outset.

C. The Trial Court's Errors.

McKaskle v. Wiggins (1984) 465 U.S. 168 confirmed that the appointment of stand-by counsel to a pro per defendant did not necessarily violate the defendant's rights of Faretta, but at the same time "imposed some limits on the extent of stand-by counsel's unsolicited participation". 465 U.S. at 177. McKaskle stated that "[i]f stand-by counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decision... or to speak instead of the defendant on any matter of importance, the Faretta right is eroded." Id. at 178. On the other hand, stand-by counsel may assist in either (1) "in overcoming routine procedural evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete", Id 183, and (2) by

"help[ing] to insure the defendant's compliance with basic rules of courtroom protocol procedural." Id.

Here, there was significant conflict between appellant and the Orange County Public Defender regarding the fundamental strategy for developing exculpatory and mitigating evidence. The court's insistence over the objections of both appellant and the Public Defender that the Public Defender continue with its trial preparation irrespective of the conflicts with appellant's simultaneous pro per efforts clearly constitutes a Faretta violation. The court's directive virtually guaranteed that the Public Defender would "make or substantially interfere with ... significant tactical decisions ..." in conflict with appellant. McKaskle at 178.

McKaskle explained that "[a] defendant's right to self representation plainly encompasses certain specific rights to have his voice heard" and he "must be allowed to control the organization and content of his own defense... ." 465 U.S. 174. Here, stand-by counsel interfered with appellant's efforts to develop his defense by simultaneously directing mental health experts to proceed in a manner different from that urged by appellant, and by interviewing witnesses on topics that in several instances were not those that appellant sought to develop. RT 987.9, p. 52. Under the fairly complicated structure for obtaining authorization for investigative funding established by

the 987.9 judge, appellant was placed in a disadvantageous position as far as obtaining witness interviews on the topics that he sought to pursue.

This Court has recognized that under certain circumstances the conduct of stand-by counsel may be sufficiently minor and unobtrusive as to comport with the requirements of McKaskle, see e.g. People v. Gallego (1990) 52 Cal.3d 115, 163, but this case is far different. Appellant and the Orange County Public Defender were at odds in trial preparation virtually from the moment of the trial court's appointment of the Orange County Public Defender as stand-by counsel. Both appellant and the Orange County Public Defender made their best efforts to proceed notwithstanding this inherently conflict-ridden arrangement, see RT 987.9, p. 58-59, but it was doomed to failure, to appellant's detriment.

This case is analogous to Sherwood v. State (Ind. 1999) 717 N.E. 2d 131, which reversed a murder conviction where the court had appointed stand-by counsel to prepare for and participate in the trial separate and independent from appellant's pro per presentation. The trial court had ruled that the "trial could proceed with hybrid representation, with Sherwood appearing 'pro se and by appointed counsel'". Immediately, Sherwood and appointed counsel both objected to this directive, with appointed counsel pointing out that the defense theories were 'inherently different' and 'totally

non-reconcilable and totally inconsistent'". 717 NE 2d 133. The Sherwood case did proceed to trial and two separate avenues of defense were presented, mutually inconsistent as Sherwood and appointed counsel had predicted at the outset. The Indiana Supreme Court reversed the conviction because Sherwood "was denied actual control of the case presented to the jury", even though he was permitted to present his version of the defense. 717 N.E. 2d at 137.

Appellant's self representation was irremediably undermined from the outset due to the recurrent and unavoidable conflicts between appellant and appointed counsel about trial preparation. Under these circumstances, the court's purported grant of self representation to appellant was fatally flawed at the outset. Appellant had already compromised his otherwise unequivocal request for self representation by agreeing to the trial court's condition that the Orange County Public Defender act as advisory counsel. Appellant had initially resisted that proposed arrangement because of the antagonism with attorney Kelley, but eventually acquiesced or capitulated to the court's condition that he proceed with the public defender as advisory counsel on May 15, 1998. The Orange County Public Defender repeatedly emphasized to the court that it could act as advisory counsel or stand-by counsel, but not

both. The court's refusal to alleviate the readily apparent conflict sabotaged of appellant's Faretta right.

There are also clear parallels in this case to Scarborough v. State (Tex. Crim. Ap. 1989) 777 S.W. 2d 83, in which a serious felony conviction and a judgment of 99 years in prison was reversed because of the court's unsolicited appointment of stand-by/advisory counsel. Scarborough had filed two motions pro per and had asked for access to the law library, at which point the trial court revoked self representation because "this Court is not convinced that you truly want to represent yourself," apparently because Scarborough had availed himself of the assistance of advisory counsel in preparing the motions. The Texas Court of Criminal Appeals reversed the conviction because the trial court had in fact ordered a hybrid form of representation that was then used as a justification for revoking appellant's right of self representation. The concurring judge made the following comments regarding the trial court's error that are extremely pertinent to the trial court's sabotage of appellant's self representation in this case:

> "The record before us makes it absolutely and unquestionably clear, although perhaps done in good faith, the trial judge was simply not going to permit appellant to represent himself at his trial. It is or should be obvious to almost anyone who reads the record before us that at every step of the way the trial judge was constantly on look-out for a legal way to justify his not permitting appellant to represent himself, or at least to legally obstruct appellant's desire to represent himself. The learned trial judge clearly erred." 777 S.W. 2d 95 (emphasis supplied).

See also Washington v. McDonald (Wash. 2001) 22 P.3d 791 [affirmed reversal of convictions where advisory counsel had a conflict of interest].

Frantz v. Hazey (9th Cir. 2008) 533 F.3d 724 (en banc) reversed the denial of a habeas corpus petition because the trial court had excluded the pro per defendant from a mid-deliberation discussion of a jury question, and resolved the matter with the participation of stand-by counsel without the defendant's knowledge or participation. The Public Defender in this case was under a directive to proceed in a manner that was certain to conflict with appellant's Faretta right to conduct the development of the defense in a manner he wished, i.e., such that appellant never "ha[d] a fair chance to present his case in his own way." McKaskle, supra, 465 U.S. at 177.

The trial court's insistence that the Orange County Public Defender prepare for trial just as if appellant was not representing himself was such a prejudicial burden as to be the functional equivalent of a denial of the Faretta right. The Orange County Public Defender repeatedly brought actual conflicts to the trial court's attention and to the attention of the 987.9 judge, but both refused to alleviate the conflict and instead reiterated the directive to proceed in the same conflicted manner. Clearly, a court cannot eviscerate a defendant's Faretta right by purporting to grant it and then imposing conditions that are inherently irreconcilable with the initial grant. For

example, if a court granted a Faretta request on the condition that the defendant wear a clown suit during trial, that condition would render the grant of self representation functionally void. Here, the trial court's unilateral and unanticipated appointment of the Orange County Public Defender as stand-by counsel (above and beyond their appointment as advisory counsel, which appellant accepted as a court imposed condition of self representation), accompanied by the directive to prepare for trial as if appellant was not representing himself, substantially undermined appellant's ability to develop his own defense. The May 15, 1998 grant of self representation was thus negated by the countervailing appointment of the Public Defender as standby counsel with a directive to continue preparing for trial in conflict with appellant. Under these circumstances, the grant of self representation was virtually guaranteed to fail, as it did, through no fault of appellant's. The trial court was apprised of the inherent conflict immediately upon the appointment of the Public Defender as standby counsel with a directive to prepare for trial without regard to appellant's self representation, but erroneously insisted on an arrangement that both on its face as well as in practice violated appellant's Sixth Amendment right as construed in McKaskle.

D. The Requirement of Reversal

All state and federal cases that have addressed the issue recognize that the infringement of a defendant's right of self representation, whether by an outright denial or by the imposition of conditions that undermine the right or inevitably lead to its revocation are constitutionally impermissible. See Sherwood v. State, supra; People v. Halvorsen (2007) 42 Cal.4th 379, 433 [reversing capital murder conviction because of erroneous denial of Faretta requests]. There is no room for harmless error analysis because, as stated in McKaskle, "since the right of self representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to defendant, its denial is not amenable to 'harmless error' analysis." Rather, "[t]heir right is either respected or denied; its deprivation cannot be harmless." 465 U.S. at 177, fn. 8.

This is an unusual case in that there is demonstrable prejudice in a number of areas. The trial court's insistence that both appellant and the Public Defender simultaneously pursue their separate and conflicting trial strategies led to the resignation of one of the principal mental state experts, Dr. Kaser-Boyd, who concluded that she could not ethically comply with the terms set by the court. Appellant thereby lost one of the primary witnesses that he sought to present at the September 21 Marsden hearing to counter Dr.

Sharma's report that appellant was simply refusing to cooperate with the Public Defender, a position that the court adopted. He similarly lost Dr. Kaser-Boyd as a mitigation witness at the penalty trial, and the Public Defender was unable to replace her by the time of the penalty trial. Under these circumstances, the trial court's imposition of inherently irreconcilable conditions on appellant's right of self representation negated the ostensible grant of self representation, and cannot be deemed harmless beyond a reasonable doubt.

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. Summary of Facts.

1. Appellant's diligent efforts in self representation

Following the grant of self representation on May 15, 1998, appellant actively and diligently pursued his self representation during the next three months, and effectuated numerous steps toward trial preparation. The transcripts of the applications for investigation and expert fees during the period of self representation provide a clear demonstration that appellant was engaged in down-to-earth, nuts-and-bolts trial preparation, not in any fanciful

or irrelevant directions, nor in any dilatory efforts, nor in any other misuse of self representation.

Appellant made efforts to interview and subpoena guilt and penalty phase witnesses, following the cumbersome procedure imposed by Judges Ryan and Millard.

On July 16, 1998, attorney Kelley filed a letter with Judge Millard, who was assigned to handle all Penal Code section 987.9 proceedings in Orange County, in which Kelley responded to a list of thirteen prospective defense witnesses that appellant had prepared and delivered to Kelley through his investigator, George Rowell. Pursuant to the procedure imposed by Judge Ryan, Kelley sent the letter to Judge Millard to indicate "whether we have contacted them pursuant to the court's directive that's reflected in my letter to Mr. Ng dated June 10, 1998." Vol. VI, Sealed Clerk's Transcripts, Orange County 987.9 Proceedings, p. 2003 – 2004; hereinafter "CT 987.9" Kelley's letter indicates as to each of the thirteen prospective witnesses whether the Public Defender had already interviewed the witness; if not, whether the Public Defender intended to do so; and, if so, whether the Public Defender objected to appellant's having his investigator interview the witness first. Kelley indicated that his investigators had interviewed two of the witnesses; that he had attempted unsuccessfully to interview six other witnesses; that he

was interested in interviewing one of five of the remaining witnesses. VI CT 987.9 2005.

Meanwhile, appellant had filed with Judge Millard a formal request for authorization for investigation funds to interview the thirteen witnesses that Kelley had reviewed, and an additional two that Kelley had either overlooked or that appellant had added. As to each witness, appellant made a concise offer of proof as the general nature of their anticipated testimony, and the phase[s] of trial to which their testimony would be relevant. VI CT 987.9, pp. 2015-2019. In general terms, six of the witnesses were relevant to the impeachment of the Canadian informant, Maurice LaBerge, who was anticipated to be a principal prosecution witness; three witnesses were relevant to demonstrating that Leonard Lake was the actual and sole killer of the missing people; and six witnesses were relevant to appellant's background and upbringing in Hong Kong and England, for purposes of social history and mental state work-up. Ibid. Based on appellant's showing, Judge Millard granted appellant's request to interview all of the witnesses except those whom the Public Defender had already interviewed. Ibid.

On July 24, 1998, appellant filed a confidential application for a $300 purchase of a computer printer to use in jail to print defense documents, explaining that "I am preparing many briefs and motion for the defense of my

case", but that "I do not have a functioning paralegal, I do not have somebody at my disposal to prepare the necessary documents regarding my case therefore, it is up to me." Appellant noted that "[t]ime is of the essence, as my next Court appearance is in less than three weeks." VI CT 987.9, p. 2022. That request was denied pending approval by the Orange County Sheriff to permit appellant to have a printer in his cell. VI CT 987.9 2020.

Also on July 24, 1998, appellant filed an application for an order approving the expense of $700.00 to have the voluminous photographs that the prosecution intended to use at trial transferred onto a CD-ROM so that appellant could review them in his jail cell, and Judge Millard approved that request. VI CT 987.9, p. 2025.

On August 12, 1998, appellant filed a confidential application for authorization for work on the case by Dr. Stuart Grassian, a psychiatrist who had previously been retained by the defense in Calaveras County, and who was designated as a defense expert witness for penalty trial. Appellant explained that the matter was urgent given that "[m]y current trial date is September 1, 1998", and noted that "my purposes for obtaining Dr. Grassian's services are largely congruent with Mr. Kelley's earlier approved application (which was never effectuated due to an irremediable breakdown in attorney client relationship while he was counsel of record), I am attaching

hereto Kelley's affidavit as exhibit "A" for reference to avoid reiterating redundant facts and showing that are substantially the same." VI CT 2053. Judge Millard granted the application. Id. at 2050.

During August 1998, appellant prepared and filed several other requests for authorization for specific travel expenses for his investigator to interview the witnesses whom Judge Millard had previously approved, and these applications were routinely granted. See, e.g., VI CT 987.9 p. 2067.

During the same period, appellant had filed several pro per motions before Judge Ryan that also demonstrated diligence in trial preparation. On June 9, 1998, appellant filed a motion to have access to the case files to assist in his trial preparation, 19 CT 6820, which was denied without prejudice as "very vague", 19 CT 6841. On June 16, appellant filed a motion for permission to make additional telephone calls to prepare his defense. 20 CT 6885.

On June 16, Judge Ryan appointed a paralegal named Anderson to assist appellant prepare for trial, 20 CT 6867. However, three weeks later the Public Defender led a declaration stating that the paralegal was not doing the work requested, at which time Judge Ryan vacated the appointment and directed the dismissed paralegal to return all legal materials to appellant, and appointed a different paralegal. 20 CT 6915.

Appellant filed other motions during July 1998, and on August 5, 1998, filed a motion to continue the trial to March 1, 1999. 20 CT 7033. On August 7, appellant filed a motion for disclosure of impeachment materials related to prosecution witness Maurice LaBerge in the possession of the Canadian authorities who used LaBerge as an informant. 21 CT 7144. The prosecution responded that it was appellant's job to get the requested information from the Royal Canadian Mounted Police directly.

2. The trial court's revocation of appellant's self representation.

On August 21, 1998, the court considered appellant's motion for continuance. The written pleading followed standard format and was supported by factual allegations and declarations. 20 CT 7035 et seq [31] The court expressed concern about a paragraph in the points and authorities that stated "the court cannot now condition a grant of a continuance upon defendant's waiver of Faretta rights." 5 RT 1055. The court asked, "Why in the world would that be in your points and authorities? This is another game

[31] The motion was supported, inter alia, by declarations from Orange County jail personnel who observed appellant working from morning until lights out on legal matters, and from the jail law librarian, who attest that "[s]ince defendant Ng had been representing himself, he has made requests for books or cases almost every day...." 20 CT 7052.

within a game. This court is not forcing you or trying to force you to do anything."[32]

The court then switched gear from the pending continuance motion to revisit the Faretta issue, asked whether defendant still wished to represent himself. The court had not granted the Faretta request in good faith.

At that point, attorney Kelley interjected as advisory counsel, "Isn't the question before the court whether or not his continuance motion should be granted?" 5 RT 1056. The court responded, "why is this threat where [the continuous pleading] about forcing him to give up his pro per status or Faretta status?" Kelley replied, "It is not a threat" and "I don't know why you take it as a threat." Ibid. The court asked why Kelley was addressing the court when he was not counsel of record, but did turn his attention back to the continuance motion.

---

[32] The passage that offended the court read in full, "the courts have made it clear that having allowed defendant to proceed in pro per the court can not now condition a grant of a continuance upon defendant's waiver of his Faretta rights", citing People v. Wilkins (1990) 225 Cal.App.3d 299. Wilkins reversed a conviction where the court granted a Faretta motion but denied the defendant adequate time to prepare. In the course of rejecting respondent's argument that the defendant had in effect waived his right to a continuance by requesting pro per status, the court stated the proposition that appellant paraphrased in his motion, "One cannot properly be forced to give up one constitutionally protected right (right to due process) in favor of another (right to counsel)," id. at 307. That was an entirely appropriate legal citation, and could not be reasonably viewed as a threat of any type.

The court asked appellant what was the basis for his request for a six month continuance, "why didn't you say two years or one year or five months or four months or three months or two months? Why six months? There is nothing in the record thus far to support that." 5 RT 1056. The court also asked when appellant expected to finish his pre-trial motions. Appellant responded that he could not give a specific date, but that he would file them as soon as he was able. 5 RT 1057. The court asked the parties for a time estimate of trial; the prosecution offered a revised estimate of two months. The court then asked appellant for an estimate, and stated that he needed a showing of good cause to grant the continuance. The court commented, "And so for I have heard from Mr. Rowell" [the approved defense investigator whose declaration was attached to the motion] and "[y]ou have him spinning all around the world trying to do things." 5 RT 1058.

The court then asked appellant, "How long will it take for this case to be tried in your opinion?" Appellant replied, "I believe the motion Mr. Merwin prepared asked for six months. I don't know whether I can accomplish that within that time." Ibid.

The court then blocked the revocation of self representation, "Okay. You know, I want to take a little break, and I want you to think about me revoking your Faretta status because I think that is about where we are at, and

I have to address it. We will take a little recess and I will give counsel and you a chance to gather your thoughts and present an argument." 5 RT 1058.

At that point, the prosecution offered the court legal citations regarding revocation of Faretta, and the court instructed that it was fully familiar with the cases, and asked the prosecution whether the Rudd case[33] provided a sufficient basis to revoke appellant's self representation.

After a recess, appellant stated, "Mr. Merwin has research the law" and asked, "would you allow him to speak for me please?" The trial court agreed, and counsel argued that appellant had demonstrated through hard work and identifiable progress that he was fully compliant with all Faretta requirements:

> Our case is a lot different. The record is from security personnel at the jail is that Mr. Ng has been working hard on his case sun up to sunset since the court appointed him, and the court's appointment was made because as the court explained it felt as a matter of law it had to grant that request. Not that it was discretionary. And it did not condition that grant on Mr. Ng's saying he would be ready.
>
> As the court read from the previous transcripts, he said would he [sic] try to be ready. And it seems to me from the effort he has put in and not just the fact that he is working morning to night on this according to the jailers, but for the motions that have been filed, albeit not written by Mr. Ng but approved by Mr. Ng, he is making progress. 5 RT 1061.
>
> The court then conducted the following colloquy:

[33] People v. Rudd (1998) 63 Cal.App 4th 620

The Court: I asked you a simple question, Mr. Ng. You did not answer it. I asked you whether you wanted to represent yourself – continue to represent yourself and you never answered it.

The defendant: The answer is yes, Your Honor.

The Court: Then I asked you about when you would be ready for trial, and I never got an answer to that.

The Defendant: I believe I mentioned it, I said the pleading states six – I understand from talking to Mr. Merwin that Mr. Kelley would take approximately six months to be ready.

The Court: You are not responding to my question. I read that. And I read exactly the way you wrote it. My question is, when will you be ready for trial.

The defendant: I try to be ready in six months, Your Honor.

The Court: Oh, you will try to be ready in six months. You were going to try to be ready by September 1st.

[whereupon, Mr. Merwin and the defendant confer.]

The defendant: The suggestion is to have six months as the target date for my pro per trial date and if it is—if I couldn't be ready by then, that counsel would take over.

The Court: Is that your request? Continue it for six months. If you are not ready, then counsel will take over; is that what you are saying?

The defendant: That is my understanding, to eliminate any concern you may have about delay. That will, you know, ensure that I try to be – if I couldn't be ready by then, my status will be revoked.

The Court: I wanted – I was trying to talk about when we could get this case started, and asked some questions. I never got responses from you, Mr. Ng. One of them was how many more pretrial motions are we going to have or I probably asked how long is it going to take to complete the pretrial motions?

The defendant: It is hard to answer that question because I haven't –

The Court: The trial date is September 1st. It is only a week – a week away. Today is the 21st. A week and three days away.

The defendant: I cannot – can Mr. Merwin articulate for me because it is difficult to answer these questions since I don't feel too comfortable in some of these issues that –

The Court: How long [] will [it] take to qualify a jury?

The Defendant: I never did a time qualification. 5 RT 1062–1064.

After some comments about the time needed for jury selection, the court announced:

> "I am going to turn it around. I think what I am doing, and this is thinking because I come out here typically with my mind not being made up until I hear everything, my suggestion is to revoke your pro per status. And if when we start jury trial you think you are ready to represent yourself, I will consider a Faretta motion. That is my thoughts right now." 5 RT 1064.

The court then told appellant the "simple reason" for his ruling is that "you haven't put any thought into getting ready for trial." 5 RT 1065. Appellant denied this and expressed frustration that the court would not "hear the problem, the issue that I try to raise." The court also noted appellant's lack of respect for the court, "Every time this court makes a ruling that you disagree with, you make derogatory remarks about the court or the court's ruling. That is not acceptable conduct." 5 RT 1065.

Appellant denied that he had been disrespectful and explained, "I just say what I felt at the time, which is what you mean, you never allow me to put evidence on before you make a speculation as to what I was doing or thinking, which is not true and I want to respond to that." 5 RT 1065-1066.

The court stated, "I think it is obvious, Mr. Ng, that you are not sincere with what you told the court in the last hearing. You were not and are not willing to cooperate with the Orange County Public Defender in the preparation of your case for trial, even though you did acquiesce in the filing of their motions today under your name, and even in court today on what, what little we have done so far. . . . You are not preparing for trial, but doing everything to avoid trial in the near future." 5 RT 1067.

The court stated that it could not revoke appellant's Faretta status because of an unwillingness to prepare, "but not being able to or willing and willing to abide by rules of procedure and courtroom protocol is not allowed." 5 RT 1067. The court concluded that appellant was "just trying to delay and that is not allowed." 5 RT 1068. The court then revoked appellant's Faretta status, and re-appointed the Public Defender as trial counsel. 5 RT 1069.

The court made the following additional remarks to the Public Defender later in the proceeding, "I fully expected that appellant would take me right up to trial date before he went into his 'I don't really want to

represent myself' stuff, but he didn't. Today he was refusing to cooperate with what the court was asking, not giving me responses at all, knowing he could answer but wouldn't. So here we are. I really thought we would go right up to trial day and then we have this motion. I knew the motion was coming. That was obvious when the Marsdens ran out." 5 RT 1072-1073. The court subsequently granted the Public Defender's motion for continuance.

B. The Trial Court's Errors

The trial court relied on two grounds for revoking appellant's self representation: that appellant was unable or unwilling to abide by rules of procedure and courtroom protocol; and that appellant was deliberately delaying the proceedings. The record contradicts both grounds, resulting in a Sixth Amendment violation under the well-settled principles of Faretta v. California (1975) 422 U.S. 806, 834, fn. 46.[34]

[34] "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." (Faretta, supra, 422 U.S. at p. 807.) The United States Constitution does not permit a state to "hale a person into its criminal courts and there force a lawyer upon him." (Ibid.) "In such a case, counsel is not an assistant but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." (Id. at p. 820.) Unless the accused has acquiesced in the representation, his defense cannot be the defense guaranteed him by the Constitution. (Id. at 821.) The notion of compulsory counsel was "utterly foreign" to the founders. (Id. at p. 833.)

1. The trial court's error in revoking self representation based on appellant's courtroom conduct.

a. The applicable law.

Faretta provides that self representation upon request is a fundamental Sixth Amendment right, but that a court may "terminate self representation by a defendant who deliberately engages in serious and obstructionist misconduct." (Id. at p. 834, fn. 46, citing Illinois v. Allen (1970) 397 U.S. 337.) The issue in Allen was whether a defendant who was represented by counsel but was "so noisy, disorderly, and disruptive that it [was] exceedingly difficult or wholly impossible to carry on the trial" could forfeit his right of presence in the courtroom. Allen held that "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Id at 343. Faretta thus equated the quantum of disruption necessary to justify the revocation of self representation with the quantum of disruption necessary to terminate defendant's constitutional right of presence in the courtroom.

People v. Carson (2005) 35 Cal.4th 1, held that "serious and obstructionist misconduct" could justify termination of Faretta rights for extrajudicial misconduct in addition to in-court misconduct, but only where the trial court considered several relevant factors and where there was sufficient evidentiary record to support termination in light of these factors.

Carson recognized the importance of the Sixth Amendment right and stated that it should not be lightly taken away without an adequate showing of cause: "Termination of the right to self representation is a severe sanction and should not be imposed lightly," id. at p. 7, and only where the accused has engaged in misconduct that "seriously threatens the core integrity of the trial." (Id. at p. 6.) Because of the severity of the sanction and the importance of the right in question, Carson stated that any decision to terminate self representation must be supported by "evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial" and that "[u]nsubstantiated representations . . . much less rumor, speculation, or innuendo, will not suffice." (Id. at p. 11.)

Carson enumerated the following factors for trial courts to consider in a Faretta revocation: (1) "the nature of the misconduct and its impact on the proceedings"; (2) "the availability and suitability of alternative sanctions"; (3) "whether the defendant has been warned that particular misconduct will result

in termination of [self representation]"; and (4) "whether the defendant has 'intentionally sought' to disrupt and delay his trial'", id at 11.

Carson further specified what factual record was necessary to support and order terminating self representation: 1) "the precise misconduct on which the trial court based its decision to terminate"; 2) how the misconduct threatened to impair the core integrity of the trial"; 3) "was the defendant warned that such misconduct might forfeit his Faretta rights"; 4) "were other sanctions available", and "if so, why were they inadequate." (Id. at pp. 11-12.) Once this assessment has been made, the reviewing court should apply an abuse of discretion standard of review, as previously described in People v. Clark (1992) 3 Cal. 4th 41, and McKaskle v. Wiggins (1984) 465 U.S. 168.

b. The absence of any showing of improper or disruptive conduct.

Here the record contains no misconduct on appellant's part that in any way threatened "the core integrity of the trial". Moreover, as to the conduct that the court cited, the court failed to either afford appellant any bases for its revocation, to give warnings that revocation was under consideration, or to consider alternatives. The entire revocation process was a surprise judicial response to what was an otherwise garden variety motion for continuance. The court did reveal that it had reviewed a compensation of cases regarding Faretta revocation, suggesting in effect an ambush. At the August 21, 1998

proceeding, appellant's conduct was not inappropriate in any way, much less comparable to the disqualifying and disruptive conduct contemplated by Faretta. The court's only complaint about appellant's conduct was that "[e]very time this court makes a ruling that you disagree with, you make derogatory remarks about the court or the court's ruling", which "is not acceptable conduct." 5 RT 1065. In fact, appellant's expressions of disagreement were consistently mild and respectful, and indistinguishable from those made by attorney Kelley, whom the court sought to reinstate.

The trial court referred to a phrase from McKaskle to support the revocation, i.e., that appellant had been unwilling or incapable of abiding "by rules of procedure and courtroom protocol," 5 RT 1067, quoting, McKaskle at 173, 183. This reflects the court's misunderstanding of the applicable law.

Faretta itself contains no reference to a lack of adherence to "rules of procedure and courtroom protocol" as a basis for revoking a defendant's self representation status. Rather, that phrase is found in the subsequent case of McKaskle v. Wiggins, supra, 465 U.S. at 173. However, Wiggins did not in any way authorize or approve revocation of self representation based on a pro per defendant's inability to "abide by rules of procedure and courtroom protocol", so long as the defendant was not "disruptive or obstructionist".

McKaskle focused on "what role standby counsel may play consistent with the protection of the defendant's Faretta rights." (Id. at p. 170.) Wiggins had been permitted to represent himself at trial, but argued on appeal that his defense had been unconstitutionally impaired by the "distracting, intrusive, and unsolicited participation" of standby counsel. (Id. at p. 176.)

The Supreme Court held that the scope of the defendant's Faretta right included the right to preserve actual control over the case presented to the jury; that unwanted standby counsel could not speak for the defendant on any matter of importance; and that disagreements between the defendant and unwanted standby counsel must be resolved in the defendant's favor on any matter which would normally be left to the discretion of counsel. (Id. at pp. 178-179.)

The Supreme Court recognized that a pro per defendant must be "able and willing to abide by "rules of procedure and courtroom protocol, " id. at 174, but also that where the defendant was ignorant of by those basic rules, advisory counsel could appropriately assist the pro per defendant as to those procedural matters without infringing the defendant's right of self representation. (Id. at p. 183.) The Court held that a defendant's Faretta rights were not violated where standby counsel's participation was limited to assisting the pro se defendant "in overcoming routine procedural or

evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete." (Ibid.) "Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure." (Ibid. emphasis supported.) McKaskle does not stand for the proposition that a defendant's Sixth Amendment right may be denied for ignorance of rules of courtroom protocol or procedure.

Faretta provides that obstructive and disruptive behavior by a pro per defendant may provide grounds for revocation of the right to self representation. 422 U.S. at 834, fn. 46. The same footnote that a failure or inability to abide by "procedural and substantive rules of law" by a pro per defendant may not later provide a basis for appeal akin to ineffective assistance of counsel. (Ibid.) Faretta nowhere states that failure to comply "with relevant rules of procedural and substantive law" is an independent ground for revoking the defendant's Sixth Amendment right. To the contrary, Faretta contemplated that a pro per defendant would likely and frequently be unable to comply with rules of procedure and courtroom protocol, and that the only adverse consequence would occur at the appellate level, i.e., no self-inflicted IAC claim on appeal. Thus, it appears that the trial court erroneously

believed that Faretta authorized revocation of self representation based on a failure of compliance with courtroom protocol.

Regarding the factors that have been recognized as warranting revocation, none were present here. The transcript of the August 21, 1998, proceeding reveals that appellant was responsive, polite, and on task. Appellant did not interrupt the court; did not use any inappropriate language; and stayed focused on legal issues rather than conditions of confinement, personal feelings, or any other tangential matters.

c. The court's failure to warn appellant or to consider alternatives to summary revocation.

At no time prior to August 21, 1998, was appellant warned that his courtroom conduct was viewed by the court as so improper as to jeopardize his self representation status. Without such a warning and probationary period, the revocation of self representation was erroneous.

Faretta explicitly cited Illinois v Allen, supra, in its brief discussion of termination of the right of self representation, and implicitly endorsed the Allen standard in the Faretta context. Allen specifically required a warning as a prerequisite to termination of the right to presence, and Carson specifically included judicial warning as an important factor for both trial and appellate courts in determining the constitutionality of a termination of self representation.

No warnings were given in this case at all. The hearing of August 21, 1998, was calendared for a hearing on appellant's duly filed motion for continuance of the then-scheduled September 1 trial date. Appellant's written motion was entirely unobjectionable in form and content. 20 CT 7033. The stated reasons for the continuance request related solely to trial preparation matters.

At the August 21, 1998 hearing, there was no notice or warning to appellant that his conduct since the grant of self representation was unacceptable in the court's view. That, in itself, demonstrates that the summary termination order was an abuse of discretion.

In addition, the court considered no alternative options or sanctions, not even the eminently reasonable one proposed by appellant himself. The trial court pressed appellant for a specific time necessary to be ready for trial. Appellant understandably referred to the advice of the Public Defender in responding that it would take approximately six months. 5 RT 1062. The trial court pressed appellant further, and appellant offered to relinquish his self representation if he could not complete his trial preparation within the requested period of a six-month continuance.

That proposal was far more than a pro per defendant should have to make in order to retain his right of self representation, but the trial court

summarily rejected it, and offered no alternatives to immediate and summary revocation. That failure, by itself and in conjunction with the other deficiencies in the trial court's conduct, demonstrates an abuse of discretion.

2. The trial court's error in revoking appellant's self representation based on appellant's purported delaying efforts.

a. The applicable law.

The trial judge also relied on appellant's purported efforts to delay trial, "You are not preparing for trial, but bring everything to avoid trial in the near future." 5 RT 1067. In fact, the case law finds a defendant's delaying tactics to be adequate ground only where the conduct also satisfies the Faretta/Allen standard of disruptive and obstructionist conduct. See, e.g., People v. Clark (1992) 3 Cal.4th 41; People v. Fitzpatrick (1998) 66 Cal.App.4th 86; and United States v. George (9th Cir. 1995) 56 F.3d 1078.

This Court recently noted in Carson, supra, "[w]henever 'deliberately dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' (United States v. Dougherty, supra, 473 F.2d at p. 1125) or to compromise the court's ability to conduct a fair trial (see Allen, at p. 343), the defendant's Faretta rights are subject to forfeiture." (Carson, supra, 35 Cal.4th at p. 10.) A deliberate purpose to delay, will "in many instances" suffice to revoke the accused's right to self representation. (Ibid.) Deliberate

delay is suggested as an adequate ground 1) where it threatens to subvert the core concept of a trial; 2) where it compromises the court's ability to conduct a fair trial; or 3) under certain unspecified circumstances, where it is simply deliberate.

None of appellant's conduct remotely warranted summary revocation, and there was a manifest lack of substantial evidence to support the revocation. The Public Defender vouched for appellant's diligence; the Public Defender referred to the jail personnel attestations to appellant's diligence; and the record itself demonstrates considerable diligence in trial preparation, none of which the trial court inquired about. Appellant has found no California cases in which self representation was actually revoked where the unrebutted record established that the defendant was diligently pursuing in trial preparations.

b. The absence of evidence of dilatory conduct or intent

The description of appellant's efforts to prepare for trial set forth in part A-3 above precludes any finding of bad faith or deliberately dilatory conduct. Appellant made entirely appropriate motions to interview and obtain the presence of defense witnesses, all of whom the 987.9 judge viewed as relevant. Appellant made motions for discovery in court, and cooperated with the Public Defender as standby-advisory counsel as far as filing other entirely

appropriate pre-trial motions. The continuance motion was derided by the trial court, "you have him [Investigator Rowell] spinning around the world trying to do things," 5 RT 1058, but each and every one of those "things" had previously been scrutinized and approved by Judge Millard. VI CT 987.9 2067. The trial court's bald assertion that "you are not preparing for trial, but are doing everything to avoid trial in the near future", 5 RT 1067, is entirely belied by the actual record.

One of the clearest demonstrations of the error in the court's conclusion is apparent from the in camera hearing of August 9, 1996, when appellant sought relief from the discharge of the Public Defender and the appointment of replacement counsel Pohlson and Peters. Sealed RT 156. Appellant argued long and hard that upon reflection, he preferred to stay with the Public Defender, notwithstanding the numerous difficulties he had experienced in his relationship with attorney Kelley, for the sole reason that he "would like the court to reappoint Mr. Kelley so my case can come to a conclusion as soon as possible." Sealed RT 156-4. Appellant specifically referred to Pohlson's statement that he would need at least two years to prepare for trial, and contrasted that to Kelley's statement that he would be ready within a year. Petitioner's actual conduct entirely belied Judge Ryan's perception that appellant was hopelessly dilatory.

c. The court's failure to warn appellant or to consider alternatives to summary revocation.

In light of the length of time that the case had been pending, and in light of the reasonableness of appellant's offer to voluntarily relinquish self representation if unable to be prepared for trial within six months, the trial court was obligated to give appellant at least some continuance to determine whether appellant would continue his trial preparation efforts in a diligent manner. In any case, the summary rejection of appellant's proposal and the peremptory revocation of self representation were unreasonable.

At the same time, the purported alternative imposed by the court was inherently untenable:

> My suggestion is to revoke your pro per status. And if then we start jury trial you think you are ready to represent yourself, I will reconsider a Faretta motion. 5 RT 1064.

This offer of future reconsideration was an illusory promise, a fig leaf of cover for the erroneous revocation of self representation. If appellant required more time to prepare as of August 21, 1998, there was no conceivable scenario in which appellant could be more prepared for trial some months hence without any additional opportunity to prepare. If appellant in good conscience did not think he was ready to represent himself – for trial as of August 21, it was certain he would feel equally unready on the eve of trial in the absence of continuing preparation efforts.

C. Requirement of Reversal.

Deprivation of the right to self representation cannot be harmless error. (McKaskle, supra, 465 U.S. at p. 177, fn. 7.) People v. Halvorsen (2007) 42 Cal. 4th 379. Appellant was fully compliant with the constitutional requirements of self representation, i.e., diligently preparing for trial; engaging in appropriate courtroom conduct; and cooperating with advisory counsel, as the August 21, 1998 hearing clearly confirms. The court's unilateral revocation without substantial evidence violated appellant's Sixth Amendment right of self representation, and requires reversal of all convictions.

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.

A. Summary of Facts

At the first hearing in Orange County on September 30, 1994, appellant moved to have the San Francisco Public Defender appointed, based on the long-standing appointment of that office to represent appellant on inter-related charges, and based on the positive attorney-client relationship established during that ongoing relationship. However, the trial court denied that motion on the basis that "in the interest of justice, the court cannot

guarantee a two year preparation time", commenting that "[t]he court finds the People have a right to a speedy trial, the families of the victims have the right to have the case tried in their life times." 2 CT 143-144[35]. The court instead appointed the Orange County Public Defender, albeit without any semblance of compliance with Penal Code section 987.05, and without any assurances that the Orange County Public Defender could be prepared for trial any sooner than the two year estimate by the San Francisco Public Defender. 1 RT 32-33. Deputies William Kelley and Allyn Jaffrey were initially assigned, and represented appellant throughout 1996, during which time various pre-trial motions were heard regarding investigation efforts and expenses, conditions of appellant's confinement, etc.

On August 2, 1996, appellant sought and obtained the discharge of the Orange County Public Defender pursuant to a Marsden motion, 6 CT 2058, in which appellant alleged a breakdown in communications between himself and attorney Kelley, as well as a specific disagreement regarding certain pretrial motions. The court immediately appointed Gary Pohlson as lead counsel and George Peters as second counsel to replace the Public Defender. The court made no effort to comply with Penal Code section 987.05 regarding criteria

[35] The tenor of the court's written order is both needlessly snide and factually unfounded. Contrary to the court's position, the San Francisco Public's request for two years to prepare for trial was not tantamount to depriving victims' families of a trial "in their lifetimes."

and procedures for appointing counsel in capital cases, and apparently did not even consider appointing the San Francisco Public Defender.[36]

The prosecution filed a motion to vacate the discharge order and substitution of counsel, 6 CT 2053, and a hearing was held on August 9, 1996. The court commented that appellant had made out a case that he had a breakdown in communication with counsel, "that is adequate for purposes under Marsden and the court exercises its discretion." 1 RT 143.

The prosecution argued that appellant's Marsden motion to discharge the Public Defender was in fact an effort "to delay the case in going to trial and to frustrate the People's right to a speedy trial in this case." 1 RT 150. The prosecution referred to Penal Code section 987.05, the trial court asked attorney Pohlson for a trial time estimate, and Pohlson understandably replied with references to the magnitude of material to be digested in order to make a reasonable estimate. The court heard further presentation in camera by attorney Pohlson and appellant, 1 RT 156, in which the court denied

---

[36] Sealed 1 RT 141-9:

> The Court: Mr. Kelley, this motion is granted. You are relieved and discharged from the case. Court will appoint new counsel. I'll be determining a member of the homicide bar, special circumstances group, that services the court.
>
> I have in mind, Mr. Ng, the past president of the Bar Association, someone squeaky clean ethically, very responsible, very competent. And the court now appoints Mr. Gary Pohlson to represent you, sir.

appellant's motion to reinstate the Public Defender, on the ground that attorney Kelley was dilatory in his trial preparation – "I don't think Mr. Kelley is ever going to get ready on this case." Sealed 1 RT 156-4. After appellant noted that attorney Pohlson had told him it would take two years for him to prepare for trial, Sealed 1 RT 156-10, the court stated "I want him [Pohlson] to tell me how long it's going to take for him to get ready." Sealed 1 RT 156-15. Appellant urged reinstatement of the Public Defender because attorney Kelley had assured him that he could bring the case to trial within a year, and appellant favored the earlier trial date. 1 Sealed RT 156-4.

Shortly afterward, appellant through separate counsel filed a motion reinstatement of the Orange County Public Defender, which was denied by the trial court. That denial was reversed by the Court of Appeal, Ng v Superior Court (1997) 52 Cal.App.4th 1010, [disapproved on other grounds in Curle v Superior Court (2001) 24 Cal.4th 1057]. The Court of Appeal concluded that neither appellant's general dissatisfaction with the Public Defender nor his specific concern about the timing of motions constituted sufficient grounds to discharge appointed counsel. 52 Cal.App.4th at 1022. The Court of Appeal noted that appellant's motion for reinstatement had been accompanied by the declaration of a psychiatrist to the effect that petitioner's

Marsden motion had been filed in a moment of "misplaced...frustration", 52 Cal.App.4th at 1015.

The Orange County Public Defender was reinstated on February 18th, 1997, 7 CT 2144, and further pretrial proceedings ensued. On March 28th, 1997, a February 2, 1998 trial date was set. 7 CT 2260.

On May 27, 1997, appellant filed a Marsden motion, sealed 9 CT 2927, asserting that appellant had "tried [his] best to cooperate with attorney Kelley, but due to a complete and irreconcilable conflict between counsel and [appellant]," the relationship had broken down. Appellant listed a number of specific legal issues that Kelley had not resolved after two years of representation, including trial site issues, sealed 9 CT 2934. The motion was heard and denied on June 20th, 1997, on the basis that the court was "satisfied this is 'Harris Revisited' and the basis for defendant's motion was that he wanted D.P.D. Michael Burt appointed". 9 CT 2942.

On September 12th, 1997, a further Marsden proceeding was scheduled, but the matter was trailed to permit Deputy Public Defender Burt to pursue discussions with the Orange County Superior Court administration regarding his appointment in conjunction with the Orange County Public Defender. 2 RT 393.

On October 10, 1997, the court appointed attorney Burt as co-counsel to represent appellant, subject to the resolution of Penal Code section 987 matters with presiding judge. A currently pending motion pursuant to Penal Code section 1368 was withdrawn, and a trial date of September 1, 1998, was set. 11 CT 3701.

On January 16, 1998, attorney Burt reported that the presiding Judge Millard rejected the representation proposal he had submitted. Appellant revived his Marsden motion and a further in camera hearing was held. Attorney Burt's appointed was vacated, the Marsden motion was denied, and the Public Defender was directed to continue its representation. Sealed 2 RT 426-447.

On January 23, 1998, appellant requested an additional Marsden hearing, 2 RT 471, which was heard and denied on February 6th after a brief hearing. Sealed 3 RT 478-479.

On February 11th, 1998, Deputy Orange County Public Defender Kelley informed the court that appellant conveyed in an in-depth conversation with him that "he has no objection at all to working with the Orange County Public Defender's existing defense team if Michael Burt were put in my place." Attorney Kelley conveyed that "we do have a real break down in our

relationship and he simply doesn't trust me." The matter was continued. 3 RT 532.

On March 20, 1998, the court denied appellant's follow up Marsden motion, which had been supported by an additional letter filed under seal. 18 CT 6163-6176. The court stated that he considered the written motions and did not think any further discussion would help. 3 RT 565. In March and May 1998, appellant filed Faretta motions to represent himself, 19 CT 6677, and appellant did represent himself from May 15 through August 21, 1998, when the trial court revoked his self representation. See Argument IV, supra.

Appellant renewed his Marsden motion on August 28, which was denied summarily without any in camera hearing. 10 RT 2297. Appellant filed a written Marsden motion on September 15, sealed 25 CT 8461 – 8472, incorporating the declaration filed on August 21 by Dr. Nievod. Appellant filed additional supporting documents, Sealed 25 CT 8506 – 8589, and the motion was heard and denied on September 21, 1998, Sealed 6 RT 1465-1539, without permitting appellant to call the witnesses he had proffered.

On October 8, appellant filed a handwritten Marsden motion, Sealed 30 CT 9747-9756, which was denied the same day. Sealed 7 RT 1624-1649. On November 5, after trial had started, appellant made another Marsden motion

based on counsel's lack of preparedness, which was denied. 34 CT 11245 – 11250.

B. The Trial Court's Errors.

The most crucial Marsden hearing was that of September 21, 1998. This was the first Marsden hearing that occurred after the trial court had revoked appellant's self representation on August 28.[37] Appellant filed an Offer of Proof on September 19, 1998, regarding the proposed testimony of Deputy Public Defender Lewis Clapp in support of the Marsden motion. Sealed 25 CT 8461-8472. Appellant stated that attorney Clapp had the most frequent and close contact with him during the prior three years of representation in Orange County, and had observed many interactions between Attorney Kelley and appellant both in and out of the courtroom. Appellant stated that Clapp would confirm that appellant had "tried [his] best to cooperate with [his] defense under very difficult conditions" prior to the permanent rupture in the Kelley-Ng attorney-client relationship. Sealed CT 25 8462. Appellant alleged that the Orange County Deputy Sheriffs treated him extremely badly and unfairly in relation to his visits with his attorneys,

[37] While the trial court's earlier denials of Marsden motions may well have been error also, the prejudice from those errors may have been purged by the grant of self representation to appellant in May 1998. For this reason, appellant focuses on the trial court rulings following the revocation of self representation.

but that "Kelley readily deferred to the jailers' accusations/explanations of their conduct and refused to allow him (Clapp) or other investigators to assist [appellant] in vindicating trump-up jail infractions, reports, harassment...." Sealed 25 CT 8463.

Appellant further stated that Clapp would confirm that he saw Kelley display impatience, aggravation and antagonism toward appellant, as well as conduct by Kelley to undermine appellant's trust in Michael Burt and other prior attorneys of record, including Pohlson, Peters, Schwartzberg, Multhaup and Margolin". Sealed 25 CT 8463-8464

Further, attorney Clapp had observed appellant's "symptoms of irrational angry, suspicious, fear, etc., whenever the subject of Kelley came up during [their] conversations", and that appellant continued to be preoccupied with the removal of Kelley notwithstanding Clapp's statements that the court may not discharge Kelley. Appellant stated that Clapp would confirm that appellant was able to trust and cooperate with other attorneys who were not under Kelley's control. Appellant asserted that Clapp had also read the reports of Doctor Nievod and that he agreed with the diagnosis and conclusions contained therein.

In addition to the offer of proof, appellant argued that Clapp's testimony would show that his "desire to reunite with Michael Burt is

mutually exclusive of [his] inability to trust and cooperate with Kelley"; and that Clapp would substantiate that appellant could work with replacement counsel other than Michael Burt. Sealed 25 CT 8466. Appellant further sought to show that many aspects of the defense investigation were not complete even though the trial was scheduled to start. Appellant tried to "resolve the conflicts administratively with Bill Kelley, Michael Giannini and Carl Holmes but to no avail." Sealed 25 CT 8467.

Appellant also filed an Offer of Proof on September 21, 1998, regarding the proposed testimony of former Deputy Public Defender Allyn Jaffrey, who had been working on appellant's case from 1994 to 1996 researching and drafting motions. Sealed 25 CT 8506. Appellant stated that attorney Jaffrey had also observed the interaction between appellant and Kelley, particularly that "she had personally witnessed Kelley mistreat [ ] and provoke [ ] [ ] appellant, and witnessed Kelley yelling at [appellant] over the phone knowing [appellant] had a similarly distressful relationship with [his] father in the past". Sealed 25 CT 8507. Appellant stated that Ms. Jaffrey would confirm that an irreconcilable breakdown had occurred between appellant and Kelley prior to her leaving the Public Defenders office.

In addition, appellant included a copy of a research memo prepared by Deputy Jaffrey in which she enumerated some 41 potentially meritorious

motions, which attorneys Kelley and Merwin "had inexcusably failed to pursue on [appellant's] behalf". Sealed 25 CT 8508. Appellant stated that attorney Jeffrey would also confirm that appellant was able to cooperate with attorneys other than Kelley, both within and independent of the Orange County Public Defenders office. Sealed 25 CT 8509

Appellant also submitted an Offer of Proof for Dr. Abraham Nievod, to testify that appellant's "irremediable breakdown with Kelley, was a product of [his] mental statement and other objective factors and is not volitional". Sealed 25 CT 8561. Dr. Nievod would further testify to the results of his psychological test results from 1994 through the present. Appellant referred to additional reports by Dr. Nievod of August 4 and 19, 1998, and to a report by Dr. Sharma of March 13, 1998. Sealed 25 CT 8560-8561.

At the hearing on September 21, 1998, appellant emphasized that his proposed witnesses would confirm that "there is an irremediable breakdown with Kelley and the breakdown has permeated to the rest of defense case", and that "the cause of the breakdown is not Michael Burt, but it is Mr. Kelley". Sealed 6 RT 1466. Appellant gave a specific example relating to a psychological expert, Dr. Nancy Kaser-Boyd, who had been retained by Kelley as a potential defense expert. During the course of the Penal Code section 1368 proceedings earlier that year, Dr. Kaser-Boyd "was ready to

write a report on my behalf to show that the breakdown with Mr. Kelley is caused by the factors that tied my childhood with my father because of some of the things he do [sic] and say, so to support that why Mr. Kelley has to be replaced and removed from any role in my case, but before she did it, I think there was somebody in the Public Defenders office talk to her or she changed her mind." Sealed 6 RT 1468. Appellant stated that with respect to the nature of the breakdown with Kelley, "her opinion would have support[ed] and corroborate[d] Mr. Nievod's". Sealed 6 RT 1469.

Appellant also referred to Dr. Lori Poore, who had been hired by Kelley as a penalty phase consultant, and "would testify to similar problem with visitation and with Mr. Kelley's insensitive to cultural issue, and also testified that my reaction upon the subject of discussing anything pertaining to Mr. Kelley after the break—before and during the breakdown." Appellant also referred to Alan Clow, a defense investigator hired by Kelley, who would testify that Kelley vetoed several investigation avenues that attorney Jaffrey had authorized, and that Kelley "didn't give me the dignity why he aborted the investigation that his own investigator had outlined and deemed it important to both my custodial situation and potential penalty phase evidence." Sealed 6 RT 1470.

Appellant also stated that Kelley had misled the court regarding the status of his investigation at a prior Marsden hearing and that Kelley had not adequately investigated the case at the time of the current Marsden hearing.

Appellant urged the court to take the testimony of Dr. Nievod and others because – even though appellant had done his best to convey the tenor of Dr. Nievod's proposed testimony -- there was an "intricacy of psychological issues" that the court "might have to consult directly with him." Sealed 6 RT 1475.

Attorney Kelley responded on various points and emphatically stated that he was proceeding with his investigation independent of appellant's cooperation. Sealed 6 RT 1481.

Kelley confirmed that Dr. Kaser-Boyd did resign from the case because Kelley had her "developing information [he] believe[d] to be pertinent to the defense of the substantive case" but that appellant was "having her go in a different direction," which put her in a "dilemma". Sealed 6 RT 1483.

Appellant responded that Kelley had given media interviews that caused his "traditional Chinese family" considerable embarrassment from the public display of the charges, which Kelley "can't even understand". Appellant offered the testimony of Dr. Poore to the effect that one day she and Kelley met with appellant's parents, and Kelley "g[o]t right into these

embarrassing, humiliating details relating to my childhood" and "they just clam up". Sealed 6 RT 1487.

Kelley acknowledged that appellant "continues to distrust me" and that he "believe[s] that Mr. Ng is being driven by an illness because I don't think that you can cite to anything specific – that he can even cite to anything specific that I have done that hasn't been toward preparing for his case." Sealed 6 RT 1496.

The trial court referred to the June 20, 1997, Marsden transcript and commented that "don't matter who the attorneys are, you are going to fight them", adding "that is clear". Appellant responded, "not Multhaup, not Margolin." Sealed 6 RT 1532. Appellant further responded that he had no conflict with "Ms. Jaffrey and Mr. Clapp." The court then stated. "I am willing to agree there is a problem between you and Mr. Kelley, and you don't need Mr. Clapp or Ms. Allyn Jaffrey to corroborate that." Sealed 6 RT 1533. The court then stated that "what you are attempting to do is manufacture a conflict and create delay", sealed 6 RT 1536, and denied the motion without taking any testimony from the proffered experts or attorneys.

1. The Court's error in making adverse findings without hearing appellant's evidence.

The trial court's ruling was as follows:

"it should be obvious to anyone who read Mr. Ng's declarations including his authors, which I did read, and some of them, of course, called for opinions and double hearsay and things like that which you can't give much weight to, but accepting his offers, going back through the entire file in my mind, Mr. Ng, what you are attempting to do is manufacture a conflict and create delay. That is not allowed. It is not allowed according to Smith. It is not allowed according to Hardy, 2 Cal.4th, page 86. Mr. Ng, it is just time to move on. Your motion is denied." Sealed 6 RT 1536-1537 (emphasis supplied).

The fundamental flaw in the trial court's ruling is that while claiming to "accept [his offers]", the court came to a conclusion directly opposite that of which the actual testimony would have supported. After appellant had explained his position as well as he could he asked, "are you intending to grant me an evidentiary hearing or intend...", Sealed 6 RT 1512 and the court answered,

The Court:	"we are having a hearing. That is what we've been doing since 1:30.
Defendant:	okay. Are you taking the offer of proof as fact or is it –
The Court:	I can't take as fact what is not fact.
Defendant:	That is why I was hoping you would let me put the evidence on
The Court:	You are putting evidence
Defendant:	Mr. Clapp, but he is not able to talk.
The Court:	Mr. Kelley would you like to proceed? Did you finish? I don't think so." Sealed 6 RT 1513

Appellant also informed the court that he "was trying to corroborate by having the expert testify live...". Sealed 6 RT 1515. The court refused to permit appellant to elicit testimony from Attorney Clapp:

The Court: "I'm not calling Mr. Clapp to the stand. I am not going to take part in creating a conflict between attorneys representing you, and I think that is what you are trying to do.

Defendant: No. I will try to get the truth out to vindicate this perception this court has –

The Court: I don't want misperceptions.

Defendant: -- 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 expounded on his reason for not permitting the presentation of evidence:

The Court: No. That is not what I meant when I said that. I just think it is poor policy for the court to say, 'okay. You have three attorneys on your team. We are going to divide them up. Put one on after another to see what they have to say about your relationship with one of them.'

I am not going to do that. In other words, Mr. Ng, I am willing to agree that there is a problem between you and Mr. Kelley, and you don't need Mr. Clapp or Ms. Allyn Jaffrey to corroborate that." Sealed 6 RT 1533.

The crux of appellant's offer of proof as to Dr. Nievod was "that my irremediable breakdown with Kelley is a product of my mental state and other objective factors and is not fallacious". Sealed 25 CT 8561. That is a crucial contested issue, and the trial court resolved it directly contradictory to appellant's offer of proof. In addition, appellant alleged that Dr. Nievod "will help explain why the court's observations of my behavior/demeanor is [sic]

not a reliable determinant and accurate reflection to the psychological symptoms and mental processes I experienced and endured." Sealed 25 CT 8562.

The trial court's refusal to take evidence from either attorney Clapp or Dr. Nievod rendered his adverse ruling fundamentally unfair and in violation of due process. The state and federal case law regarding the trial court's responsibility in addressing a Sixth Amendment claim regarding a breakdown between attorney and client requires a reasonable opportunity to present the relevant facts.

In the more typical Marsden case, the defendant voices specific complaints to the court about the attorney's preparation, the court elicits from the attorney what investigation/preparation has been done, and makes a finding based on that record. Here, in the context of a Marsden claim based on a fundamental breakdown between attorney and client, the inquiry is somewhat different because the existence of an irremediable conflict is not an objectively verifiable fact such as whether or not the attorney contacted a particular alibi witness. In this case, appellant asserted repeatedly that an irremediable conflict had arose between him and Kelley specifically (not the Orange County Public Defender as an entity) and offered several specific reasons how that rift had occurred. For his part, Kelley acknowledged that

appellant did not trust him and was not cooperating with him due, in Kelley's opinion, to mental illness on appellant's part. Sealed 6 RT 1496. ["I still believe that Mr. Ng is being driven by an illness..."].

Schell v. Witek (9th Cir. 2000) 218 F.3d 1017, 1025-1026 (en banc) granted relief where the petitioner had alleged an irreconcilable conflict with his appointed attorney prior to trial, but the motion was not adjudicated following a transfer between judges, although Schell had been told it had been denied. Schell reaffirmed the basic Sixth Amendment principle "that to compel one charged with an egregious crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the affective assistance of any counsel whatsoever," id at 1025, quoting Brown v. Cravens (9th Cir. 1970) 424 F.2d 1166, 1170. Schell also confirmed that, "the state court's summary denial of defendant's motion for new counsel without further inquiry violated the Sixth Amendment," quoting Hudson v. Rushen (9th Cir. 1982) 686 F.2d 826, 827. From these principles, Schell concluded that "it is well established and clear that the Sixth Amendment requires on the record an appropriate inquiry into the grounds for such a motion, and that the matter must be resolved on the merits before the case goes forward." 218 F.3d at 1025.

Schell remanded for an evidentiary hearing to determine whether the conflict was attributable to Schell himself, and if not, whether it was serious enough to establish prejudice for non-structural error – "because the state court failed to make an appropriate inquiry, the record did not reflect how far the relationship between Schell and his counsel had deteriorated, or whether Schell himself had sabotaged the relationship or failed to make reasonable efforts on his ends to develop the relationship." 218 F.3d 1027. See also Plumlee v. Masto (9th Cir. 2008) 512 F.3d 1204, 1208 (en banc) [no constitutional error where a trial court "held a full-blown evidentiary hearing and made extensive findings" that there was "no basis for Plumlee's unwillingness to cooperate with [counsel]"]. Here, the trial court refused to take evidence on the key issue of whether appellant was unwilling to cooperate with Kelley, or whether he was unable to cooperate with him because of friction in the relationship that was compounded by appellant's mental disabilities.

People v. Stankewitz (1982) 32 Cal.3d 80, 94 reversed a capital murder conviction where the defendant's "inability to assist his counsel was ... the product of a genuine mental disorder", id at 93, footnote 7. Given that state of the record, "the trial court had to take some action to unravel the fundamental dispute presented to it", either "a fully competency hearing" or

"a substitution of counsel". However, it was error for the court "to do nothing at all". Id at 94. Here, the trial court denied appellant an evidentiary hearing to demonstrate that a "genuine mental disorder" was an intrinsic part of the breakdown of the relationship with counsel, a clear error.

United States v. Musa (9th Cir. 2000) 220 F.3d 1096, 1102 found error where the district court failed to conduct an adequate inquiry regarding the defendant's request to substitute counsel based on a breakdown of communication. Relying on inter alia, United States v. Walker (9th Cir. 1990) 915 F.2d 480, 482, the Court of Appeal stated that "[e]ven if the defendant's counsel is competent, a serious breakdown in communication can result in an inadequate defense", and that "[b]y not conducting any inquiries into the reasons for requesting substitute counsel, the district court cannot make an informed decision on that request." Id. at 1102. The trial court here was similarly unable to make an informed decision on appellant's Marsden motion because of the refusal to take actual evidence on the crucially contested issue of whether appellant chose not to cooperate or whether appellant was unable to cooperate.

The case law confirms that the court has a specific obligation to take the testimony of independent third party witnesses where relevant to resolving a disputed factual same about the breakdown of representation. United States

v. Gonzalez (9th Cir. 1997) 113 F.2d 1026, granted relief where the defendant alleged that a breakdown had occurred with his appointed attorney because the attorney had threatened him and forced him to accept a plea bargain "in the presence of his probation officer." The attorney denied any such conduct, and the district court denied defendant's motion to discharge the attorney and withdraw the plea. The Ninth Circuit reversed because "[t]he court had available an independent witness, Gonzalez's probation officer, to help it resolve the matter." However, "[t]he 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 that both deprived this court of a record for review and denied Gonzalez an opportunity fully to explore his concerns about his appointed counsel's performance." 113 F.3d at 1028-9.

Similarly, United States v. Nguyen (9th Cir. 2001) 262 F.3d 998 confirmed that "[f]or an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth,' [citation], and examine available witnesses,", citing Gonzalez, supra (emphasis supplied). The Ninth Circuit reversed because, "[a]lthough Nguyen persisted in his complaint and said he had witnesses to support his claims, the Judge asked Nguyen and his attorney only a few cursory questions, did not question them privately, and did not interview any

witnesses'. Id. at 1004-5 (emphasis supplied). The trial court here similarly failed to take the testimony of the witnesses that appellant proffered, and instead made adverse findings.

2. The Court's failure to direct the Public Defender to provide alternate trial counsel.

In this case, the Orange County Public Defender as an institutional litigant was appointed to represent appellant. The trial court had no impediment to directing the Orange County Public Defender to assign a different trial deputy to represent appellant. Appellant repeatedly expressed his willingness and ability to work with attorneys Clapp and Jaffrey, and in a large office such as the Orange County Public Defender there certainly would have been other deputies with adequate experience to handle this case. The trial court would not have had to substitute counsel at all, but could have simply directed the Orange County Public Defender to reassign a different deputy to the case. A reassignment of that nature would have conserved much if not all of the prior work that the Public Defender's deputies had put into the case.

Part of the benefit of a Public Defender's office is that there is a beneficial continuity of counsel where individual deputies may leave the office because of illness or other reasons of choice, or may have a conflict on a particular case, at which point other deputies pick up the case and carry on.

Appellant specifically informed the trial court that he had made efforts to reach an administrative solution to this problem in a conference that included both the Public Defender, Carl Holmes, and attorney Kelley. Sealed 25 CT 8467. Apparently this informal discussion did not solve the problem, but the trial court had every incentive and opportunity to effect a reassignment of counsel within the office to achieve the result required by Stankewitz without discharging the entire Public Defender office as an entity. It was an abuse of discretion for the trial court not to pursue this readily apparent remedy to the stalemate.

C. The Requirement of Reversal.

The case law holds that erroneous denial of a motion to substitute counsel is not per se prejudicial as is the complete denial of counsel, but rather is measured by the harmless beyond a reasonable doubt standard of Chapman v California (1967) 386 U.S. 18. See People v. Marsden (1970) 2 Cal.3d 118, 126[38]. Federal case law holds that the state has a "heavy burden" to demonstrate that the error in denying substitution of counsel was not harmless. This is a far more exacting standard for the state than the general

[38] Subsequent cases have reversed for Marsden error without a specific discussion of harmless error, e.g., People v. Hidalgo (1978) 22 Cal.3d 826, 827, and the most recent decision states, "[I]n the usual case, Marsden error requires a new trial since an inadequate record denies meaningful appellate review." People v. Lopez (2008) 168 Cal.App.4th 801, 815.

Strickland standard for ineffective of assistance of counsel. See United States v. Adelzo-Gonzalez (9th Cir. 2001) 286 F.3d 772, 781 [vacating convictions and remanding for further proceedings because "the district court failed to conduct an adequate inquiry into Adelzo-Gonzalez' first and last timely motions to substitute counsel".]

The "heavy burden" to demonstrate harmlessness cannot be met in this case because, inter alia, the record demonstrates continuing conflicts between appellant and attorney Kelley regarding such fundamental matters as appellant's testimony. It would necessarily have adversely affected the jury's perception of appellant's testimony that counsel did not acquiesce in that testimony, and did not call appellant during the defense case. Rather, it would have been readily apparent to the jury that appellant insisted on testifying after attorney Kelley had rested, and that appellant testified over Kelley's implicit objection. The jury would certainly have inferred that ether attorney Kelley did not believe appellant's testimony to be true, or did not believe appellant's testimony would help the case. Either inference was unfairly adverse to appellant, but was the all too foreseeable result of the court's error in denying the Marsden motion. The trial court's refusal to effect a substitution for attorney Kelley cannot be deemed harmless beyond a reasonable doubt.

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.

A. Summary of Facts.

In 1985, following Leonard Lake's arrest and suicide in San Francisco and following appellant's arrest in Canada, the San Francisco Public Defender was appointed to represent appellant on charges filed in San Francisco County. During the pendency of the extradition proceedings, appellant formed an attorney-client relationship with the Public Defender Michael Burt, who was assigned to represent him. While the extradition was pending, attorneys Lew and Burt sought appointment in Calaveras County regarding the charges appealed from there, conducted substantial litigation regarding matters of discovery, publicity, etc., but were then discharged after some three years of representation[39].

When the Canadian extradition proceedings were completed and appellant was arraigned in Calaveras County, he specifically requested that the San Francisco Public Defender be appointed for consolidated

---

[39] Attorney Lew was appointed in August 1985, VI CT Cal J 1148 seq. and Attorney Burt was appointed on January 14, 1989, as an independent contractor, outside his regular employment as a Deputy Public Defender. V CT Cal J 1469-70. Almost two years later, the Calaveras Justice Court vacated both of the appointments because appellant was still contesting extradition. VI CT Cal J 1983.

representation on all charges, but the Calaveras County Justice Court refused, and instead appointed local counsel who were unfamiliar with the case and unacquainted with appellant. The Justice Court unilaterally rejected reasonable attorney Burt's eminently reasonable estimate of eight to ten months to prepare for the preliminary hearing; appointed local counsel without making any inquiry as to their times estimates; and arbitrarily set a date six months hence for the preliminary hearing, in clear violation of Penal Code section 987.05. II RT Cal J 917. Nor surprisingly, local counsel were unable to prepare for the preliminary hearing within that unrealistic time frame, and in fact took longer to prepare than the San Francisco Public Defender's initial (and realistic) estimate. Appellant repeatedly requested that local counsel be discharged and the San Francisco Public Defender appointed.

That change of representation appeared imminent in 1993, when Judge Claude Perasso sitting by designation in Calaveras County indicated his intent to discharge local attorneys Webster and Marovich, appoint San Francisco counsel for further proceedings, and consolidate all of the pending counts in San Francisco. XVI CT Cal S 5296 – 7. That evidently sensible plan derailed when the prosecution filed a Code of Civil Procedure section 170.1 challenge to Judge Perasso because of a driving under the influence conviction he had incurred during the previous year. Retired Orange County Judge Donald

McCartin was designated to sit for the remaining proceedings in Calaveras County, but he refused to appoint the San Francisco Public Defender, discharged local counsel, and directed the case to Orange County, over numerous objections. See Arguments I and II, supra.

The case arrived in Orange County in September 1994. Appellant immediately requested the appointment of the San Francisco Public Defender for a number of mutually reinforcing reasons, all with the explicit concurrence of the Orange County Public Defender. The refusal by the Orange County Superior Court to appoint the San Francisco Public Defender rendered the trial fundamentally unfair.

1. The Calaveras County proceedings regarding appointment of the San Francisco Public Defender.

This case would likely have been tried to verdict long prior to the 1994 discharge of local counsel if the Calaveras Justice Court had appointed the San Francisco Public Defender upon appellant's return to Calaveras County. Appellant filed a motion for the joint appointment of the Public Defender and private counsel Garrick Lew immediately upon appellant's arrival in Calaveras County, accompanied by San Francisco Public Defender Jeff Brown's declaration specifically requesting appointment to the pending Calaveras County charges pursuant to Penal Code section 987.2(g). VII CT Cal J 2233. At the hearing on October 24, 1991, Deputy Burt assured the

court that the San Francisco Public Defender would bring its institutional resources to bear on the case to ensure progress.[40] Attorney Burt and Lew stated that eight to ten months would be required to prepare for the preliminary examination, given the magnitude of the discovery and the number of charges involved. The Justice Court refused to appoint Burt for the stated reasons that Burt had other commitments in the Ramirez and Menendez cases pending in Los Angeles ("I am not appointing you, Mr. Burt, because of your appointment in the Ramirez matter and that Mendez (sic) []matter", II RT Cal. J. 788), and refused to appoint Lew because of his estimate of eight to ten months to prepare for the preliminary hearing. The court then stated

[40] THE COURT: Okay. Mr. Burt, then I understand you are requesting this Court to appoint you and Mr. -- you and Mr. Lew are requesting this Court to appoint both you, Mr. Lew, and an additional attorney -- or to appoint the office, and for this court's appointment, then, to include the number of attorneys in the discretion of the Public Defender's Office of San Francisco that they feel is appropriate?
MR. BURT: Your Honor, I would ask the Court to appoint the office, as opposed to me individually. And I'm representing to the Court that should the Court make that appointment, that is, to the Office of the Public Defender, that's correct, Mr. Brown has represented, and is representing to this Court, that we will provide whatever it takes to provide adequate representation to Mr. Ng. And the understanding is that I would be the person in charge of supervising the case and supervising the other attorneys who would be involved in preparing the case. II RT Cal J 780.

that it had already made off-the-record arrangements to appoint local counsel, and set the case for preliminary hearing six months hence.[41]

With local counsel at the representational helm, the preliminary examination was not in fact held until November 1992, thirteen months from the refusal to appoint the San Francisco Public Defender and Garrick Lew. XIV CT Cal. J 5439. The short-sighted blunders of the Calaveras County Court permanently derailed the course of representation in this case and the fairness of the outcome. While the Orange County Superior Court had the last clear chance to rectify the representation errors and send the case to a constitutionally correct conclusion, the Calaveras County errors were a direct cause of the failure to ensure that the San Francisco Public Defender tried the case.

Judge Perasso presided over the dispositive hearing in Calaveras County regarding representation that took place over several days in 1993,

---

[41] Mr. Lew's estimates are based, in fact, upon the appointment of the Office of the Public Defender. The Court has contacted individuals -- as a matter of fact, two individuals, who are relied upon by Mr. Burt in their preparations, both of them have appeared in this Court. Both of them have capital case experience. The Court is appointing Mr. Thomas Marovich and Mr. James Webster, both have indicated they will accept the appointments. The Court is finding that the estimate relied -- excuse me, based upon all the materials presented by both Mr. Burt and Mr. Lew and by Mr. Martin, all the supporting materials, I'm finding that the case cannot be brought to preliminary hearing in the 60 days initially suggested by the Prosecution. The Court finds that the six months is an appropriate amount of time. II RT Cal. J 789.

during which four mental state experts testified, two retained by independent counsel for appellant, and two appointed by Judge Perasso. Their testimony demonstrated a complete convergence of opinion that because of appellant's severe dependent personality disorder, he was incapable of cooperating with local counsel who had been foisted upon him instead of the San Francisco Public Defender. These expert witnesses explained that the unusual combination of circumstances in the case, including appellant's psychological dependency, his prior and continuing relationship with attorney Burt, and the highly suspect actions of the Calaveras Justice Court at the outset of the case, resulted in their unanimous conclusion that the breakdown between appellant and local counsel was involuntary on appellant's part and non-manipulative. Psychological testing, multiple interviews with appellant, and other materials supported those opinions. Sealed CT Cal S 1819 at seq. Those mental state materials were cited in support of the subsequent Harris motions in both Calaveras County and Orange County.

2. The initial refusal to appoint the San Francisco Public Defender at the outset of the Orange County proceedings.

At the outset of the Orange County proceedings in 1994, appellant filed a motion joined by the San Francisco Public Defender for appointment or "confirmation of representation." 1 CT 3. Attached to the motion was the Declaration of Orange County Public Defender Carl Holmes in which he

urged the court to appoint the San Francisco public defender pursuant to penal code section 987.2(g). Public Defender Holmes emphasized that the San Francisco Public Defender had been representing appellant for some nine years, had developed a great deal of familiarity with the overall case, and had developed a relationship of trust and confidence. In contrast, the Orange County Public Defender was entirely unfamiliar with the facts of the case, but was at the same time eminently aware of the pointless delays that had occurred in Calaveras County related to the appointed of local counsel Webster and Marovich, who had to start off from square one and who did not have the trust and confidence of appellant. 1 CT 16.

The prosecution had no objection and in fact confirmed that "the People believe that the Court to properly exercise its discretion by choosing to appoint the San Francisco public defender", referring to penal code section 987.2(g), "provided that the assigned attorney, presumably Michael Burt, can satisfy the court that he has no scheduling conflicts which prevent him from preparing and being available in a reasonable time for pre-trial motions and trial." 1 CT 49-50.

The Orange County bench was not at all disposed towards this representation arrangement from the outset. A letter from the San Francisco Public Defender to Judge DeRonde (the then-designated penal code section

987.9 Judge) was filed in the Orange County case, and various Orange County judges including Judge Ryan, appended hand written comments displaying their resistance and even antagonism to the proposed appointment. 1 CT 137-138, e.g., "they are asking me to do the impossible!".

On September 30, 1994, the matter was heard and Judge Ryan refused to appoint the San Francisco Public Defender. The written order states that "there is no Harris issue".

In his written order Judge Ryan stated as follows:

"Court finds there is no Harris issue. In the interest of justice, the court cannot guarantee a two year preparation time. The court finds the People have a right to a speedy trial, the families of victims have a right to have the case tried in their life time. Motion denied." 1 CT 143–4.

Regarding the San Francisco Public Defender letter referred to above that contained the public defender's basic conditions for appointment, Judge Ryan found, "condition three of the pleadings cannot be met" and therefore there is "no consent to accept case by the San Francisco Public Defender." The Orange County Public Defender was appointed instead. 1 CT 143-144. The "condition three" was "[a] forum convenient to this office trying the case". 1 CT 137.

The court stated on the record that the San Francisco Public Defender's request for a trial date two years hence was unacceptable. 1 RT 23 ["Gentlemen, it is absolutely unbelievable that it would take Mr. Burt or any

other competent death penalty counsel two years to begin this case competently"]. Appellant argued specifically for a hearing pursuant to Penal Code section 987.05 for the parties and prospective counsel to present evidence regarding the amount of time necessary to prepare, 1 RT 24-25, noting that the Calaveras Justice Court had failed to abide by section 987.05 with manifestly untoward consequences. The court denied the motion, repeated that two years for preparation was unacceptable ("The interests of justice just can't handle another delay of two or more years which is required"), refused to consider the forum issue ("flat out will not be met"), and appointed the Orange County Public Defender without any section 987.05 hearing. Trial eventually began in November 1998, more than four years later.

3. The subsequent motions for appointment of Attorney Burt.

On January 13, 1995, the Orange County Public Defender filed a motion for change of venue, and for assertion of San Francisco vicinage, as lack of Orange County jurisdiction, and a denial of effective representation based in large part on the bankruptcy of Orange County. 2 CT 230. That motion was accompanied by a declaration of Michael Burt regarding his ongoing attorney/client relationship with appellant with respect to the San Francisco charges. 2 CT 508.

On February 24, 1995, the Superior Court tentatively denied the motion to appoint Burt and to change the venue of the case, but tentatively granted the motion to relieve the Orange County Public Defender based on financial matters. 2 CT 603.

The Public Defender continued to represent appellant, and various pretrial motions were heard and ruled on. Then, twenty three months after the Orange County Superior Court had refused to appoint the San Francisco Public Defender based on his estimate of two years to prepare for trial, appellant filed a Marsden motion. Judge Fitzgerald granted the appellant's Marsden motion on August 9, 1996, noting that appellant had alleged the breakdown in communication with the Orange County Public Defender and "that is adequate for purposes under Marsden and the court exercised its discretion". 1 RT 143. However, the court immediately appointed two Orange County attorneys, apparently without any consideration of appointing the San Francisco Public Defender at all, and disregarded the procedural requirements of Penal Code section 987.05. Clearly the Orange County bench was applying a double standard as far as appointing counsel, imposing stringent (and unreasonable) conditions on the San Francisco Public Defender as a pre-condition of appointment, and applying no conditions whatsoever to the appointment of local counsel.

In September 1997, a Marsden motion was trailed in order to permit Michael Burt to pursue discussions with the Orange County Superior Court Administration regarding his appointment in conjunction with the Orange County Public Defender. 2 RT 393.

On October 10, 1997, the court appointed attorney Burt as co-counsel with the Orange County Public Defender, subject to the resolution of penal code section 987 matters with the presiding judge. 11 CT 3701. On January 16, 1998, attorney Burt met with Presiding Judge Millard regarding the proposal for representation that Burt had submitted at the behest of the Calaveras County court administrator. At the in camera discussion of that proposal, Judge Millard stated that he would only appoint attorney Burt pursuant to a flat fee arrangement of $250,000, from which Burt would have to pay all of his office expenses and living expenses. RT 987.5, p. 2 –3. Attorney Burt had proposed an hourly fee of $125 per hour, based on the $100 per hour rate that the Attorney General was billing the state, with an increase to reflect that the Burt would have to pay office overhead out of that hourly fee, while the attorney general did not. Judge Millard confirmed that he would not accept Burt's appointment pursuant to an agreement for an hourly rate. RT 987.5, p. 4.

Attorney Kelley reported to the trial court that Presiding Judge Millard rejected the representation proposal Burt had submitted and Burt's appointment was vacated. 2 RT 423–425. The court then heard a Marsden motion in camera, at which appellant asked that Michael Burt speak for him, and the court responded, "I can't make Mr. Burt speak for you" because "[h]e does not represent you." Sealed 2 RT 426.

Appellant continued to propose solutions to the representation logjam. At a hearing on January 23, 1998, the court confirmed with Mr. Burt that no agreement had been reached as to funding Mr. Burt's appointment as lead counsel in the case. RT 463. As an alternative, Burt confirmed that he could personally work with the Orange County Public Defender's Office as co-counsel. 2 RT 464, CT 3804. The court advised Burt to advise the court on or before February 6th if there was any chance of his joining the defense team. 2 RT 470, 11 CT 3804. The court had already scheduled a PC 1368 motion and a motion to move the case to San Francisco County for hearing on Friday, February 6, 1998. 11 CT 3804.

The court stated that "Judge Mewhinney wanted to appoint Burt. Said so. Couldn't. I couldn't appoint him on his first appearance in '94. I tried to appoint him now." 2 RT 470. Defense counsel Kelley expressed skepticism at this characterization. 2 RT 470. To which, the court responded, "I didn't

ask for anything. That is my reading of the record. I know you said otherwise. But I have read the same record you have and neither one of us were there. He said, "the logical choice is . . . ," or words to that effect, 'Lew and Burt.' He said that. That is in the record. You look at October 11, 1991, page 83 of the transcript. You will see that. Okay? And I wanted to appoint Mr. Burt. I think that is obvious." 2 RT 471.

On February 11, 1998, Attorney Kelley informed the court that appellant "has no objection at all to working with the Orange County public defender's existing defense team if Michael Burt were put in my place" because he and appellant had a "real breakdown in our relationship and he simply doesn't trust me." 3 RT 569.

That alternative of substituting Burt for Kelley as primary trial attorney, while keeping the Orange County Public Defender as attorney of record, was further discussed on March 20, 1998. 3 RT 569. Burt indicated to the court that he was prepared to follow up on the court's suggestion on February 11 that Burt substitute in for defense counsel Kelley as lead counsel. 3 RT 569. Burt reviewed the history of his appearances before the court: on October 10, 1997, Burt indicated a willingness to join the defense team and to attempt to resolve problems existing between Mr. Ng and defense counsel Kelley; on January 16, 1998, Burt indicated that financial arrangements had not been

worked out, but more importantly that, in Burt's view, his appointment as a member of the existing team, with defense counsel remaining as lead counsel, would not solve the problems which existed. On that same date, Burt proposed to the court that the court appoint Burt as counsel, separate and apart from the Orange County Public Defender, allowing him to proceed with a new team. 3 RT 571. On January 23, Burt indicated that he could personally work together with the Orange County Public Defender, but believed that Mr. Ng would not be able. 3 RT 572. On February 11, there was a proposal that Burt join the existing Orange County Public Defender team, replacing defense counsel Kelley who would leave the team. 3 RT 572.

Burt indicated that he was there at the request of appellant to discuss with the court this last proposal. 3 RT 569, 573. Before he would be able to join the team, financial arrangements would have to be worked out with Judge Millard. 3 RT 573. In addition, Burt raised the possibility that his joining the team might require adjusting the trial date that had been set for September. 3 RT 573-574. The court replied that "The trial date is firm." 3 RT 574. It was "not negotiable." 3 RT 574. The court reasoned that Burt had asked for this trial date earlier himself when he had earlier indicated his willingness to join the team. 3 RT 574. The court also assumed that because Burt was assigned

to the related case in San Francisco County, Burt would be up-to-date on the case. 3 RT 574.

Burt pointed out that the September trial date was premised upon joining the existing team with Kelley remaining as lead counsel. 3 RT 574. Defense counsel Kelley suggested that the September date was not certain and that there was currently ongoing litigation in Canada, outside the defender's control and involving key witnesses, which might produce delay. 3 RT 575. The court responded, "There should be nothing going on in Canada." 3 RT 575.

Burt argued that Kelley had informed him that there were more than 100,000 pages of discovery or defense investigative material to be reviewed. 3 RT 584. Burt told the court that he had been away from the case since 1991 and would have a great deal of catching up to do. 3 RT 584. Burt requested "the opportunity to take a certain period of time to be able to report back to the court realistically on whether removing Mr. Kelley entirely is going to permit me to be at or near this date of September 1st." 3 RT 579.

The People disclaimed any interest in who represented appellant, but insisted on their "right to a speedy and fair trial." 3 RT 583-584. The People argued that they should not be penalized if appellant had chosen not to cooperate with a particular counsel. 3 RT 584.

While the court granted that it would be an abuse of discretion not to permit a continuance for good cause, the court was unwilling to appoint Burt and relieve Kelley if that decision would delay the September date. 3 RT 578. The court insisted as a condition of appointment that Burt be able to make a good faith estimate that he would be prepared to begin on September 1st: "I am not going to play that game. That went on in Calaveras County. You ought not to accept the appointment unless you can be ready by September, and that is a good faith estimate." 3 RT 585. Burt repeated his request for more time "to work with Mr. Kelley to see whether I can make that representation to the court . . . ." 3 RT 585. The court refused: "We're doing this today. I know this happened up in Calaveras County. We just have to get things done. We don't put them off for another day." 3 RT 585.

Mr. Burt replied, "Very well, your honor. I am not prepared at this time to commit to the court without the discussion that I indicated . . . Not just discussion, but simply getting in and seeing in detail what has been done and what needs to be done and also discussing with Mr. Kelley whether given the problems he has alluded to means that he could not be ready by September 1st because if he could not be ready, I certainly could not be." 3 RT 585. Burt again expressed his willingness to investigate this issue if he was given an appropriate period of time to do so. 3 RT 586.

The court responded, "I have been as patient as a judge could be. . . . I want answers. I don't want 'We'll do it next time.' I want answers. Either you can or you can't. If you can make a good faith representation that you could be ready, again understanding that things do change, but a good faith representation that you could be ready by September 1st, fine, come aboard. But just to get another delay, that won't work." 3 RT 586.

Burt argued again the new and different circumstances, the necessity of Kelley leaving the team, and the extra work there would be making up for his absence. 3 RT 587. Finally, the court responded, "Mr. Burt I have tried to appoint you. I have tried. If you don't come aboard, Mr. Kelley is trying this case. What else can I say?" 3 RT 588.

On April 16, 1998, defense counsel Kelley filed a declaration with the court explaining that appellant had refused to meet with three defense experts retained for the purpose of the 1368 hearing "without the approval of Michael Burt." 19 CT 6518-6522. As a result of appellant's refusal to cooperate, the defense would be unable to submit evidence "regarding the effects of culture upon Ng's obsession with Michael Burt," that appellant "was presently suffering from the effects of isolation," and that appellant was still suffering from two untreated disorders recognized in the DSM IV. 19 CT 6518-6522.

Appellant would not speak with or assist current counsel with any aspect of his defense unless he first conferred with Michael Burt. 19 CT 6521. Appellant, moreover, would not consent to the release of psychological evaluations to any expert, which reflected prior opinions of mental health professionals. 19 CT 6521. Kelley also claimed to be unable to testify to the content of his conversations with appellant because appellant had refused to waive the attorney-client privilege. 19 CT 6522. Defense counsel Kelley and Merwin were unable to adequately represent appellant's interests in the 1368 hearing for fear of violating appellant's attorney-client privilege. 19 CT 6522.

During proceedings on April 17, 1998, the defense read into the record appellant's objection to being forced to proceed with current counsel in spite of his numerous objections and the affidavits of counsel attesting to "irreconcilable conflicts." 3 RT 615-616. The court denied the motion. 3 RT 616.

At the 1368 hearing on April 20, appellant again objected to having to continue with his current counsel. 3 RT 704. Appellant claimed that current counsel suffered from a conflict because they did not want to relinquish their appointment and have Mr. Burt replace them. 3 RT 704. The court replied

that in his view defense counsels Kelley and Merwin would prefer to be off the case. 3 RT 704.

Ng explained that one source of the distrust and hostility between he and his current counsel was their unwillingness to assist him in putting on evidence of their incompetence. 3 RT 705. He complained that the court "seem[ed] to vouch for their credibility from day one . . ." and had denied him a meaningful hearing of his claims of incompetent representation. 3 RT 705. Appellant stated that he had no standing to bring a Harris motion himself and that he was limited to communicating with the court through Marsden motions. 3 RT 706. Mr. Ng wanted effective representation and believed that Burt was in the "best position to provide." 3 RT 706.

During the court's hearing of his renewed Faretta motion on May 8, 1998, the court reiterated its position regarding the Harris issue:

> I don't know if you recall when we had the original Harris, that what we call Harris motion when Judge McCartin was still on the case, and I was assigned to handle the appointment of counsel motion, at that time I questioned whether or not Harris even applied. Nothing has really changed since then. I don't think Harris does apply. Mr. Burt has literally never represented you on anything like a jury trial. And that is what Harris was talking about." 4 RT 759.

The trial court subsequently characterized appellant's Marsden motions as "Harris motions", and denied them on that basis. See Argument V, supra.

B. The Trial Court's Errors.

1. The applicable law.

The right to counsel for indigent defendants encompasses the right not only to competent counsel but also to counsel of preference where the indigent defendant has a pre-existing attorney-client relationship with a particular attorney, and the subject matter of the additional charges overlaps with the prior representation. Harris v. Superior Court (1977) 19 Cal.3d 786.

In addition, the legislature had specifically provided for the appointment of a public defender who represents a defendant in one county to represent the same defendant in a different county on interrelated charges. Penal Code section 987(g) provides pertinent part that where an indigent defendant is first charged in one county and establishes an attorney-client relationship with a public defender, a defense services contract attorney, or private attorney, and the defendant is then charged with a second subsequent county, the court in the county or subsequent county may appoint the same counsel as was appointed in the first county to represent the defendant when all the following conditions are met", including the requirement that the charges "would be joinable for trial if they have taken place in the second county, that the interest of justice and economy would be best served by

unitary representation, and counsel in the first county consents to the appointment."

2. The refusal to appoint the San Francisco Public Defender in September 1994 when the case arrived in Orange County.

The trial court erred in failing to apply the objective factors identified in Harris v. Superior Court, Supra, in determining whether to appoint the San Francisco Public Defender. The trial court summarily refused to appoint the San Francisco Public Defender for three reasons: (1) the Public Defender's request for a trial date two years from the date of appointment was characterized (without benefit of any evidentiary hearings as required by penal code section 987.05) as "unbelievable" and unacceptable; (2) the Public Defender's request regarding a choice of a forum selection; and (3) the court's finding that there was "no consent" by the Public Defender because of the need for approval of any appointment by the San Francisco Board of Supervisors under the Public Defender's charter. See 1 RT 31-32 – "even if the San Francisco Public Defender and Mr. Burt consented to the appointment, their consent, according to their paperwork, I'm assuming it's true, could be abrogated by the San Francisco Board of Supervisors and the Mayor, so literally the decision to accept is out of their control, according to

the paperwork filed by the San Francisco Public Defender offices." 1 RT 31-32.

The court was flat wrong both procedurally and substantively in rejecting out of hand the Public Defender's request for a trial date two years hence. It took the Orange County Public Defender more than four years to go to trial. Had an evidentiary presentation been convened, as required by Penal Code section 987.05, that showing would certainly have been made. Certainly, the court would have been apprised that virtually all capital cases brought to trial in Orange County within recent history required a minimum of two years for trial preparation, while the cases with more complexity generally required five or more years.[42] Thus, the very objective reference point of the recent track record of the Orange County court system itself

---

[42]

Case Number	Case No.	Date of Offense	Date of Judgment	Time to Judgment
People v. Marlow	S026614	12-Nov-86	08-May-92	5 yrs, 6 mo.
People v. Taylor	S025121	15-Jun-88	30-Jan-92	3 yrs, 6 mo.
People v. DeHoyos	S034800	20-Mar-89	27-Aug-93	4 yrs, 5 mo.
People v. DePriest	S040527	17-Dec-89	27-May-94	4 yrs, 6 mo.
People v. Alfaro	S027730	15-Jun-90	14-Jul-92	2 yrs, 1 mo.
People v. Sturm	S031423	19-Aug-90	26-Feb-93	2 yrs, 6 mo.
People v. Monterroso	S034473	21-Nov-91	12-Aug-93	1 yr, 9 mo.
People v. Burney	S042323	10-Jun-92	16-Sep-94	2 yrs, 3 mo.

This summary of cases was compiled from information provided by the California Appellate Project.

would have attested to the reasonableness of the Public Defender's two year estimate for a case that was much more complicated than the norm.

Second, the Public Defender's request for a forum convenient for the office trying the case was not a demand that the case be transferred to San Francisco as precondition of appointment. As demonstrated by the further explanation in the Public Defender's letter – "in light of the facts that one of the cases against Mr. Ng already involves San Francisco and that six other counts has strong vicinage connection with San Francisco, and since San Francisco is sufficiently near to Calaveras County, we respectively request that San Francisco is the appropriate forum". 1 CT 137. The trial court erroneously viewed this as a non-negotiable demand by the Public Defender which the court "flat out will not be met." 1 RT 31.

Apart from pre-judging a hotly contended legal issue in the case, the court manifestly misunderstood the Public Defender's actual position, which was a preference for a forum in San Francisco, but that preference did not in any way preclude the San Francisco Public Defender in trying the case in Orange County, for example. That is manifested by the subsequent negotiations between the Orange County Superior Court and Michael Burt for appointment during 1997-98. The trial court in its haste to reject the application of Public Defender for appointment mis-characterized the Public

Defender's preference as a demand, and seized on that as an additional ground to deny the appointment.

Finally, the court manifestly abused its discretion in determining that the Public Defender had not consented to the appointment within the meaning of Penal Code section 987.2(g) because any appointment would have to be approved by the San Francisco Board of Supervisors pursuant to the Public Defender's charter. That basis for denial was flagrantly unreasonable in view of the political reality that the Public Defender in any county is by definition a public entity that has to function within the scope of county authority. Penal Code section 987.2(g) clearly contemplated the appointment of a Public Defender office in a different county if the designated conditions were met, and clearly did not contemplate that the term "consent" would require that a Public Defender be able to accept an appointment without having to comply with its duly enacted authorization procedures. Thus, none of the three reasons sited by the court for refusing the Public Defender were valid.

Next, the court ignored section 987.05 in its appointment of the Orange County Public Defender without conducting a hearing with respect to readiness. Had the court properly convened a hearing, presumably the Public Defender would have presented evidence in support of a trial two years or more in advance of the date of appointment, and the court would have been

forced to reconsider its refusal to appoint the San Francisco Public Defender on that basis. However, by ignoring the provisions of section 987.05, the trial court erred in its appointment of the Orange County Public Defender.

Finally, the court equally erred in finding that "there is no Harris issue". The court stated, "I've studied Harris v. Superior Court, 19 Cal.3d 786, but the factual background in Harris is not even remotely similar to the factual background in this case." 1 RT 30. The court purported to distinguish Harris on the basis that while appellant "does have trust and confidence in Mr. Burt in his ability to represent him," attorney Burt "has never represented Mr. Ng in a trial, court or jury, this case or other cases"; nor has he ever "appeared for Mr. Ng in any evidentiary hearing to suppress evidence or any other legal motion to the charges dismissed". The court further commented that while "Mr. Burt had been appointed in Calaveras County...that was rescinded" and "a motion to be reappointed...was denied" so "that just goes off the board like it doesn't matter." 1 RT 28.

The trial court's understanding of Harris was fundamentally flawed. Harris reaffirmed the general proposition that "[a]n indigent defendant's preference for a particular attorney, while it is to be considered by the trial court in making an appointment [citing Drumgo v. Superior Court (1973) 8 Cal.3d 930] is not a determinative factor requiring the appointment of that

attorney – even in combination with other relevant factors such as the subject attorney's competence and capability." 19 Cal.3d 795-796. Harris then noted the existence of two specific objective factors in the case that made it an abuse of discretion not to appoint Harris' preferred attorneys. The "most significant" factor was that the preferred attorneys had "established a close working relationship" with the defendant and had acquired "an extensive background in various factual and legal matters which may well become relevant in the instant proceeding". 19 Cal.3d 789. One of the attorneys, Leonard Wineglass, had been appointed by the Los Angeles County Superior Court to represent Emily Harris in a robbery of a Los Angeles sporting good store and had tried that case to judgment. Attorney Jordan had been appointed to represent Ms. Harris in federal proceedings in a firearm possession charge that had apparently not been adjudicated, but she had continually consulted with Ms. Harris during the tenancy of the Los Angeles County prosecution.

Clearly, nothing in Harris required that the preferred attorney have tried a case to judgment or presented any particular kind of motion to qualify for appointment, as the trial court erroneously believed. Rather, the prior representation must have only provided "an extensive background in various factual and legal matters which may well become relevant in the instant

proceeding" that "any other attorney appointed to the case would necessarily be called upon to acquire". Id. 798. That is exactly what attorney Burt and the San Francisco Public Defender had acquired during the nine years of representation between 1985 and 1994. Mr. Burt had obtained discovery during the period that he had been appointed in Calaveras County, and had obtained discovery regarding the case charged in San Francisco. Mr. Burt had obtained substantial information about the Canadian extradition hearings and the informant LaBerge while counseling appellant during that period. Just as in Harris, the important experience had been gained by Mr. Burt through involvement in multiple proceedings involving appellant, and any other attorney appointed would need to assimilate that same knowledge of facts and law. Harris relied on a second factor of "considerable significance", i.e., the "emphasis" by alternative appointed counsel regarding "their relative unfamiliarity of the facts and legal issues involved and the necessity for their expenditure of considerable energy and time if they were to bring their level of familiarity with those facts and issues to appoint comparable, with that already reached by attorneys Jordan and Wineglass." Id. 799. In this case, the declaration of Public Defender Carl Holmes provided exactly that same emphasis in which he stated as follows:

"Because of the San Francisco Public Defender's unusually strong and long standing attorney-client relationship with Mr. Ng; because of the

substantial cost advantage to this State resulting from the San Francisco Public Defender continuing representation rather than our office or anyone else beginning anew; because of the strong likelihood that most, if not all of the counts, will be transferred to San Francisco on vicinage grounds; and because of Mr. Ng's clearly stated preference for representation by the San Francisco Public Defender, I concur that representation by the San Francisco Public Defender is manifestly correct, if not constitutionally compelled." 1 CT 16-17.

Harris then concluded that the trial court's refusal to appoint Wineglass and Jordan was an abuse of discretion given the objective factors regarding the amount of relevant experience required by Wineglass and Jordan, plus the defender's preference based on trust and confidence developed over a substantial period of time. In this case, those factors applied with equal or greater force, but there is a further factor that is equally compelling. The undisputed psychological evidence at the Calaveras County Marsden hearing demonstrated that appellant had a dependent personality disorder that resulted in his view of attorney Burt and the San Francisco Public Defender not as a mere "preference" but rather as a substantial need as far as a viable attorney client relationship. That type of objectively demonstrated psychological factor is directly analogous to that recognized by People v. Stankewitz (citation). Counsel specifically offered those documents to the Orange County Superior Court as part of the evidentiary presentation requested under Penal Code section 987.05. 1 CT 75. Under this combination of

circumstances, the trial court's refusal to appoint attorney Burt on September 30th, 1994 was clear error.

3. The refusal to appoint the San Francisco Public Defender in February 1998 prior to trial.

The representation issue was revisited in October 1998 after the attorney-client relationship with the Orange County Public Defender had broken down, as confirmed by Deputy Public Defender Kelley. Attorney Burt, in fact, was appointed co-counsel with the Orange County Public Defender on October 10, 1997, subject to resolution of logistical arrangements with the presiding Judge.

On Friday, March 20, 1998, the trial court had the last clear chance to resolve the representation imbroglio and appoint attorney Burt. However, that opportunity was squandered because the trial court insisted on an immediate and unequivocal commitment to try the case in September 1998. But the court refused Burt's request to consult with the Public Defender about the investigation status before making that commitment, and instead insisted on a decision that very date.

The Court:	I'm not going to play that game. That went on in Calaveras County. You ought not accept the appointment unless you can be ready by September, and that is a good faith estimate.
Mr. Burt:	And as I indicated to the Court, I am certainly willing to take some time to work with Mr. Kelley to

see whether I can make that representation to the Court so that I can report back to the court that –

The Court: We're doing this today. I know this happened up in Calaveras County. We just have to get things done. We don't put them off to another day.

Mr. Burt: Very well, your Honor. I am not prepared at this time to commit to court without the discussion that I indicated. 3 RT 585. Emphasis supplied.

Burt explained that he could not resolve those issues on that date but with a reasonable amount of time to consult with the Public Defender and review progress he could "answer that question for the court." The court refused:

The Court: I want answers. I don't want we'll do it next time. I want answers. Either you can or you can't. 3 RT 586.

In light of the overall posture of the case, there was no justification for the court's myopic insistence on a decision by attorney Burt on the date of March 20, 1998, as opposed to March 27, 1998, or any other day within a reasonable period of say two weeks. Attorney Burt extended himself considerably to the point of agreeing to accept appointment of co-counsel in conjunction with the Orange County Public Defender, a hybrid arrangement that had a number of obvious salutatory aspects to it, including continuity of both Burt with his work, continuity of representation with the Orange County Public Defender's work, and the accommodation of the Harris interests on

appellant's part. The trial court's insistence on a commitment from Burt on the specific date of March 20, 1998 was arbitrary on its face, and contrary to the spirit of Penal Code section 987.05, which provides that "[t]he court may allow counsel a reasonable time to become familiar with the case in order to determine whether he or she can be ready". Penal Code section 987.05 further provides that where counsel makes a representation that he will be ready for trial on a particular date "and without cause is not ready on the date set" is subject to "sanctions ... including ... contempt of court, imposing a fine, or denying any public funds as compensation for counsel's services. The section concludes with the provisional that "[B]oth the prosecuting attorney and defense counsel shall have a right to present and argument as to a reasonable length of time for preparation and on any reasons why counsel should not be prepared in the set time."

Moreover, the unfair treatment of appellant's request for appointment of Michael Burt is particularly apparent by contrast to the very different treatment that the Orange County court gave to local counsel Pohlson it appointed as lead counsel on August 2, 1996. The prosecution objected to the appointment again on August 9 on the ground that there had not been any showing that Pohlson as replacement counsel could be prepared for trial within a reasonable time period within the meaning of section 987.05. 1 RT

151. In response, the court inquired, "Okay, Mr. Pohlson, realizing that you haven't had an opportunity to review everything yet, could you give us an idea of when you will be able to try the case?" 1 RT 152. Pohlson replied obliquely with a roster of his currently pending murder cases then set for trial. The court then scaled down its request for an estimate of a trial date to a request for a simple assurance from Pohlson that he would be diligent – "Can you assure me that you won't be dilatory and that you're going to proceed with all possible haste with respect to the present case?" Pohlson dutifully assured the court "I'm not going to be dilatory," and did not address the "all possible haste" aspect of the inquiry.

This reflects an ongoing and unfair disparate treatment of the court's consideration of Burt as trial counsel. Each time Burt's appointment was under consideration, the court insisted that Burt make a commitment to a particular trial date under section 987.05, and each time the court flunked Burt under the 987.05 test and refused to appoint him. In contrast, when addressing Pohlson's appointment, the court made a tentative effort to elicit some type of compliance with 987.05 from Pohlson, and when Pohlson responded with a recitation of his roster of pending cases (a factor that was used against Burt on multiple occasions), the court effectively waived any further compliance with 987.05 for Pohlson. Under these circumstances, the

court's refusal to appoint Burt, and accord him a brief continuance to consult with the Orange County Public Defender, was clear error.

C. The Requirement of Reversal.

The standard of reversal for the erroneous failure to appoint qualified counsel with a prior history of representing the defendant has not been specifically addressed under California or federal law. However, it must necessarily be the Chapman standard that is applicable where a Marsden motion is erroneously denied. The same factors are present – the defendant was represented by the wrong attorney in violation of his Sixth Amendment rights. Where the defendant is not represented by any attorney, the standard is reversal per se. Where the court abuses its discretion in failing to appoint the attorney of preference with a prior history of representation and connection to the current charges, the standard must be Chapman. For the reasons set forth in Argument V regarding the Marsden error, the trial court's failure to appoint the San Francisco Public Defender and Michael Burt cannot be found harmless beyond a reasonable doubt.

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.

A. Summary of Facts.

This argument is included in the section of the opening brief designated "representation issues" because the crux of the Penal Code section 1368 evidence related to an irreconcilable breakdown of the attorney client relationship between appellant and attorney Kelley, see People v. Stankewitz, supra, not any kind of global mental deviation or dysfunction on appellant's part.

1. The first competency hearing of April 20, 1998.

On January 16, 1998, the court held a hearing that touched on issues relating to appellant's representation and to possible proceedings pursuant to Penal Code section 1368. 2 RT 407-408. One issue before the court was whether Michael Burt, Deputy Public Defender, Office of the Public Defender, San Francisco County, would be involved in appellant's defense. 2 RT 408. Defense counsel Kelley wished to inform the court what was going on with Burt's involvement "because it may have some bearing on the motions." 2 RT 408. When no agreement was reached to provide funding for Mr. Burt's participation, the issue of a 1368 hearing was again before the court. 2 RT 448. The court recognized that "if we have a 1368 trial, and it

sounds like it would be a demand for a jury trial, that Mr. Kelley and Mr. Merwin would be witnesses and would not be appropriate attorneys to represent Mr. Ng." 2 RT 448. The court gave the parties a week to determine whether they were able to agree on the issue of representation for appellant at the 1368 hearing. 2 RT 451.

A week later, appellant was represented by counsel William Kelley and James Merwin. 11 CT 3803. The parties had been unable to reconcile their positions on whether appellant should receive independent counsel for the expected 1368 hearing. 2 RT 459. The prosecution, moreover, insisted on maintaining the September 1998 trial date that had already been set; if there was to be a 1368 motion, the prosecution argued that it should take place as soon as possible, so as not to interfere with the September date. 2 RT 457. Defense counsel Kelley argued that appellant should have independent counsel should there be a 1368 hearing. 2 RT 461. Kelley argued that his position would be hopelessly conflicted were he forced to represent appellant's interests at a 1368 hearing. 2 RT 461.

The trial court recognized that independent counsel had been appointed in the past, but expressed the opinion that "nothing has ever been achieved by it." 2 RT 461-462. Kelley argued that the prior appointments of independent counsel experience were limited to the Marsden context. 2 RT 462. The

court responded, "You call it whatever you want. I don't care if you call it Marsden, Independent Counsel, Harris, and none of these apply, Harris or Marsden. I mean, every motion is, 'I want Mr. Burt to represent me.' And this court, I think, did its best to cause that to happen. And I am assuming that it hasn't happened." 2 RT 462. The court addressed the defense and stated, "I told you what my feelings were last week. I will tell you that they are now. Unless I see or hear something that I have not seen before, and I have probably read all the cases you are going to give to me, there will be no independent counsel," a position at odds with the court's view the previous week. 2 RT 464. The court further stated that sufficient expert reports existed to be considered substantial evidence enough to require a 1368 hearing. 2 RT 464.

Defense counsel Kelley asked the court whether he was in fact ruling on that issue of independent counsel, and the court responded that his "thoughts" were that independent counsel would not be appointed. 2 RT 464-465. Defense counsel asked for and was granted permission to submit points and authorities on the issue of whether appellant was entitled to independent counsel. 2 RT 465.

The court confirmed the respective positions of appellant and the Public Defender, i.e., that appellant believed he was competent to seek the

discharge of the Public Defender, while the Public Defender believed him to be incompetent because of his unwillingness or inability to cooperate with them. Appellant spoke up claiming that the judge was misstating his position. The judge cut him off, saying "I wasn't talking to you." 2 RT 467.

On February 3, 1998, defense counsel submitted a Motion For Appointment Of Independent Counsel For Jury Trial On Defendant's Mental Competence; Points, Authorities and Argument; Declarations. 11 CT 3807. Defense counsel argued that the court should appoint independent counsel because appellant was entitled to counsel at a trial of his 1368 motion, which representation they could not provide because they would be crucial witnesses. 11 CT 3808. Defense counsel argued that if independent counsel were not appointed, they would each have to testify, elicit testimony from the other, call character witnesses on their own behalf, and argue their own credibility to the jury. 11 CT 3809. Defense counsel cited case law for the proposition that permitting an advocate to argue his own credibility to the jury might constitute reversible error. 11 CT 3809, citing People v. Edgar (1917) 34 Cal.App. 459, 467-468; People v. Podwys (1935) 6 Cal. App.2d 71, 73-74; People v. Alverson (1964) 60 Cal.2d 803, 808-809. Moreover, California State Bar Rule 5-210 prohibited counsel from being both witness and advocate at the same jury trial. 11 CT 3809. Finally, defense counsel Kelley

and Merwin each submitted affidavits proving they possessed knowledge about appellant's mental state, specifically appellant's mental disorder, his inability to trust anyone but Mr. Burt with his defense, and the level of cooperation which would be necessary to his defense. 11 CT 3815. They argued that they were the best source of information as to appellant's present mental condition. 11 CT 3815. Finally, they urged the court to follow the example of other courts that had appointed independent counsel under like circumstances. 11 CT 3816-3818.

Defense counsel Kelley's attached affidavit stated that Burt was appointed on the Calaveras homicides in 1986 and that he continued to represent appellant until the Justice Court of Calaveras County removed Burt from the case. 11 CT 3819. The affidavit noted that this removal was urged by the prosecution over the objection of Burt and appellant. 11 CT 3819. Burt, however, continued to provide representation to appellant and maintained communication with him. 11 CT 3819. In 1991, Burt sought reinstatement, which was denied by the Calaveras Justice Court. 11 CT 3820. Instead, the court appointed attorneys Webster and Marovich over appellant's objection. 11 CT 3820. Appellant made numerous Marsden motions to have Webster and Marovich removed and Harris motions to have Burt appointed. 11 CT 3820. In 1993, after a closed Marsden hearing, Webster and Marovich

were removed because the attorney-client relationship had broken down as a result of appellant's mental illness. 11 CT 3820.

After the case was transferred to Orange County, appellant made a motion to have Burt reinstated as appellant's attorney of record. 11 CT 3820. The court denied the motion and appointed the Orange County Public Defender. Kelley stated his opinion that appellant's claim that Burt was the only lawyer he could trust was genuine. 11 CT 3820. Appellant's obsession with Burt had rendered him unable to cooperate in his own defense. 11 CT 3821. Kelley did not believe appellant to be unwilling but rather unable to cooperate because of his mental illness or obsession with Burt. Kelley believed that appellant was legally incompetent because appellant was unable to assist in his own defense, 11 CT 3821. Kelley explained the nature of defending a capital case and detailed the necessary cooperation that was not forthcoming either from appellant or appellant's family. 11 CT 3821-3822. Defense counsel Merwin's affidavit was substantially similar. 11 CT 3824-3827.

The prosecution responded that the exception to Rule 5-210, found in subsection (A), applied because the prosecution did not contest the representations defense counsel were prepared to make. 11 CT 3829. The prosecution was prepared to grant that appellant had always wanted Burt to

represent him and that this desire had been expressed both in his statements and conduct. 11 CT 3829-3830. The prosecution's argument was that these statements and conduct were not the product of mental incompetence but of appellant's choice not to cooperate. 11 CT 3830. The prosecution argued that defense counsels' affidavits referred to their opinions concerning appellant's competence, opinions which were not admissible as evidence because counsels lacked the necessary expertise. 11 CT 3830. Defense counsel Kelley had also sworn as to the types of assistance that a capital defendant must provide his defense counsel for effective representation. 11 CT 3829. The prosecution brief argued that these opinions were irrelevant because no legal authority "defined the scope of rational assistance in this way." 11 CT 3830. Moreover, these opinions were outside the scope of the competency trial, which focused on whether the failure to assist was the result of mental disorder or developmental disability. 11 CT 3830-3831. According to the prosecution, defense counsel Kelley was free to testify about his personal knowledge of appellant's conduct but such knowledge was uncontested. 11 CT 3831.

The prosecution also argued that because defense counsel Merwin's testimony would be cumulative of Kelley's, Merwin would be free to represent appellant at the competency hearing. 11 CT 3831-3832. The

prosecution argued that permitting Merwin to represent appellant would "prevent additional delay." 11 CT 3832.

On February 6, 1998, the parties agreed that substantial evidence had been presented that required a 1368 hearing. 3 RT 487-488.

Defense counsel Kelley again expressed his belief that there was a conflict of interest with appellant with regard to the 1368 proceeding "because our interests are clearly adverse and if he - - we cannot be effective lawyers for him in a 1368 proceeding and if we were compelled by the court to represent him, he would not be getting proper representation." 3 RT 481. Kelley claimed that neither he nor Merwin could fairly represent appellant's interests in a 1368 hearing. 3 RT 481.

The court asked Mr. Ducker, the Alternate Defender, how long it would take Ducker's office to prepare for the 1368 hearing, in the event the motion for conflict-free counsel was granted, and Ducker responded that if the hearing involved the single issue of appellant's competency "that could be done in my view in reasonable short order." 3 RT 489. The prosecution stated that its intent was not to pre-try the underlying offenses but "to deal specifically with the issue whether or not he [appellant] can rationally assist his current counsel." 3 RT 490. When defense counsel Merwin suggested that Ducker would be capable of a more exact estimate after consulting with

appellant over the following week, the court interrupted, "Why does everything have to be next week or the week after or the month after? What is wrong with today?" 3 RT 491.

The court believed that the "real issue" was whether appellant would talk to the conflict-free counsel, should one be assigned. 3 RT 492. Ducker tried to explain that section 1368 hearings "almost by definition sometimes include clients who won't talk to you or who can't talk to you." 3 RT 492-493. The court again interrupted and stated, "So really there is hardly a reason for a conflict [attorney]?" 3 RT 493. The court continued to press the question of when the Alternate Defender could be ready. 3 RT 494-495. Ducker stated that he could not give a good-faith estimate before knowing how much of the case his office would be responsible to prepare. 3 RT 495-496.

The court stated that he did not believe that Kelley and Merwin wanted appellant to be found incompetent: "What you want - - and this is an opinion. I am not making any findings, in other words. - - What you want is for Mr. Ng to cooperate with you. And if he won't, then get him the attorney that he would cooperate with. I think that is a fair statement. Whether it is true or not is irrelevant because it has nothing to do with what my ruling would be." 3 RT 497-498. The court did find that Rule 5-210 was not violated because

defense counsels' testimony would not be disputed. 3 RT 501. The court expressed skepticism that appellant would cooperate with appointed counsel or anyone except Burt. 3 RT 499-500. The court insisted that he had no authority to "force Mr. Burt to represent Mr. Ng." 3 RT 500. In addition, the court was concerned about delay: "What can independent counsel do except ask for more time to prepare, which is more delay?" 3 RT 500.

The court expressed frustration with appellant's repeated attempts to have Burt appointed as his counsel -- "For the last several years everything done on this case has been targeted for the same result, and it is a dual result, one is to have Mr. Burt represent Mr. Ng and the other is to transfer this case to San Francisco. I went back through the file and that is what has been going on. You can call it independent counsel. You can call it 1368. They are all for the same purpose." 3 RT 482. Defense counsel disagreed with the court's characterization and repeated its request to be relieved because of the conflict of interest. 3 RT 483.

Public Defender Carl Holmes stated to the court that appellant's lack of cooperation with his deputies Kelley and Merwin went beyond differences concerning the 1368 hearing, "It is essentially a question of Mr. Kelley's personal interests being at odds with Mr. Ng's interests." 3 RT 502. Holmes was convinced his office had a conflict of interest, 3 RT 503, and that

appellant could not receive a fair 1368 hearing, unless someone other than Mr. Kelley or his office represented him. 3 RT 504. Holmes stated that he truly felt "that without the appointment of conflict counsel in this case that it would not only cause this case to continue on its course but it might, in fact, from almost everyone's viewpoint, damage the course of this case." 3 RT 505. He also stated, "I can almost assure you that if Mr. Ng doesn't have counsel appointed on the 1368 that the hearing will be so difficult and ugly that probably we will, in fact, cement what could be longer living conflict." 3 RT 506. Holmes urged the court to rely on his experience and good faith in what "may be, perhaps, the only thing that can save the Public Defender's position on this case . . . ." The court remarked that this was a "maybe," and the Public Defender agreed. 3 RT 507. The court confirmed that the Public Defender could not make a stronger showing of proof without violating confidences. 3 RT 507.

The court granted the Alternate Defender 15 minutes to confer with the prosecution, before the court would hear argument from the various parties. 3 RT 507-508.

When court reconvened, [Alternate Defender] Ducker explained to the court his new understanding that appellant did not necessarily wish to go forward on the competency issue. Ducker's role would be to make an

independent judgment about whether to go forward. 3 RT 508. The court observed that this was the exact position of Mr. Kelley who had already made the judgment that appellant was incompetent. 3 RT 509. The court asked whether Ducker's wish was to "be in a position to make the same decision?" 3 RT 509. Ducker replied that it was. 3 RT 509.

Defense counsel Merwin interjected that the Alternate Defender's office intended to present evidence and argue in conformity with Mr. Kelley's belief that appellant was incompetent, but that appellant was entitled to an attorney to argue his own belief that he was competent. 3 RT 510-511. The court disagreed, stating, "No case actually holds that is what we have to do. Mr. Ng has a right to get up and tell the jury that he is perfectly competent." 3 RT 511. The court believed that appellant's real purpose was to have the court appoint Burt and to transfer the case to San Francisco where a jury could then decide whether or not he was competent. 3 RT 511.

Defense counsel Kelley objected that appellant was being "left sort of out there in the lurch holding no bag at all with nobody representing his interests." 3 RT 512. The court replied that Kelley was representing appellant's interests, even if appellant did not feel that this was so. 3 RT 512.

The court denied the Public Defender's motion to withdraw. 3 RT 513. Defense counsel Kelley inquired whether the court was making a finding that

no conflict existed. 3 RT 513. The court responded that it was not making any finding: "I didn't make any findings. So why would you say am I saying there was? I didn't say that. I said your motion is denied. The record is clear. It is there. It is, Dear District Court of Appeals; Dear Supreme Court; Dear District Court, this is a problem. I mean, I can't make it any clearer for you." 3 RT 513.

The trial court insisted that the case needed to begin moving forward: "Everything in this case seems to be a circle. We have to break the circle and start moving forward. This issue - - This issue, I know it will go to a higher court, but it isn't over yet. It isn't over yet. One of two things have to happen. This case moves to San Francisco with Mr. Burt or we try the case with you. Nothing else will work. It is one of those two things. It is that simple. And this isn't just a guess. This is after lots and lots of studying that is where we are at." 3 RT 517.

The court disagreed that defense counsel Kelley and the office of the Orange County Public Defender could not represent the interests of appellant at the 1368 hearing. 3 RT 519. The court recognized the defender's obligation "to see that somebody mentally ill not go to trial." The court, however, expressed skepticism concerning appellant's mental illness: "But this mental illness, according to Dr. Seawright Anderson and others would be

overcome just like (snaps fingers) presto if Mr. Burt was representing him." 3 RT 519. The judge repeated that he had tried to make that happen but lacked the authority to do so. 3 RT 519-520. In the end, the court did not "know the nature of the conflict." 3 RT 517-518.

The court appointed mental health experts for the purpose of the 1368 hearing, suspended criminal proceedings, and set March 20 for submission of the mental state reports. 3 RT 521.

On March 6, defense counsel had submitted a pair of motions arguing adverse positions. 12 CT 4078-4099. The defense brief argued that the court's refusal to appoint independent counsel had placed them in the difficult position of having to represent mutually inconsistent interests of their client. 12 CT 4080.

Counsel stated that the assertion of appellant's interest in a determination of incompetence required the defense to divulge materials they believed to be protected by the attorney-client privilege. 12 CT 4080. In contrast, the assertion of appellant's interest in a determination of competency required the defense argue that these same materials were protected and to resist their production. 12 CT 4080. With respect to evidence regarding appellant's relationship with former counsel, the latter defense brief also

argued that even if appellant had waived the attorney-client privilege that these materials were irrelevant. 12 CT 4098.

The People's brief argued that all these materials should be produced. 18 CT 6123. The People agreed with defense counsel's argument that appelant had waived the attorney-client privilege by alleging that defense counsel Kelley was incompetent. 18 CT 6124. The People argued further that appellant through his many prior Marsden motions had similarly waived this privilege with respect to all his former counsels. 18 CT 6124. The People also argued that appelant's past medical evaluations previously presented to a court in Marsden proceedings should be produced because any privilege was waived through their submission to the court. 18 CT 6124-6125.

Drs. Kausal Sharma and Paul Blair submitted their assessments of appellant's competence as the court had requested, 18 CT 6146-6152, 6153-6155, and both found appellant competent to stand trial. 18 CT 6152, 6155.

At the March 20 hearing, the court ordered the defense to produce any documents they would be providing to their own doctor, over appellant's objection of attorney-client privilege. 3 RT 608-609. According to the court, "there is no privilege. . . . Oh, absolutely is not." 3 RT 601. The court

questioned whether there could be any attorney-client privilege where the client is challenging the competence of the attorney. 3 RT 590.

Defense counsel Kelley argued that the privilege still applied, but the court disagreed, saying "Once waived. Waived." 3 RT 591.

The prosecution argued that appellant had waived any privilege vis-à-vis his former attorneys when he filed a $1 million lawsuit against them. 3 RT 597. He had waived his privilege vis-à-vis his current attorneys through his accusations of malpractice. 3 RT 597. The prosecution also qualified their request for production, stating that they were only asking for those documents "which were presented to the court either by testimony or by reports or any other matter having to do with a specific claim that a lawyer breached a duty to Mr. Ng." 3 RT 597-598. Moreover, because Drs. Sharma and Blair had not relied on earlier reports and accusations for their assessments, the prosecution sought only those materials necessary for cross-examination of any additional expert the defense would chose to offer. 3 RT 598.

On March 31, 1998, appellant filed a motion in the Orange County Superior Court, giving notice he would move to exercise his right to self representation under Faretta v. California (1975) 422 U.S. 806, People v. Canfield (1992) 2 Cal.4th 357, and the Sixth Amendment. 18 CT 6444-6445.

In the same filing, appellant also moved the court to exercise this right of self representation prior to the commencement of the competency hearing scheduled for April 20.

On April 16, defense counsel Kelley filed a declaration with the court explaining that appellant had refused to meet with three defense experts retained for the purpose of the 1368 hearing "without the approval of Michael Burt." 19 CT 6518-6522. As a result of appellant's refusal to cooperate, the defense would be unable to submit evidence "regarding the effects of culture upon Mr. Ng's obsession with Michael Burt," that appellant "was presently suffering from the effects of isolation," and that appellant was still suffering from two untreated disorders recognized in the DSM IV. 19 CT 6518-6522. Appellant, moreover, would not consent to the release of psychological evaluations to any expert, which reflected prior opinions of mental health professionals. 19 CT 6521. Kelley asserted that he was precluded from testifying to the content of his conversations with appellant because appellant had refused to waive the attorney-client privilege, and that he and Merwin were unable to adequately represent appellant's interests in the 1368 hearing for fear of violating appellant's attorney-client privilege. 19 CT 6522.

During proceedings on April 17, 1998, the trial court indicated that it had received and read two Faretta motions, one delivered by the public

defender and another sent by appellant via the mail. 3 RT 614. The court stated that as criminal proceedings had been suspended, the court would defer hearing the Faretta motion until criminal proceedings had been reinstated. 3 RT 614. There was no objection by the defense. RT 614. The defense did read into the record an objection by appellant to being forced to proceed with current counsel in spite of his numerous objections and the affidavits of counsel attesting to "irreconcilable conflicts." 3 RT 615-616. The court denied the motion. 3 RT 616. The defense stated its intention to submit the 1368 on the existing reports of Drs. Blair and Sharma, declarations previously submitted by Kelley and Merwin, as well as the original declaration of Dr. Seawright Anderson. 3 RT 693. Defense counsel Kelley had apparently decided to withdraw his earlier demand for a jury trial. 3 RT 501.

On April 20, 1998, the Public Defender filed a declaration by Dr. Seawright Anderson, stating that he considered appellant to be mentally incompetent within the meaning of Penal Code section 1368 because he suffered from bipolar disorder that left him unable to cooperate with the public defender in a rational manner. 19 CT 6544. Dr. Anderson believed that the appointment of Burt, along with supportive therapy, would alleviate this condition so that appellant could cooperate with Burt in appellant's defense. 19 CT 6544. Finally, Dr. Anderson offered the opinion that unless

the court appointed Burt to represent appellant that appellant would "regress to a psychotic disorder – such as Delusional Paranoid Disorder, or Schizophrenic Psychosis. 19 CT 6544.

At the 1368 hearing, the defense submitted on the reports of Drs. Blair and Sharma, the declaration of Dr. Seawright Anderson, and the declarations of Kelley and Merwin. 3 RT 696. Going through the submitted documents, the court again questioned whether it would be possible to appoint conflict-free counsel: "So there is no such thing as getting an independent attorney because Mr. Burt would have to approve. . . . I think the concept 'independent' means neutral, not attached, you know bipartisan, I suppose. You know, somebody who could render an objective opinion and give objective advice" 3 RT 699. In the view of the court, any counsel "approved by Michael Burt" would not be independent. 3 RT 698. Merwin suggested that it would be easy to appoint counsel who were at least independent of the current defense team. 3 RT 699. The court stated there was no need for an independent attorney to assist appellant in articulating his position. 3 RT 699-700. In fact, appellant had "no problem whatsoever . . . articulating his position. It is perfectly clear and rational. He has been in court many days. Very intelligent man. Knows what he wants and how to say it." 3 RT 700.

On the merits, the court noted that Dr. Sharma had the benefit of the best opportunity to examine appellant, found his report "the most telling," and noted that Sharma's report was consistent with the court's observations of appellant and appellants' writings to the court. 3 RT 700. The court was "not impressed with Dr. Anderson['s report], even when it was the only one before the court." 3 RT 701. In the court's opinion, appellant had refused to cooperate with counsel in any meaningful way, 3 RT 701, but was not mentally incompetent, did not have a mental disorder, and was capable of assisting counsel in a rational way if he chose to do so. 3 RT 703.

The court reinstated criminal proceedings, 3 RT 706, eventually granted appellant's Faretta motion, appointed the Public Defender as both advisory and standby counsel, and the conflicts between appellant and attorney Kelley continued throughout May-August, 1998.

2. The competency proceedings of August 21, 1998.

On August 17, 1998, appellant filed a motion to re-institute section 1368 proceedings on the basis the additional psychological testing administered by a defense psychologist yielded results that called into question appellant's competence to proceed to trial. 21 CT 7500. Appellant stated the issue clearly – "the results of the tests and interviews conducted in July 1998 by Dr. Nievod concluded that my condition has significantly

deteriorated from previous levels that he observed during the course of his interviews and testings, and substantiated the sincerity and necessity of my previous requests to remove Mr. Kelley from having any role in my trial." 21 CT 7501 (emphasis supplied).

Appellant further requested that conflict-free counsel be appointed to represent him for the purposes of preparing for and litigating the competency issues. In brief, the continuing conflicts with attorney Kelley were driving appellant crazy and causing such psychological stress that he could well have deteriorated to the point of incapacity to proceed at all, much less representing himself. 21 CT 7500-7503.

In support of the motion, appellant filed an eleven page affidavit by Dr. Abraham Nievod, a clinical psychologist. Sealed 21 CT 7505-7515. Nievod recounted that he had examined appellant at Folsom Prison in 1994 at the request of appellant's prior counsel, had subsequently been retained by the Orange County Public Defender in 1996, and he re-interviewed appellant again during February 1996. Sealed 21 CT 7505. Appellant contacted Nievod after obtaining pro per status and asked him to reinterview him as to his current psychological status. Sealed 21 CT 7506. Nievod interviewed appellant at the Orange County jail several times during July of 1998, and administered a battery of psychological tests that updated and added to the

psychological test data that he had collected since 1993. Sealed 21 CT 7506. Nievod had re-administered some or all of the psychological tests at approximately 24-36 month intervals since the initial testing at Folsom Prison, with consistent results over that four year period. Sealed 21 CT 7506. Mr. Ng had received consistent diagnoses of Axis II Dependent Personality Disorder; diagnostically significant levels of anxiety, manifesting as both Anxiety and Obsessive Compulsive Disorder; and a Mood Disorder, specifically Axis I depression. Sealed 21 CT 7506-7507. Nievod stated that a forensic psychiatrist previously retained by the defense, Dr. James Missett, concurred in his findings. Sealed 21 CT 7507.

The July 1998 tests indicated that these disorders remained active, and that appellant's mental condition had "deteriorated markedly from previous levels." Sealed 21 CT 7507. Appellant's level of depression was more profound and more debilitating. Sealed 21 CT 7507. Appellant's anxiety had become so severe as "to interfere with concentration, cognitive processes, memory, judgment, and insight." Sealed 21 CT 7507. Appellant also exhibited symptoms characteristic of Post-Traumatic Stress Disorder such as "difficulty falling asleep, outbursts of anger, panic attacks, hyper vigilance, exaggerated startle response, and a subjective sense of numbing and detachment." Sealed 21 CT 7508. Appellant had dramatically increased

clinical symptoms of both a Schizoid Personality Disorder and an Avoidant Personality Disorder, displaying "a pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal contexts." Sealed 21 CT 7508-7509. Appellant's "most significant and characteristic Personality Disorder" was a Dependent Personality Disorder. Sealed 21 CT 7510. Appellant's psychological disorders had "affected his ability to make reasoned, informed and insightful judgments." Sealed 21 CT 7512. Appellant was at best able to "partially understand the true meaning of the court's rulings; criminal procedures; motion process; legal arguments involving an analysis of issue, rule, analysis, and conclusion; and the overall strategy involved in preparing a defense." Sealed 21 CT 7512.

Nievod believed that appellant's deterioration was irremediable under the current circumstances, and that appellant was "sincere and honest in representing to the court his beliefs that substantiate his decision to remove Mr. Kelley from having any role in his trial." Sealed CT 7513. Appellant's rejection of Kelley was not "the product of malingering, manipulation, or an attempt to interminably prolong the 13 year history of bringing Mr. Ng to trial." Sealed 21 CT 7513. Instead these beliefs were the product of

appellant's mental condition, Sealed 21 CT 7514, as was his "idealization" of Michael Burt. Sealed 21 CT 7514-7515.

On August 21, 1998, the court heard appellant's motion for a jury trial on his competence. 5 RT 992. Appellant asked that Dr. Nievod be permitted to testify in camera to substantiate the motion. 5 RT 992-993. Appellant argued that there had been a change in circumstances. 5 RT 993. The court disagreed and compared the present circumstances to those in the past: "Well, we had two original attorneys. Got rid of them. Change in circumstances. Two new attorneys. Same thing. Nothing new." 5 RT 993. Appellant explained to the court that what was at issue was appellant's mental state rather than his representation. 5 RT 993. The court disagreed, stating that Dr. Sharma had said that there was no mental illness and suggesting that the argument over representation and the argument over mental state were linked. 5 RT 993-994.

The prosecution objected to argument on to the granting of the 1368 motion, arguing that the court had sufficient information to rule on the motion from the court's own observations of the defendant. 5 RT 994.

The court asked appellant what Dr. Nievod's testimony would add to the declarations submitted with the motion and the addendum filed that morning. 5 RT 995-996. Appellant explained that Dr. Nievod would testify

as to appellant's current mental state. 5 RT 996. The court responded that appellant's mental state was fine, and suggested that appellant's purpose was the again to object to his representation. 5 RT 996. Appellant explained that Dr. Nievod's testimony would address both these arguments, and that Dr. Nievod would also testify that defense counsel Kelley's 1368 motion had been flawed because "he didn't give certain information to the mental health expert that examined me." 3 RT 996. Appellant argued that Dr. Nievod's testimony would refute the court's assumption that appellant would continue to object to any attorney save Michael Burt. 3 RT 997. When the court refused to hear the testimony, appellant stated, "I am not competent to proceed." 3 RT 997.

The court asserted that appellant was playing a game, talking to the psychiatrists or psychologists with whom he wanted and not with any others. 5 RT 998. The court asserted that any testimony that Dr. Nievod wished to give could have been submitted to the court in writing. 5 RT 998. Appellant complained that he did not have advisory counsel and that he needed to talk with conflict-free counsel, to which the court responded that appellant had two excellent conflict-free attorneys with whom he could consult. 5 RT 998.

Appellant asked that Dr. Nievod be permitted to testify as to his observations of appellant the previous evening. 5 RT 999. Appellant claimed

that he had been up late and had awakened tired and confused, was fatigued and unable to concentrate. Appellant asked for a postponement so that he could recover and "gather my issues together." 5 RT 1000.

Appellant alleged that he was unable to adequately describe his own mental state, and expressed surprise and disappointment that the court would not hear Dr. Nievod's testimony. 5 RT 1001.

The court observed that appellant neither looked tired nor sounded confused, and asked what the mental health expert would be able to add were he permitted to testify. 5 RT 1001. Appellant stated that he would not know until the court permitted the expert to testify. 5 RT 1001-1002.

The prosecution argued that appellant was attempting to manipulate and delay the proceedings, and noted that appellant had been competent to file the competency motion and sign his name to several other pending motions. 5 RT 1002. The prosecution also drew attention to several witnesses who had traveled great distances to be present at the hearing of the motions. RT 1002.

Appellant stated that he was having trouble moving forward but at the same time he was having trouble trusting his advisory counsel, "I feel like I am being pressured by somebody to do certain things. I think – I feel I am not voluntarily going through with this process." 5 RT 1004. The court explained that appellant was representing himself and that he was free to

either follow or reject the advice of advisory counsel. 5 RT 1004. The court asked whether appellant still wanted to be his own attorney. 5 RT 1004. Appellant indicated that he wanted to be his own attorney but that he was handicapped by the denial of conflict-free advisory counsel. 5 RT 1004.

The court responded that there was no conflict, but appellant had chosen not to cooperate which was appellant's choice, one that he made "intelligently and voluntarily," adding that no mental illness prevented appellant from cooperating. 5 RT 1004.

Appellant stated that the Public Defender's Office had "changed their position and monopolized their resources, so I am basically put in a position where I feel betrayed and deceived by the Public Defender, like Carl Holmes and Kelley, so it had changed my - - it had aggravated my mental anxiety and my ability to concentrate." 5 RT 1010. The court was unconvinced there had been any change: "I told you when you waived your right to a jury trial on that [the prior 1368 hearing], that is a one time thing unless the situation changed. There is no change." 5 RT 1011.

Appellant insisted there had been change, referring to the Nievod test results, but the court replied, "You still want Mr. Burt. That is what this is all about." 5 RT 1011. Appellant stated that Dr. Nievod had been asked to give evidence that appellant's breakdown with defense counsel Kelley was

unrelated to Michael Burt. 5 RT 1012. This was new evidence because defense counsel Kelley had limited the prior hearing to whether appellant was incompetent because of his obsession with Michael Burt. 5 RT 1012.

The court concluded that appellant's attempt to relitigate the 1368 motion was related to appellant's motion to continue and also to his Faretta status. 5 RT 1014. The court was convinced that appellant was not preparing for trial, but was instead investing his resources in obtaining delay. 5 RT 1014. The court remained persuaded by Dr. Sharma and his own observations that appellant was able to assist counsel or to act as his own counsel in the conduct of his defense in a rational manner. 5 RT 1014. "This court does not have a reasonable doubt about your mental competence as defined in Penal Code section 1368. There has been no substantial change in circumstances or new evidence to indicate otherwise. Your motion for a new 1368 proceeding is denied." 5 RT 1014.

3. The October 8, 1998 competency proceeding.

On October 8, 1998, defense counsel Kelley informed the court that in Mr. Kelley's view, appellant was presently incompetent to proceed pursuant to section 1368 of the Penal Code. 7 RT 1542. Kelley based his belief upon the history of the case but also upon a recent report by Dr. Nievod, submitted at an in camera hearing on September 21. 7 RT 1542. Kelley argued that Dr.

Nievod's report presented a more thorough analysis than was available to the court before the earlier 1368 hearing. 7 RT 1544. The defense asked the court to suspend criminal proceedings and order a new hearing on the question of appellant's competency. 7 RT 1542. The court responded that it had read Dr. Nievod's report, the supplement to it, as well as Dr. Nievod's testimony at a prior competency hearing in Calaveras County. 7 RT 1543. The court did not believe that the new report added anything to the analysis: "all he did was add to what he said originally. Literally there is nothing new in there. If you read between the lines, it is just telling us all that [appellant] on purpose will not cooperate with you and that is not a mental illness. I have no doubt, no question at all as to his present mental competence and we are not going to suspend proceedings." 7 RT 1544. In the court's view, "there [was] just no reason to have another [hearing]." 7 RT 1543.

B. The Trial Court's Errors.

1. The Applicable Law.

California law and the Fourteenth Amendment to the United States Constitution both prohibit the trial, conviction, or punishment of a defendant who is mentally incompetent. People v. Rogers (2006) 39 Cal.4th 826, 846; § 1367, subd. (a). "When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full

competency hearing." People v. Lawley (2002) 27 Cal.4th 102 131. "The determination of the defendant's competence to stand trial goes to the fundamental integrity of the court's proceedings; and once the court declares a doubt exists, a section 1368 hearing must be held and defendant may not waive a hearing." People v. Harris (1993) 14 Cal.App.4th 984, 994. Defense counsel's belief that the defendant is mentally incompetent may itself constitute substantial evidence sufficient to require a section 1368. Failure to conduct a hearing when there is substantial evidence of incompetence requires a reversal of any judgment of conviction. Lawley, supra, at p. 131.

Defendant retains a Sixth Amendment right to counsel for the 1368 competency hearing. People v. Jablonski (2006) 37 Cal.4th 774, 803; Baqleh v. Superior Court (2002) 100 Cal.App.4th 4789, 503. Defendant has a right to counsel concerning even whether to participate in the 1368 adjudication: "the examination cannot be conducted without 'the assistance of [defendant's] attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.' [citation omitted] Counsel would need to explain the risk of impeachment to the possibly mentally impaired defendant and, if that risk was sufficiently grave, might be ethically bound to advise the defendant not to communicate

with the court-appointed mental health professionals at all during the examination." People v. Pokovich (2006) 39 Cal.4th 1240, 1252.

Defendant also has the right to conflict-free counsel. "[U]nlike a criminal defendant, whose legal interest lies in being found not guilty whether he is guilty or not, the defendant in a competency proceeding has not only the right not to be tried for a criminal offense when he is incompetent; he has an equally important interest in not being sent to a mental institution with his criminal case unresolved, if he is competent." People v. Stanley (1995) 10 Cal.4th 764, 806. When defendant and defense counsel disagree on the question of competence, the court may protect these dual interests and avoid conflict by the appointment of a third attorney. Ibid.

2. The errors relating to the April 20, 1998 denial.

Appellants need for conflict-free counsel was particularly acute at the April 20, 1998 hearing, because attorney Kelley had a manifest conflict in presenting the case to the court. The conflict was two-fold: first, Kelley sought to have appellant found unable to cooperate with counsel in a rational manner, while appellant denied any incompetency and alleged only a breakdown with Kelley. Second, Kelley framed the issue in terms of appellant being incompetent because of a mental illness described as an obsession as to attorney Michael Burt. In other words, Kelley's position was

that appellant was incompetent, not because of any deficiencies in Kelley's representation, but rather appellant's obsession with Burt poisoned the otherwise adequate representation provided by Kelley.

Independent counsel could have framed the issue in a distinctly different manner that reflected appellant's position, i.e., that appellant and Kelley had reached an irremediable breakdown in their relationship, likely attributable to personality traits and conduct on both their parts, but that the breakdown was independent of appellant's preference for Michael Burt. That argument, consistent with appellant's actual position, was never presented to the court by attorney Kelley or any other member of the Public Defender's office.

This Court has recently reaffirmed that "it has long been held that under both Constitutions, a defendant is deprived of his or her Constitutional right to counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labeled under a conflict of interest, compromised his or her loyalty to the defendant". People v. Doolin (2009) 45 Cal.4th 390, 417, quoting People v. Rundle (2008) 43 Cal.4th 476, 168. Rundle found that defense attorneys had in fact "'pulled their punches' during the questioning of witnesses", due to one of the attorney's personal interest in avoiding the disclosure that his wife had been the source of

information about jury misconduct. 43 Cal.4th at 107-171. Rundle concluded that "defense counsel's questioning of [a juror misconduct witness] was inadequate compared to what reasonable and unconflicted counsel would have done, was a result of Smith's predicament and both attorneys' desire not exacerbate it, and could not have been based on a strategic choice regarding how best to protect defendant's right." Id. at 171. Rundle made it clear that Smith's co-counsel was equally subject to the conflict because "we believe Humphrey's sense of loyalty to his co-counsel was sufficient to create an actual division of loyalties on his part...." Ibid.

Applied to this case, attorney Kelley's conflict in emphasizing if not focusing solely on the assertion of an obsession on appellant's part toward Michael Burt, to the exclusion of any argument as to his own fault as contributing to the attorney-client breakdown, demonstrated a primary conflict of interest. The other members of the Public Defender's office were similarly subject to the conflict because of their "sense of loyalty", as members of the same Public Defender office.[43]

[43] People v. Doolin, supra, addressed a conflict of interest argument based on the defense attorney's fee arrangement, and in the course of analyzing that claim disapproved Rundle and numerous other cases "to the extent that they can be read to hold that attorney conflict claims under the California Constitution are to be analyzed under a different standard from that articulated by the United States Supreme Court." 45 Cal. 4th 421.

3. The errors relating to the August 21, 1998 denial.

The trial court's primary error was the failure to acknowledge that Dr. Nievod's psychological testing during July 1998 constituted new evidence of possible incompetency on appellant's part sufficient to require a section 1368 hearing. Dr. Nievod's test results specifically stated that appellant's mental condition had "deteriorated markedly from previous levels", Sealed 21 CT 7507. Dr. Nievod expressly stated this deterioration adversely affected appellant's self representation in that appellant only "partially understood the true meaning of the Court's ruling; criminal procedures; motion process; legal arguments involving an analysis of issue, rule, analysis and conclusions; and the overall strategy involved in preparing a defense." Sealed 21 CT 7512. Dr. Nievod attested to appellant's sincere and honest belief that attorney Kelley's continuing role in the case was the cause of the deterioration, not any malingering or manipulation on appellant's part. Sealed 21 CT 7513.

The trial court failed to acknowledge these recent test results as sufficient cause for further section 1368 proceedings. First, the court stated there was "nothing new" because this motion was simply a reiteration of prior proceedings in Calaveras County where appellant successfully discharged his then-appointed counsel. 5 RT 992. When appellant interposed that it was his mental state at issue, not his representation, the court invoked Dr. Sharman's

report of March 1998 that appellant had no mental illness, 5 RT 993-994. The court failed to acknowledge that Dr. Sharman's examination had occurred four months prior to Dr. Nievod's far more current testing, and therefore did not rebut the evidence of changed circumstances. See People v. Tomas (1977) 74 Cal.App. 3d 75 [error in failing to institute 1368 proceeding based on expert's opinion]. People v. Ary (2004) 118 Cal.App. 4th 1015, 1020 [error in failing to recognize substantial evidence of incompetency even though counter-valuing evidence existed].

The court further erred in refusing to hear Dr. Nievod's testimony as to appellant's mental state, while at the same time rejecting his written declaration and offer of proof. When the court asked appellant what Dr. Nievod would testify to, and appellant responded that he would testify to his current mental state, the court interrupted, "[y]our current mental state, Mr. Ng, is fine" and "[y]our attitude is the same at is has always been." 5 RT 996.

The court reverted to the position espoused by attorney Kelley at the April 20, 1998 hearing, i.e., that appellant's evidence regarding his mental state really related to his desire for Michael Burt to be his attorney – "it doesn't matter who the attorneys are. Unless their first name is 'Michael' and the last name is 'Burt'," we are going to have the same problem." 5 RT 997.

The prosecution did not particularly advance the resolution of the issue with their argument that "it seems to the People that this defendant is trying yet again to delay and manipulate the proceedings", knowing that "he was certainly competent enough to file a 1368 competency motion which was served on us at 5:15 this past Tuesday." 5 RT 1002. That is a clear non-sequester, because the crux of appellant's 1368 motion was that he had been informed by the psychologist who conducted ostensibly objective testing that his functioning had deteriorated, at which point appellant simply placed that evidence before the court with a request to the effect that, "please find out what's happening to me."

When appellant noted that he believed that the Public Defender's continued role in the case as advisory counsel and standby counsel exerted additional pressure on him, the court responded with the following conclusory assertion:

> "The Court: There is no conflict. There is absolutely no conflict between you and the Orange County Public Defender's Office. Your choice not to communicate with them, if that is in fact true, that is your choice. There is no mental illness to prevent you from doing it. There is no reason for you not to distrust [sic] the Orange County Public Defender's Office and attorneys who are representing you. That is your decision and one you made intelligently and voluntarily.
> The Defendant: I said Dr. Nievod's report refuted that." 5 RT 1004-1005.

Appellant repeatedly asked to put Dr. Nievod on to testify and the court repeatedly refused, ostensibly focused on the Section 1368 motion but uniformly characterizing as a "Michael Burt" motion. The court denied the motion based on the pleadings. 5 RT 1015.

Appellant could not have more clearly articulated the objective basis for his claim of changed circumstances since the prior section 1368 adjudication and the trial court could not have been clear in his rejection of that new evidence based on Dr. Sharma's prior report. The court's refusal to take Dr. Nievod's testimony demonstrates a categorical rejection of that evidence without any effort to test the weight it should be given through the process of live examination. The law is clear that a well substantiated offer of supported by an expert declaration cannot be summarily rejected in a Section 1368 proceeding, but the trial court erroneously did so in this case. People v. Tomas, supra.

4. The errors relating to the October 8, 1998 denial.

Attorney Kelley argued on petitioner's behalf on October 8, 1998, essentially in conformity with what appellant argued on September 21, i.e., Dr. Nievod's report presented a more thorough and current analysis than was available to the court before the April 19, 1998 competency hearing. 7 RT 1544. The trial court erroneously objected the argument for the same clearly

incorrect ruling, i.e., "literally there is nothing new in there". 7 RT 1544. The current psychological testing that clearly provided sufficient basis to require a hearing as to the seriousness of appellant's mental deterioration since April 1998.

C. The Requirement of Reversal.

The trial court's failure to institute an additional section 1368 hearing is structural error for a variety of reasons. The deterioration clearly and adversely affected appellant's self representation efforts. It affected his overall functioning, including his ability to understand and carry out advice from independent mental health professionals such as Dr. Nievod. The case law is clear that the erroneous denial of a hearing upon a prima facie showing of incompetence under section 1368 and the federal due process guarantee is reversible per se. Pate v. Robinson (1966) 383 U.S. 375; People v. Hale (1998) 44 Cal. 3d 531.

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.

A. Summary of Facts

1. The rulings that authorized the Calaveras County cage.

Upon appellant's arrival in Calaveras County following extradition from Canada, the prosecution applied pursuant to Penal Code section 4007 to have appellant housed in the California Department of Corrections at Folsom Prison rather than in the Calaveras County Jail on the ground that "the defendant in this case is likely to be a threat to other prisoners in the Calaveras County Jail if confined in that facility." VI CT Cal J 2030. On November 1, 1991, the Calaveras Superior Court directed that appellant be confined at Folsom State Prison indefinitely. VII CT Cal J 2257. On November 20, 1991, counsel filed a motion to have all shackles removed from appellant while he was in the courtroom. VII CT Cal J 2316. The first objection to appellant being shackled in the Calaveras Justice Court occurred on October 11, 1991, in the course of a Harris motion for the appointment of attorney Burt – "one of the reasons why counsel needs to be appointed in cases like that, is that we do not face what we are facing today in the courtroom. And this is, the individual coming shackled in violation of

Duran, because there is nobody who can actually prevent that, and that goes on national television." II RT Cal J 560. Defense counsel announced his intent to file a motion regarding physical restraints on appellant while in the courtroom, II RT Cal J 800. At the hearing on November 21, 1991, the court took judicial notice of the prior Penal Code section 4007 hearing to confine appellant at Folsom Prison, referred to various items of testimony in that hearing, II RT Cal J 825, and concluded that there was a "manifest need" for courtroom restraint, although none of the section 4007 testimony related to courtroom misbehavior or any statements of intent to engage in courtroom misconduct, either plans of violence or plans of escape. II RT Cal J 827. Defense counsel noted that "[w]e have probably 10 to 15 armed guards surrounding him in the courtroom at all times with heavy artillery" such that "I don't see where loosening one of his hands so that he has full range of motion so he can write and reach out and pick up the paper in front of him, file, what have you, is going to endanger this Court at all." The court reiterated its ruling that appellant would remain in full shackles. II RT Cal J 831.

The sheriff, apparently without permission of court or definitely without any notice to counsel, built a metal cage in the Calaveras Courthouse Jury Room to lock appellant in before and after his court

hearings and during lunch hour and recess. Defense counsel objected to this because it both impeded attorney/client communications, because the bailiffs that were also in the jury room could hear the entirety of their conversations, and because the psychological affects of being in the cage were demeaning and demoralizing for appellant psychologically. IV RT Cal J 1826-1827. The matter was set for hearing on August 21, 1992. In further proceedings on August 14, 1992, defense counsel requested permission to take a photograph of appellant in the cage, and the court asked the prosecution to "contact the Department of Corrections and determine if they have an objection to a photograph of Mr. Ng in the jury room in the holding facility." V RT Cal J 2182. Defense counsel noted, "you can call it a holding facility, but it's a cage any way you look at it," which the court duly acknowledged, "I understand that." Permission was eventually granted and a copy of that photograph can be found at IV OC CT 987.9, pp. 1113-1114. The prosecution preferred to use the euphemism "holding facility" in further arguments regarding its propriety. See e.g. V RT Cal J 2297.

On October 6, 1992, further hearing was held regarding courtroom security and additional objections to use of the cage. VI Cal J 2512. The issue remained unresolved through the preliminary hearing in October 1992,

and appellant remained in the cage when not in the courtroom. See VIII RT Cal J 3029-3030.

Appellant reported to counsel that he was having mental difficulties and "nightmares" about being in the cage, VIII RT Cal J 3712, and after appellant was held to answer, counsel made further objection to the cage, on the basis that it is "an inhumane and barbaric condition" that should be removed. I RT Cal S 115.

At a further hearing regarding courtroom and courthouse security, a defense expert testified that the use of the cage, over and above the use of shackles during court recesses was "excessive". III RT Cal S 724. At hearings on May 12, 1993 and June 9, 1993, defense counsel pressed the argument that the "cage was unconstitutional punishment", VI RT Cal J 1713, and "that holding cage constitutes just another additional punishment for Mr. Ng." VI RT 1792-1793. The court ruled with respect to courthouse and courtroom security that "the holding cage is large enough for the defendant to stand, walk, lean back in a chair, and is a place where he may be deposited during the lunch period where he can converse with his counsel without guards being present in the room, eat a lunch, do whatever." The court did not view confinement in the cage to be cruel and unusual punishment or a violation of appellant's rights. The court expressed some

"sympathy" for appellant, but urged him to "just sit in there and relax." VI RT 1803-1804.[64] The court based its ruling on part on a finding that "appellant had training in the martial arts", VI RT Cal S 1807 (although the prosecution had acknowledged in the federal lawsuit that there was no evidence to that effect). The court therefore confirmed that appellant should be fully shackled while in court and confined in the cage when not in court.

2. The rulings that authorized the Orange County stun belt.

At appellant's first appearance in Orange County Superior Court on September 30, 1994, the Orange County Sheriff unilaterally required appellant to wear a stun belt along with other physical restraints. 1 RT 9. Prior to arriving in Orange County, appellant had been held in administrative segregation in Folsom, and ferried to Calaveras County Superior Court for court proceedings, where armed guards had been stationed in the courtroom but appellant had not worn a stun belt. 1 RT 15. At the September 30 hearing, appellant's counsel expressed concern that "we have a situation of an escalating security here." 1 RT 11. The district attorney, however, argued that appellant was "now restrained a lot less securely than in Calaveras County." 1 RT 15. Additionally, the prosecution stated that there had been

[64] The Federal Magistrate who reviewed the same materials described the cage as "Beneath any concept of human dignity worthy of his civilized society, except under the most demanding circumstances, demonstrated by clear and convincing evidence of the necessity." VI RT Cal S 1794.

"at least two prior findings by courts in this case that there is a manifest need to restrain the defendant." 1 RT 9.

In response to appellant's objection to the use of the belt, the court replied that it did not "want to second guess the sheriff and everything at this particular stage" and would therefore allow the belt to remain. 1 RT 12. The court ordered appellant's leg irons and leg cuff to be removed, however, and noted that the use of the belt was "probably overkill." 1 RT 11-12. At a subsequent hearing, held on October 21, 1994, appellant was not forced to wear the stun belt, although he was shackled at his arms, and legs.

In April 1997, the Public Defender filed a motion to have the shackles removed during court hearings. 7 CT 2294. At the hearing on May 9, 1997, 1 RT 43, the court reconsidered whether to require appellant to wear a stun belt. Appellant's attorneys argued that the evidence supporting the use of restraints was "incredibly remote," and in many cases relied on "double and triple hearsay." 2 RT 279. At the same time, appellant's attorneys emphasized that appellant "has been in court for 12 years in the courtroom and never had one incident." 2 RT 280. Appellant's attorneys also submitted a declaration provided by the lawyer who represented appellant in Canada and had experienced no outbursts or violent incidents during the six years he had spent with appellant. 2 RT 281. Additionally, they emphasized

that the use of the stun belt was likely to create a "very serious" impediment to appellant's concentration because it would make appellant constantly aware that "some law enforcement officer had the ability to zap me." 2 RT 283-284.

The court concluded that there was "a manifest need" for appellant to wear the stun belt. 2 RT 291. The basis for this ruling, the court said, was that appellant "has been found with contraband relevant to a possible escape." 2 RT 291. The court did not explain what contraband it was referring to, but presumably was alluding to the metal clasp of an envelope that had been found six years earlier in the wall of a visiting booth used by many prisoners. 2 RT 289-290. Additionally, the court added, "all of the problems with [other types of] restraints are addressed by the use of that belt." 2 RT 291. The use of the belt, the court explained, would mean that appellant "won't have people looking at him like he is in chains." The court told appellant that "I think you prevailed at the hearing" on the use of restraints. 2 RT 359. After all, the court noted, the belt "is a painless thing and it is not observant to anybody. So you are free at counsel table, and you have full movement and it is not uncomfortable like the chains." 2 RT 359. The court did not address the evidence of adverse psychological impact from the stun belt.

On October 14, 1998, shortly before trial, the Orange County Public Defender filed a Motion to Remove Stun Belt, accompanied by numerous exhibits. 31 CT 10213. A hearing was held on October 23, 1998, and counsel for appellant presented, inter alia, expert testimony from Dr. Stuart Grassian. Dr. Grassian explained that because of appellant's psychological background, the use of a stun belt was likely to create a "very, very, very substantial cognitive impairment in [appellant's] ability to participate meaningfully in trial." 12 RT 2895. Dr. Grassian explained that appellant was an individual who exhibited a tendency toward "obsessional thinking," meaning that "once he gets a thought in his mind, it become extremely difficult for him to get it out of his mind." 12 RT 2893. The stun belt would likely have some adverse impact on any detainee, but the adverse impact on appellant would be significantly worse, to the point that "he cannot pay attention adequately." 12 RT 2893. Instead of having an awareness of the trial, appellant would be like to develop "a kind of tunnel vision," fixating on the threat created by the belt. 12 RT 2893.

The court denied the motion by minute order dated October 26, 1998. 33 CT 11118-11119. The court stated that it felt Dr. Grassian's opinion to be "inconsistent with what this court has observed of Mr. Ng's conduct in the courtroom." 33 CT 33:11118. The court stated that appellant apparently

"understood all the proceedings." 33 CT 33: 11119. In denying the motion, the court did not state that there was a "manifest need" for the belt. However, the court listed "some of the reasons why the court believes that Mr. Ng should remain restrained." 33 CT 11119:

- The fact that Mr. Ng. fought with and shot one of the security guards who apprehended him in Calgary;
- The court's impression that it was "apparent that Mr. Ng does not want to remain in custody";
- Allegations that appellant had discussed escape with LaBerge while in a Canadian prison, and at Leavenworth had discussed the possibility of "busting another inmate out after their release";
- Appellant was said to be proficient in martial arts;
- Appellant had "talked about delaying his trial while in a Canadian prison" and had "certainly been successful in that endeavor." 33 CT 11119.

At a 1999 hearing before appellant was to testify on his own behalf, counsel requested the court to have the stun belt removed while appellant testified. 28 RT 6818. The court asked the bailiff whether the bailiff had "any comments" on the request. 28 RT 6818. The bailiff replied "we will

just probably have to have more security in the courtroom," and the court left the security arrangements to the Sheriff's discretion. 28 RT 28 6818.

Appellant testified on January 27 – February 2, 1999. He was not required to wear the stun belt, but there were additional bailiffs in the courtroom, and appellant was escorted to the witness stand out of the presence of the jury so that the jury would not see the shackles he wore. Of course, the jury did see that appellant, unlike every other witness, was in the witness chair when the jury came in and remained there until after the jury had left. 30 RT 7158. Moreover, a bailiff stood directly behind him while he was on the witness stand, within arm's length and equipped with a taser, or stun gun, i.e., the functional equivalent of the stun belt.

B. The Trial Court's Errors.

1. The applicable law.

California's general principles regarding the use of restraints, as set forth in People v. Duran (1976) 16 Cal.3d 282, "also apply to the use of a stun belt." People v. Mar (2002) 28 Cal.4th 1201, 1205. Mar emphasized that there are "a number of distinct features and risks posed by a stun belt that properly should be taken into account by a trial court, under the Duran standard, before compelling a defendant to wear such a device at trial." (Ibid.)

Under Duran, a criminal defendant may not be subjected to physical restraints in the presence of the jury "unless there is a showing of a manifest need for such restraints." Duran, 16 Cal.3d at p. 290. Moreover, "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record." Id. at p. 291. Following Duran, Mar emphasized that the court must "make its own determination of the 'manifest need' for the use of such restraint as a security measure in the particular case, and may not rely solely on the judgment of jail or court security personnel in sanctioning the use of such restraints." Mar, 28 Cal.4th at 1218. In making this determination, "the court is obligated to base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney." Ibid, quoting People v. Cox (1991) 53 Cal.3d 618, 651-652.

Mar concluded that the trial court had not complied with the Duran test in requiring the defendant to wear a stun belt. Id. at p. 1220. This was true even though defendant "was on trial for assaulting a guard; he had previously been convicted of escape and of assaulting a peace officer; [and] on two recent occasions he had threatened correctional officers and threatened his own defense attorney." Id. at p. 1220, quotations omitted. In spite of this concern, the record contained only rumors rather than concrete

information: "the trial court never required the security officers to present an on-the-record showing of the specific facts or details of the incident, and no such showing appears in the record." Id. at p. 1222. Because the trial court had not made any on-the-record showing of a manifest need, the Duran standard was not met. Ibid.[65]

Some factors the courts have said may create a "manifest need" for restraints include a showing that the defendant plans to engage in violent or disruptive conduct in court, or plans to escape, People v. Anderson (2001) 25 Cal.4th 543, 595; or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained," Mar at 1220; Cox at 651. The nature of the crime for which the defendant is being tried is by itself insufficient to justify courtroom restrains or a stun belt. Duran, 16 Cal.3d at p. 293 [defendant charged with assault with a deadly weapon by a life prisoner][66]

---

[65] Mar noted that the type of circumstances identified by the Court of Appeal, if adequately established on the record and actually relied upon by the trial court, might well support a trial court's determination of manifest need to impose restraints upon a defendant. (Ibid.)

[66] Duran included a compilation of cases in which there was sufficient evidence of manifest need to justify courtroom constraints: People v. Kimball (1936) 5 Cal.2d 608, 611 [Defendant expressed intention to escape, threatened to kill witnesses, secreted lead pipe in the courtroom.]; People v. Burwell (1955) 44 Cal.2d 16, 33 [Defendant wrote letters stating that he intended to procure a weapon and escape from the courtroom with the aid of friends.]; People v. Hillery (1967) 65 Cal.2d 795, 806 [Defendant had

People v. Burnett (1980) 111 Cal.App.3d 661 concluded that it was improper to shackle a defendant merely because he had been convicted of escaping from prison seven years earlier. The court noted that "where prior escape required that a defendant be shackled, the escape was of much more recent origin than that in the present case." Id. at p. 667. "We know of no case wherein shackling was justified where a defendant's ambulant propensities were demonstrated only by a seven-year-old escape conviction," the court added. Ibid.

People v. Combs (2004) 34 Cal.4th 821, 838, in contrast the California Supreme Court concluded that a 1992 report of a psychologist regarding the defendant's potential to disrupt the courtroom proceedings was not too stale to justify shackling him during trial in 1993. The court noted that the defendant "never complained that [the psychologist's] report contained outdated or inaccurate information, nor did he request that alternative security measures be tried first. He only argued that the restraints

---

resisted being brought to court, refused to dress for court and had to be taken bodily from prison to court,]; People v. Burnett (1967) 251 Cal.App.2d 651, 655 [Defendant had previously attempted to escape in this proceedings.]; People v. Stabler (1962) 202 Cal.App.2d 862, 863-864 [Defendant attempted to escape from county jail while awaiting trial on other escape charges.]; and People v. Loomis (1938) 27 Cal.App.2d 236, 239 [defendant repeatedly shouted obscenities in the courtroom, kicked at the counsel table, fought with the officers and threw himself on the floor.]

were unnecessary because he had not tried to escape from the courtroom and had not caused anyone harm there." Ibid. In this case, all of the information purporting to justify the 1998-1999 shackling/stun belt restraints on appellant were older than the stale seven year old information found inadequate in Burnett.

Besides requiring a showing of "manifest need," Mar noted that the unique risks associated with the use of stun belts should also "require assurance that a defendant's medical status and history has been adequately reviewed and that the defendant has been found to be free of any medical condition that would render the use of the device unduly dangerous." Mar, 28 Cal.4th at p. 1205-1206. Additionally, the court added:

> a trial court, before approving the use of a stun belt, should consider whether there is adequate justification for the current design of the belt-which automatically delivers a 50,000-volt shock lasting 8 to 10 seconds, a shock that cannot be lowered in voltage or shortened in duration-as opposed to an alternative design that would deliver a lower initial shock and incorporate a means for terminating the shock earlier. Particularly in view of the number of accidental activations, we conclude that a trial court should not approve the use of this type of stun belt as an alternative to more traditional physical restraints if the court finds that these features render the device more onerous than necessary to satisfy the court's security needs. (Id. at 1206, emphasis added.)

Finally, Mar stressed the "potentially significant psychological effects" of using a stun belt on a defendant, effects that stem from the

anxiety created in a defendant's mind by the device. 28 Cal.4th at 1228. In light of these potential adverse effects, Mar emphasized that any presumption that the use of a stun belt is less onerous or less restrictive than more traditional security measures is unwarranted. "Instead, we determine that a trial court must take into consideration the potential adverse psychological consequences that may accompany the compelled use of a stun belt and should give considerable weight to the defendant's perspective in determining whether traditional security measures-such as chains or leg braces-or instead a stun belt constitutes the less intrusive or restrictive alternative. "Ibid."

2. The erroneous rulings.

a. The May 1997 ruling.

The court's May 1997 ruling to use a stun belt during court proceedings was not supported by substantial evidence the established manifest needed. 2 RT 291. The court's only specific reference to a factual basis for this ruling was that appellant "has been found with contraband relevant to a possible escape." 2 RT 290-291. However, the "contraband relevant to a possible escape" to which the court alluded was nothing more than the metal clasp of an envelope that had been found wedged in the wall of a visiting booth that appellant and other inmates had used in the New

Folsom Prison. 31 CT 10253. This small clasp, which could not be conclusively linked to appellant, had been found prior to a 1991 hearing, six years before the court relied upon it to find a "manifest need" to restrain appellant in 1997. 31 CT 20253. The only other items of purported evidence that could constitute "contraband relevant to a possible escape" were two reports of a razor blade in appellant's cell. 2 CT 289. However, the trial court acknowledged that these allegations, which dated from the same period as the stale envelope clasp, were "not sustainable because Folsom was unable to say they searched that cell immediately prior to Mr. Ng's occupancy." 2 RT 289.

Thus, the facts upon which the court relied in the 1997 hearing were of roughly the same vintage as the seven-year-old allegations of an escape attempt that were rejected as being too stale in Burnett and were of far less probative value than was the escape conviction in Burnett, 111 Cal.App.3d at 667.

Thus, the 1997 decision to require appellant to wear the stun belt in court was based primarily if not solely on the clasp of an envelope that had been found in an empty visiting booth six years earlier at Folsom prison. Unlike the defendants in Mar and Burnett, appellant had not been convicted of escape. Unlike the defendant in Mar, appellant had not threatened

corrections officers, and he had not threatened his attorney. Appellant had simply been sitting quietly during court proceedings for more than 12 years, including during hearings in which he was not made to wear the belt. 1 RT 43. He had never been cautioned or reprimanded for any inappropriate in-court behavior in Orange County, and there was no evidence at all of any reason to believe that appellant contemplated any inappropriate courtroom behavior at his trial.

The trial court reached its conclusion about the stun belt because of a belief that the belt was "a painless thing" that was "not uncomfortable like the chains." 2 RT 359. Indeed, the trial court suggested that "all of the problems with [other types of] restraints are addressed by the use of that belt" because the device would not be conspicuous in front of the jury. 2 RT 291. In light of the recognition in Mar of the psychological impact of stun belts, the court's analysis was deficient because it rested on the unfounded assumption that the belt was somehow "less onerous or less restrictive than the use of more traditional security measures." Mar, 28 Cal.4th at 1228.

The Public Defender argued that appellant's behavior had been exemplary for a dozen years in custody prior to the 1997 hearing, noting that "we have had zero incidents in all jurisdictions that he has appeared in." 2 RT 281. Additionally, trial counsel stressed the potential for the use of the

belt to interfere with appellant's ability to participate in the trial "in terms of his ability to concentrate and assist counsel." 2 RT 284.

b. The October 1998 ruling.

The Public Defender filed a motion shortly prior to trial to have the stun belt removed. 31 CT 10213. The prosecution responded with the same facts that had been stale the previous year. In denying the motion, the court relied on, inter alia, the circumstances of appellant's arrest in Calgary that had taken place some 13 years earlier, 33 CT 11119; and hearsay anecdotes about appellant's feats of martial arts skills that were older still. 33 CT 11119. Nothing more recent then 1991 was presented.

At the same time, the court failed to address the admission by the State of California in a pending federal lawsuit that there was no evidence that appellant ever had any martial arts training much less that had attained sufficient proficiency to be deemed at all dangerous. Given that there is "no case wherein shackling was justified where a defendant's ambulant propensities were demonstrated only by a seven-year-old escape conviction", Burnett, supra at 667, it was certainly not appropriate to continue to use a stun belt on appellant on the basis of vague anecdotes that were twice as old as the stale conviction in Burnett.

C. The Resulting Prejudice.

In conducting the prejudice analysis, Mar noted that it was "not explicitly apparent from the transcript of the proceedings what effect the stun belt had on the content of defendant's testimony or on his demeanor while testifying." Id. at p. 1213. Moreover, the defendant was "able to testify at length to his version of the events." Ibid. Nevertheless, Mar considered the potentially devastating consequences of triggering the belt along with the defendant's expressions of anxiety about wearing the belt and concluded that "it is reasonable to conclude that defendant's being required to wear the stun belt had at least some effect on his demeanor while testifying." Id. at p. 1225. Applying the standard of People v. Watson (1956) 46 Cal.2d 818, Mar concluded that there was a reasonable probability that the improper use of the stun belt affected the outcome of the defendant's case. Ibid.

Applying that standard here, the stun belt likely had an adverse effect on appellant's courtroom expression from 1997 through the trial. During this period, appellant represented himself for some four months, and made numerous Marsden motions, speaking on his own behalf. The relevant inquiry as to prejudice, therefore, is whether there is "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as

to whether the error affected the result." Mar, 28 Cal.4th at 1225, quoting Watson, 46 Cal.2d at p. 836-837.

In the case of a stun belt, which is relatively inconspicuous to the jury, the potential for prejudice stems less from the possibility that the jury will be influenced by seeing the restraint than from the possibility that the defendant's ability to participate in pretrial proceedings and at trial will be compromised by the anxiety created by wearing the belt. Indeed, the core of appellant's argument against the belt was that the device "distracts its wearer" and posed a medical risk to appellant. 31 CT 10245.

The REACT stun belt is designed to create a dramatic psychological effect on the wearer through the fear of being subjected to an excruciating 50,000 volt shock. 31 CT 10275. The physical impact of such a shock is typically sufficient to hurl a prisoner to the ground and possibly to cause the prisoner to urinate or defecate involuntarily. 31 CT 10373. Prisoners are made aware of this potential before they are forced to wear the belt. 31 CT 10373. For that reason, the manufacturer states:

> The most unique feature of the belt is the psychological impact rendered upon the wearer. Just knowing the belt contains a jolt of 50,000 volts of unleashed electricity at officer discretion, prompts the most violent inmate into becoming a complying customer. 31 CT 10275.

The psychological power of the belt, the manufacturer claims, derives from the fact that "the human mind cannot focus on two mind-set tasks at the same time." 31 CT 10278. If an individual were to try to escape, therefore, the belt would "change the ability to carry out the deed." 31 CT 10278. Faced with this unquestionable obstacle to action, the wearer is said to become "docile, cooperative, [and] manageable." 31 CT 10277. That claim of efficacy the stun belt manufacturer reinforces the expert testimony of Dr. Grassian that the stun belt would have a particularly severe impact on appellant's mental state and significantly interfere with his courtroom participation.

The REACT belt is also extremely intimidating because the device has a history of accidental activation, Mar, 28 Cal.4th at 1228. As of April 1997, shortly before the court initially approved the use of the belt in appellant's case, the manufacturer had reported nine occasions when the belt had been set off by mistake. Ibid. As noted above, these "potentially significant psychological effects" led Mar to reject any presumption that a stun belt is "less onerous or less restrictive" than other forms of restraints. Ibid.

For appellant, in particular, the psychological impact of being forced to wear the REACT belt was likely to have been severe. As Dr. Stuart

Grassian testified during the October 23, 1998 hearing, appellant is an individual who had a pre-existing tendency toward "obsessional thinking," meaning that "once he gets a thought in his mind, it become extremely difficult for him to get it out of his mind." 12 RT 2893. Because of this potential to become "stuck" on certain thoughts, Dr. Grassian testified that appellant might be forced "to dissociate, to numb out, to space out" as a way of managing his own mental processes. 12 RT 2894. This risk would be particularly acute if "the content of the thought is noxious, upsetting, unpleasant." 12 RT 2894. Dr. Grassian concluded that the "that impairment coupled with the stun belt causes a very, very, very substantial cognitive impairment in [appellant's] ability to participate meaningfully in trial." 12 RT 2895.

When appellant testified he was wearing shackles, but the additional bailiffs assigned by the sheriff for the duration of appellant's testimony were equipped with tasers, whose psychological effect is tantamount to that of a stun belt. That is particularly true here where the trial court agreed to have the stun belt removed for appellant's testimony in conjunction with the sheriff's heightened security measures, which would likely have had a similarly inhibiting effect on appellant.

Appellant's testimony, if credited by the jury, provided a complete defense to all charges. Appellant testified that he was Lake's factotum; that he participated in Lake's fantasy about imprisoning women, and that while he regrets his part in the false imprisonment of the women on the M-Ladies Tapes, he never kidnapped or killed them, or anyone else. Therefore, as in Mar, the jury's evaluation of appellant's credibility was critical to the defense case,[67] and the prolonged use of the unnecessary security measures requires reversal.

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. Summary of Facts.

On September 24, 1998, the Public Defender filed a Motion to exclude the prior testimony of Canadian jailhouse informant, Maurice LaBerge. 26 CT 8668. The Public Defender noted that LaBerge had been

[67] The resolution of this matter turned completely on the jury's evaluation of the credibility of the witnesses, an evaluation that depended in large part upon the demeanor of each witness on the witness stand. Indeed, the trial court, in explaining its ruling on the use of the stun belt, clearly indicated that in its view the quality of defendant's testimony in his own behalf, and in particular his demeanor while testifying, might well be the determining factor as to how the case would be resolved. Mar, 28 Cal.4th at 1224, emphasis added.

named as a prosecution witness, but that LaBerge had been killed in an automobile accident in Alberta, Canada in May 1998. Notwithstanding his death, the prosecution had announced an intent to introduce portions of his testimony from the Ng extradition hearing held in November 1988 in Canada. 26 CT 8670. The motion argued for exclusion on the grounds that 1) the extradition testimony was not admissible under Evidence Code Section 1291 (a) (2); 2) that LaBerge was so inherently incredible a witness that the admission of his prior testimony would undermine the truth seeking function of the trial process and deprive appellant of due process; and 3) appellant's federal constitutional right to confront and cross-examine LaBerge would be violated by the admission of the prior testimony. 26 CT 8691.

The prosecution filed a response on October 2, 1998, 28 CT 9193, and argued that the extradition testimony met the foundational requirements of Evidence Code Section 1291. The prosecution noted that it was seeking to introduce only a small portion of LaBerge's testimony relating to four drawings made by appellant, and appellant's remarks to LaBerge about those drawings. The prosecution also stated that they would introduce LaBerge's testimony acknowledging his extensive criminal history, and would

"stipulate to the admissibility of any other relevant impeaching evidence, subject to Evidence Code Section 352 objection". 28 CT 9194.

The motion was heard on October 8, 1998. 7 RT 1611. Defense counsel argued that this was a question of first impression, and that there was no indication in the legislative history of Evidence Code Section 1291 that it contemplated the admission of testimony given in a foreign tribunal. Counsel argued that since the Canadian government attorney in the extradition proceedings had only to establish a prima facie of appellant's involvement in the charges to sustain the government's burden of proof, defense counsel had little incentive to significantly challenge the credibility of the government witnesses, including LaBerge 7 RT 1614.

In addition, defense counsel pointed out that the strategy of appellant's Canadian attorney in the extradition proceedings was primarily to resist extradition on the grounds that appellant would certainly be prosecuted for and likely receive a death penalty in California, which was a sufficient reason for Canada to refuse extradition regardless of the strength of the evidence of guilt. Secondarily the attorney sought to show that LaBerge, that he was in affect acting as a law enforcement agent, a "person in authority", which would render his testimony inadmissible at the extradition proceedings under Canadian law. That aspect of Canadian

extradition proceedings gave him an entirely different motive and incentive to approach the LaBerge testimony, a motive and incentive that was essentially unrelated to a challenge to LaBerge's credibility. 7 RT 1615. When counsel re-emphasized this argument at the October 2, 1999 hearing, the following curious colloquy occurred:

> "The Court: But why do you say that?
>
> Mr. Kelley: Because it was dealing strictly with the admissibility of his testimony per se regardless of its credibility because of his being a person in authority. Now the Canadian court disagreed with McCloud –
>
> The Court: You don't think he was trying to lay a Sixth Amendment objection in our Constitution in our Country?
>
> Mr. Kelley: No. No.
>
> The Court: Come on.
>
> Mr. Kelley: No. He was dealing with the Canadian – a Canadian rule of law.
>
> The Court: But he had somebody whispering in his ear.
>
> Mr. Kelley: No, I don't think, Judge –
>
> The Court: It is quite apparent from the nature of the examination.
>
> Mr. Kelley: You know, I wasn't there, and you weren't there, and I don't think that's true.
>
> The Court: But I read it all.
>
> Mr. Kelley: You read all of his examination –

The Court: Yes.

Mr. Kelley: I know it is submitted in their exhibit.

The Court: Yes.

Mr. Kelley: But, no, I don't think that was a Sixth Amendment –

The Court: It sure sounded like a pretty good Sixth Amendment examination. You may be right. I just thought it was. That was my impression. I am sorry, Mr. Kelley.

Mr. Kelley: No. I have nothing else to add. 7 RT 1616 (emphasis supplied).

The trial court never explained the court's perception of a covert but concerted effort "to lay a Sixth Amendment objection". The court's further comment that it "sounds like a pretty good Sixth Amendment examination" appears internally contradictory, but the contradiction – between the court's perception of imported covert agenda to establish a Sixth Amendment "objection" vs. the court's description of the examination as Sixth Amendment compliant– was never resolved.

The trial court acknowledged that "there is no law on this particular issue" but that "it sure appears to the court that they did at the extradition hearing is what is done at a preliminary here, very, very, very similar." 7 RT 1618-1619. The court ruled that "because I find that what went on was quite similar to our preliminary hearing, with very extensive cross-examination, their motion is denied on that ground." 7 RT 1620. The court further found

that his testimony was not inherently incredible and that appellant's Sixth Amendment objection was denied because the "extensive cross-examination that was allowed and actually utilized" in Canada satisfied that right. 7 RT 1622.

Defense counsel filed certain specific objections to the excerpts of the Canadian testimony that the prosecution had proffered, 18 RT 4390, and the trial court ruled. 18 RT 4398. The sustained objections were noted in a copy that was filed with the Clerk, and the prosecutor submitted an unmarked copy for presentation to the jury.

During trial, Royal Canadian Mounted Police Deputy Raymond Monroe testified that he worked as an investigator for the Canadian Government during the Ng extradition proceedings, and was present when Maurice LaBerge testified regarding certain drawings that appellant had made while in Canadian prison. 20 RT 4755. He identified certain of the drawings, People's exhibit 223 through 230, 20 RT 4761 and then read LaBerge's testimony from the extradition hearing. 20 RT 4773-4787. There were certain stipulations regarding potential impeachment evidence, and Deputy Monroe was cross examined regarding the 42 crimes that LaBerge committed and the lenient treatment LaBerge had received for many years from Canadian law enforcement authorities. 20 RT 4810.

B. The Trial Court's Errors.

1. Evidence Code section 1291 does not encompass testimony given in a foreign proceeding.

Defense counsel objected to the admission of LaBerge's testimony on the basis that Evidence Code Section 1291 never contemplated the admission in a California court of testimony from a foreign proceeding. That objection should have been sustained, and the evidence excluded on that basis. There are significant reasons, underpinned by a federal due process analysis, that confirm the inapplicability of Section 1291 to foreign proceedings.

Prior judicial proceedings in other California courts presumably would have complied with both the California and Federal Constitutional requirements regarding admissibility, and therefore were presumptively appropriate for admission in a subsequent proceeding. Similarly, proceedings held in other states of the United States presumably would have complied with all federal constitutional requirements imposed upon the states by the Fourteenth Amendment, and therefore their reliability would be substantially assured, and their admissibility similarly appropriate.

In contrast, legal proceedings in foreign courts encompass an enormous gamut of judicial systems, from the common law and English speaking jurisdictions; to primitive tribal proceedings in non-English-

speaking corners of the world; to courts of general jurisdiction that operate entirely on religious law. The very broad spectrum of judicial systems among the myriad of foreign countries provides a sound policy reason that confirms the wisdom of the long-settled presumption that "the Legislature d[oes] not intend the statutes of this state to have force or operation beyond the boundaries of the state", Norwest Mortgage v. Superior Court (1999) 72 Cal.App.4th 214, 222, citing North Alaska Salmon Co. v. Pillsbury (1916) 174 Cal. 1, 4. This presumption, aided by other clear indicia of legislative intent, establishes the California legislature limited the gamut of proceedings cognizable under Section 1291 to those occurring within the state of California or within the other states and federal jurisdictions of the United States.

The presumption noted above is recognized in both California and federal contexts, and has been explained by this Court as follows:

> [T]he presumption is that [the legislature] did not intend to give its statutes any extraterritorial effect. The intention to make the act operative, with respect to occurrences outside the state, will not be declared to exist unless such intention is clearly expressed or reasonably to be inferred "from the language of the act or from its purpose, subject matter or history." North Alaska Salmon Co., supra, 174 Cal. at 4.

Evidence Code section 1290 – 1292 contain no language of any type that conveys an intent that the hearsay exception should apply to foreign

proceedings, nor any basis by which that conclusion could be reasonably inferred. Section 1290 lists four types of proceedings that may generate testimony that is subject to admission as "former testimony". There is no reference to foreign proceedings, nor is there any facially broad language such as "any court of record in any jurisdiction." Section 1291 describes the circumstances by which a party to a prior proceeding may have testimony from that proceeding admitted in a current proceeding. Section 1292 describes the circumstances in which a party to a current proceeding may have testimony from a prior proceedings admitted against him although not a party to the prior proceeding. Nothing in the text of the three related provisions supports an inference of international reach.

The legislative history of Section 1291 is equally silent, and nothing in the Comment provided by the Assembly Committee in conjunction with the enactment of Section 1291 suggests that the legislature contemplated that foreign testimony was within the reach of the statute.

The language of Evidence Code Section 1290 is most reasonably read to exclude any application to foreign proceedings. It specifically limits the potentially admissible "former testimony" to four specific types of testimony given under oath: (a) testimony in "another action or in a former hearing or trial of the same action"; (b) "a proceeding to determine a controversy

conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States; (c) a deposition taken in compliance with law in another action"; or (d) "an arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof". Testimony given at an extradition proceeding in a foreign country does not fit under any of those permissible categories. It is not an "action" within the meaning of Evidence Code Section 105, which includes civil and criminal cases. It could conceivably be viewed as testimony given in a "proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy", the first part of section 1290(b), but then manifestly fails the second part of the Section 1290 admissibility test because the Canadian judicial system is neither an agency of the United States government nor a public entity within the United States.

In clear contrast, when the California Legislature sought to include foreign matters within the scope of an Evidence Code provision, it specifically included that proviso in the relevant definition. See Evidence Code Section 200 ["Public Entity"]" – "'public entity' includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public operation whether foreign or

domestic". If section 1290(b) had been drafted to authorize the admission of testimony given in a proceeding conducted by a "public entity" generally, the Canadian extradition testimony may well have fallen within the Evidence Code section 200 scope. However, the legislature unmistakably limited the admissible former testimony to that given before an "agency of the United State" or a "public entity within the United States."

Further confirmation of this construction is apparent from other provisions of the Evidence Code that specifically refer to foreign law.

> There are two provisions of the Evidence Code that expressly authorize the evidentiary use of documents generated in foreign countries, Evidence Code section 452(f), which permits judicial notice of "[t]he law of an organization of nations and of foreign nations and public entities in foreign nations", and Evidence Code section 1530, which provides for authentication of copies of various official documents, and expressly includes official documents published by foreign governments under certain criteria. Nothing in section 1290 et seq. is at all comparable as far as providing a basis for inferring the that legislature contemplated admitting foreign testimony under section 1291.

Similarly, the California legislature has been equally explicit in the Penal Code whenever it intended that an event or occurrence in a foreign jurisdiction would be admissible and relevant in a California prosecution. For example, Penal Code section 686 ["Prior foreign conviction; punishment for subsequent offense"], enacted in 1872, provides that a prior conviction incurred "in any other state, government, country or jurisdiction" (emphasis

supplied) may be used to enhance punishment for a current California offense if the prior conviction would have been a felony in California. There is no comparable provision in section 1290 authorizing the admission of any prior testimony given in any proceeding in "any other...country".

Small v. United States (2005) 544 U.S. 385 is highly instructive on this point, because it provides a clear re-affirmation of the presumption against any foreign application of domestic statutes absent an express legislative intent. Small construed the federal felon in possession of a firearm statute, 18 U.S.C. Section 922(g)(1), which included very broad language that purported to include "any person" who "has been convicted in any court of a crime ...". Small concluded that a section 922(g) conviction could not be based on a prior conviction in a foreign court.

The Supreme Court referred to the "common sense notion that Congress generally legislates with domestic concerns in mind", 544 U.S. 388, quoting from Smith v. United States (1993) 507 U.S. 197, 204 fn. 5, and applied that assumption to section 922(g). The Supreme Court noted that "considered as a group, foreign convictions differ from domestic convictions in an important way", including the fact that a foreign felonies include "convictions for conduct that domestic law would permit, for example, for engaging in economic conduct that our society might

encourage", id. at 389, citing the criminal code of the former Soviet Union. In addition, foreign convictions may "include a conviction from a legal system that is inconsistent with an American standard of fairness". Ibid.

The Supreme Court concluded that those considerations were not dispositive but "simply convince us that we should apply an ordinary assumption about the reach of domestically oriented statutes here – an assumption that helps us determine Congress' intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance". 544 U.S. at 390. The Supreme Court stated that "given the reasons for disfavoring an inference of extra territorial coverage from a statute's total silence and our initial assumption against such coverage...we conclude that the phrase 'convicted in any court' refers only to domestic courts, not to foreign courts." Id. at 394. The Supreme Court explicitly noted its willingness to reconsider the issue upon receipt of any contrary indicia of legislative intent from Congress, but that none had been forthcoming.

The lesson for Evidence Code section 1291 is clear. If the legislature had intended it to encompass testimony given in foreign proceedings, it would have so stated in section 1290, just as the legislature explicitly included foreign convictions as a permissible basis for the enhancement of

current charges. Absent a similarly clear statement of legislative intent, this Court must conclude that Evidence Code section 1291 does not authorize the admission of foreign testimony.

2. The lack of compliance with Section 1291.

Even if Section 1291 encompasses testimony in a foreign tribunal, the criteria of admissibility was not met here because of the manifestly different purposes of the two proceedings, such that appellant's Canadian lawyer had an "interest and motive" in the extradition proceedings that was entirely different from that of a criminal defense attorney defending the capital charges themselves.

As defense counsel argued below, the Canadian government had only to prove a prima facie case that appellant was involved in the charged offense, which raises an issue of the content of the testimony, not its credibility. Once LaBerge testified and made his contribution to the prima facie case, defense counsel had no interest or incentive in impeaching him because that would not have negated the prima facie case under the standards of Canadian extradition law.

In addition, the interest and motive that appellant's Canadian counsel did have was to resist extradition, and the tactic taken was to persuade the Canadian tribunal that appellant was likely to be convicted of capital murder

and sentenced to death if extradited to California without assurances from California prosecutors that the death penalty would not be imposed. Therefore, with respect to appellant's Canadian lawyer, it was within his litigation strategy for extradition purposes to emphasize the likelihood that appellant would be convicted and sentenced to death in the absence of either a refusal to extradite or a conditional extradition order with assurances that the death penalty would not be sought. Otherwise, the Canadian court could well have viewed the prospect of a capital sentence as a mere possibility that did not weigh sufficiently strongly against extradition. That is an entirely different "interest and motive" than that of the Orange County Public Defendant at appellant's trial.

People v. Sanders (1995) 11 Cal. 4th 475 held that Section 1291 did not permit the admission of evidence of a witness who was unavailable at trial, but who had previously testified at a suppression hearing in the same case. The Supreme Court concluded that because "at issue in the suppression hearing was whether the police officers who obtained a warrant to arrest defendant relied on good faith on information provided by [the witnesses]", the prosecution "accordingly had little motive to impeach [the witness'] capacity". 11 Cal. 4th 525.

Similarly, given that the Canadian government's burden at the extradition hearing was simply to establish a prima facie case of appellant's involvement, appellant's Canadian counsel had "little motive to impeach" LaBerge's testimony. Sanders concluded that "[b]ecause the People did not have an opportunity to cross examine [the witness] with an 'interest and motive' similar to 'that which they had at trial, the testimony was properly excluded.'" Id. at 526.

3. Admission of the Canadian extradition testimony violated appellant's federal constitutional right of confrontation.

Beyond the failure of the extradition testimony to comply with the foundational requirements of Section 1291, the admission also violated appellant's Sixth Amendment right of confrontation and cross examination. See People v. Sandoval (2001) 87 Cal. App. 4th 1425 [reversing conviction because of confrontation violation arising from erroneous admission of prior testimony under Evidence Code Section 1291]. Crawford v. Washington (2004) 541 U.S. 36 held that actual confrontation on cross examination is guaranteed by the Sixth Amendment as a pre-condition for the admission of testimonial statements. "That incriminating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes Clause's demand most urgent." Id. at 66.

Thus, the fact that LaBerge incriminated appellant in the testimonial setting of a Canadian extradition proceeding increases the urgency of the cross examination requirement. Crawford held that the Sixth Amendment Confrontation Clause barred "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross examination." Id 53-54. The "opportunity" contemplated by Crawford was an opportunity that carried a comparable incentive and interest to cross examine, which did not occur here for the reasons set forth in part two above.

A review of the decision of the Supreme Court of Canada authorizing extradition sets forth the issues that were contested, none of which provided appellant's Canadian counsel an incentive to challenge LaBerge's credibility in any manner comparable to that incumbent on trial counsel in this case. Rather, Canadian counsel MacLeod stated that "the real focus of the extradition proceedings, as far as I was concerned, was the legality of extraditing Mr. Ng to California without such an assurance" that the death penalty would not be imposed or executed." 26 CT 9034-5. In addition, the government attorney had to establish only a prima facie case of culpability, such that any affirmative defense or impeachment of a witness as to culpability was not a viable strategy. 26 CT 9035. While attorney MacLeod

did conduct some cross-examination of LaBerge, he had meager opportunity or resources to develop impeaching materials, and confirmed that what he did have was a small fraction of that which Kelley had assembled by the time of trial. 26 CT 9033. Under the circumstances, the admission of the evidence violated appellant's Sixth Amendment Right of Confrontation.

C. The Requirement of Reversal.

The standard of review of a Confrontation Clause violation is whether the erroneous admitted testimony was harmless beyond a reasonable doubt. Chapman v. California, supra. In this case the confrontation violation cannot be deemed harmless because of the central emphasis placed on the LaBerge testimony and the cartoon caricatures whose admission was predicated on that prior testimony. The prosecutor extensively cross examined appellant about LaBerge's testimony and the cartoon caricatures from Canada. 32 RT 7670.

After appellant testified, the prosecutor began a second round of closing arguments that emphasized LaBerge's extradition testimony and appellant's apparent admissions in the course of his conversations with LaBerge. 32 RT 7726; 7763. Defense counsel responded that LaBerge's testimony about the cartoons was the result of his successful efforts in manipulating appellant, and in falsely reporting his conversations with

appellant. The prosecution concluded with a final re-emphasis on the LaBerge caricature cartoons as indicative of genuine admissions of guilt on appellant's part. 33 RT 8089.

The tenor of the cartoon caricatures was noxious and inflammatory. LaBerge's testimony and the cartoons featured prominently in the prosecutor's closing arguments that appellant was involved in the actual killing of the decedents, and particularly the babies. See, e.g., 32 RT 7724-7728 [emphasizing LaBerge's testimony about appellant's admission to "killing babies"]", 33 RT 8088-8091 [more emphasis on LaBerge testimony about "baby killings"]. That inflammatory evidence cannot be deemed harmless beyond a reasonable doubt as to the guilt or penalty verdicts. The jury would all too likely have attributed the moral obloquy arising from the materials entirely to appellant, given that LaBerge was not available for the jury's direct assessment. While the evidence suggested that LaBerge played a substantial part in fomenting appellant's involvement with the cartoon caricatures, and was largely responsible for their production, the jury would have placed the onus on appellant alone. This echoes the pervasive prejudice arising from the jury's inability to actually see Leonard Lake and to determine the degree of dominance and responsibility that Lake had for the crimes that were charged solely against appellant.

Under these circumstances, given the entirely circumstantial nature of the evidence of appellant's actual involvement in any homicide, the erroneous entry of LaBerge's extradition testimony and the accompanying cartoon caricatures cannot be deemed harmless beyond a reasonable doubt.

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

A. Summary of Facts

Throughout the prosecution's case, the trial court made evidentiary rulings that favored the prosecution and permitted the jury to hear inadmissible and prejudicial evidence. Appellant emphasizes that this argument must be reviewed in conjunction with the following argument regarding the trial court's equally erroneous rulings that excluded defense evidence proffered either through cross examination or during the defense case. The combined effect of this analysis compels a conclusion of evidentiary favoritism toward the prosecution, above and beyond the individually erroneous rulings.

B. The Trial Court's Errors

1. Error in admitting John Gouveia's testimony regarding the telephone call attributed to appellant.

Over defense objection, John Gouveia (the Foster brother of Mike Carroll), was permitted to testify that he received a telephone call from

someone who identified himself as Charles Ng. 13 RT 3342. The basis for the defense objection was hearsay, particularly because Gouveia could not authenticate the identity of the caller as Charles Ng, given the absence of prior acquaintance and absence of any basis for recognizing his voice.[68] The prejudice from this evidence was that it appeared to establish a connection between appellant and Mike Carroll, because Gouviea testified that the caller "asked to speak to Michael." 13 RT 3342. Apart from this particular testimony from Gouveia, the remaining evidence showed only a connection between Leonard Lake and Mike Carroll. The theory of the defense was that Lake by himself killed O'Connor, Stapley, and Carroll, because of Lake's personal vendetta against them as drug dealers who polluted the otherwise pristine Wilseyville environs.

---

[68]Q. Thank you. Now, after Michael Carroll returned from being in the military, did he ever tell you whether he knew a person by the name of Charles Ng?
Mr. Kelly: Objection, it's hearsay.
The Court: Sustained.
Q. By Mr. Smith: Did you ever resume a phone call from someone who identified himself as Charles Ng?
Mr. Kelly: Objection, that's hearsay.
The Court: Overruled.
The Witness: That means I can answer?
By Ms. Honnaka: Yes, that means you can answer.
A: Yeah, I did.
Q. And the person who identified himself as Charles Ng, did he ask to speak with someone?
A. He asked to speak with Michael. 13 RT 3342.

In the absence of adequate foundational evidence independently identifying the caller, the hearsay statement "this is Charles Ng" should not have been admitted for its truth or for any other reason. Otherwise, one party to a lawsuit could hire a namesake of the opposing party (e.g., "John Jones"), pay the namesake to call a third party witness, identify himself as "John Jones", and make an admission relevant to the lawsuit. The first party could then call the third party witness to testify to the apparent admission. A major policy justification for Evidence Code section 1220 is to avoid tainting trials with unreliable and even contrived evidence as occurred in this case and as illustrated in the hypothetical.

The trial court erred was in failing to recognize that Evidence Code section 1220 and basic guarantees of due process require that the proponent of an admission of a party-opponent establish that the declarant is in fact the party against whom the extrajudicial statement is offered. See O'Laskey v. Sortino (1990) 224 Cal.App 3d 241, 249 [affirming the exclusion of a tape recording of the opposing party because of inadequate authorization] (overruled on other grounds in Flanagan v. Flanagan (2002) 27, Cal.4th 766).

The trial court's error is highlighted by an inconsistent ruling made by the trial court when the prosecution objected to a defense question to Stan

Petrov as to whether he and his secretary Lauren Bradbury had received a telephone call on July 26, 1984 from someone who identified himself as Jim Bright [a Lake pseudonym]. The trial court sustained the prosecution's objection on a virtually identical evidentiary question. 14 RT 3398.

2. Error in admitting irrelevant evidence regarding appellant's statements and conduct in the workplace.

Defense counsel filed a written motion to exclude certain testimony by witness Kenneth Bruce that were irrelevant to the charges but that reflected poorly on appellant's character. 16 RT 3834; 34 CT 11227. At the hearing of the motion, the prosecutor successfully argued for the admission of appellant's recitations of certain coarse rhymes around the workplace;[69] statements regarding the possession of guns and knives; and an instance in which appellant brought a butterfly knife to work. Defense counsel argued that these statements were irrelevant because they were abstract statements unrelated to the circumstances of this case. The conduct at issue entailed the entirely legal possession of these items. The items individually and cumulatively were prejudicial because of the likelihood that the jury would view appellant's possession of weapons and his coarse rhymes as a proclivity to violence. Notwithstanding the extensive case law regarding the

[69] See 34 CT 1229 – "No gun, no fun"; No kill, no thrill"; "Daddy dies, Mommy cries, baby fries."

inadmissibility of possession of weapons that are not tied to a charged crime, the court overruled the defense objection accompanied by the pejorative comment, "your [evidence code] 352 argument is almost specious" because "there is nothing prejudicial about it." The trial court asserted that "as far as relevance, they can be used as corroborating evidence as to the drawings and as to the statements made up in Canada." 16 RT 3840-41. Co-worker, Kenneth Bruce, did testify to the statements and observations during the trial. 16 RT 3851-51.[70]

The case law recognizes the error in admitting evidence of a defendant's possession of weapons unconnected to the charged offense because of its all too likely use as a proxy for a proclivity to violence and, therefore, guilt of the charged crime. 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]; United States v. Hitt (9th Cir. 1992) 981 F.2d 422, 424 [reversing conviction because photograph of unrelated firearms could have caused the jury to conclude the defendant "was so dangerous he should be locked up regardless of whether or not he committed this offense"].

---

[70] The trial court also overruled defense objections to similar testimony from other Dennis Moving employees including Larry Boen to appellant's "no gun, no fun" statements. 17 RT 3936.

3. Error in admitting two VCR players seized from appellant's apartment.

The defense counsel objected to the prosecution's photographs taken at appellant's apartment that depicted two VCR players, both common General Electric models, that may have been similar to (although not in any way identified as) a VCR that was missing from the Dubs' residence. One had a serial number that was not the one owned by the Dubs. The other had its serial number removed. The trial court overruled the objection on the ground that the prosecution was entitled "to argue to the jury that it [the VCR player] was taken from the Dubs [sic]". 17 RT 3920. Defense counsel emphasized that his objection was based on the California Evidence Code and his state and federal constitutional rights to due process. Ibid.

The trial court erred because as of 1985, a VCR player was a generic piece of home entertainment equivalent to that found in virtually every residence. Without some independent confirmation that the VCR player photographed at appellant's apartment was the VCR player missing from the Dubs, the trial court's ruling permitted a spurious inference that appellant had somehow come into possession of at least one item taken from the Dubs' at the time of their disappearance.

4. Error in admitting evidence of appellant's association with marijuana.

The trial court made two erroneous evidentiary rulings that improperly prejudiced appellant with irrelevant evidence that he was associated with marijuana trafficking. During pre-trial proceedings, the prosecutor requested permission to present evidence of four bags of marijuana found at appellant's apartment at 136 Lennox Street. The trial court correctly sustained the defense objection, because there was no offer of any connection between the marijuana and any of the victims or the charged offenses. 16 RT 3924. However, shortly afterward, the trial court overruled a defense objection to testimony from Dennis Moving employee, Hector Salcedo, that appellant "offered to Mr. Peranteau, invited him to go up to the hills to help him harvest a weed field." The prosecution's only theory of relevance was that the marijuana may have belonged to Lake, and the "relevant inference that jury can make from this testimony that there is a connection between Ng and Lake and Ng was talking about Lake at that moment in time." 17 RT 3934.

Of course, the prosecutor could not establish when that conversation occurred in relation to Peranteau's disappearance, other than sometime during appellant's Dennis Moving employment. The trial court ruled it was relevant because "you have somebody who disappears", and "now you have

a direct statement made before that disappearance", so "it is relevant". 17 RT 3935.

During trial, the prosecution sought a reversal of the earlier exclusionary ruling as to the marijuana found in appellant's apartment. The trial court agreed to reverse its ruling and permitted the prosecution to present this evidence on rebuttal because it "refutes" [the defense] theory, whatever Lake did, he did on his own". The court viewed the statement as evidence that victim Peranteau was lured up to Wilseyville with promises of marijuana, and, coupled with other evidence that appellant did not smoke marijuana, the court admitted the evidence on the theory that appellant must have possessed the marijuana as part of a joint plan with Lake, rather than for his own personal use. 28 RT 6755-6756.

The trial court commented that because "the jury has been told under no uncertain terms that Mr. Ng does not use pot", and therefore "one would ask why would he have it, or why would it be at his house", unless it was part of a joint venture with Lake. 29 RT 6756.

The trial court exceeded the rational bounds for permissible inferences. The prosecution could not establish any temporal nexus between appellant's invitation to Peranteau and Peranteau's disappearance. The four bags of marijuana in appellant's apartment permitted only the most tenuous

speculation that they were related to some joint venture with Lake, particularly where appellant's general ties to Lake were not at all disputed. The evidence served only to prejudice appellant.

C. The Resulting Prejudice.

The trial court's erroneous rulings permitted the prosecutor to portray appellant as involved with drugs and weapons, both of which are widely associated in the popular mind with violence of various sorts. This evidence had negligible, if any, probative value, but served to portray appellant as a criminally-oriented character.

Moreover, the trial court not only erroneously expanded the rules of relevance to admit evidence that was prejudicial to appellant, but also erroneously restricted them to exclude evidence about Lake and his culpability, resulting in an unfair advantage to the prosecution. United States v. Donato (D.C. Cir. 1996) F.3d 426 [reversing for multiple errors, including more favorable treatment of the prosecution].

The combined effect of this erroneously admitted evidence plus the prejudice of the other errors committed by the trial court deprived appellant of due process and fair trial. 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.

A. Summary of Facts

The theory of the defense was that Leonard Lake was a conscience-less serial killer, who was actively engaged in a deranged plan to capture and dominate women in the manner of the psychopathic protagonist of the novel The Collector by John Fowles. An important component of this theory of defense was that Lake routinely used and manipulated other people in many facets of his life, and appellant was one of many pawns on Lake's lengthy roster, without knowledge of or involvement in the murders committed by Lake.[71]

To adequately present this defense, counsel had to demonstrate to the jury that not only was Lake a remorseless serial killer, but also that he was (and candidly viewed himself) as a diabolically clever person who manipulated people like a puppet master, getting them to unwittingly assist him without any knowledge of his larger criminal scheme. That theory of defense was clearly presented during counsel's opening statement, see 11

[71]The trial court understood the theme – "we have the People's case against Charles Ng and we have the defense case of Ng versus Leonard Lake, so it is very interesting." 25 RT 6060-1.

RT 2941-3,[72] and through appellant's own testimony at trial. It was within that context that the trial court made numerous erroneous evidentiary rulings that individually and cumulatively infringed appellant's rights to present a defense.

B. The Trial Court's Errors

Appellant addresses each of the several errors excluding defense evidence in this section, because the prejudicial impact of the multiple exclusions is cumulative. The exclusion of Leonard Lake's personal diary chronicling his demented criminal vision is the single most prejudicial ruling standing alone, violating appellant's Sixth Amendment right to present a full defense. Chambers v. Mississippi (9173) 401 U.S. 284 recognized a federal constitutional right of due process to present evidence of out-of-court statements that have "persuasive assurances of trustworthiness"; id at 302, and that are "both reliable and crucial to [the] defense." Chia v. Cambra (9th Cir. 2004) 360 F. 3d 997, 1009 [granting habeas corpus relief for the exclusion of an exculpatory extrajudicial statement by a third party.]

[72] Counsel described Lake as an "opportunist" who viewed people as depersonalized "ops" ["everybody was an 'op' for him"] and who duped people "to help" in a nefarious enterprise "without even knowing what [they] were doing." 11 RT 2943.

While the exclusion of the diary may have been the single most prejudicial ruling, the combined effect of all of them systematically undermined the defense.

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

The trial court sustained the prosecutor's objections to the defense question to Sylvia Showalters, Lake's sister -- "between Leonard and Donald [Lake's brother] did Gloria [their mother] ever express to you her opinion to say to you Donald was her favorite son over Leonard?" 21 RT 5003. Ms. Showalter's affirmative answer to this question, had it been admitted, was relevant and foundational to the portrait of Lake as someone who developed an anti-social personality disorder. Evidence regarding his mother's preference for her developmentally disabled son Donald, rather than the more precocious Lake, who showed some signs of higher intellectual functioning as a youth, 21 RT 5005, was an important foundational part of the defense.

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

The trial court sustained the prosecutor's objections to defense counsel's questions to Karen Roedl, Lake's ex-wife, whether Lake had a "God complex". 21 RT 5041. That testimony was similarly necessary to

provide a foundation for the psychological portrait of Lake that was essential to the defense. This testimony would have explained that Lake not only killed people without conscience but also felt himself able to use other people for what he viewed as his own higher purpose without letting them know what the higher purpose was or what their role in it was. The evidence from a credible lay witness that described Lake as having what is popularly known as a "God complex" was essential to the overall defense efforts to persuade the jury that appellant was an unknowing and unwitting cog in Lake's grandiose and homicidal plan. That important testimony was erroneously excluded.

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

The trial court sustained the prosecutor's objection to questions of Ernie Pardini as to whether appellant "seemed like a lost child in trying to win his father's approval." 23 RT 5685. Pardini had been Lake's next door neighbor in Philo from 1982-84 when Lake ran the Philo Motel. He was acquainted with appellant, who worked for Lake at the motel up through April 1982.[73]This lay testimony about the readily apparent relationship between Lake and appellant was essential to demonstrate that Lake had

[73]The parties stipulated that appellant was not in California from April 29, 1982 through July 9, 1984. 23 RT 5669.

managed to implement his God complex into a relationship in which Lake was the dominant father figure and appellant was the needy supplicant. This evidence was important to demonstrate that appellant was manipulated into a role in which he felt obligated to assist Lake in Lake's ventures, bizarre as some of them seemed, to obtain Lake's approval.

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

The trial court made a number of exclusionary rulings that prevented the defense from adequately demonstrating that Bond and Stapley were conducting methamphetamine distribution efforts through Brenda O'Connor's house in Wilseyville, which angered Lake and which gave Lake a motive to kill them entirely independent of appellant. At a hearing outside the presence of the jury on December 15, 1998, the prosecutor moved to exclude evidence of the methamphetamine distribution operation of Bond and Stapley in San Diego. The trial court excluded the testimony of Mark De la Cruz and Rick Satterfield regarding Stapley's methamphetamine manufacturing activities in San Diego County and the methamphetamine distribution efforts in conjunction with Bond. 24 RT 5952-5954. Defense counsel expressly argued that this evidence established a motive why Leonard Lake would individually retaliate against them, because he did not

like drug dealers generally, and was particularly angry about their activities in Wilseyville. The trial court rejected the defense argument with a pejorative characterization that it was an "Irving Kanarak" [sic] objection".[74]

The trial court excluded testimony from Curtis Everett as to whether Bond told him he was going back to Calaveras County to have a confrontation with Lake. 25 RT 6172-3, 6175.

The court sustained objections to all questions regarding Bond's last statement before his disappearance that he was going to Wilseyville to "finish it". 25 RT 6178.

The trial court also excluded virtually all testimony from Martha Everett regarding Lonnie Bond's statement that he was going to Wilseyville with his 22 caliber pistol to confront Leonard Lake for hassling Brenda O'Connor. 26 RT 6194-9 That testimony was critical to support the defense theory 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 court did modify that

[74] The trial court apparently viewed the objections raised in other trials by now deceased attorney Irving Kanarak as the epitome of extreme and unacceptable criminal defense tactics. While attorney Kanarek was indeed somewhat controversial during his years of practice, , the trial court invoked the Kanarek reference on several occasions to indicate its view that the defense objection was too far-fetched for serious consideration.

ruling to some extent 26 RT 6203.[75] However, the jury was left with the trial court's sense of rulings during Curtis Everett's testimony that sustained the prosecutor's objections to similar questions.

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

The trial court sustained the prosecution's objection to the defense offer of proof regarding the testimony of Robert Ressler, who was offered as "one of the original founders of what we know as the Behavioral Science Unit of the FBI", to testify that Leonard "fits the profile of a serial killer" and that Ressler never in his professional experience either had analyzed or heard of an Asian serial killer. 26 RT 6376-7. The trial court mocked the offer of proof, "you need an expert to tell these twelve citizens plus the three alternates that Mr. Lake fits that profile?" and excluded it. 26 RT 6377-6378.

This was clearly erroneous, because the defense needed an expert witness to tie together the various foundational observations made by the Lake witnesses as to Lake's troubled childhood, his grandiose plans, and his lack of empathy/manipulativeness toward others, not merely to label Lake as a serial killer, but to corroborate Lake's domineering positioning toward

[75]Martha Everett eventually testified that she asked Bond not to return to Wilseyville, but Bond assured her, "I will be okay. I am going to settle the score with this guy." 26 RT 6366-7.

appellant. As the trial court observed, "[t]here are serial murders in this case." 26 RT 6378. The point of this expert testimony was to show Lake fit the FBI profile, but appellant did not, and that appellant was merely one of Lake's disposable "Ops."

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

Defense counsel filed a motion to admit Lake's journal. 34 CT 1546. The motion argued the journal was relevant to "Ng's innocence", because it tended to prove that Lake had murdered many other individuals without any knowledge or participation on appellant's part, and that Lake could have committed the murders alleged against appellant without appellant's knowledge or participation. 34 CT 11549-50. Defense counsel offered these portions of the journal that met the Evidence Code Section 1101 standard of admissibility, and argued that the rest was inadmissible hearsay. 34 CT 11551. The journal encompassed dates from October 12, 1983, to November 9, 1984. 34 CT 11570-11595.

The People's Response argued against the admission on relevance grounds of any entries prior to July 1984 when appellant returned to California, and alternatively to admit additional statements that the prosecution viewed as incriminating toward appellant. 34 CT 11607-11615.

At the initial hearing regarding the admissibility of various statements from Lake's diary, the trial court stated that the excerpts offered by the defense were misleading, and that "the diary should be excluded" 26 RT 6395. The defense then offered the diary in its entirety, but the court denied that on the ground that there was "too much junk" in it that was "not very relevant because what is admissible is not being contested at this time", i.e., Lake's admission that he murdered his best friend Charles Gunnar and his brother Donald. 26 RT 6396. The court left open the possibility for the defense "to narrow down a few things out of the diary", 26 RT 6398.

Defense counsel renewed his argument for admission of a re-edited version of Lake's journal entries regarding his activities when appellant was out of state. 28 RT 6757. Defense counsel argued that the diary was important to show that Lake's ostensibly benign conduct with women such as Beverly Lockhart was really malevolent because the diary demonstrated "that she was being looked at as a potential captive" and "was being targeted as a Miranda person". 28 RT 6761-6763.

Defense counsel specifically requested admission of the passage of Lake's diary dated September 10th 1984, in which he states, "the past two months saw Miranda come to fruit", accompanied by a description of O'Koro as a "whore, druggie, and a fool", and his "enjoy[ment] using her"

always phased in the first personal singular "I", and never the plural "we", see 34 CT 11593; 28 RT 6786. Counsel also requested that Lake's diary entries regarding Robert Barufaldi be admitted to show that he was also a Miranda target.

The prosecutor then argued that all of the diary should come in. The trial court refused to admit it under Evidence Code section 352 and 356. 28 RT 6805, with the sole exception of the February 19, 1983 entry. 28 RT 6801.[76] The edited version of the diary offered by the defense is marked as Ex. 661. In response to final pleas by defense counsel regarding the admissibility of the diary entries that showed Lake targeting Lockhart and Barufaldi, the court denied those requests, telling counsel, "you can argue what you want to argue without reference to the diary." 28 RT 6812.

Defense counsel was correct that many of Lake's journal entries fall squarely within Evidence Code sections 1230, declaration against interest, particularly in light of Lake's recognition that his attitudes and actions were both immoral and criminal, and with his expectation that the journal would at some point be read by others. 34 CT 11561-2. Further, the portions offered by the defense were independently admissible under Chambers v.

---

[76]See 34 CT 11571: "Collector" at 2300 tonight record Ah, "the Collector." Has it really been near 20 years I've carried this fantasy? And Miranda. How fitting. My lovely little village in Humboldt, my lovely little prisoner of the future..."

Mississippi, supra, given the parties' agreement that Lake was the author. The journal had "persuasive assurances of trustworthiness" as it reflected Lake's 20 year criminal scheme, Chambers at 302, and was crucial to the defense. Holmes v. South Carolina (2006) 547 U.S. 319.

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

Defense counsel argued for the admissibility of a video tape recording in which Lake and Cricket "engage in what we believe to be a well, a conversation where they were looking at photographs of women and they were picking out women to make them disappear." This targeting activity occurred "during a rather lengthy consensual sadomasochistic episodes [sic] between Lake and Cricket, which we have edited it out completely because I don't think that is particularly relevant..." The prosecution objected that the conversation was just "pillow talk" between Leonard Lake and Claralyn Balasz ["Cricket"]", 28 RT 6764-6766.

Defense counsel further argued in favor of support of admission, and the court did note that Lake needed help getting victims, confirming the defense theory that Lake was trying to get Cricket to help him get victims. The court excluded the tape because "there is no plan to do anything"; "little girls that are mentioned in the tape are alive"; and the tape was "remote [in

time]." 28 RT 6780. Those reasons were erroneous. Part of the defense was a demonstration that Lake engaged in other criminal conduct aided wittingly or unwittingly by other people. For this reason, the very remoteness of the videotape to the pending charges in the temporal sense in the thematic sense of demonstrating Lake's abiding criminal activities independent of appellant.

8. Erroneous refusal to permit the defense to recall Claralyn ["Cricket"] Balasz after appellant testified.

Defense counsel initially intended to call Cricket for lengthy testimony – "a full day, if not more." 34 CT 11543. However, when she was called by the defense, she was only asked whether she had received immunity with respect to the murders of Dubs' family, Cosner, Peranteau, Gerald, Carroll, Allen, the Bond/O'Connor family, Charles Gunner, Randy Jacobsen, Tom Meyers, Donald Lake, Sheryl O'Koro, Maurice Rock, and Stapley. 27 RT 6578. [She had].

That position changed substantially after appellant insisted on testifying. At that point, defense counsel requested the opportunity to recall Cricket because the complexion of the defense had changed significantly with appellant's testimony. 32 RT 7690. At that point, the need to corroborate important parts of appellant's testimony through her testimony outweighed potential damage she could have caused. The trial court denied this request on the grounds that the defense had previously had an

opportunity to examine Cricket, and also that she was not then present and available to testify, based on counsel's representation that her doctor had told her she could not travel that day because of bronchial infection, but would be available the following day. 32 RT 7690. The court denied the request to reopen. 32 RT 7691-2.

These rulings individually and cumulatively violated appellant's sixth amendment right to present an adequate defense. Crane v. Kentucky (1986) 476 US 683; Olden v. Kentucky (1988) 488 US 227. Lake's diaries were objective and irrefutable windows into his manipulative course of conduct that the jury had to understand in order to find a reasonable doubt regarding appellant's culpability, and the other evidence further corroborated the defense.

C. The Resulting Prejudice

The cumulative effect of the trial court's exclusionary rulings prevented the defense from adequately demonstrating to the jury that Lake was a highly secretive and diabolical psychopath who manipulated people without their realizing it. Because appellant had a number of undeniable ties to Lake, there was a great danger of the jury finding him guilty of Lake's murders on the basis that he must have known what Lake was doing. The excluded evidence would have shown that entirely innocent people such as

Beverly Lockhart and Roger Barufaldi also had contacts with Lake that appeared relatively unremarkable, but that unbeknownst to them were part of Lake's malevolent Miranda plan, albeit as victims rather than abettors.

In addition, the excluded evidence was essential to corroborate appellant's testimony that he was in effect an unwitting pawn in Lake's larger criminal scheme. Without the diary and other corroborating evidence, the jury could well have discounted appellant's testimony as being self serving and straining credulity. It was essential to the defense to demonstrate that Lake had repeatedly bamboozled other people in the course of his Machiavellian machinations, without triggering any awareness or suspicion on their part. Equally important, this evidence demonstrated a modus operandi on Lake's part in making a point of using other people in his criminal scheme without telling them what their actual role was.

Among the crucial portions of Lake's journal that were kept from the jury were the following passages. The spelling is as rendered in the journal.[77]

Jan. 7, 1983 Snooped around her apartment...Beverly Lockhart...mucho drugs...heavy user of men. This entry shows Lake's clandestine conduct toward Ms. Lockhart as an individual who otherwise did not see any ulterior or undisclosed agenda on Lake's part.

[77] The text of the motion including these passages is found at 32 CT 10432 et seq.

Feb. 4, 1983 I must leave this city. I have to return to the country not only for my own security and peace of mind, but even more, for the privacy to create a true base of operations. The country, with an adjacent slope of suitable size for the construction of an underground base. . I can peacefully spend my hours moving earth and building an underground shelter...at lease [sic] for recon...Establishment of suitable line of females to help cohabitate same. This passage reflects the development of Lake's private plan for his secret kidnap chamber.

Feb 6 and 14, 1983 Wrote "Donald" letter for mom. ...She got Don's letter. This passage reflects Lake's deviousness in writing and sending forged letters to his mother, purportedly from his brother Donald, whom he had already murdered.

31 Mar [1983] Ammusing...Our "land of the free" is not prepared to deal effectively with a truly free man. What can they do to one who carries cyanide pills in his pockets? When death holds no fears...When there is no responsibilities beyond the next meal? Society – you are being socked and you don't understand by who or why. And if you did, you a powerless against one who is not afraid to die. This passage reflects the extent of Lake's sociopathic disorder, his willingness to pillage society without pang of remorse, and his delusions of power.

Monday May 9 [1983] Dreams again. One fun and sexual, the other, court and trial for my crimes. Almost amusing however, very light in any event. I ma a dangerous person. Society would worry if they knew I existed and what I was up to. ... This passage re-confirms Lake's devotion to dangerous criminal activities long before appellant returned to California, and his lack of conscience or remorse.

July 6 [1983] Went to Myers Flat for painting supplies and post up notice for young labor force to start UGF. Began planning operation Miranda.. This passage demonstrates that Lake used dupes in his larger criminal schemes, and that he began his specific Miranda preparations long before appellant was in California.

July 17]1983] Then put in another hour plus diging first permanent burial hole for medical supplies. Cleaned barrels and inserted first. Inventoried medical supplies. Found cynanide Bottle broken. Salvage what I could. Set out some poison milk for kitties. Last night probable kill down graded to only wounded. Minor at that. Did some target shooting with 22. Killed kitten (Confirmed). This passage demonstrates more of Lake's matter of fact sociopathic conduct.

Jan 8 [1984] 1983 was the year of Miranda. Started (and abandon) in Humboldt County and restarted here. M is a serious underground constructionment to:

(1) Provides facilities for my sexual fantasies

(2) Provide physical security for myself and my possessions

(3) Provide limited (very) protection from nuclear fallout.

This passage demonstrates Lake's continuing commitment to his criminal scheme, entirely without the knowledge and participation of appellant.

This passage demonstrates Lake's continuing commitment to his criminal scheme, entirely without the knowledge and participation of appellant.

Feb 29 [1984] Thought a lot about Beth today. She might be a good candidate for Miranda. This entry shows Lake plotting about using unsuspecting people in his criminal scheme.

Mar 5 [1984] went to S.J. Both checks were there. Expect to close fish very soon. Responded to an ad in Spectator. Queer wants to give BJ's. went over to his house to case the place. Nothing of immediate grabbable value so I let him give me head. Slow and deep like I like it. With a little work I might be able to pass for him. Consider a Fish-like operation.

This passage documents Lake's continuing schemes to kill and prey on others. Just as Lake had set himself up to collect his brother's disability checks after he killed his brother, he was contemplating a similar plan to kill the homosexual he had just encountered and assume his identity.

July 4 [1984] Drove to 19th & met my new roomies/unpacked. Met Marcia. Age 29. Looks and acts younger. Spacy SSI. Minor mental case. Nomenally attractive. Doper. Reasonably poor. Might attempt to put the make upon her. This passage in conjunction with the next confirms Lake's constantly predatory and manipulative approach to other people.

July 5 [1984] Room for on victim in back yard.

June [July] 10 [1984] Started teaching Charlie to drive. He is very hesitant to get involved in my plan. This passage shows appellant's resistance to participation in Lake's criminal schemes.

Sept. 10 [1984] The gap between this writing and the last was to allow a period of Time to past that was best left unrecorded. In these month I have acquired a now toy of good value. I have also learned items on interesting personal value.

I have learned that my programming of youth...that which is called morality either was not given or was given poorly. To all purposes save a very few, I have no morality. The hows and whys of this discovery serve to

n purpose being recorded. Accept it as fact. In terms of life or death, neither seems to move me.

The past two months saw Miranda come to fruit. That taught me more. The perfect woman for me is one who is totally controld, a woman who does exactly what she is told and nothing else. There are no sexual problems with a totally submissive woman. There are not frustrations. There are only pleasure and contentment. I have observed (I believe) one woman who found this not only acceptable but even desireable I doubt this will be the norm and in the case the woman's low mentality probably affected the discovery. A whore, druggy and fool. Still, I enjoyed using her and (seemingly) she enjoyed being used. I do hope I do better next time however.

Operation Alpha helped my money needs. Pink Palace I & II helped with money and pussy. Fish was formally closed with the return of the van. Again I am low on money and lacking Xportation. Again I must act. This passage is a virtual confession to the murders of two of the Pink Palace residents, with a third on the immediate horizon, as follows.

Sept 11 [1984] My thoughts turn to P.P. III. Lake focuses on another victim.

Oct 15 [1984] Worked 2 hours for C. Coordinated with III and completed op. Pulled off with no hitch. It is routine now Sweat, dirt, but no regrets. This is a cold-blooded confession to another murder that from the context was entirely single-handed and "routine".

Oct. 19 [1984] Attempted to locate available P.O Box for III. This passage reflects Lake's repeated murder/identity theft modus operandi.

The jury should have been permitted to receive this extremely reliable evidence of Lake's homicidal conduct that was entirely independent of appellant and that demonstrated his continuing manipulation of others to facilitate his criminal schemes. Instead, the jury got mere snippets, not the real story from the perpetrator's own journal.

One key illustration of the prejudice from the exclusion of the journal is apparent in defense counsel's closing argument. Counsel argued that while appellant did go to great lengths to please Lake and to help him in questionable activities, appellant had a moral compass that enabled him to draw lines that he would not cross, notwithstanding Lake's efforts to inveigle him into darker activities. Counsel used the example of Lake's theft of the picture of Perry MacFarland's wife. Counsel argued that appellant was offended by Lake's conduct in taking the sentimental property of a

friend, and retrieved the picture for MacFarland. 32 RT 7915. [78] That was a positive defense theme, but there was no actual evidence that appellant had to persuade Lake to give back the picture, or to stand up to Lake directly. How much better it would have been to illustrate the crucial point that appellant did not voluntarily acquiesce to all of lake's criminal schemes by incontrovertible evidence of Lake's own lament that appellant "is very hesitant to get involved in my plan." 34 CT 11593.

Another evidentiary area that the court excluded was the evidence of the antagonism between Lake and the drug dealers Bond and Stapley that had nothing to do with appellant, and which apparently lead to their demise (as well as that of O'Connor and her child). This evidence was important to show that appellant had a very small role in Lake's overall criminal relations with them, i.e, assisting Lake with the false imprisonment of O'Connor, as memorialized on the M Ladies video tape. It was important to show the jury that Lake had a major motive to do away with Bond and Stapley entirely

---

78 And so for Leonard Lake to rip off this guy's wife's picture to Charles Ng was a line there. Wait, don't go over that line. And he gets the picture back. I bring that up so -- to help you to understand, yes, the prosecution may say yes, there is no line there that he won't cross for lake, but there is a line. There is still a conscience there. It's reasonable. It's reasonable to believe that Charles Ng was willing to help lake out to a certain extent, but no further. and if that's reasonable, which I wholeheartedly submit to you that it is, if that's just as reasonable as the prosecution's theory that, well, Charles Ng had this agreement with lake to kill, your verdict should be not guilty.

independent of any activities he had in conjunction with appellant and that appellant had a bit player role in this aspect of Lake's psychopathic drama.

Similarly, prejudicial was the exclusion of the testimony of expert witness Robert Rassler because that testimony was not merely intended to label Lake as a serial killer, but in addition to show a number of behavioral attributes associated with serial killers, particularly their need to keep their overall homicidal plans secret, and not disclose them to family, co-participants, their lack of empathy and manipulation of others, etc. All of this evidence was necessary to corroborate appellant's own testimony regarding his unwitting role in Lake's criminal plan. Case law recognizes the necessity of corroborating the testimony of a defendant that would by itself be subject to skepticism on the part of the jury. See Foster v. Lockhart (8th Cir. 1993) 9 F. 3d 722 [granting habeas corpus relief for IAC in failing to present medical evidence corroborating the theory of defense]; Brown v. Myers (9th Cir. 1998) 137 F. 3d 1154 [granting habeas corpus relief for IAC because counsel failed to investigate alibi witnesses who would have corroborated the petitioner's testimony – "as it was, without any corroborating witnesses, Melvin's bare testimony left him without any effective defense"].

The trial prosecutors took advantage of the absence of corroboration in arguing against appellant's credibility, and spent some twenty pages of closing argument contending that numerous aspects of appellant's uncorroborated testimony were not credible. 33 RT 8072 – 8102. All of the independent and objective evidence regarding Lake's modus operandi and criminal plans contained in the excluded evidence would have "len[t] credibility to [petitioner's] story" and "would have created more equilibrium in the evidence presented to the jury". Riley v. Payne (9th Cir. 2003) 352 F. 3d 131, 1320. For these reasons, appellant's convictions must be reversed.

XII. APPELLAT 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. Summary of Facts.

The court and counsel discussed jury instructions on January 20, 1999, 28 RT 6878, including a number of special instructions proposed by the defense.

The defense requested a unanimity instruction as to the jury determination of what act appellant committed as a basis for a first degree murder verdict, noting that there were three theories of liability given to the

jury: actual killer, aider and abettor, and conspirator. 28 RT 6919.[79] The court acknowledged that the jury could split "four, four and four" as to what constituted appellant's culpable conduct, but given the existing state of the law, refused to instruct on unanimity. 28 RT 6920 – 1 [noting that "it will be really funny if you're right" because "then you can come back and we'll have a real laugh;" (jury instruction conference humor, however well – meant, generally doesn't stand the test of time)].

Defense counsel also broached a request for instructions on lesser related offenses under the federal constitutional guarantee of "theory of the case" instructions. 28 RT 6923, referring to a proposed special instruction that modified CALJIC 17.10, 36 CT 12035 - 12038. After some discussion of the state law prohibition against lesser-related offenses under People v. Birks (1998) 19 Cal.4th 108, the court deferred the issue pending the submission of federal authority by the defense. 28 RT 6924 – 5. Defense counsel later argued that "in this particular case where our defense is focused on conceding those, many of those lesser related charges," the jury should be instructed that the defendant theory of the case was that he may

[79] This request occurred in the context of the discussion of the intent to kill element of the special circumstance instruction. That instruction enumerated the three possible bases for a first degree murder conviction – "when he participated as a co-conspirator with, or aided and abetted an actor in commission of a murder in the first degree, or did the actual killing." 29 RT 6918.

have committed some crimes, but not the far more serious crimes that the prosecution elected to charge. Counsel expressly invoked appellant federal due process right to these instructions. 29 RT 6956. The prosecution objected and the court denied the request. 29 RT 6957.

The defense offered a special instruction to require the jury to determine whether Orange County was a proper jurisdiction to adjudicate counts I - VI, 36 CT 12044. The court denied the instruction on vicinage/jurisdiction because it was a "legal issue", 28 RT 6926, and noted on the instruction itself, "[the] issue is whether Calaveras County was a proper county." 36 CT 12044 (emphasis in original).

B. The Trial Court's Errors.

1. The failure to instruct on unanimity.

Defense counsel was correct that the jury should have been instructed to make a unanimous finding as to the particular conduct on appellant's part that supported a first degree murder conviction and/or a special circumstances finding. People v. Majors (1998) 18 Cal.4th 385, 408 reiterated a general principle that "the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator," but the specific instruction sought here related to a unanimity instruction as to the conduct constituting the actus reus of the offense.

That crucial distinction was recognized and vindicated in People v. Napoles (2002) 104 Cal.App.4th 108, 118 – 119. The jury had been instructed that "It is not necessary for all of the jurors to agree that a defendant committed the same act or acts or omission or omissions," which the Court of Appeal held to be erroneous – "Since evidence was presented of more than one specific act, reasonable jurors would have understood that a conviction was permissible if different sets of jurors believed a defendant committed different single acts or omissions constituting abuse, without all 12 agreeing on the commission of any single violation." Because "[s]uch a result would violate the criminal defendant's right to a unanimous verdict," the Court of Appeal concluded that the trial court "erred in giving this particular non-unanimity instruction." Id. at 118 – 9.

The federal constitutional law emanating from In re Winship (1970) 397 U.S. 358 confirms the constitutional necessity of a unanimity instruction under the circumstances of this case. Apprendi v. New Jersey (2000) 530 U.S. 466 confirmed that each fact necessary to impose a particular punishment has to be proved beyond a reasonable doubt. Cases following Apprendi have reiterated that principle in each context in which it has been considered. See, e.g., Cunningham v. California (2007) 549 U.S. 207.

Finally, the argument urged here is supported by Schad v. Arizona (1991) 501 U.S. 624, 626, which differentiated between statutory alternatives that are "mere means of committing the crime, rather than independent elements", and concluded that the due process clause does not require unanimous jury verdicts as to "mere means", but does require unanimity as to "independent elements." The jury in this case was instructed with three alternative sets of independent elements: conspiracy, aiding and abetting, and actual perpetrator. Appellant was thus deprived of due process by the failure to give a jury unanimity instruction as requested.

2. The refusal to instruct on lesser-related offenses.

The trial court relied on People v. Birks (1998) 19 Cal.4th 108 as the basis for refusing the requested instruction, but appellant also made a federal due process argument that has a different conceptual basis than that rejected in Birks. Defense counsel argued that the lesser related offense instructions should be given to provide the jury with appellant's theory of the case, i.e., that he may have been guilty of certain uncharged offenses, but that he was not guilty of the charged offenses. Counsel was not seeking jury verdict forms as to the lesser related offenses, but only jury instructions that set out the parameters of appellant's culpability, from which to argue not guilty as to the charged offenses. Conde v. Henry (1999) 198 F.3d 734, 739 [federal

constitutional error to refuse to instruct on simple kidnapping where defendant charged with kidnapping for robbery].

3. The refusal to instruct on vicinage/jurisdiction.

People v. Posey (2004) 32 Cal.4th 193 held that the determination of venue was an issue of law of pretrial determination by the court, not a question for the jury. However, Posey plainly differentiated between venue and vicinage – "the Legislature may define venue pursuant to statutory provisions, subject only to such constraints as may be imposed by the United States and California Constitutions, particularly with regard to vicinage and due process of law." Id. at 209. Vicinage is a constitutional right that "implicate[s] the trial court's fundamental jurisdiction in the sense of subject matter jurisdiction, which is the authority of the court to consider and decide the criminal action itself." Id. at 208.

Under the federal constitutional requirements of In re Winship and Apprendi, supra, appellant was entitled to a jury instruction regarding the existence of vicinage in Orange county.

C. The Requirement of Reversal.

The standard of reversal for these instructional error individually and cumulatively is whether they are harmless beyond a reasonable doubt. Conde v. Henry, supra. The failure to instruct on unanimity cannot be

deemed harmless because the evidence was equivocal as to appellant's role in the charged murders, given the absence of any eyewitness testimony, any forensic evidence, or any confessions or admissions. The failure to instruct on lesser related offenses was not harmless because it withheld the instructional foundation for appellant's theory of defense, i.e., that appellant may have been involved on the periphery of appellant's plan, and may have been legally culpable as an accessory after the fact, or for some lesser offense as false imprisonment, but there was no basis to convict him of the murders. Finally, the failure to instruct on vicinage is manifestly prejudicial as to counts I – VI because Orange County had no connection to the offenses whatsoever.

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. Summary of Facts.

On April 14, 1999, attorney Kelley raised the issue of improper contact between Calaveras County District Attorney Investigator Hrdlicka and juror #174. Kelley informed the court that during a recess he had viewed investigator Hrdlicka having a "nice friendly chat" with juror 174, and that when he approached Hrdlicka and pointed out that he was talking to

a sitting juror, Hrdlicka responded, "I'm very well aware of that." Kelley reported that both Hrdlicka and juror 174 were "friendly" and "laughing" during the interchange. When questioned by the court, Hrdlicka stated, "I have no excuse for my behavior, and I apologize to the court and to all participants." He explained that the conversation had expanded from discussion of his unusual neckties to their respective experiences with shoulder surgery. 37 RT 8869.

The court also examined juror 174, who confirmed that she and Hrdlicka had discussed his ties and their shoulder surgeries. The tenor of the conversation went beyond particular curiosity about a single tie and crossed into the personal. Juror 174 acknowledged that she told Hrdlicka that "[her] fiancé would probably wear something like that where he wouldn't wear a regular tie." 37 RT 8874. Hrdlicka advised her where she could buy ties like his, i.e., a very chummy conversation that commingled the juror's personal life with Hrdlicka's extra-judicial role as fashion consultant.

Juror 174 added that Hrdlicka had also told her that victim Stapley's father had two hip and one knee replacement operations, and that the rehabilitation process was long and difficult. 37 RT 8874. When asked whether the two of them had discussed anything related to the case, she answered, ""[h]e said that Mr. Stapley had his knees replaced" and "if that is

about the case, then we spoke about the case", but "otherwise nothing." 3337 RT 8875.

Upon further inquiry, juror 174 reported that there had been an ongoing out-of-court contacts between Hrdlicka and members of the jury from the outset of the case. She and a number of the other jurors had been interested in the unusual ties that Hrdlicka frequently wore to court, and had asked to let them look at the ties more closely when they were in the elevator. This type of interchange had started early in the case, and occurred more than a dozen times:

> [Juror 174]. But there have been others that have asked him the same type of thing.. It got – for awhile it got to be a standing, "let me see your tie" everytime he walked out the elevator.

Q. Everybody on the jury?

A. Just about, yeah.

Q. You would to out in a group and just like –

A. We would all be sitting out there and he would come out. And so he would just kind of open his coat where we can all see --

Q. How many times do you think this has happened?

A. Probably a dozen or more in all this time. 37 RT 8877 – 8880.

Hrdlicka and the majority of the jury had thus developed a ritual focused on Hrdlicka's ties, and he clearly participated in and facilitated the

interaction, displaying the tie-of-the-day to the waiting jurors as he emerged from the elevator.

After inquiry of the remaining jurors, defense counsel made a motion for a penalty mistrial on the basis that Hrdlicka had made a sustained effort to ingratiate himself to the jurors. Kelley also pointed out that there had been inconsistencies among the jurors as far as their reports of the extent of what had occurred. In conjunction with the request for mistrial, Kelly specifically objected to any consideration of dismissal of juror 174, because she was one of the jurors who had held out for a hung jury on the murder charge regarding Paul Cosner. 37 RT 8973. The court made a finding of misconduct on the part of Hrdlicka and Juror 174, but found no prejudice.[80] 37 RT 8966.

Defense counsel prepared and submitted an admonition to juror 174 and the other jurors regarding the contacts with Hrdlicka, and the court responded that the draft admonition was "so bad I would like to rip it up." 37 RT 8983-1.

---

80 "Here is what I am finding: there was misconduct. I will tell you what my findings are. Misconduct by Mitch Hrdlicka; misconduct by juror number 10 for not obeying the court's order. No prejudice whatsoever to any of the other jurors over any comments, at least that are now before the court concerning Mr. Hrdlicka's unusual ties.

During this conversation, the Attorney General reported that juror 174 had been overheard by Stapley's mother talking on a telephone and that Stapley's mother had heard the words "mistrial" and "San Andreas Investigator." Juror 174, when requestioned, acknowledged talking to her fiancé on the phone, but denied talking about the court's inquiry that morning. 17 RT 8998. She did testify that she had mentioned Mr. Stapley's knee surgeries to other jurors at lunch that day. 37 RT 9010. Mr. Stapley had testified during the penalty phase regarding the adverse emotional and financial consequences of the murder and trial. 34 RT 8449-8454.

Attorney Kelley stated that he was considering an additional motion for mistrial based on his concern that juror 174 may have been planning or actually writing a book about the case. The court excused her for misconduct, denied the defense motion for permission to select a replacement alternative, and denied the motion for mistrial. 37 RT 9402. The court circulated its intended instruction regarding Hrdlicka's contact with the jurors, commented that Hrdlicka must have been "brain dead" to have engaged in this conduct, and banned him from the courthouse. 37 RT 9047.

B. The Trial Court's Errors.

The trial court erred in failing to declare a mistrial based on the evidence regarding investigator Hrdlicka's sustained effort to promote a chummy relationship with many if not most of the jurors. The trial court was in fact charitable in characterizing investigator Hrdlicka's actions as merely "brain dead" because they were not merely oblivious, they were all too likely to create an inappropriate sense of bonding and friendship between the jurors and Hrdlicka as an ambassador for the prosecution.

The inquiry of the jurors clearly reflects that Hrdlicka had managed to develop positive feelings of rapport and camaraderie with the jurors. That extra-judicial bond would have made it more difficult for the jury to return a verdict that they thought might disappoint Hrdlicka or being an affront to him.

The case law clearly precludes a party or individual identified with the party from establishing extrajudicial relationships with jurors during the course of a trial. The touchstone for unauthorized juror contact is Remmer v. United States (1954) 347 U.S. 227, 229:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but

> the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer was recently followed in Caliendo v. Warden (9th Cir. 2003) 365 F.3d 691, in which a California conviction was reversed because a police officer who had testified at trial had subsequently engaged in courthouse conversations with jurors during recesses while deliberations were occurring. The trial court held a hearing at which the officer and the jurors testified that "that they did not discuss anything related to the trial," and that "[t]he topics of conversation included baseball, eating, a juror's neighbor, [the officer]'s exercise habits and equipment, and his heavy police workload", id. at 693. The trial court denied a mistrial motion on the basis that, while the officer "certainly should have known better," the court "will accept the jurors at their word that they will not let whatever conversation they had with Detective Mundell influence their judgment in the case as to whether or not Mr. Caliendo, based upon the evidence that has been introduced here in court, is either guilty or not guilty of these charges." Id. at 694.

The Ninth Circuit granted habeas corpus relief because the California courts had failed to apply the clearly established rule of Mattox v. United States (1892) 146 U.S. 140, 150 that "private communications, possibly

prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." The Ninth Circuit held that "[w]e and other circuits have 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." Caliendo at 696, relying on United States v. Armstrong (9th Cir. 1981) 654 F.2d 1328. Caliendo reversed the conviction because the California courts had failed to apply the rebuttable presumption of prejudice.

The case law is clear that the rebuttable presumption applies to unauthorized contacts even if the content of the communications does not purport to relate to substance of the pending charges. United States v. O'Brien (1st Cir. 1992) 972 F.2d 12, 13 – 15 [upholding a guilty verdict but applying the Mattox presumption where a police officer who was a potential prosecution witness, but who did not testify, spoke with three jurors during a recess about matters unrelated to the case]. Rinker v. County of Napa (9th Cir. 1983) 724 F.2d 1352, 1354, applied the Mattox rule to a civil action and stated that the "harm inherent in deliberate contact or communication can take the form of subtly creating juror empathy with the party and reflecting

poorly on the jury system."

Hrdlicka clearly conveyed information to the jurors that would make them more sympathetic to him, to the prosecution, and to the families of the victims, e.g., by telling juror 174 about the difficult medical tribulations of Stapley's father in addition to his tribulations as father of a murder victim. That was information that the jury had no reason to know about, but it likely had the effect of evoking a degree of sympathy for Stapley's father, just as one would feel sympathy for anyone who had recently undergone a major hospital procedure. He had been engaged in the extra-judicial communications with at least some jurors from the beginning of the case, and had established an ongoing cordial relationship with them. That course of conduct was sufficient to create a possibility of prejudice and trigger the application of the Mattox rebuttable presumption of prejudice. "The Mattox rule applies when an unauthorized communication with a juror crosses a low threshold to create the potential for prejudice." Caliendo supra, at 697. The trial court erred in failing to apply that presumption in adjudicating appellant's motion for mistrial.

C. The Requirement of Reversal.

Reversal is required in this case because the trial court failed to apply the rebuttable presumption of prejudice established in Mattox, supra, where

the potential for prejudice was as clearly present as it was in Caliendo, supra. "This contact was possibly prejudicial because Detective Mundell was a critical prosecution witness and his interaction with multiple jurors lasted for twenty minutes," and "[a]lthough the conversation did not directly concern the trial, it went beyond 'a mere inadvertent or accidental contact involving only an exchange of greeting in order to avoid an appearance of discourtesy'". 365 F.3d at 698.

The ongoing contacts between Hrdlicka and the jurors went "beyond 'a mere inadvertent or accidental contact'", and constituted a shared diversion that continued throughout both phases of the trial. The jurors performed the role of appreciative audience, and Hrdlicka performed the role of sartorial entertainer. The likelihood of prejudice was clear from the "juror empathy" that was established between Hrdlicka and the jurors, see Rinker v. County of Napa, supra. United States v. Rutherford (2004) 371 F.3d 364 remanded for further evidentiary hearing as to whether the non-verbal conduct of federal agents toward the jury may have intimidated them into a guilty verdict. The same principle applies here, but in the converse context of inappropriately friendly communications between Hrdlicka and the jurors. Rutherford applied the presumption of prejudice to the non-verbal conduct -- "Because of the perceived, as well as actual, power that government actors

have at their disposal and the positions of authority that they occupy, we have held that even seemingly innocuous juror conversations and contact between such individuals and a juror can trigger a presumption of prejudice." 371 F.3d at 643.

The trial court erred in failing to apply the presumption of prejudice and in declaring that there was no prejudice arising from the jurors ongoing interchanges with Hrdlicka about his ties. The court failed to acknowledge that jurors are often reluctant to disclose whether they were influenced by an improper contact. See Jeffries v. Wood, 114 F.3d 1484, 1491 (9th Cir. 1997) (en banc) [stating that the prejudicial effect of an extrinsic contact "may be substantial even though it is not perceived by the juror, and a juror's good faith cannot counter this effect"]; United States v. Barfield Co. Inc., (5th Cir. 1996) 359 F.2d 120, 124 [stating that juror's testimony that he was not influenced by a conversation he had with one of the parties about non-trial related matters, was not dispositive because "it would no doubt be difficult to have a juror admit that he was influenced by such an approach."]. Hrdlicka had testified for the prosecution at the guilt phase, and was a regular courtroom figure as an official representative of the prosecution. His extrajudicial role as an ingratiating or endearing fashion friend likely established a bond of "juror empathy" that extended beyond him

individually to the jurors' view of the prosecution as a whole. Given the closeness of the case on the penalty issue, as indicated by the lengthy period of deliberations, the presumption of prejudice from the misconduct was not rebutted on this record.

Under these circumstances, the improper course of juror contacts cannot be deemed harmless beyond a reasonable doubt, and the penalty verdict must be reversed.

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. Summary of Facts.

The jury began its jury deliberations on Monday, April 26, 41 RT 9904. On the morning of Monday, May 3, following the first week of jury deliberations, the court convened a "closed session" at which only District Attorney Smith, Attorney General Honnaka, and attorney Clapp were present, in addition to the court reporter and court staff. The court informed counsel that "it was reported to this court some time late Friday afternoon that a sitting juror was contacted by an individual who identified himself as Charles Ng by telephone." Ibid. The court stated that it wanted to question the juror in a confidential manner.

After attorneys Kelley and Merwin joined the closed session, the court proposed to "question her to see what her state of mind was." Attorney Merwin posed the question, "should Mr. Ng be present?" and the court responded, "I don't think we have to have him present for this first hearing"; the prosecutor stated, "I have no thoughts to offer you, I really don't"; and defense attorney Kelley flatly stated, "I don't think he should be present either." 41 RT 9912. The court expressed a concern that "I don't know how the juror would feel if he [appellant] were present", and "that is my concern." Ibid. The court stated that "this is a unique situation" and that "defendants even in capital cases don't have to be present at all hearings."

The bailiff then recited his report of the call that he had taken from the juror, in which someone had called her, asked whether she was on the Ng jury, identified himself as "Charles", and told her that "I like you very much." 41 RT 9913. The bailiff informed the court that the call had occurred at approximately 3:30 p.m., and that the bailiff had then contacted a deputy at the Orange County Jail who stated that appellant had been using the phone for about two hours up until approximately 3:30. There was some discussion whether appellant could make non-collect calls from the county jail and a general consensus that he could not. 41 RT 9914.

The trial court then conducted an examination of juror #12 who reported her version of the telephone call, essentially the same conversation as the bailiff had reported. The juror stated that the caller initially said, "this is Charles", but she "didn't pay any attention to it because that is [her] ex-husband's name" and "[she] thought he was calling." The caller then asked if he had reached juror 12 and she asked directly whether this was Charles Ng. The caller answered "oh, I am sorry. I just wanted to tell you, you are very nice." She then asked how the person had gotten her number; the caller responded "I had a friend help me"; and the juror said, "you can't call me", hung up and immediately called the bailiff. 41 RT 9916-9917.

The court asked whether she had recognized the voice and she answered "I don't recognize it", adding "it wasn't a voice that I would know". The court reminded her that she had recently heard appellant testify in court at considerable length, and the juror reaffirmed that she could not identify the voice as appellant's or anyone else's. 41 RT 9917. The court then asked whether the phone call affected her ability to remain partial as a juror and she answered:

A: "I don't think I have a problem with that. And I was shocked at the time, but that really does not have anything to do with what, you know, we were deliberating on, so –
Q: Could you avoid telling the other jurors about this call?
A: Oh, yes.
Q: Whoever made it?

A: I wouldn't tell. Yeah, I could avoid it." 41 RT 9917-9918

After some further questioning in which juror 12 again reconfirmed that she could not identify the caller as appellant, and after she reaffirmed she could continue deliberating, the court and counsel continued their discussion. The trial court commented that "at the time she thought it was Charles Ng on the phone," and asked counsel whether they wanted some time to formulate a response. Attorney Kelley immediately stated, "[t]here has been no prejudice shown" so "I think we should just continue to let them deliberate." 41 RT 9921. The Attorney General agreed.

When the court asked "shall we bring Mr. Ng and apprise him of what has been going on?", attorney Kelley stated, "I would rather do that myself unless you feel like you need to", and the court acceded to counsel's preference.

The court called juror 12 back into the courtroom, elicited her acknowledgement that "we don't know who made the phone call" and "it would be unfair to assume Mr. Ng made the phone call", and stated "it is important that you totally disregard this, what appears to be a rather traumatic event." The juror averred that she could do that. The court directed her not to mention the incident to anybody and told the juror that if

she can't "abide" to let the court know "because I don't want to be unfair to you either". 41 RT 9924.

The court reconvened in open court with appellant present and the following occurred:

> The Court: In the Ng matter, all counsel are present; Mr. Ng is present. And Mr. Ng has been told about the closed hearing this morning?
> Mr. Kelley: Yeah.
> The Court: And Mr. Ng, you were not invited for several reasons. One is I was concerned that you would react one way or another; that would create problem which we avoided by not having you here. I didn't want to lose a juror without good cause and all counsel agreed to the proceeding.
> The Defendant: Over my objection. 41 RT 9926 (emphasis supplied).

The jury resumed its deliberations and a death verdict was returned that afternoon.

B. The Trial Court's Error.

The trial court unilaterally excluded appellant from this crucial phase of the proceeding where the court investigated clearly improper and potentially prejudicial unauthorized contact with a deliberating juror. Inquiries into juror misconduct, juror tampering and other potential infringements on the integrity of the jury decision making process are clearly proceedings at which the defendant is entitled to be present. Rushen v. Spain (1983) 464 U.S. 114, 117 ["our cases recognize that the right to

personal presence at all critical stages of the trial and the right to counsel are fundamentals of each criminal defendant", in the context of the trial court interviewing a juror about her knowledge of a murder connected with members of the Black Panther group, to which the defendants belong].

Campbell v. Wood (9th Cir. 1994) 18 F.3d 662 confirmed that "a person charged with a felony has a fundamental right to be present at every stage of the trial", including proceedings relating to jury matters, subject to the same rules of waiver that applied to other fundamental constitutional rights. 18 F.3d at 671. Monroe v. Kuhlman (2nd Cir. 2006) 433 F.3d 236 confirmed that "[t]he Supreme Court has held that the right to be present at one's criminal trial is protected by due process in cases where, as here, the claimed error does not relate to the defendant's opportunity to confront witnesses or evidence", citing United States v. Gagnon (1985) 470 U.S. 522, 526. Monroe applied the right to be present in the context of a judicial ruling that jurors could examine various exhibits that had been received into evidence during breaks in the court proceedings when the defendant was not present, eventually ruling that because Monroe's capacity to contribute to his defense even if present during the jury viewings was speculative, the state court decision denying relief was not an unreasonable application of Supreme Court law. The important point here is that the right to be present

does apply to non-evidentiary proceedings involving jurors. Accord: Fisher v. Roe (9th Cir. 2001) 263 F.3d 906.

Here, the hearing regarding juror 12's report of what initially appeared to be jury tampering by appellant himself was necessarily a critical stage of the proceedings. There are two reasons for this. If the affected juror believed that appellant had in fact contacted her privately on her home telephone, there is a substantial likelihood that she would have had adversely viewed appellant for this improper conduct. Alternatively, if it was not appellant but someone else who made the telephone call, there was similarly a substantial likelihood that the undisputed shock to the juror would have interfered with her ability to deliberate fairly thereafter. The trial court was therefore correct in immediately convening a hearing to inquire of the juror, but erred in excluding appellant from the proceeding.

The court's initially stated justification for excluding appellant was that "I don't know how the juror would feel if he was present." 41 RT 9912. That rationale is patently untenable because one of the primary objectives of the inquiry was to determine whether the juror had become prejudiced against appellant, and there is no logical way that appellant's presence at the hearing could have adversely affected the reliability of the court's inquiry. The trial court may have been implicitly suggesting that the juror might be

able to maintain her composure better if appellant was not present, but would be more likely to break down if appellant was present. That is hardly a rational basis for excluding appellant, because the juror was going to have to encounter appellant at subsequent phases of the proceeding, including the rendition of the verdict, or responses to jury questions if they occurred. If fact, the jurors all confronted appellant shortly after the conclusion of the closed session colloquy when they returned the death verdict.

The court's post hearing rationale for excluding appellant was that "I was concerned that you would react one way or another" and "I didn't want to lose a juror without good cause." 41 RT 9926. The case law is clear that a defendant can only be excluded from critical phases of trial based on evidence and a finding that he was likely to be disruptive or dangerous. Here, the court relied on nothing except an inchoate hunch or unfounded concern to exclude appellant. If the court did entertain a concern that appellant might cause a disruption, the only constitutionally correct procedure available to the court would have been to address appellant directly prior to the jury inquiry, explain the situation to appellant, ask whether he wanted to be present, and if so, to determine whether there was any reasonable evidentiary basis to conclude that appellant was going to be

disruptive or dangerous during the inquiry. The trial court skipped over that necessary phase entirely.

Next, this was a critical phase where appellant's presence would have been extremely important. The trial court made an initial factual inquiry whether appellant could have been the person who made the telephone call, and then received conflicting information from court staff and counsel. Apparently, appellant did have access to a telephone at the approximate time the call was made, but at the same time appellant could only make collect calls, and the call to juror 12 was not a collect call. Thus, there were important factual issues to which appellant was an essential witness. The court took no further efforts to resolve this factual question.

Had he been present, he could have told the court and counsel who he was talking to at 3:30, and that could have been independently verified. Appellant could have informed the court whether he could make non-collect calls from the county jail, and whether or not he had the ability to make a collect call to one party who could then call a third party such as juror 12. Most county jail telephone systems have internal foils to prevent that type of call. An important focus of the hearing was whether or not appellant had made the telephone call, and appellant was an essential participant in answering that question.

Next, appellant anticipates a waiver argument based on the statement of attorney Kelley that "I don't think he should be present either." 41 RT 9912. First of all, it was appellant's personal right of presence at issue, not counsel's assessment of the need for appellant's presence. Second, appellant objected at the earliest opportunity, albeit after the hearing had been completed and the juror sent back for further deliberations. 41 RT 9926. Third, an attorney cannot validly waive a defendant's presence without consultation with the defendant and compliance with Penal Code Section 977. Attorney Kelley had every opportunity to consult with appellant before unilaterally proceeding without him, but made no effort to do so. Finally, the acrimonious relationship between attorney Kelley individually and appellant throughout the trial proceedings removes any presumption that attorney Kelley was in fact speaking for appellant on this point.

Nor did attorney Kelley make any effort to advocate on appellant's behalf during the hearing. When the court offered to all counsel the opportunity to "think about it and get back to the court", Kelley answered, "there has been no prejudice shown" so "I think we should continue to let them deliberate." 41 RT 9921. Counsel's preference to get back to business as usual in the face of the juror's acknowledgment that the incident the previous Friday was a "shock" to her, and that she was still very "nervous"

about it at the Monday hearing, hardly shows consideration or concern for appellant's interests.

C. The Requirement of Reversal.

The standard of reversal for a violation of a defendant's right of presence is the Chapman standard of harmlessness beyond a reasonable doubt. United States v. Rosales- Rodriquez (9th Cir. 2002) 289 F.3d 1106, 1111. Here, the error must be viewed as prejudicial because juror #12 joined in a death verdict shortly after being sent back to continue deliberations, with the unresolved issue of whether or not it was appellant who had improperly contacted her by telephone. The assurances on the part of juror 12 that she could nonetheless render a fair verdict are substantially undetermined by the trial court's very phrasing of the question to her – "it is important that you totally disregard this, what appears to be a rather traumatic event." 41 RT 9923. This is a situation in which the court's perhaps well meaning directive to "totally disregard" the event was inherently incapable of effectuation.

Moreover the trial court did not undertake the most basic means of palliating the otherwise apparent prejudice, i.e., by conducting a minimal investigation to determine whether appellant could be excluded as the caller, and if so, to inform the juror. The case law imposes a duty on the trial court

to mitigate any likelihood that a jury will attribute an improper contact to the defendant. See United States v. Shapiro (9th Cir. 1982) 669 F.2d 593, 601 [Court must guard against jury assuming one of the parties was responsible for an attempted jury tampering]; United States v. Williams (7th Cir. 1984) 737 F.2d 594, 613 [by talking with jurors, judge acted to avoid the "alarming possibility" that jurors would mistakenly believe threatening call was from either party]. See also United States v. Angulo (9th Cir. 1993) 4 F.3d 843, 847 ["remand[ing] to the district court to hold an evidentiary hearing to determine whether the jurors who knew of the threat were able to act impartially and without bias," at which "[t]he government will be required to show that the threatening telephone call was harmless beyond a reasonable doubt to defendants"].

In fact, there was prejudice in that the juror was left with the unresolved factual issue whether it had been appellant who called her. Counsel could have at least requested that the court take basic steps to determine whether there was clear evidence that it was not appellant who made the call, in which case juror #12 could have been so instructed to relieve her residual concerns that appellant had intrusively contacted her.

Under these circumstances, the trial court's error in excluding appellant from any proceedings and in failing to take any other palliative action could not be deemed harmless beyond a reasonable doubt.

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.

A. Summary of Facts

A prominent aspect of appellant's penalty phase presentation was the testimony from California Department of Correction staff who had contact with appellant while he was incarcerated at Folsom Prison during the pre-trial proceedings in Calaveras County. The thrust of this testimony was to demonstrate that appellant, even if he had been responsible for the eleven murders for which he was convicted while out of prison, would be a non-violent, conforming and productive inmate if sentenced to life without parole. This type of mitigation has been long cognizable under the Eighth and Fourteenth Amendment; see Skipper v. South Carolina (1986) 467 U.S. 1. However, the trial court repeatedly sustained prosecutorial objections to defense counsel's Skipper presentation.

Maurice Geddis, a correctional officer at Folsom, testified that after appellant's extradition from Canada and delivery to Folsom Prison, he was among a group that were "hand picked" by the Folsom Administration to be

appellant's "security escorts", "responsible for making sure he had proper mechanical restraints and just basic security and transportation to and from Calaveras County Court." 36 RT 8710. C.O. Geddis described the procedure by which the C.D.C. staff drove appellant shackled in a van to Calaveras County Superior Court, where he was held in a metal cage when he was not in an actual courtroom. 36 RT 8713. Defense counsel elicited the following type of favorable testimony:

Q: During your time that you transported him – I think you said it was about a year if I recall?
A: Yes.
Q: From time to time did you have to give him directives, stand still, put your hands behind your back, that sort of thing?
A: Uh huh.
Q: Did he ever refuse a directive?
A: No.
Q: Did he always act compliant?
A: Very much so.
Q: Courteous?
A: Yes.
Q: Did you ever have trouble with him whatsoever?
A: None. 36 RT 8715-8716.

Defense counsel then attempted to provide a context for this ostensibly favorable testimony so that the jurors, who were presumably unfamiliar with the security arrangements in prison and the degree of voluntary compliance that inmates could either offer or withhold, would understand that appellant's positive conduct was the result of appellant's internal self-discipline, and not merely the reflections of iron-clad security

arrangements. To this end, counsel asked follow-up questions intended to contrast appellant's compliant conduct with the disruptive and dangerous conduct of others who were equally constrained in terms of physical shackling, etc.

"Q: There had been other inmates during your time that you did have trouble with; is that correct?
A: That is correct.
Q: We are talking about corn fed straps?
A: Yes.
Q: Corn fed, I think strap is named after an inmate, is –
A: Yes, it is.
Q: A guy named Paul Schneider?
A: Yes.
Q: He is a guy when you got him trussed up in the Martin chains, he would still act out?
Mr. Smith: Objection, your Honor, relevancy.
The Court: Sustained. 36 RT 8716.

The same limitation was imposed on the next defense witness from the Department of Corrections, Gerald Coleman. He worked in the prison library from 1991 through 1995 and had contact with appellant when he came to the law library during that period. 16 RT 8724. C.O. Coleman testified that over the course of this three year period, appellant was never a problem, never said any thing disrespectful and was "polite" and "courteous". 36 RT 8728.

Defense counsel then attempted to contrast appellant's positive adjustment to that of other inmates who were similarly constrained but nonetheless caused trouble:

> "Q: Let me ask you this: have you every escorted inmates even though they were restrained but still made you worry for your safety, concern for your safety, someone you really felt like you got to be on full alert, this guy might go off, like Corn Fed, Paul Schneider?
> A: Yes, I have.
> Mr. Smith: I am going to object, relevancy.
> The Court: Sustained. 36 RT 8732

At the same time, defense counsel's objections were overruled when the prosecution asked various questions on cross examination about whether other inmates were treated the same as appellant, e.g. 36 OC RT 8733-34.

Similarly, the prosecutor was permitted over objection to elicit from correctional officers that appellant had certain privileges unavailable to other Folsom inmates. The correction officer explained that appellant's ostensibly preferential treatment e.g. more access to the telephone to call his attorneys, was due to the fact that appellant was an un-sentenced pre-trial detainee rather than a sentenced prisoner. 36 RT 8859-8860. The prosecution was unfairly permitted to compare appellant's custodial situation to that of other inmates to blunt the mitigating effect of the defense evidence, while the defense was not permitted to compare appellant's custodial conduct to that of other inmates to highlight the mitigating import of the evidence.

B. The Trial Court's Error.

Defense counsel was improperly restricted in presenting to the jury the context of prison life to enable the jury to accord appropriate weight to the mitigation evidence regarding appellant's compliant conduct while a safe-keeper at Folsom Prison. In the absence of the evidence that counsel was foreclosed from eliciting, the jury may well have thought that the uniformly positive descriptions of appellant's custodial conduct were of little predictive value as to appellant's future conduct. Each of the correctional officers testified to the chains, handcuffs and other restraints that were put on appellant after he was out of his cell whether in prison or being transported to Calaveras County. Under these circumstances, the jury could have thought that it would have been virtually impossible to cause any trouble, so that appellant's track record in not causing trouble was not particularly relevant or impressive.

Defense counsel sought to show that appellant's almost 15 year track record of compliant custodial conduct was not the product of extra tight security that would have turned Godzilla into a house pet, but rather was the product of appellant's internal character, deference to authority and compliant nature in a custodial setting. Counsel sought to give meaning to the mitigating evidence that it was appellant's character not the chains and

handcuffs that was the driving force in appellant's positive institutional adjustment. That only could be shown to the jury by testimony that other inmates subject to the same shackles and restraints were undeterred in their violent conduct.

Defense counsel's attempt to present this evidence was particularly important because the conditions of life in prison are not generally known to the general populace of non-felons who serve on juries. In addition, those reference points that are available to the general public regarding life in prison tend to be unrealistic and cinematic representations, e.g., Cool Hand Luke and Brubaker. The trial court erred in precluding appellant from presenting important evidence to support his position that his almost 15 year track record of positive institutional adjustment was highly predictive of his future institutional conduct if sentenced to life.

C. The Requirement of Reversal.

The standard of review for the erroneous exclusion of mitigating evidence is harmless beyond a reasonable doubt. People v. Smith (2005) 35 Cal.4th 334, 368 ["we use the Chapman test in evaluating the effect of erroneously excluding mitigating evidence; reversal is required 'unless the state proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'"]. Here, the error cannot be deemed

harmless beyond a reasonable doubt because of the unusual importance the Skipper evidence had in the overall mitigation presentation. Given that appellant was convicted of multiple murders, the jury would have very understandably been extremely concerned about appellant's dangerousness if sentenced to life without parole, dangerousness to both inmates and correctional staff. The jury would likely have heard the evidence from the Folsom Prison Correctional Officers and discounted it as a prognosticator of appellant's future institutional adjustment because of the highly restrictive security arrangements. It was essential to show that virtually identical highly restrictive security arrangements had little or no effect on characterologically violent and disruptive inmates. The trial court's error here, viewed by itself and in conjunction with other penalty phase errors, cannot be deemed harmless beyond a reasonable doubt. People v. Lucero (1988) 44 Cal.3d 1006 [reversing death sentence because of exclusion of expert testimony regarding unlikelihood of future dangerousness in prison].

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.

The prosecution's case in aggravation included a stipulation that appellant was convicted on July 15, 1982 by a military court martial of conspiracy to steal government property, burglary of government property,

and escape from lawful confinement on a military facility. 34 RT 8401. In the defense case, counsel sought to present evidence from other members of the Marine Corp regarding the discriminatory treatment appellant had received while in the service.

At penalty trial, the defense called Bradley Chapline, a former Marine Corp Officer who had appellant in his custody while he was at Tripper Army Medical Center in Hawaii and then while transporting appellant to Leavenworth Federal Prison. 36 RT 8788. Appellant had a broken leg in a cast while he was in the hospital. Mr. Chapline spoke of appellant's compliant behavior while in the hospital. However, appellant was harassed or injured by other guards when Sergeant Chapline was not on duty, and when he heard about it he instructed the other guards that "the incidents that were reported to me, that better never happen again." 36 RT 8794.

When asked whether Sergeant Chapline "observe[d] in the Marine Corp at the time that Charles Ng was in the Marines, whether or not is was difficult for a minority at times to move up in the Marines", he answered, "yes". 36 RT 8797. On cross examination the prosecutor asked Sergeant Chapline whether appellant had told him why he had broke into the armory, and Chapline answered that appellant had said he wanted to "get even" with the Marine Corp.

On redirect, the following colloquy occurred:

"Q. By Mr. Clapp: Charles Ng wanted to be a Marine Officer; is that correct?
A. That is what he stated.
Q: In fact, it was because he believed because of racism that that wasn't happening?
Mr. Smith: Objection –
The Witness: That would be accurate
Mr. Smith: Objection, calls for speculation.
Mr. Clapp: I'm not asking him for speculation. What I'm asking, your Honor, what did Charles Ng say.
The Court: Rephrase your question.
Q By Mr. Clapp: Did he tell you it was because he thought the Marines were treating him unfairly due to a race?
A: Yes, Sir.
Q: And in fact you know there was some racism in the Marines at that time; is that true?
A: There was when I was previously stationed at Le Jeune, North Carolina.
Mr. Smith: I'm going to object. It is irrelevant as to this case, your Honor.
The Court: Sustained.
The Witness: Your Honor, did you want me to answer about Hawaii?
The Court: Well, Mr. Clapp, I am sure, will ask you another question.
The Witness: Okay. I am sorry.
Q. By Mr. Clapp: That is what I was going to ask you about, regardless of whether you saw racism in Camp Le Jeune and whether you saw any racism, evidence of that in Hawaii?
A: Yes.
Q: And did that cause – what is it – do you recall what Mr. Ng said to you about this topic?
Q: Do you recall what Mr. Ng said to you how he had been, perhaps, treated unfairly because of race?
A: Sir, in Hawaii at that time, there was a lot of tensions between Caucasians military and the local

Asian American populous in town. There was an extreme amount of tension.

As far as some Marines that lacked respect and lacking respect because I knew what their personal feelings were, they did not like Asian Americans in uniform, that was even more bitter to them.

Q: Alright. Now as far as the mistreatment or injury that Charles Ng sustained at the hands of the other Marines when he was in the hospital –

Mr. Smith: Well I'm going to object, your Honor, assumes facts in evidence and it calls for hearsay and there is no personal knowledge.

The Court: Assumes facts not in evidence?

A: Yes.

The Court: Sustained.

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, well I'm going to object. Assumes fact not in evidence.

The Court: Sustained.

Q By Mr. Clapp: Were the Marines that you had to admonition who had been guarding Charles Ng, were they Caucasian?

A: Yes, sir, they were. 36 RT 8804-8806.

After a conference between defense counsel, counsel again attempted to elicit Sergeant Chapline's testimony regarding racial harassment and tormenting, and the court sustained the objection as well. 36 RT 8807-8808.

The trial court erred in curtailing defense questioning of Sergeant Chapline regarding racial harassment of appellant during his Marine Corp service in Hawaii. The prosecutor sought to show that appellant was a bad Marine, as exemplified by his burglary of the armory. The defense wanted

to show that there was a different side of this scenario, i.e. that appellant had gone into the Marine Corp with every intention of following orders and performing to the best of his ability, but that he ran into a race-based ceiling as far as promotion and endured racial harassment and torment from other Marines. Sergeant Chapline was immersed in the middle of this Marine Corp milieu in Hawaii and should have been permitted to testify to his opinion about whether appellant specifically incurred racial discrimination at the hands of other Marines while in the service there. The direction of the defense presentation was apparent from defense counsel's questioning, and the witness was permitted to answer a few questions that conveyed some of the background information regarding the race situation in the Marine Corp at that time. However, the court curtailed the crux of the mitigation presentation in terms of how appellant individually experienced and suffered from that racial discrimination.

The case law clearly recognizes that evidence of racial discrimination in the background of a capital defendant is admissible as a factor in mitigation in a penalty trial. See e.g. United States v. Bernard (5th Cir. 2002) 299 F.3d 467, 486 ["the District Court admitted expert testimony regarding the effect of racial harassment on Appellant"; "[i]n closing argument, [defendant's] counsel relying on the evidence of racial

harassment, argued that [defendant's] childhood racial experiences mitigated his moral culpability for his crime"; and that "[t]he jury was not, therefore, precluded from considering racial discrimination and harassment as a potential mitigating factor in [defendant's] background"]. The case law clearly recognizes that "adversity" endured by a capital defendant in an earlier phase of his life prior to the capital murder constitutes "mitigating evidence [that] serves to humanize the defendant and is critical in the determination of whether a jury should spare the defendant's life." Belmontes v. Ayers (9th Cir 2008) 529 F.3d 834, 864.

Accord: Abdul-Kabir v. Quartermain (2007) 550 U.S. 233.

The standard of reversal is whether the exclusion was prejudicial or demonstrably harmless beyond a reasonable doubt. Hitchcock v. Dugger (1987) 481 U.S. 393, 398-99.

Prejudice is present in this case, based on exclusion of the evidence of racial harassment of appellant by Caucasian Marines while he was in the service. The prosecution relied on appellant's military misconduct as evidence in aggravation, and appellant was entitled to offer countervailing evidence of military misconduct against appellant as evidence in mitigation.

The evidence of racial harassment against appellant specifically, as well as evidence of racial discrimination against Asian servicemen generally

during the relevant time frame, was important to show that appellant tried hard to succeed in conventionally defined avenues of achievement but was thwarted by the darker forces in the military system. This evidence would help the jury understand why appellant later attached himself to Leonard Lake rather than to another mainstream organization or affiliation. Sergeant Chapline should have been permitted to testify to the full extent of the racial harassment and racial discrimination that effected appellant's stint in the Marine Corps.

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.

A. Summary of Facts.

During the penalty jury instruction conference on April 21, 1999, the parties discussed the proposed jury defense instructions regarding lingering doubt. 39 RT 7614. Defense counsel referred to proposed jury instructions 8, 9 and 25, which are found at 39 CT 12989-13035. The court commented that it had given a lingering instruction in prior cases but that "most of the cases say it is not required to be given sua sponte, and generally not necessary, and I agree with that". 39 RT 9714. The prosecution argued that People v. Sanchez (1995) 12 Cal.4th 78 established that a court can properly refuse a lingering doubt instruction because there was no federal or state

constitutional right to a specific lingering doubt instruction, and that it was "appropriately covered under factor (k)". 39 RT 9715.

The court agreed that "lingering doubt is something beyond reasonable doubt, and the jurors can consider that in deciding whether or not to impose the death penalty". The court then refused the instructions but suggested that counsel could argue lingering doubt – "I am not telling you you can't argue lingering doubt", but "I am telling you that I am not instructing you on it" because "it is covered in (k) and you can tell the jury what you want to tell them in argument." 39 RT 9716.

Defense counsel did argue lingering doubt as a mitigating factor to the jury in the context of discussing factor (j) "whether or not the defendant was an accomplice to the offense and its participation in the commission of the offense was relatively minor";

> He is not less guilty, but is he as deserving of death as someone who is the actual killer? And that is what we are talking about here when we talk about level of participation. And that is what I submit to you – I am at a loss really because I can't – I just don't know where you are at with that issue. But if you have a doubt – beyond a reasonable doubt is one thing, and he was convicted beyond a reasonable doubt. And I assure you, I respect the work that you did for days to make that decision. But now we are talking about killing him. And I am now submitting to you that it is just not beyond a reasonable doubt. It is certainty, beyond all shadow of a doubt; if you are going to kill a man, you should be – you should have any little nagging doubt, or lingering doubt there about whether he was actually the killer. If you have a little nagging doubt there, that should be given some weight. That

should be given a substantial amount of weight when you are trying to decide should we kill him or not?" 40 RT 9871 (emphasis supplied).

Counsel then proceeded to discuss factor (k), and referred to various matters in mitigation including appellant's submission to authority as a Marine, and his positive adjustment to highly structured prison conditions. 40 RT 9872.

B. The Trial Court's Error.

The United States Supreme Court had recognized that evidence of innocence and its penalty phase relevance as "lingering doubt" is a proper consideration for a penalty jury. Oregon v. Guzek (2006) 546 U.S. 517, 527. Guzek held that it was within the prerogative of a state legislature to preclude the presentation of new and additional evidence of alibi or innocence at the penalty phase, but simultaneously recognized that "Oregon law gives the defendant the right to present the sentencing jury all the evidence of innocence from the original trial regardless." The Supreme Court concluded that this procedural restriction would have only at most a "minimal adverse impact"... on a defendant's ability to present his alibi claim at resentencing". Id at 528.

Guzek is particularly significant because two concurring Justices, Scalia and Thomas, expressly complained that the Guzek majority failed to avail itself of the opportunity "to put to rest, once and for all, the mistaken

notion that the Eighth Amendment requires that a convicted defendant be given the opportunity, at his sentencing hearing, to present evidence and argument concerning residual doubts about his guilt." Id at 528. Clearly, seven Justices of the United States Supreme Court believe that there is a right to rely on the concept of "lingering doubt" or "residual doubt" at the penalty phase proceeding.

In fact, "lingering doubt" is so alive and well as a capital defense tool following Guzek that federal courts have held that it is an entirely rational tactical decision to forego the presentation of other types of mitigation and rely solely on lingering doubt in the sentencing phase. Blankenship v. Hall (11th Cir 2008) 542 F.3d 1253, 1280 ["Counsel made a reasonable strategic choice to pursue a lingering doubt strategy, and we do not second-guess that decision"], citing Stewart v. Dugger (11th Cir. 1989) 877 F.2d 852, 856 ["Trial counsel made a strategic decision that in light of the atrocious nature of the offense, [the defendant]'s only chance of avoiding the death penalty was if some seed of doubt, even if insufficient to constitute reasonable doubt, could be placed in the minds of the jury"].

This Court recently reconfirmed that "the jury's consideration of residual doubt is proper; the defendant may assert his possible innocence to the jury as a factor in mitigation under section 191.3 factors (a) and (k)."

People v. Page (2008) 44 Cal.4th 1, 55. Page referred to the Sanchez case cited by the trial court. Page also stated that "there is no requirement, under either state or federal law, that the courts specifically instruct the jury to consider any reasonable doubt of defendant's guilt". Appellant believes that this is a constitutionally untenable rule, because a reasonable jury could feel justified in disregarding guilt phase evidence in making the penalty determination because that guilt phase evidence would not seem directly related to any enumerated penalty factor.

The text of factor (k) as given in this case does not provide any apparent basis for considering lingering doubt as to appellant's guilt in its penalty determination.[81] As the cases point out, a concern about residual doubt does not in any way "extenuate the gravity of the crime" because the crime remains as heinous as the prosecution demonstrated. Rather, the point of the residual doubt concept is that the brunt of that heinousness should not be entirely placed on the defendant because of residual doubt that he is the actual perpetrator.

---

[81] The jury instructed as follows:

> (k): any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial. 41 RT 9895.

Nor is lingering doubt fairly considered to be a part of the defendant's "character or record". The evidence falling within the scope of the defendant's "character or record" consists of particular traits or acts that defendant does have, e.g., a trait for kindness, or a record of kind acts to other people. Residual doubt is an entirely different concept, and a reasonable juror would not have any basis to view it as encompassed within factor (k).

It is likely that the manifest unsuitability of factor (k) as a vehicle to authorize consideration of lingering doubt that prompted defense counsel to refer to lingering doubt in the context of factor (j), "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Counsel may well have had good reason for arguing under the rubric of factor (j), but that choice highlights the trial court's error in refusing to instruct directly that the jury should consider any residual or lingering doubt as a factor in mitigation, independent of the scope of the enumerated factors.

The reason for this requirement is that jurors would likely understand the specification of permissible factors (a)-(k) to necessarily imply an exclusion of other factors that were not within the scope of those enumerated factors. That concern has driven the lengthy litigation over this aspect of the

California capital sentencing instructions, see, e.g., Boyde v. California (1994) 494 U.S. 370, and Ayers v. Belmontes (2006) 549 U.S. 7.

A jury unfamiliar with these decades of capital litigation would all too likely view the enumeration of factors (a)-(k) as a limitation on the scope of permissible mitigation, because otherwise the enumeration of some factors would be a pointless exercise. Applying a common sense version of the principle of interpretation "expressio unius, exclusio alterius", the jurors would most likely view the enumeration of permissible factors to be a directive that certain subjects were in bounds for their penalty determination, and other considerations were out of bounds. Otherwise, the jury would have wondered why the court simply did not instruct them to consider anything and everything they had heard that they viewed as relevant to the penalty determination.

In addition, it is the imprimatur of a jury instruction that authorizes the jury to consider particular evidence. See, e.g., Conde v. Henry (9th Cir. 1999) 189 F 3d 734. The Supreme Court in Boyde essentially recognized that the text of the former version of factor (k) restricted the jurors' consideration of mitigation to that which extenuated the gravity of the crime, which a deprived background does not do in any logical manner. However, the Supreme Court concluded that because jurors would understand from

common sense that a deprived background is kind of an excuse, that they would consider that type of evidence even though it did not fit textually or logically within the ambit of the jury instruction.

Lingering doubt is not analogous to the type of deprived background evidence that Boyde thought that jurors would recognize as necessary to consider on their own. Rather, jurors are far more likely to rebuff any reference to lingering doubt by a penalty phase juror – in the absence of an instruction – with the common sense retort, "we already crossed that bridge when we convicted the defendant, let's move on."

C. The Requirement of Reversal.

The standard of reversal for failing to instruct on a defense theory of the case or the impact of defense evidence is the Chapman standard of harmlessness beyond a reasonable doubt Conde v. Henry, supra. Here, the refusal to instruct on lingering doubt cannot be deemed harmless beyond a reasonable doubt for a number of reasons. First, the instructions given to the jury regarding their penalty deliberations failed to directly inform them that they should consider the evidence from the guilt trial, both defense and prosecution, in the penalty decision.[82] In its penalty determination, the jury

[82] "You will now be instructed as to all of the law that applies to the penalty phase of this case. You must determine what the facts are from the evidence received during the trial unless you are instructed otherwise." 40 RT 9884.

could have reasonably viewed the instructional reference to "the trial" as referring to the penalty trial, which they had just completed.

Of course, the jury was instructed that they could consider the circumstances of the offense in determining the penalty, and of course the prosecutor argued that the circumstances of the offenses warranted the death penalty. However, that is a different focus than a lingering doubt focus. The jury had determined a set of "circumstances of the offense" beyond a reasonable doubt in reaching their guilty verdicts. The purpose of a lingering doubt instruction and argument was to give the jury pause as to whether their guilt phase view of the circumstances of the offense was so rock solid as to support the imposition of the death penalty.

In essence, the prejudice from not instructing the jury on lingering doubt lies in the failure to directly tell the jury, "on one hand, you found that the prosecution's evidence was sufficiently persuasive to convict a defendant and send him to prison for the rest of his life; on the other hand, were there any question marks in the prosecution's case or in the defense case that gives you pause about inflicting the irreversible penalty of death". There is just nothing in the instructions given that legitimates lingering doubt as a factor in the penalty determination. The bottom line is that, given that lingering

doubt is recognized as a legitimate penalty consideration, the jury must be so instructed or its potential mitigating effect is nullified at the outset.

In addition, the prosecution's evidence in this case is rife with the opportunity for consideration of lingering doubt. There is no direct evidence that appellant had any role in any of the homicides for which he was convicted, and he testified that he did not commit any of them. This is a highly unusual case in which the evidence conclusively showed that Leonard Lake had a long and sordid track record as a single-handed serial killer.

Moreover, the jury was unable to reach a verdict as to the charge of the murder of Paul Cosner. Objectively viewed, the evidence of appellant's responsibility for the Cosner murder was more or less comparable to that of several of the other charges, i.e., appellant was in Lake's company around the time of the homicide, and may have engaged in activities constituting accessory after the fact. The similarities in the prosecution's evidence as to several of the murder counts suggests the jury would have found them close questions as they did with respect to the Cosner count. The point here is that there may have been ample lingering doubt in the jury's mind when it came to their penalty determination, but there was no jury instruction that

permitted them to act on that lingering doubt as a mitigating factor. Under these circumstance, the death penalty must be reversed.[83]

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.

A. Summary of Facts.

At the jury instruction conference on April 21, 1999, the court refused a defense instruction that even if the jurors find that aggravation substantially outweighs mitigation, they may still return a verdict of life without parole. 39 RT 9681. See 39 CT 13000; 13025 - 6. Prior to argument, defense counsel asked "whether the court would sustain an objection to the argument that even where there the jurors find that aggravation substantially outweighs mitigation they may still, based upon all of the circumstances that have been presented before them, return a verdict a life without parole." 40 RT 9818. The parties argued the point extensively,

---

[83] The trial court did instruct the jury toward the end of the penalty instructions that "in determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." 40 RT 9894. That does direct the jury to consider the evidence presented at the guilt phase, and may have corrected the ambiguity in the court's earlier instructions in the eyes of the jury. The latter instruction, however, does not in any way encompass the concept of reasonable doubt as a legitimate mitigating factor.

referring particularly to People v. Medina (1995) 11 Cal.4th 694, 782. The court stated that "it would be improper to argue – to misconstrue the law in an argument", referring to Medina, supra, 40 RT 8921, and told counsel that "if what you say is inconsistent with Medina or any other Supreme Court case, I would sustain the objection." 40 RT 9822.

Defense counsel thereafter did not argue to the jury that even if they found that aggravation outweighed mitigation they were nonetheless free to return a life verdict[84]. The court instructed with the standard CALJIC instruction 8.88. 41 RT 9839.[85] The jury returned a verdict of death on May 3, 1999, seven days later. 41 RT 9928.

---

[84] Counsel argued the law as follows:

> This is the framework that the law gives jurors in a court of law in the United States when we are asking about appropriate penalty. All right. "In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances" – you see? – "to be persuaded that aggravated circumstances are so substantial in comparison with mitigating circumstances that it warrants death instead of life." 40 RT 9838-9.

[85] The court instructed with the standard version of CALJIC 8.88:

> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating

B. The Trial Court's Error.

Appellant first argues that the trial court erred in refusing the proffered modification of CALJEC 8.88 to expressly reflect that the jury need not return a death sentence even if their assessment was the totality of aggravation outweighed mitigation. Counsel for appellant understands that this argument was rejected in People v. Medina, supra, and that rejection has been reiterated as recently as People v. Parson (2008) 45 Cal.4th 332, 371 ["the trial court properly instructed the jury with CALJIC No. 8.88, a standard penalty instruction defining the scope of the jury sentencing discretion and the nature of its deliberative process"]. Counsel for appellant urges reconsideration for the same reasons set forth below that it was constitutional error for the trial court to preclude defense counsel for arguing that the jury need not return a death verdict even if it determined that aggravation outweighed mitigation.

The fundamental flaw in the California sentencing instruction is that it directs the jurors to engage in a weighing process with respect to aggravating evidence versus mitigating evidence as a foundation for its penalty decision. The constitutional problem with this instruction is that as a practical matter, aggravation is necessarily going to outweigh mitigation by

---

circumstances that it warrants death instead of life without parole". 40 RT 9903.

any common sense standard in 98% of the cases. A capital murder is an inherently heinous crime by definition, and the aggravating weight of that factor by itself would reasonably be viewed as outweighing whatever (generally modest) good deeds the defendant may have proffered in mitigation or whatever (generally major) adversities the defendant may have encountered in his life.

From the common sense perspective that reasonable jurors are supposed to bring to the capital sentencing determination, the aggravating import of a capital murder is almost certainly going to outweigh whatever the defendant offers as mitigation, subject to extremely rare exceptions that might comprise the other 2% of capital prosecutions. For example, if the defendant could demonstrate that he selflessly risked his life to save some impressive number of other innocent lives before committing the capital murder, a reasonable juror might view the record in mitigation as actually outweighing the aggravation. A determination that mitigation outweighed aggravation is likely limited to highly unusual and hypothetical cases such as a firefighter with a history of successful rescue efforts to his credit, or a surgeon with a track record of performing life-saving procedures where no other medical assistance was available, or a soldier who rescued comrades from otherwise imminent death in combat. Otherwise, the outcome of the

weighing of aggravation versus mitigation is essentially a foregone conclusion.

At the same time, the imposition of the death penalty is not supposed to be foregone conclusion. CALJIC 8.88 attempts to provide a counter weight to this otherwise essentially foregone conclusion by telling the jurors that they "are free to assign whatever moral or sympathetic value [they] deem appropriate to each and all of the various factors you are permitted to consider." However, that instruction clearly fails to address the fundamental problem in this statute because if jurors assign the appropriate moral or sympathetic value to the capital murder versus the capital defendant's generally modest amount of mitigation, the jurors are going to wind up with the same foregone conclusion, i.e., that aggravation outweighs mitigation.

At that point, reasonable jurors are going to believe that a result of this evidentiary analysis is that death is the appropriate punishment. Otherwise, the jurors would legitimately ask themselves, why would they have been directed to weigh the aggravating factors versus the mitigating factors in the first place if the resulting answer was not supposed to effectively dictate the verdict.

In the face of the inherent flaw in the instructions, it was essential for a fair penalty determination that defense counsel be permitted to argue that

even if the jury found that aggravation substantially outweighed mitigation, they were free to return a verdict of life nonetheless. That is exactly what defense counsel sought permission to do from the court, and exactly what the court refused to permit counsel to do. The trial court erred and violated appellant's Fifth, Sixth, and Eighth amendment rights when it ruled that the line of argument proposed by the defense counsel was precluded by this court's ruling in Medina with respect to jury instructions.

A constitutionally fair and reasonable penalty trial should include both a jury instruction and the opportunity for defense argument to the following effect:

> "Now that you have waived the totality of aggravating circumstances versus the totality of mitigating circumstances, and assigned whatever moral or sympathetic value you have found appropriate for each, you may well have decided that aggravation outweighs the mitigation, perhaps that it even substantially outweighs mitigation, however, that is just an initial point of reference in your ultimate penalty decision, and is not determinative of the outcome. Obviously, the commission of a capital murder is a very heinous act, which warrants an extremely harsh penalty. Our legal system has insured that by requiring that the penalty options are limited to death and life without parole. You should return a death verdict only if you find both that the circumstances in aggravation are so great and that the circumstances in mitigation, if any, are so meager, that the death penalty is the appropriate punishment. In many capital prosecutions, the record reflects that the aggravation substantially outweighs mitigation, for example in the case of an unprovoked killing of a store clerk in the course of a convenience store robbery committed solely for monetary gain, but that the death penalty is not appropriate because the degree of aggravation is not sufficiently great. Alternatively, some records in capital cases reflect a particularly elevated case in aggravation, which

> may well substantially outweigh the totality of mitigation evidence presented, yet the evidence in mitigation may be viewed as sufficiently great to warrant a life sentence even in the face of great aggravation.

That theme is what defense counsel was entitled to argue in this case, but was erroneously precluded from doing so.

C. The Requirement of Reversal.

Appellant believes that the standard of reversal for precluding argument on this crucial point is the Chapman standard of harmlessness beyond a reasonable doubt. The case law recognizes that defense attorney's argument to the jury is an essential component of the sixth amendment guarantee and its arbitrary curtailment must be judged under the Chapman standard. See United States v. Miguel (9th Cir. 2003) 338 F.3d 995, 1008 [reversing murder convictions where "[t]he District Court's order to counsel not to argue this theory and its instruction to the jury that no evidence supported it prevented defense counsel from 'framing and giving content to the core of [the] defense'". Miguel viewed the trial court's restriction on closing argument as a "structural error", citing Conde v. Henry (9th Cir. 2000) 198 F.3d 734, but added that "even were we to conclude the harmless error analysis applies, as the Government suggests, we would still reverse."

In this case, the trial court's error requires reversal whether the error is viewed as structural or subject to a Chapman analysis. This is a classic

case in which the evidence of aggravation was extremely great, given the convictions for multiple murders and the finding that appellant intentionally committed them. At the same time, there was a substantial amount of mitigation evidence presented, relating to the dominant role played by Leonard Lake, the essential undisputed evidence of appellant's dependent personality disorder and other mental impairments, and the significant number of positive testimonials from individuals that appellant had encountered throughout his life. This case falls into the relatively infrequent capital trial profile where there is an unusually large amount of aggravation, but at the same time a substantial and diverse amount of mitigation. But, as noted above, it is virtually inconceivable that a reasonable juror could determine that appellant's presentation in mitigation in any way outweighed the aggravating effect of twelve murders.

For appellant to have any type of adequate consideration of the mitigating evidence and a fair penalty decision, it was imperative for defense counsel to explain to the jury that even if the aggravating evidence was deemed to substantially outweigh the mitigating evidence, they were not required to impose the death penalty. Obviously, defense counsel wanted to make that a fundamental theme of his presentation, as he repeatedly argued

to the court in support of both the proffered jury instruction and the proscribed avenue of argument. 41 RT 9821-9832.

Rather, defense counsel was relegated to making the tepid argument that while the jury's decision was tethered to the outcome of the weighing of aggravation against mitigation, nonetheless "[t]he judge will not instruct that you are required to vote for death", and "[m]ake no mistake about this, you are not ever told that is what you have to do." 41 RT 9883. However, that was a manifestly weak and indirect effort to make the point that should have been the highlight of closing argument as counsel wanted to do. Instead, counsel was obligated to ignore the 600 pound gorilla that was sitting on the prosecution's side of the scale of justice, and argue only that, "[i]ndividually you weigh aggravation and mitigation and decide – you make an individual and moral decision what is it that is appropriate, that is just and is equitable." Ibid.

The penalty jury deliberated for a week, from August 26 to verdict on May 3, 1999, indicating that the outcome, even under the instructions given and even in the absence of counsel's argument, was a matter of debate. Certainly if counsel had been able to address the jury's virtual certain conclusion that aggravation substantially outweighed mitigation, and inform them that that was the beginning of their penalty decision, not a proxy for

the conclusion, the outcome would likely have been different. Reversal is clearly required if this court deems the error to be structural, as did the Ninth Circuit in Miguel, and reversal is equally required if the Chapman standard is applied.

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

From the time in 1994 that Judge McCartin was assigned to sit in Calaveras County in place of Judge Perasso, who recused himself after being challenged by the prosecution, to the time of the death judgment in June 1999, appellant was subjected to a continuing course of judicial bias and misconduct.

Judge McCartin behaved improperly in the course of the trial site selection process by covertly manipulating the selection process to send the case to Orange County for trial. The testimony at the hearing of June 30, 1994, summarized in Argument I, supra, demonstrates that what he actually told the Judicial Council staff attorney handling the case was plainly skewed toward Orange County and away from San Francisco; that he knew that the assurances he had given counsel for appellant regarding the selection process were abrogated at the outset; and that he failed to reveal that he was making affirmative efforts to send the case to Orange County or that he was

deliberately thwarting appellant's efforts to put San Francisco County into consideration.

Not only did Judge McCartin act in a calculated albeit covert manner to ensure that the case would be sent to Orange County, he testified at the June 1994 hearing to a number of matters that were specifically and unequivocally contradicted by the Calaveras County Clerk; by the Judicial Council staff attorney handling the matter; and by stipulation of the parties. See Argument I, supra, part A-6, pp. 167 – 174.

Judge McCartin committed misconduct and a fraud upon appellant that caused continuing prejudice for the remainder of the case. Bracy v. Gramley (1997) 510 U.S. 899, 904 reaffirmed that "the Due Process Clause requires a 'fair trial in a fair tribunal' [citation], before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id. at 905. The record here demonstrates that Judge McCartin had an interest in the outcome of the trial site selection proceedings, i.e., to covertly steer the case to Orange County while overtly purporting to afford appellant a fair chance at having San Francisco selected. This may have been a different type of judicial bias and misconduct than that committed by Judge McCartin during the penalty retrial in People v. Sturm (2006) 37 Cal.4th 1218, 1233,

but it was equally wrong and carried equally if not more prejudicial consequences.

Next, Judge Fitzgerald was assigned the case shortly after it was transferred to Orange County in September 1994, and over the course of the next two years engaged in sufficiently questionable conduct as to be discharged from further involvement in the case the Court of Appeal. Ng v. Superior Court (1997) 52 Cal.App.4th 1010 primarily addressed Judge Fitzgerald's error in discharging the Public Defender as appellant's attorney without sufficient cause, but concluded with a direction that the case be assigned to a different judge on remand. The Court of Appeal reviewed three prior writ petitions filed by the Public Defender following unsuccessful challenges to Judge Fitzgerald for bias, as well as the record presented in the then-pending proceeding, and concluded that the accumulated effect of Judge Fitzgerald's conduct, including a colloquy with appellant in which he [Judge Fitzgerald] maligned attorney Kelley, required re-assignment.

At that point, Judge Fitzgerald had denied numerous motions by appellant to transfer the case to San Francisco, and to otherwise correct the errors made by Judge McCartin in the trial site selection process, to no avail. In view of Judge Fitzgerald's "unusual and inappropriate desire to keep the case," Ng at 1024, those earlier rulings are equally suspect as biased.

Finally, Judge Ryan's rulings so consistently favored the prosecution as to support a further inference of judicial bias. See Arguments X and XI, supra, contrasting the rulings that admitted evidence offered by the prosecution vs. the rulings that excluded evidence offered by the defense. In addition, there were a number of pejorative comments about attorney Kelley, who had been the object of Judge McCartin's inappropriate invective in Sturm.

United States v. Antar (3d Cir. 1995) 53 F.3d 568 reversed convictions for judicial bias based on the court's statement that his goal was to get back money to shareholders defrauded by defendants. Here, a similar bias was shown by the conduct of the Orange County judges to steer the case to Orange County and keep it there over the repeated objections of appellant. United States v. Donato (D.C. Cir. 1996) 99 F.3d 426 reversed convictions for multiple errors, including judicial bias as demonstrated by hostility to defense counsel and more favorable treatment of prosecutor. Here, both Judges Fitzgerald and Ryan demonstrated hostility to attorney Kelley, and treated the prosecution more favorably with respect to rulings on venue/vicinage issues as well as evidentiary issues.

At some point in the pretrial proceedings, Judge Ryan became so firmly set in his belief that appellant was pursuing an effort to delay trial that

he stopped analyzing the legal issues that came before him, and denied appellant's requests based on that fixed view rather than on the merits of the claims.[86] Under these circumstances, appellant's right to due process was violated by the pervasive judicial bias.

Reversal is required as to both guilt and penalty because the judicial bias was pervasive and constituted structural error. See Sullivan v. Louisiana (1993) 508 U.S. 275, 279, citing Tumey v. Ohio (1927) 273 U.S. 510. Appellant requests that this Court reverse his convictions.

XX. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT ANDAPPLIED AT APPELLANT'S TRIAL, VIOLATESTHE UNITED STATES CONSTITUTION.

Many aspects of California's capital sentencing scheme, individually and in combination with each other, violate the United States Constitution. Because challenges to most of these have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional

---

[86] The court conflated all of the representation issues into single request for appointment of Michael Burt as appellant's attorney:

> "You call it whatever you want. I don't care if you call it Marsden, Independent Counsel, Harris, and none of these apply, Harris or Marsden. I mean, every motion is, 'I want Mr. Burt to represent me.'" 2 RT 462.

basis, and requests for the Court's reconsideration of each claim in the context of California's entire death penalty system.

Appellant further requests the Court to consider their cumulative impact on the functioning of California's capital sentencing scheme. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." Kansas v. Marsh (2006) 548U.S.163, 178, fn. 6.[87] See also, Pulley v. Harris (1984) 465 U.S. 37, 51.

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a constitutionally adequate basis for selecting the relatively few defendants to be subjected to capital punishment. In short, California's special circumstances are now so numerous and so broadly construed as to be chargeable in virtually every non-vehicular homicide.

---

[87]In Marsh, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." 548 U.S. at 178.

Nor are there adequate penalty phase safeguards that ensure the reliability of the verdict. Instead, jurors are not required to agree with each other at all as far as the existence of aggravating factors, and jurors are not required to find that evidence of aggravating factors meets any burden of proof at all. The result is truly a "wanton and freakish" system that arbitrarily imposes the death penalty on a handful of unfortunate defendants from among the thousands of murderers in California annually.

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" People v. Edelbacher (1989) 47 Cal.3d 983, 1023.

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. People v. Bacigalupo (1993) 6 Cal.4th 857, 868.

The 1978 death penalty law was drafted not to narrow those eligible for the death penalty but to expand liability to make virtually all murderers

eligible. See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7." Since 1978, the legislature has increased the number of special circumstances from 19 to 22, and both the legislature and the judiciary have expanded the scope of many of them.

Virtually all felony-murders are ostensibly special circumstance eligible, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or during a mental breakdown, or acts committed by others. People v. Dillon (1984) 34 Cal.3d 441. Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. See People v. Hillhouse (2002) 27 Cal.4th 469, 500-501, 512-515.

B. Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[88] The Court has approved numerous expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[89] or having had a "hatred of religion,"[90] or threatened witnesses after his arrest,[91] or disposed of the victim's body in a manner that precluded its recovery.[92] It also is the basis for admitting evidence under the rubric of "victim impact". See, e.g., People v. Robinson (2005) 37 Cal.4th 592, 644-652, 656-657.

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, Tuilaepa v. California (1994) 512 U.S. 967, it has been used in ways so arbitrary and contradictory

---

[88]People v. Dyer (1988) 45 Cal.3d 26, 78; People v. Adcox (1988) 47 Cal.3d 207, 270.
[89]People v. Walker (1988) 47 Cal.3d 605, 639, fn. 10.
[90]People v. Nicolaus (1991) 54 Cal.3d 551, 581-582.
[91]People v. Hardy (1992) 2 Cal.4th 86, 204.
[92]People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35.

as to violate both the federal guarantee of due process of law and the Eighth Amendment.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." Maynard v. Cartwright (1988) 486 U.S. 356, 363.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death, In Violation Of The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as

to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional right to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. People v. Fairbank (1997) 16 Cal.4th 1223, 1255, started that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . .". But this position has been squarely rejected by the U.S. Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466 hereinafter Apprendi; Ring v. Arizona (2002) 536 U.S. 584 [hereinafter Ring]; Blakely v. Washington (2004) 542 U.S. 296 hereinafter Blakely; and Cunningham v. California (2007) 2007 549 U.S. 270.

Apprendi held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. Id. at p. 478.

Ring struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Id., at 593. The court acknowledged that in a prior case reviewing Arizona's capital sentencing law Walton v. Arizona (1990) 497 U.S. 639 it had held that aggravating

factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. Id., at 598. The court found that in light of Apprendi, Walton no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Blakely considered the effect of Apprendi and Ring in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." Blakely v. Washington, supra, 542 U.S. at 299. The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. Ibid. Blakely ruled that this procedure was invalid because it did not comply with the right to a jury trial. Id. at 313.

The governing rule since Apprendi is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum

sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely, at 304.

United States v. Booker (2005) 543 U.S. 220, 224 reiterated the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Cunningham rejected this Court's interpretation of Apprendi, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the mid-term specified by the legislature. Cunningham v. California, supra. In so doing, it explicitly rejected the reasoning used by this Court to find that Apprendi and Ring have no application to the penalty phase of a capital trial.

In the wake of Apprendi, Ring, Blakely, and Cunningham, any jury finding relied onto impose the death penalty must be found true beyond a reasonable doubt. However, California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the

required finding need not be unanimous. People v. Fairbank, supra; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].

In the wake of Cunningham, it is crystal-clear that in determining whether or not Ring and Apprendi apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that further factual findings must be made before a death penalty can be imposed.

Under California law, the maximum punishment that may be imposed upon a guilt verdict of first degree murder with special circumstances, the death penalty may be imposed only upon a further factual finding that is not encompassed within the guilt verdict or the penalty procedure.

Arizona argued in Ring that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment. Therefore, Ring was therefore sentenced within the range of punishment authorized by the jury's guilt verdict. The Supreme Court squarely rejected that argument:

> This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict."

Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151. Ring, 124 S.Ct. at 2431.

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." Ring, supra, 530 U.S. at 604. Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Even where the jury finds a special circumstance true under section 190.2, a death verdict is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. Section 190.3; CALJIC 8.88 (7th ed., 2003). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring, 530 U.S. at 604.) In Blakely, made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged,

but also all (punishment-increasing) facts about the way in which the offender carried out that crime." Id., 124 S.Ct. at 2551; emphasis in original.

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to Apprendi and Cunningham, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

2. This Court's interpretation of the capital sentencing provisions in a manner as to preclude intra-case or inter-case proportionality review in either the trial court or this court results in arbitrary, discriminatory, or disproportionate impositions of the death penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has not adopted. In Pulley v. Harris (1984) 465 U.S. 37, 51, the

high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the appropriateness of the death penalty, either intra-case or inter-case proportionality review. See People v. Fierro, supra, 1 Cal.4th at p. 253. Those common sense comparisons are essential to an equitable and constitutional capital sentencing mechanism, and are lacking in California.

D. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366. The nonuse of the death penalty, or its limitation to

"exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. See, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; Thompson v. Oklahoma, supra, 487 U.S. at p. 830 [plur. opn. of Stevens, J.] Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although California is not bound by the laws of any other sovereignty in the administration of its criminal justice system, both the federal and state governments have relied on the customs and practices of other parts of the world as relevant reference points. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" 1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot, supra, 159 U.S. at p. 227.

In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in

part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Atkins v. Virginia, supra, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. See Atkins v. Virginia, supra, 536 U.S. at p. 316.

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes." Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. Cf. Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence must be set aside.

CONCLUSION

Appellant has raised twenty claims of state and federal constitutional violations, under Article I of the California Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Numerous violations of California statutes occurred as well, constituting in the aggregate a further violation of federal due process. See Hicks v. Oklahoma (1979) 447 U.S. 343.

Finally, appellant requests that this Court address the cumulative prejudice accruing from the multiple constitutional and statutory violations. People v. Holt (1984) 37 Cal.3d 436; Killian v. Poole (9th Cir. 2000) 282 F.3d 1204, 1211.

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

Dated: May 15, 2009

Respectfully submitted,

ERIC S. MULTHAUP
Attorney for Appellant

CERTIFICATE OF WORD COUNT

Eric Multhaup declares that this Opening Brief consists of 121,625 words.

Dated: May 15, 2009

_____

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 OPENING 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:

Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Att'n: Kenneth Sokoler, Esq.

District Attorney
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

California Appellate Project
Att'n: Pat Kern, Esq.
101 Second Street, Ste. 600
San Francisco, CA 94105

Charles Ng
P-46001
San Quentin State Prison
San Quentin, CA 94974

Clerk, Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92702

I declare under penalty of perjury that service was effected on May 15, 2009 at Mill Valley, California and that this declaration was executed on May 15, 2009 at Mill Valley, California.

_____
ERIC S. MULTHAUP