SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PAUL LOYDE HENSLEY, Defendant and Appellant.	S050102 (San Joaquin County Superior Court No. SC054773A)

APPELLANT'S OPENING BRIEF

VOLUME I

(Pages 1- 128)

Automatic Appeal from the
Superior Court of the State of California
In and for the County of San Joaquin
Honorable Frank A. Grande, Judge

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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	**S050102**
v.	)	**(San Joaquin County Superior Court**
PAUL LOYDE HENSLEY,	)	**No. SC054773A)**
Defendant and Appellant.	)	

STATEMENT OF THE CASE

Appellant Paul Loyde Hensley appeals from his convictions and sentence of death in the present case. (9 CT 2448-2452.)

On May 4, 1993, an indictment was filed against appellant in action number 93F03740 in the Sacramento County Superior Court charging appellant with capital murder and other charges related to the death of Gregory Renouf. (RT [Sac. Co. May 7, 1993] 2-4.) On September 9, 1993, an information was filed against appellant in action number SC054773A in the San Joaquin County Superior Court, charging seven counts, including capital murder for the death of Larry Shockley. (1 CT 104-110.) Also on this date, an information was filed in San Joaquin County Superior Court

action number SC056271A, charging appellant with escape from jail. (SCT[1] 10-11.)

On September 23, 1993, the parties entered into a stipulation whereby the Sacramento County and the San Joaquin County charges would be consolidated and appellant would be tried on all charges in a single consolidated proceeding in San Joaquin County; the Sacramento prosecution would in turn be dismissed. (1 CT 115-119.) On that day, an amended information was filed against appellant in San Joaquin County action number SC054773A. (1 CT 122-131.) The prosecutor was subsequently permitted to amend the information a second time, and consolidate actions SC054773A and SC056271A for purposes of trial. (2 CT 341.) As a consequence, appellant was charged as follows at the time of trial on the basis of a second amended information filed on January 27, 1994:

Count 1	Murder of Larry Shockley on Oct. 16, 1992 (§[2] 187, subd. (a)); robbery special circumstance (§ 190.2, subd. (a)(17)(i)); burglary special circumstance (§ 190.2,

[1] "SCT" refers to the Clerk's Supplemental Transcript on Appeal dated March 25, 2003.

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

	subd. (a)(17)(vii))[3]; multiple murder special circumstance (§ 190.2, subd. (a)(3)); § 12022.5 firearm use enhancement
Count 2	Second degree robbery of Larry Shockley on Oct. 16, 1992 (§ 211); §12022.5 firearm use enhancement
Count 3	Vehicle theft from Larry Shockley on Oct. 16, 1992 (Veh. Code, § 10851)
Count 4	First degree residential burglary of Larry Shockley's home on Oct. 16, 1992 (§ 459); § 12022.5 firearm use enhancement
Count 5	Attempted premeditated murder of Stacey Copeland on Oct. 17, 1992 (§ 187, subd. (a)/§ 664); § 12022.5 firearm use enhancement; § 12022.7 great bodily injury enhancement
Count 6	Second degree robbery of Stacey Copeland on Oct. 17, 1992 (§ 211); § 12022.5 firearm use enhancement; § 12022.7 great bodily injury enhancement
Count 7	Second degree robbery of Scott Rooker on Oct. 15, 1992; § 12022.5 firearm use enhancement
Count 8	Murder of Gregory Renouf on Oct. 17, 1992 (§ 187, subd. (a)); robbery special circumstance (§ 190.2, subd. (a)(17)(i)); multiple murder special circumstance

[3] On December 17, 1993, the burglary special circumstance attached to count 1 was dismissed. (2 CT 315-316.)

	(§ 190.2, subd. (a)(3)); § 12022.5 firearm use enhancement
Count 9	Second degree robbery of Gregory Renouf on Oct. 17, 1992 (§ 211); § 12022.5 firearm use enhancement
Count 10	First degree residential burglary of Gregory Renouf's home on Oct. 17, 1992 (§ 459); § 12022.5 firearm use enhancement
Count 11	Escape from county jail on June 19, 1993 (§ 4532, subd. (b))

(ACT-A[4] 5-13; SCT 10-11.)

On May 11, 1994, appellant filed moving papers requesting a change of venue. (3 CT 679-696 [defense moving papers]; see 3 CT 705-727 [prosecution opposition].) This motion was on denied June 6, 1994. (3 CT 728, 827; 4 CT 841.) On June 10, 1994, the court denied appellant's motion to suppress his videotaped statement to the police. (4 CT 862; see 1 CT 76-91; 3 CT 537-542, 546-585 [defense moving papers] and 3 CT 593-604 [prosecution opposition].)

Appellant's first trial began on June 27, 1994. (4 CT 886.) On August 16, the court considered and denied appellant's Batson-Wheeler[5]

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[4] "ACT-A" refers to the Clerk's Augmented Transcript on Appeal-A, dated December 30, 2003.

[5] Batson v. Kentucky (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712]; People v. Wheeler (1978) 22 Cal.3d 258.

motion to dismiss the jury panel. (5 CT 1235.) Jury selection was completed that day and the guilt phase began on August 18. (5 CT 1235, 1239.) The jury received the guilt phase case on October 6. (5 CT 1427.) On October 7, the jury returned a verdict, finding appellant guilty of first degree murder on counts 1 and 8, guilty of second degree robbery on counts 2, 5, 7 and 9, guilty of first degree burglary on counts 4 and 10, guilty of nonpremeditated attempted murder on count 5, and guilty of vehicle theft on count 3. The jury found all the charged special circumstances true; it found all the enhancement allegations true, except for the firearm allegation attached to count 4, which was found not true. (6 CT 1476-1493.) The penalty phase began on October 18 and went to the jury on December 1. (6 CT 1638, 1719.) On December 7, following three days of deliberations, the jury indicated that it remained hopelessly deadlocked 9-to-3; the court discharged the jury and declared a penalty mistrial. (7 CT 1785; 36 RT 10100.)

A second trial, as to penalty only, began on January 10, 1995. (7 CT 1815.) Jury selection was concluded on March 13, 1995, and presentation of evidence began that day. (7 CT 2017.) The jury received the case on May 16. (8 CT 2200-2201.) On May 18, following approximately two days of deliberations, the jury returned a verdict fixing the penalty at death. (8

CT 2207-2208.)

Thereafter, defense counsel orally moved for a mistrial on grounds that juror Y.M. had consulted his minister regarding the case while the jury was deliberating. This motion was heard on May 19 and 22, 1995, and denied at the conclusion of the hearing. (8 CT 2210, 2238-2239.) On June 30, 1995, appellant filed a written motion for a new trial. (8 CT 2263-9 CT 2343; 9 CT 2360-2363; see 9 CT 2346-2359 [prosecution opposition].) This motion was heard on August 1 and September 18, 1995, and denied at the conclusion of the hearing. (9 CT 2364, 2372-2373.)

On September 26, 1995, appellant was sentenced to death on counts 1 and 8. (9 CT 2395-2396.) Appellant was also sentenced to a noncapital terms of 31 years, calculated as follows:

	Term
Count 1	
§ 12022.5, subd. (a) enhancement	4 years (midterm)
Count 8	
§ 12022.5, subd. (a) enhancement	4 years (midterm)
Count 5	
§ 187, subd. (a)/ § 664	9 years (principal upper term)
§ 12022.5, subd. (a) enhancement	5 years (upper term)

§ 12022.7 enhancement	(3 years stayed)
Count 2	
§ 211**[6]	1 year (1/3 midterm)
§ 12022.5, subd. (a) enhancement	1 year, 4 months (1/3 midterm)
Count 3	
Veh. Code, § 10851	(4 years concurrent)
§ 12022.5, subd. (a) enhancement	(4 years concurrent)
Count 4	
§ 459*	(6 years concurrent)
Count 6	
§ 211**	1 year, 4 months (1/3 upper term)
§ 12022.5, subd. (a) enhancement	(4 years stayed)
Count 7	
§ 211**	1 year (1/3 midterm)
§ 12022.5, subd. (a) enhancement	1 year, 4 months (1/3 midterm)
Count 9	
§ 211**	1 year (1/3 midterm)
§ 12022.5, subd. (a) enhancement	1 year, 4 months. (1/3 midterm)

[6] The symbol "*" refers to the degree of the crime, e.g., first degree robbery.

Count 10

§ 459* (6 years concurrent)

Count 11

§ 4532, subd. (b) 8 months (1/3 midterm)

(9 CT 2396-2398, 2450-2452.)

STATEMENT OF APPEALABILITY

This is an automatic appeal following a judgment of death, which lies within the original jurisdiction of the California Supreme Court. (Cal. Const., art VI, § 12, subd. (a); Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt-Innocence Phase

1. The Prosecution Case

a. Count 7 – Robbery of Scott Rooker (Oct. 15, 1992)

On October 15, 1992, appellant approached Todd Chappell as he was leaving work at Baskin Robbins for a lunch break. Appellant told Chappell that he had seen someone suspicious in the parking lot that he thought might try to rob Baskin-Robbins. He wanted to know if Chappell knew this person. Appellant identified an employee of Rico's Pizza from next door as the would-be robber. After talking to appellant, Chappell proceeded to lunch. (24 RT 6586-6589.)

After Chappell left, appellant ordered an ice cream cone from Baskin Robbins employee Scott Rooker. Rooker was the only employee left and there were no other customers present. As Rooker was ringing up the sale, appellant came around the counter, displayed a gun and ordered Rooker to the ground. Appellant took all the money from the drawer and rifled through an unlocked safe near the cash register before he left. (24 RT

6569-6577.)

b. Counts 1, 2 and 3 – Shockley Robbery/Murder (Oct. 16, 1992)

i. Prior Relationship Between Shockley and Appellant

Larry Shockley was appellant's father-in-law. Shockley was married to Delores Shockley, and was stepfather to her six children, including appellant's wife Anita Hensley. Denise Underdahl was Anita's sister. (21 RT 5701, 5731, 5737.) Delores and Larry Shockley had been married for 18 or 19 years. They had moved into their house on Bordeaux in August 1991. At some point thereafter, appellant, Anita and their children began living with the Shockleys. (21 RT 5735-5736.)

Appellant and Shockley were partners in a landscaping business called Wine Country Services. (21 RT 5710, 5727-5728.) Sometime in early 1992, there had been a dispute between Shockley and appellant about money which Shockley owed appellant. The dispute resulted in a fight in which appellant struck Shockley. Shockley then evicted appellant, Anita and their children from his home. Appellant and Anita went to live with Anita's sister, Sandra, in Stockton. (21 RT 5710-5711, 5736-5737.)

Shockley had instructed the neighbors to call the police if appellant was seen in the neighborhood. Nonetheless, three days before Shockley's death, Shockley had Denise Underdahl drive with him to Anita's home around 12:30 or 1:00 in the morning so that he could speak with appellant. Denise was surprised, because she was not aware that Shockley and appellant were once again on speaking terms. (21 RT 5712.)

ii. Events of October 16, 1992

On October 16, 1992, Shockley was working the graveyard shift as a guard for Pinkerton Security assigned to General Mills in Lodi. Shockley was scheduled to leave work at 6:00 a.m. Co-worker Donna Rhyne reported to work at 5:45 a.m. that day to relieve Shockley. When Rhyne arrived Shockley was on the telephone. When Shockley got off the phone, he told Rhyne that he had spoken to the police and that his son-in-law had been stopped for a suspended license. Shockley obtained Rhyne's permission to leave work early, telling her that he had 15 minutes to get to a Chevron truck stop located at I-5 and Highway 12 or the police would arrest his son-in-law. (20 RT 5507-5508.)

Shockley left General Mills around 5:50 a.m, driving a blue

Oldsmobile station wagon. (20 RT 5509.) Appellant and Shockley met at the Chevron truck stop. From there, they traveled in Shockley's car to a dirt road off Highway 12, a little east of Guard Road. At this location appellant shot Shockley in the back of the head, then twice in the face. Appellant covered Shockley's body with a tarp and the floor mats from Shockley's car. (20 RT 5383, 5446-5448, 5453-5456; 1 ACT-B[7] 234-236.) Appellant then took Shockley's car and drove to Shockley's house on Bordeaux in Lodi. (1 ACT-B 237-239.)

That morning between 8:30 and 9:00 a.m., Larry Shockley's next door neighbor, Paul Ricci, observed appellant at Shockley's house when Ricci went out to his car. He knew appellant and they exchanged a brief greeting. Ricci noticed Shockley's trailer attached to his station wagon and backed in next to the garage. The garage door was open and Ricci saw appellant walking back and forth between the garage and the car. Ricci could see things being loaded in the station wagon. (20 RT 5527-5530, 5534-5536, 5538.)

Appellant did not appear nervous, and Ricci did not become concerned until later that morning when he remembered that Shockley had

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[7] "ACT-B" refers to the transcript of appellant's recorded statement to the police, contained in "Clerk's Augmented Transcript on Appeal-B," filed on July 14, 2004.

said that he did not want appellant around. (20 RT 5530-5531, 5538.) Shockley had recently told Ricci that he was afraid of appellant. Shockley said that he had recently called the police to have appellant evicted from his home, and that he had used the neighbor's phone because appellant had ripped Shockley's phone off the wall. (20 RT 5541-5542.)

Other neighbors had also become concerned about appellant's presence. Daniel Springer lived with his mother across the street from Shockley. (20 RT 5545.) Between 8:00 and 9:00 a.m., Springer's mother had noticed appellant at Shockley's house and asked Springer to investigate. (20 RT 5546, 5550.) Springer saw appellant standing next to Shockley's station wagon. He saw Shockley's trailer hitched to the station wagon and backed up to the garage. Springer could see that there were objects loaded in it and a tarp or blanket over the top. (20 RT 5546-5547, 5558.) Springer decided to ask another neighbor, Suzette Reese, if she knew anything about the situation. (20 RT 5548, 5569-5570.) As he walked to her home, Springer watched appellant pull the station wagon around the block and park it and then walk back toward Shockley's house. (20 RT 5548-5549.)

When Reese and Springer saw appellant walk back toward the car, they called out to him, asking where Shockley was. Appellant replied that Shockley was in the car and that they were taking things to storage. (20 RT

5549, 5563, 5570.) Appellant's statements concerned Springer because he knew that Shockley had not been in the car when appellant pulled out of the driveway. Springer thought appellant appeared to be nervous and hesitant. (20 RT 5549, 5562-5563.)

After speaking with appellant, Springer went to the home of Mike and Denise Underdahl in the duplex adjoining Shockley's home. (20 RT 5555.) Shockley had been married to Denise's mother who had passed away just a few months before. Mike and Denise had moved in shortly afterwards, on August 31, 1992. (21 RT 5701.)

Springer told Mike Underdahl about his concerns. They went to Shockley's house and checked the doors, found a broken window and a badly damaged screen. Although Underdahl had a key, he was unable to unlock the doors because toothpicks or wood shavings were broken off in the locks. Underdahl called the police. (20 RT 5555-5557, 5587.)

c. Count 5 – Stacey Copeland Robbery/ Attempted Murder (Oct. 17, 1992)

Stacey Copeland was a drug-addicted prostitute working in the area of the Oasis Bar in East Stockton. (21 RT 5763-5765.) Copeland testified that on October 17, 1992, at about 1:00 p.m., appellant approached Copeland

for a "date." They agreed upon the terms of the transaction, and Copeland drove away with appellant in his blue Oldsmobile station wagon. They stopped in an open field beyond a new subdivision at the corner of Alpine and Sanguinetti. (21 RT 5752-5755, 5795.)

Appellant and Copeland had sex in the back of the station wagon. Afterwards, Copeland got dressed and got into the front passenger seat, and appellant began to drive away. (21 RT 5755-5757.) The car had rolled only a few feet when they heard a scratching sound. Appellant stopped the car and Copeland looked out the window to see what was scratching it. When appellant released the brake the scratching sound could still be heard, so Copeland opened the door to get a better look. (21 RT 5757-5758.) At that point appellant pulled a gun and shot Copeland in the back. The force of the gunshot threw Copeland six feet from the car. She looked back to see appellant still pointing the gun at her. Appellant then sped away with the car door still open. (21 RT 5758, 5762, 5770-5771, 5780, 5782-5783.)

Although Copeland could move her arms, she was unable to move her legs. She experienced great pain and feared that she would die. (21 RT 5759.) An hour-and-a-half later, a young Mexican boy came walking through the field. Copeland asked him to call for help. (21 RT 5760.)

Deputy Frank Dorris and Deputy Trammell of the San Joaquin

County Sheriff's Department were dispatched to the scene. (21 RT 5760, 5794-5795, 5800.) The description of the station wagon provided by Copeland was similar to the car driven by the Shockley murder suspect. The deputies were concerned that Copeland might not survive, so they decided to show her a photo of the suspect, who was appellant. She immediately identified appellant as the man who had shot her. (21 RT 5761, 5800-5802.)

Copeland was taken to a hospital where she underwent surgery. The bullet cut the right side of Copeland's spinal cord and went through her stomach, liver and pancreas causing a great deal of blood loss. She was left paralyzed from the waist down. (21 RT 5762-5763, 5777.)

Copeland testified that while appellant was not overly friendly, he had not been rude. He appeared to be cold and without emotion, but Copeland had not sensed she was in danger. Appellant had not seemed angry and no dispute arose during the transaction. There was no indication that he was drunk or under the influence of drugs, and his driving had not been erratic. (21 RT 5757, 5762, 5767-5768, 5770.)

Appellant had driven off with Copeland's purse still in his car. (21 RT 5769, 5771, 5773-5775.) Later the purse was discovered outside a store in Galt and turned over to the police. (21 RT 5806-5812, 5816-5817.) Several items were found with the purse which did not belong to Copeland,

including a black address book and a Costco card issued to Larry Shockley. (21 RT 5781, 5817-5818.)

After the Copeland shooting, appellant went to the Radio Shack on Marconi Avenue in Sacramento. (24 RT 6594.) Appellant asked about police scanners and decided to buy a model costing about $300. For payment appellant wrote out a check drawn from Larry Shockley's bank account. When the clerk asked him for identification, he said he had left it in his car. He left the store presumably to get his driver's license, leaving the check behind. Appellant never returned. (24 RT 6598-6601.)

Later that evening, Radio Shack manager Wayne Smith heard a news report about Shockley's murder. He recognized the name from the check left by appellant and called the police. (24 RT 6603.)

d. Count 8 – Renouf Homicide (Oct. 17, 1992)

After leaving Radio Shack, appellant went to a pornography shop on Del Paso Boulevard in Sacramento. There appellant met Gregory Renouf, a homosexual, and they made an agreement to have sex. They agreed to meet at an abandoned warehouse district a mile up the road. They traveled there in separate vehicles. (1 ACT-B 261-264, 269.)

En route appellant formulated a plan to shoot Renouf and burglarize his house. When they arrived at the agreed location, Renouf got out of his car. Appellant fired at Renouf six times, striking him five times and killing him. Appellant took Renouf's wallet and keys, and drove Renouf's car back to Renouf's apartment on G Street in Sacramento. (1 ACT-B 263-265, 269.) Appellant ransacked and burglarized Renouf's apartment, taking Renouf's checkbook along with other things. (1 ACT-B 265, 269-270; 23 RT 6370-6371, 6378.)

From Renouf's apartment, appellant drove to a Chevron station on Northgate Avenue in Sacramento. There he changed clothes and placed his bloody clothes into a dumpster. (1 ACT-B 266-267.) In the late hours of October 17 and early hours of October 18, appellant cashed several checks, including a payroll check issued to Renouf in the amount of $80 and a personal check drawn on Renouf's personal checking account in the amount of $73, at a Safeway store on West Capitol Avenue in West Sacramento. (25 RT 6957-6961, 6868-6970.) Appellant also wrote another check on Renouf's account in the amount of $71 to a Safeway store on Alhambra and J Street in Sacramento. (1 ACT-B 270-271; 25 RT 6973-6976.)

From there, appellant went to the Pacific Motel where he engaged the services of some prostitutes. (1 ACT-B 271.) After appellant left the

motel, he drove for awhile until he grew tired and pulled his car over to go to sleep. Appellant fell asleep near the Sacramento Police Station Patrol Annex substation on H Street. (1 ACT-B 271; 22 RT 6039-6043.)

On the evening of October 17, Renouf's body was spotted by a passerby who reported it to the police. (21 RT 5891-5892, 5895, 5897, 5903-5904.)

e. Appellant's Arrest (Oct. 18, 1992)

On October 18, 1992, Sacramento Police Officer Marty Gish was ending his graveyard shift at about 7:30 or 8:00 a.m. (22 RT 6037.) As he was walking down H Street, he noticed a newer model Oldsmobile station wagon with a license plate of a type issued in the late 1970's parked by the curb. (22 RT 6039-6040.) The front license plate was missing. (22 RT 6088.) Officer Gish called for backup and was joined by Officer Sweeney. (22 RT 6040, 6109.)

The officers observed appellant asleep behind the wheel of the car. The doors were locked. Sweeney knocked several times on the car window until appellant awakened, appearing disoriented. Appellant attempted to open the electronic door lock mechanism several times, before Sweeney was able to get the door open. (22 RT 6041-6043, 6111-6112.) They ordered

appellant to step away from the car. Gish patted appellant down and found a loaded .25 caliber semiautomatic in his vest. Appellant said he had the gun for protection. (22 RT 6044-6045, 6112-6113.) When appellant failed to respond to a request for identification, Sweeney removed a wallet out of appellant's rear pants pocket. (22 RT 6113.) Out of the blue, appellant said, "I am an ex-con." (22 RT 6045.)

Sweeney found a driver's license issued to Gregory Renouf in appellant's wallet. Gish had earlier seen the name "Gregory Renouf" listed as a homicide victim; he was therefore concerned. The officers arrested appellant, but performed no further search at that time. (22 RT 6046, 6093, 6113-6115.)

The officers transported appellant to the main police facility. (22 RT 6049.) When Gish tried to open the door to the building, appellant pulled sharply to the left. Gish lost his balance and fell to the ground. Sweeney went to the ground and seized appellant in order to subdue him. There was no further struggle. Appellant, who was handcuffed, suffered an abrasion to his forehead. (22 RT 6050, 6116-6118.)

Appellant was booked and processed. (22 RT 6045, 6118.) The arresting officer noted on the intake assessment sheet that appellant appeared to be intoxicated, and that he had visible needle marks or scars. (22 RT

6527.)

Appellant's gun was found to be fully loaded with one round of ammunition in the chamber and six rounds in the magazine. (22 RT 6056.) The wallet found on appellant was leather with a horse's head and the name "Larry" embossed on it. (22 RT 6057.) The officers also found a check-cashing card, an interim driver's license, a paycheck and a checkbook, all issued to Renouf. (22 RT 6058-6063.) Additionally, a baggie containing rock cocaine was found in appellant's left, front pocket. (22 RT 6119; 23 RT 6532, 6535.)

Appellant underwent a medical assessment that day. A nurse noted a minor abrasion on his forehead. Appellant told the nurse that he used methamphetamine, marijuana, cocaine and heroin, but appellant refused to answer further questions concerning the amount or frequency of drug use. The nurse noted that appellant was alert, oriented, had clear speech and walked without staggering. (23 RT 6515.)

Appellant submitted to having blood taken. (23 RT 6528.) His blood tested positive for .07 milligrams of methamphetamine. No other drugs were detected. (23 RT 6543-6547, 6549, 6555.)

f. Appellant's Interrogations and Confession (Oct. 18-19, 1992)

Detective Keith Faust of the Sacramento Police Department interrogated appellant starting at 9:41 a.m on October 18. Appellant was placed in an interrogation room where he was subject to clandestine video and audio taping. (23 RT 6413-6415, 6418, 6442.)

Appellant was advised that he was under arrest for a murder which took place in San Joaquin County and was provided with Miranda admonitions.[8] (1 ACT-B 1-2.) Appellant appeared sleepy, but Faust thought he was coherent. (23 RT 6416; 1 ACT 16, 28, 70.) Appellant told Faust that he had taken heroin three days before with a woman named Donzelle, and was unable to remember anything, including how he got the jacket he was wearing and the gun found in his possession. (1 ACT-B 5-14.) At about 10:00 a.m., appellant invoked his right to counsel and Detective Faust discontinued the interview. Appellant slept off and on for the next few hours. (5 RT 1054; 24 RT 6645.)

After 1:24 pm., Detective Faust contacted appellant again and asked him to remove his shirt so that photos could be taken. He saw what

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[8] The legality of this interrogation is a disputed issue on appeal. (See Argument III, below.)

appeared to be blood on appellant's arms and hands. (1 ACT 106-107.) At this time, appellant told Faust that Donzelle and a man named Kyle Mooney had tried to set appellant up, and that the only thing that appellant had done was to steal Shockley's car. He said that Gregory Renouf's property had been given to him by Donzelle and Mooney, who had picked Renouf up at a pornography shop. (1 ACT-B 20-26.)

Around 2:00 p.m., Detectives Larry Ferrari and Xavier Ordez, of the San Joaquin County Sheriff's Office, began interrogating appellant. Appellant said that he had gone with Kyle Mooney and Donzelle to Shockley's house. Appellant had handcuffed Shockley and taken some of his property. Then appellant, Mooney and Donzelle drove Shockley to a remote area where Mooney had shot Shockley. Afterward they sold the stolen property. (1 ACT-B 43, 59-61, 70, 77, 83-88, 102.) This interrogation of appellant ended around 3:32 p.m. (1 ACT 53, 135, 140-141.)

San Joaquin County Deputy District Attorney George Dunlap then arrived and, along with Detective Ferrari, restarted the interrogation at 7:04 p.m. Although appellant complained that his head hurt, he consented to another interview. (1 ACT 54-55; 1 ACT-B 121-122.) Detective Ferrari again provided appellant with Miranda admonitions. (1 ACT-B 122.)

During the interview appellant said that he could not see and that he did not know what day it was. He said that he was not "all right" and complained that he had been kept in a cold holding cell with no blanket and had been unable to sleep. Appellant again stated that it was Mooney and Donzelle who had killed and robbed Shockley. (1 ACT 121-122, 126-161.)

After 9:00 p.m., appellant expressed his willingness to "tell everything" after he was able to get a night of sleep. Although appellant insisted several times that he would talk after he got some sleep, Deputy District Attorney Dunlap continued to prod until appellant finally confessed to shooting Shockley. Appellant acknowledged that he had committed the crime by himself and said that he would provide more details after he had had a chance to sleep. He also asked if he could strike a deal where he would be guaranteed the death penalty. The interview was then discontinued until the next morning. (1 ACT 218-227.)

Detective Ferrari and attorney Dunlap resumed the interview around 9:45 a.m. the next morning, October 19. Appellant appeared more rested, but was distraught and crying. He again said that he wanted the death penalty. (1 ACT-B 228; 2 ACT-B 311.) Appellant said that Shockley had tried to hire him to kill Shockley's stepdaughter, Sheree Gledhill, and that he had killed Shockley when Shockley reneged on the agreement. When the

interrogators expressed disbelief, appellant said, "I'm not lying." Appellant said that around 4:00 a.m. on the morning of the Shockley homicide, appellant had gone to the guardhouse where Shockley worked to see if he could trick him into giving appellant some money. He told Shockley that he had killed Gledhill and wanted to get paid. Shockley had replied that he would take care of payment later. (1 ACT-B 231-233.)

Appellant then went to Shockley's house and burglarized it. He took Shockley's pet parrot, his rifle and some tools. (1 ACT-B 233-234.)

Appellant still wanted to get some money from Shockley. Appellant called Shockley from a Chevron station and said that he had been pulled over for a registration violation, and that he would be arrested if Shockley did not come out to help him. When Shockley arrived at the Chevron station appellant said that he had thrown gun shells out of the car before the police had pulled him over and that he wanted Shockley to help him recover them. (1 ACT 234-236.)

Shockley drove appellant to where he said he had thrown away the gun shells. Appellant subsequently shot Shockley in the back of the head. Appellant said that he had not contemplated killing Shockley before they met near some sunflower silos, but appellant had become angry when Shockley started to walk away when appellant asked Shockley for money as

payment for killing Glenhill. After he killed Shockley, appellant realized that he needed money to get away so decided to take Shockley's money. Appellant took seven dollars from Shockley's body. Appellant stated that he then took a tarp and the floor mats from Shockley's car and attempted to cover the body with them. (1 ACT-B 235-237; 2 ACT-B 306, 308.)

Appellant drove away in Shockley's car and again went to Shockley's house where he took some things. After selling the stolen items he bought some "crank" and heroin, and drove around that day "pretty stoned." (1 ACT-B 238-245.) Appellant admitted that he had burglarized Shockley's house both before and after shooting him, and that he acted alone. He admitted that the story he had told on the day of his arrest, regarding Donzelle and Mooney, was untrue. (1 ACT-B 233, 238-239, 244.) He told the police that he had taken drugs both before and after killing Shockley and throughout the crime spree. (1 ACT-B 239, 242-243, 245, 253, 266, 271.)

Appellant also admitted shooting Stacy Copeland, and taking her drugs and money. He said that he had only intended to rob her. He had asked her to check to see if his car was scratched in order to get her out of the car. He wanted her to exit the car so that he could take her purse which was on the floorboard. Appellant said that he got excited and the gun went off. He did not know he had shot her in the back, and in fact thought he had

shot her in the buttocks. The shooting of Copeland was an accident. (1 ACT-B 249-252.)

Appellant stated that he met Renouf at a pornography shop. Renouf solicited appellant for a homosexual act and they agreed to do this in an abandoned warehouse district. Initially appellant had planned only to rob Renouf, but en route he decided that because Renouf was a large man he would have to shoot him. It had not been appellant's intention to kill Renouf. (1 ACT-B 261-264.) When they arrived at the agreed location, appellant displayed his gun. Renouf grabbed the gun and appellant started shooting. Renouf ran away and appellant continued to shoot at him. (1 ACT-B 264, 269.)

Following appellant's interview, Detective Ferrari and Deputy District Attorney Dunlap asked appellant if he would be willing to drive to the crime scenes in the Sacramento area to recover evidence. Appellant agreed to this and Detectives Faust and Walker transported appellant. All but the last 15 to 20 minutes of the drive was recorded. (23 RT 6439, 6455-6546, 6462-6464; People's Exh. 340.)

The drive began at approximately 2:40 p.m., and lasted about an hour-and-a-half. Appellant was cooperative throughout the drive. (23 RT 6462-6463.) Appellant showed the detectives the Chevron station where he had

dumped his clothing. Appellant explained that he had changed clothing in the bathroom. The officers were then able to recover some clothing and a box of checks from the dumpster. (23 RT 6466-6468.) Appellant showed them where Renouf's car was parked and indicated where his own car had been parked at the time of the shooting. (23 RT 6470.)

Appellant directed them to the Radio Shack and explained that he had tried to write a $300 check. (23 RT 6471-6472.) Appellant helped them locate some papers he had thrown in a gutter not far from Renouf's apartment. These papers had Renouf's name and address on them. (23 RT 6474-6475.) Appellant also helped them recover a credit card which belonged to Shockley from a garbage can at a Lucky's grocery store. (23 RT 6479, 6499.) Appellant told the officers about his cashing checks at the Safeway stores. (23 RT 6480-6481.)

g. Count 11 – The Jailbreak (June 19, 1992)

On June 19, 1993, appellant was assigned to Housing Unit Four of the San Joaquin County Jail. He had been in custody since his arrest on October 18, 1992. That day appellant and six other inmates escaped from the prison by breaking a window on the second floor of the facility, and climbing over

the chainlink fence that surrounded the facility. (24 RT 6619-6620).

Subsequently, the San Joaquin County Sheriff "trapped" the phone of appellant's wife Anita. The trap revealed that she had received a phone call from a telephone booth located at Haight and Stanyan in the Haight-Ashbury district of San Francisco. (24 RT 6662-6663.) On June 23, 1992, six police officers traveled to that area and set up a stakeout across the street from the telephone booth where the call originated. (24 RT 6637-6638, 6663-6665.) Approximately 20 minutes later, appellant was spotted and arrested. (24 RT 6665-6670.) There was a brief struggle while appellant was handcuffed by the police. (24 RT6639-6641, 6670.)

A syringe was found in appellant's shirt pocket. (24 RT 6638-6642.) Appellant did not appear to be under the influence of any drugs at the time of his arrest. (24 RT 6675-6677.)

h. Police Investigation/Scientific Evidence re Shockley Homicide

i. Shockley's Home

Police arrived at Shockley's home following neighbors' reports of suspicious circumstances on the morning of October 16, 1992. The doors could not be unlocked because toothpicks or wood shavings had been broken off in the lock mechanism. A window screen found near the front door was

badly damaged. (20 RT 5586.) After gaining entry to the home, police found that it had been ransacked. A bedroom window had been broken from the outside. (20 RT 5588-5589, 5591-5592.) Tire tracks were found on the lawn in front of house. (20 RT 5611.) A broken padlock, which appeared to be cut through, was found outside the door leading to the garage. (20 RT 5617.)

A television, a VCR, and a stereo and speakers were missing from the living room, and a hand trolley was found there. (21 RT 5713-5717; 22 RT 6229-6230.) Also, a television and safe were missing from the master bedroom. (21 RT 5713-5717.) It appeared that a heavy object had been dragged across the carpet from the living room to the dining room. A door attached to the dining room had been removed from its hinges. (20 RT 5621.)

A total of eight prints were lifted from the exterior of Shockley's home. (21 RT 5682-5691.) Six of the eight prints were determined to be from appellant. (22 RT 6297-6299.)

ii. Appellant's Toyota

On October 16,1992, appellant's Toyota Corolla was located by police at the Chevron station at I-5 and Highway 12. (20 RT 5603, 5717-5718.) Officer Todd Patterson subsequently accompanied Denise Underdahl and Shockley's neighbor Louis Park to this gas station. (20 RT 5603.) Underdahl recognized appellant's Toyota Corolla. She also recognized Shockley's parrot which was inside the car. (21 RT 5717-5718.) Park told the police that he had seen this Toyota parked in Shockley's front yard that morning. (20 RT 5512-5514, 5518, 5521.)

Arnie Vibe was working as a cashier at the Chevron station where appellant had left the Toyota. On the evening of October 16,1992 , around 6:00 p.m., a man came in concerned about whether his car had been towed or stolen. The man said he was concerned because he had a $700 bird inside the car. Vibe had told the man that he would have to speak with the manager in the morning. (25 RT 6947-6950.)

Appellant's Toyota was processed on October 29, 1992. (21 RT 5652.) Blood was found on the back seat, back right window and floorboard of the car. (21 RT 5641, 5648-5649, 5651.) Inside the trunk, police found a box of fifty .25 caliber bullets with nine rounds missing. (21 RT 5645-5646.)

iii. Shockley Homicide Scene

On the evening of October 16,1992, San Joaquin County Sheriff's Deputies responded to a report that Shockley's body had been found by a passerby in the area of Highway 12 and Guard Road. (20 RT 5446-5448, 5453-5456, 5383.) The body was covered with brown carpeting, some brown vinyl material and car floor mats. (20 RT 5384-5385.) There were two separate pools of blood, one directly underneath the victim's head, and one approximately two feet away. (20 RT 5397, 5420.) Two front pants pockets and one jacket pocket were turned inside out. No wallet or keys were found on the body. (20 RT 5421, 5433.)

iv. Shockley's Vehicles

Shockley's blue Oldsmobile station wagon was processed for fingerprints; numerous prints attributable to appellant were found on the car and items located inside it. (23 RT 6268-6280.) Items found in the car included a 50-round box of .25 caliber cartridges with 11 rounds missing, a .22 caliber semiautomatic rifle and a 50-round box of .22 long-rifle cartridges. (23 RT 6279.) An expended .25 caliber casing was also found in

the back of the station wagon. (24 RT 6694.)

Shockley's utility trailer was found on Manchester Street in Stockton. (21 RT 5823-5827.)

v. Autopsy/Firearm Analysis Regarding Shockley

The autopsy of Larry Shockley revealed a gunshot wound to the back of the head and two gunshot wounds to the face. The shot to the back of the head was made from some distance, while the two shots to the face were contact wounds. The shots to the face were instantly fatal, and the one to the back of the head would likely have resulted in death within a few minutes. (20 RT 5477-5480, 5487-5488.)

Forensic firearm examination of the brown carpet which was covering Shockley's face revealed two bullet holes. The shots causing this had been fired at close range, less than one foot away. (24 RT 6688-6690.)

i. Police Investigation/Scientific Evidence re Renouf Homicide

i. Crime Scenes

On the morning of October 17, 1992, Detective Glenn Walker

responded to a report of a homicide on Railroad Drive in Sacramento. (21 RT 5905-5906.) When he arrived, Walker found a blue Chrysler parked outside a warehouse building. Renouf 's body was lying in front of the car, his head partially under the front bumper. (21 RT 5909.) There was a significant amount of blood around his head. His left rear pocket was unbuttoned. The white lining of the right, front pocket was slightly pulled out. (21 RT 5909.)

Six bullet casings and one bullet slug were found close to the car. (21 RT 5856, 5860-5861, 5923.) A fingerprint belonging to appellant was found on a Marlboro cigarette pack recovered from the scene. (22 RT 5946-5947; 23 RT 6338-6339.)

Renouf's apartment was found to have been ransacked. (21 RT 5918, 5926-5927.) Two fingerprints belonging to appellant were found on items inside. (22 RT 6351.)

ii. Autopsy of Gregory Renouf

An autopsy of Renouf was performed on October 18, 1992. (22 RT 6148.) Renouf had five gunshot wounds, including a wound to the top of the forehead, left cheek, right cheek, right lower back and left flank. All the

shots were from a distance greater than 18 to 24 inches. The gunshot wound to the lower back passed through the liver and caused extensive bleeding. The wounds to the forehead and back were lethal. (21 RT 6152-6160.)

j. Other Scientific Evidence

i. Appellant's Fingerprints

Nine latent prints were lifted from the Pacific Motel hotel room where appellant told police he had gone the evening before his arrest. (22 RT 6017-6019, 6028, 6032-6033.) Of the nine prints submitted from the hotel room, four prints were positive to appellant. (23 RT 6354.)

Three fingerprints belonging to appellant were found on items in Stacey Copeland's purse which had been turned over to the Galt Police Department, including a container of hairspray, a dictionary and a spiral notebook. (23 RT 6282-6284.)

ii. Evidence Related to Appellant's Gun

The gun found on appellant at the time of his arrest was a Titan .25

caliber semiautomatic pistol. (22 RT 5981.) Casings located at the Renouf crime scene were tested and found to have been fired by this gun. (24 RT 6701-6702.) Also, the bullets taken from Renouf's body were found to most likely have been fired from the Titan pistol. (24 RT 6706-6711.)

A bullet taken from Shockley's body was probably fired from the Titan pistol. (24 RT 6711.) There was insufficient detail on the bullet taken from Stacey Copeland to resolve if it was fired from this gun; however it could be determined that it was fired from a similar gun. (24 RT 6712.)

2. The Defense Case

a. Shockley Hired Appellant to Kill His Stepdaughter

Charles Flynn testified that he had befriended Larry Shockley in the year or so before his death. During this period, Shockley's wife Delores had been ill and had died; she was especially ill in the months before her death. Shockley loved his wife very much. After she died Shockley seemed to go to pieces; he was emotionally distraught and not eating properly. (24 RT 6820, 6824.) Flynn believed that after Shockley's wife died, the only thing that kept him going was his grandchildren. At some point after her death, the

grandchildren came to live with him for a while. (24 RT 6833-6835.)

A couple of weeks after Delores died, Shockley told Flynn about a plan he had to kill his stepdaughter Sheree Gledhill. (24 RT 6820-6822; see 21 RT 5733.) Shockley had been arguing with Gledhill about her children (who were Shockley's step-grandchildren). (24 RT 6820-6822.) Shockley told Flynn that Gledhill lived by a canal, and that he wanted somebody to lay on the bank of the canal with a high-powered rifle and shoot her while she was in her home. Shockley did not solicit Flynn's help with shooting Gledhill, nor did he say that he had hired somebody to do this. (24 RT 6820-6824.) Flynn felt that Shockley was under a great deal of strain as a result of losing his wife and fighting with Gledhill about her children, and that the pressure was too much for him to handle. (24 RT 6822.)

Flynn thought this conversation was strange, and he was very concerned that Shockley might need professional help. He discussed this with Shockley's son-in-law, Mike Underdahl, but Underdahl was unresponsive. Later, Shockley briefly mentioned his plan to kill Gledhill in a second conversation with Flynn. (24 RT 6821-6822, 6829.) Flynn testified that he believed Shockley might have followed through with his plan if he were pushed hard enough. (24 RT 6824.) Shockley said that he was having many problems with Gledhill and that he had great disdain for her. In the

period before his death, Shockley's relationship with Gledhill had deteriorated. He told Flynn that Gledhill had serious problems with drugs and he did not want his grandchildren exposed to that lifestyle. Shockley told Flynn that the oldest daughter in particular was having a lot of problems and that Gledhill's children had been detained by authorities for running away from home. (24 RT 6820, 6825-6828.)

Flynn testified that Shockley loved his grandchildren very much, and was trying very hard to be of help, even seeing a counselor at the high school. Flynn was aware that Shockley and his wife had had custody of Gledhill's two daughters at some point during the year-and-a-half prior to Shockley's death. (24 RT 6825-6826.) Shockley told Flynn that he was in a custody battle with Gledhill, and that he was fighting "tooth-and-nail" with her to get the children. (24 RT 6833-6834.)

Flynn was also aware that Shockley had a fight with appellant over money Shockley owed appellant. Shockley had told Flynn that appellant had hit him, and that Shockley had called the police to complain about appellant. Flynn said that Shockley was afraid of appellant "to some extent." Flynn understood that appellant had threatened Shockley's life. (24 RT 6830-6832.)

b. Renouf's Arrest For Soliciting a Homosexual Act

On May 27, 1981, Gregory Renouf was arrested after he approached a male undercover Sacramento police officer in a public place with the intent to engage in a lewd act. (25 RT 6869.)

c. Appellant's Arrest Following the Jail Escape

Sargent Michael Junker of the San Joaquin County Sheriff's Office was part of the team that had arrested appellant in San Francisco following his escape from jail. Appellant was handcuffed by the officers. As the officers were handling him, appellant started to pull away. Junker, who was in front of appellant, pulled a gun on appellant and told him not to move. After they found an identifying tattoo on appellant's arm, appellant admitted he was Paul Hensley. (25 RT 6857-6859.) Although appellant pulled away from the officers, he never broke their hold on him. There was never a struggle which resulted in anyone falling to the ground. (25 RT 6862.)

B. The Penalty Phase

The jury deadlocked in the penalty phase of appellant's first trial and a penalty mistrial was declared. (7 CT 1785.) The evidence summarized below represents the second penalty phase, in which the present death judgment was returned. In the penalty phase the prosecutor relied upon the aggravating factors set forth in section 190.3, subdivision (a) (circumstances of present crimes), subdivision (b) (past violent criminal conduct), and subdivision (c) (prior felony convictions).

1. Evidence of Aggravation

a. Circumstances of the Subject Crimes

Stacey Copeland testified that after she was shot she lay for hours trying to stay alive. It was difficult for her to breathe because the bullet penetrated three organs, causing blood to accumulate in her lungs. She was unable to move. A young Mexican boy came by, and she wanted to get his attention, but she was afraid that he would become scared and run away. She waited until he got as close as possible and then asked him to call 911.

Copeland maintained consciousness after being shot until she underwent surgery. That entire time she did not know whether she would live. Copeland is now paralyzed and has been told she will never walk again. She stated that she still has a lot of emotional and physical pain. (48 RT 13906-13910.)

Denise Underdahl testified that she had a good relationship with her stepfather, Larry Shockley, and that he was a nice man. (48 RT 13783, 13793-13794.)

No testimony was presented by the family or friends of Gregory Renouf.

b. Criminal Activity Involving Force or Violence

i. Dawn Evans Incident (Nov. 26, 1977)

On November 26, 1977, when appellant was 16 years old, he assaulted 16-year-old Dawn Marie Evans. Evans was babysitting a child who lived in an apartment in appellant's neighborhood. (47 RT 13435-13436.) Appellant knocked on the door and asked if he could come in to get a drink of water. Evans allowed him in and waited while he was in the kitchen. A few minutes later he came out, grabbed her from behind, put one hand on her throat and

put a box-cutter knife to her neck. He ordered her not to scream and to put down the child she was holding. She screamed and would not let go of the child. Appellant dropped the knife and ran. (47 RT 13436-13439.) Appellant attended the same high school as the victim, but they were not acquainted with each other. (47 RT 13436, 13442, 13445.) This incident was reported to the police, but the matter was not prosecuted. (50 RT 14809-14811, 14820.)

ii. Stockton Savings Robbery (Aug. 27, 1992)

In August 27, 1992, appellant robbed the Stockton Savings Bank, where Jo Ann Wagner worked as a teller. Appellant walked up to her window, displayed a gun, and handed over a white plastic grocery bag. He asked her, "Do you know what this means?" She filled the bag with money and inserted a dye-pack grenade inside. Appellant took the bag and walked out. (47 RT 13545-13548 .) The grenade then went off, leaving a red cloud in its wake. (47 RT 13549.)

David Russell was appellant's getaway driver in the robbery. He testified against appellant in exchange for a dismissal of the charges against him. (47 RT 13567-13568, 13570.) Russell waited in the alley behind the

bank. Appellant came out a few minutes later carrying a bag with red smoke trailing from it. (47 RT 13570-13571.) Appellant placed the bag in the trunk of the car. When they arrived at a safe location, appellant told Russell that they needed to get the grenade out of the bag as soon as possible. They dropped it down a manhole, then drove to appellant's sister-in-law's house where they washed the money with some bleach to get as much of the red out as possible. They then went on to Russell's house and washed the money in the washer and dryer. They burned the money that they were not able to get clean. (47 RT 13571-13574, 13590-13591.) The robbery netted the two of them a few hundred dollars. (47 RT 13574.)

iii. Larry Shockley Incident (May 4, 1992)

On May 4, 1992, a few months prior to Larry Shockley's death, appellant and Shockley got into an argument over money which Shockley owed appellant. Shockley called the police and Officer Roger Butterfield responded to the call. Shockley complained that appellant had pushed him into a wall, causing a scrape on Shockley's right elbow. Appellant told the officer that he pushed Shockley only after Shockley approached him in a hostile manner. Shockley did not want to press charges, he only wanted

appellant to leave his residence. Butterfield stayed on the scene until appellant left. (53 RT 15234-15238.)

Anita Hensley was present during the fight and testified that appellant and Shockley were arguing about money regarding a purchase they had made together. Shockley attempted to hit appellant with a telephone. Appellant protected himself by pushing Shockley down, but Shockley tried again to hit appellant with the phone. Appellant pushed Shockley down a second time and told him to stay down. (54 RT 15661-15662.)

iv. Anita Hensley Incident (Aug. 31, 1992)

On August 31, 1992, appellant and Anita Hensley got into an argument after appellant failed to come home for almost three days. She accused him of taking drugs and appellant denied this. The argument escalated, and appellant grabbed Anita by the throat, lifted her off the ground and struck her twice. Appellant was arrested and jailed for a month in connection with this incident. (54 RT 15667-15670.)

c. Prior Felony Convictions

On December 29, 1979, when appellant was 18 years old, he robbed Sheri Turner at knife-point while she was working at Zip's hot dog stand in Concord. (47 RT 13463-13470.)

On January 2, 1980, appellant robbed Betty Klekar while she was working at a Caspers restaurant. Appellant walked right up to the register, reached over the counter and opened it. He brandished a eight-to-ten inch kitchen knife in his right hand and opened the register to withdraw money with his left hand. Klekar described appellant's demeanor as calm. Appellant told her that he was sorry he was taking her money. (47 RT 13474-13477.)

On January 12, 1980, appellant robbed Linda McVey at knife point while she was working at Kentucky Fried Chicken. She said that appellant appeared tense, and was quick and short with her. (47 RT 13618-13623.)

On July 26, 1985, appellant was convicted of being a felon in possession of a firearm in violation of section 12021, subdivision (a). This arose out of an incident in which he was stranded on the road with a flat tire. A California Highway patrol officer stopped to offer assistance. Appellant asked the officer for a ride and, in compliance with policy, the officer advised

appellant that he had to search him before allowing him in the vehicle. Appellant raised his hands, told the officer that he had a gun and pointed to his pocket. The officer described appellant as cooperative during the event. Appellant said, "Officer, don't freak. I have a gun in my right front pocket." (47 RT 13502-13507.)

On November 13, 1986, appellant was involved in an incident which resulted in a conviction for assault with a deadly weapon. The victim, Rick Jones, was an acquaintance of appellant. Jones' girlfriend, Stacy Phillips, who was present during the incident, testified that appellant and Jones were friends, and that their relationship had deteriorated due to an incident which involved a tire slashing. Anita Hensley testified that Jones, who was 23 years old at the time, was having sex with appellant's 14-year-old sister, and that they were also fighting over damage done to Anita's stepfather's car. There was a 10-day feud between them. Jones stopped appellant almost daily during this time, calling him names and threatening to "shank" him. Since Jones was much bigger than appellant, Anita placed a baseball bat in the car for appellant's protection. (54 RT 15618, 15741-15742.)

Phillips testified that Anita Hensley forced Jones' car off the road, and appellant came after Jones with a baseball bat. Jones was struck twice and sustained large bruises to his rib cage and his left forearm. Anita, in turn,

denied that she rammed the car on purpose and said that it was an accident that got out of hand. Both Anita and appellant were charged and convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) as a result of this. (45 RT 15619, 15621.)

2. Evidence of Mitigation

a. Appellant's Childhood

i. Life with Penny and Sonny Cordes

Appellant was born in 1961. His mother was Penny Hensley. Three months after his birth, Penny met Herman "Sonny" Cordes (Sonny) and they were married on May 13, 1962. (54 RT 15448-15450.) Appellant never knew his real father and only learned that Sonny Cordes was not his father much later. Penny and Sonny had two more children, Cathy born in 1963 and Julie born in 1968. Julie was born autistic. Penny drank and smoked a lot of marijuana when she was pregnant with Julie. (54 RT 15451-15452, 15463, 15465, 15468-15470.)

Penny and Sonny had a difficult marriage. They never got along and they separated several times. They both drank and they both had outside affairs. (53 RT 15302; 54 RT 15455-15456, 15464-15465.) Sonny worked a

full-time job with PG&E and, in the last five years of their marriage, he also worked an additional 40 to 45 hours a week at Shakey's Pizza. (54 RT 15456-15457.) Penny drank a great deal and often went out in the evenings, particularly towards the end of their marriage. She slept most days and failed to keep a clean house. The couple often argued, which led to some shoving, although no violence beyond this. There was never violence used on the children. (54 RT 15464, 15465, 15485, 15538.)

Cordes testified that he treated appellant like his own son and that they had a good relationship. He testified that he thought appellant was a "normal little boy," with the normal problems that kids have, but a bit slow and immature for his age. Appellant had a problem with his eyes which required glasses, but he would not wear them. He also had a bed-wetting problem and stayed in diapers until he was five years old. He required a baby bottle until the same age. Appellant was picked on by other kids for wearing diapers, but he was out of diapers by the time he went to school. Appellant missed a lot of school; his mother failed to get up in the morning and get him there. His grades suffered because he had a problem with his eyes and difficulty in paying attention. (54 RT 15454, 15457-15458, 15515-15516.)

After seven years, Penny and Sonny divorced. They battled over child support and custody of the children. Sonny wanted custody of his two

daughters, and he did not want to pay child support for appellant. Although there was conflicting evidence on this point (as noted below), Sonny Cordes testified that appellant learned that Sonny was not his father during a court hearing on the issue of child support. Appellant did not appear to react at the time, but after the hearing Sonny saw appellant crying. Appellant was seven or eight years old at the time. (54 RT 15465, 15467-15470.)

Prior to this hearing, Sonny Cordes came to pick up the two girls from Penny. Appellant had followed behind him yelling, "Dad, I want to go. Daddy, I want to go." Cordes admitted that he was angry with Penny at the time for trying to get child support for appellant, and because of this he did not stop. (54 RT 15467, 15471.) Due to the bad feelings between himself and Penny, Cordes never considered taking custody of appellant. (54 RT 15474.)

Although Penny won legal custody of her daughters, she relinquished custody of them to Sonny shortly afterwards. (54 RT 15476, 15479.) Appellant only saw Sonny Cordes two more times, once for a family vacation (1971) and once for a birthday party (1972 or 1973). Appellant had no other contact with his sisters until 1984, when he and Cathy made contact following his release from prison. This contact was discouraged by Penny, and they did not see each other again after that occasion. (54 RT 15472,

15487, 15558-15559, 15569.)

ii. Life with Penny and Terry Thori

Penny had been seeing Terry Thori towards the end of her marriage to Cordes and she married Thori after her divorce. In 1969, the couple and appellant moved to Salt Lake City where they lived for the next three years. Penny and Terry had two daughters together, Chantel and April. (52 RT 15109-15111; 55 RT 15774.)

Penny and Terry's relationship was a stormy affair. They drank heavily and had many fights. Penny was particularly hot tempered when she drank. She would instigate fights which often resulted in Terry holding her down. She did this with other members of the family as well. There were rumors of affairs and Penny once made a sexual advance toward Terry's brother Steven. (52 RT 15108-15109, 15115-15116; 53 RT 15118-15119; 55 RT 15783-15786.)

Although Penny and Terry would spend money on their children, they were not actively involved in their children's lives. Terry Thori had little interest in appellant and there was practically no interaction between them. Penny was known to give the children beer to put them to sleep at night. (53

RT 15120, 15184-15186.) Penny also introduced appellant to methamphetamine. She put it in his coffee so that he could be more productive and stay up later when helping out at his grandmother's convalescent home. (55 RT 15710-15711.)

In 1973, after a particularly bad fight, Terry left Penny and moved back to California. Penny followed him there a couple of days later. Appellant continued to live with his mother and stepfather until early 1975 when appellant was in the seventh grade. Then Penny and Terry broke up once again and Penny was forced to move in with a friend. There was not enough room for appellant, so Penny asked Keith Passey, a friend who had lived with them in Salt Lake City, if he could take appellant in. Passey and appellant had a good relationship, and somewhat reluctantly Passey agreed to this. (55 RT 15770-15772, 15774, 15787-15788, 17846-17847.)

iii. Life with Keith Passey[9]

Passey first met appellant in 1969 when appellant was eight years old. Passey had been a longtime friend of the Thori family. During the three years

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[9] Keith Passey testified in appellant's first penalty trial, but failed to appear to testify at the second penalty trial. As a consequence of his unavailability, the court allowed his prior testimony to be read to the jury. (See 55 RT 15763-15764.)

that the Thoris lived in Salt Lake City, Passey lived with them. (55 RT 15764, 15768, 15771-15772.)

Passey had more of a relationship with appellant than Thori, particularly near the end of their time in Utah. Thori was a strict disciplinarian, although Passey never saw Thori use physical force on appellant. Passey, on the other hand, spent time with appellant sleigh riding, going to the park and fishing. Passey was a truck driver and therefore was away for weeks at a time, but appellant was always glad when he came home because he was always able to get Passey to do something with him. (55 RT 15775, 15788-15789, 15892, 17823, 17903.)

Passey found appellant to be intelligent and was surprised to learn that appellant had to go through the first grade twice. Penny told Passey that one of his teachers thought appellant was retarded. Appellant had trouble reading, and so Passey enrolled him in a remedial reading course with the Evelyn Woods school when he was nine years old. Passey attended the course with appellant twice a week. By the end of the course, appellant's vocabulary had improved almost to his grade level. (55 RT 15776-15778.) Passey testified that appellant seemed to get along well with other children, cared for others, and was happy most of the time, especially when he was doing things. (55 RT 15782-15783.)

When appellant came to live with Passey during the seventh grade, Passey was living in Reno, Nevada. Passey moved to a two bedroom apartment so that appellant could have a room to himself. Passey had a job as a truck driver and was working odd hours, so appellant often had to look out for himself. (55 RT 17843-17845.)

Appellant stayed with Passey from the end of seventh grade through Christmas of 1976. Appellant received good grades in school during this time. Passey found appellant to be very intelligent at that age. He had an impressive memory and was very artistic. Passey considered appellant to be generally very honest. (55 RT 17843, 17854.)

Although Sonny Cordes testified that appellant had learned that he was illegitimate at the custody hearing when appellant was seven years old, Passey testified that on one occasion when he was driving appellant home from camp, when appellant was 13 or 14 years old, appellant said that his mother had told him that Sonny Cordes was not his father. Appellant was very upset about this and was crying. He said to Passey, "You always knew, didn't you?" (55 RT 17852, 17884.)

When appellant was in the eighth grade, appellant and some friends were accused of breaking into a car. Passey picked up appellant from Juvenile Hall. He noted that appellant felt kind of high when he got out

because it was so easy. Appellant went home to visit his mother for Christmas of 1975. Although the plan was for appellant to return to Passey, Penny called Passey to tell him that appellant had decided to stay with her. (55 RT 17854-17856.)

Passey kept in touch with appellant and at some point appellant said that he wanted to come to live with him again. Passey agreed if appellant would enroll in summer school. When appellant was unable to produce any report cards or homework, Passey called the school and learned that appellant had not been attending. He then sent appellant back to live with his mother. (55 RT 17924-17927, 17934-17935.)

Passey testified that he thought that appellant had come to live with him a couple more times. On one of those occasions, appellant had been arrested. The arresting officers said that they found appellant in the park, high on something, gibbering like an idiot. Before Passey could arrange bail, appellant was sent back to California on some outstanding warrants. Afterwards, appellant did four years at the California Youth Authority. Passey visited appellant and exchanged letters with him during this incarceration. (55 RT 17864-17866.)

b. Appellant's Adult Life

Anita Hensley was introduced to appellant by his mother, Penny, in May 1984. The couple married on September 1, 1984. They have four children together: Amanda born May 12, 1985; Samantha born July 14, 1989; Paul, Jr. born June 12, 1990; and Danielle born March 16, 1994. (54 RT 15609-15611.)

Appellant was working for Sure Kill Exterminators in 1984 when he met Anita. (54 RT 15616.) He went to jail between spring of 1985 and February 1986 for carrying a concealed weapon. (54 RT 15613.) After being released from prison, Paul began working with Anita Hensley's stepfather Larry Shockley, doing odd jobs, handyman and yard work, and repairs. (54 RT 15617.)

Anita and appellant used methamphetamine together. Appellant's use of the drug started in 1986. At times appellant was irritable, short-tempered and paranoid from using this drug. At other times he would work hard and fix things while under its effects. (54 RT 15620.)

In late 1986, appellant was sent to Soledad prison in connection with his assault on Rick Jones. (45 RT 15619, 15621.) When appellant was in prison, Anita was unable to visit him because she was a codefendant in the

Jones case. During this time, Anita lived with another man. When appellant was released in 1988, Anita and appellant got back together and moved in with Delores and Larry Shockley. Appellant and Larry Shockley got along well at this time. (54 RT 15621-15622.)

Between 1988 and 1989, the Hensleys lived in the Bay Area and appellant worked at pest control jobs. (54 RT 15624.) Appellant passed a difficult test with the Structural Pest Control Board to obtain his license and work with Terminix. His employment with them began in July 1988. His supervisor, Timothy Palmberg, testified that appellant was a very good employee. There were no disciplinary actions involving him, and no evidence of drug use. Appellant spoke to Palmberg extensively about his family and future plans. In April 1989, appellant quit, but returned for a short stint later that year in a different capacity. (53 RT 15349-15362.)

During this time, appellant used marijuana and methamphetamine. He would snort methamphetamine, which would result in both irritability and his ability to do more work. (54 RT 15654-15655.)

In 1990, the Hensleys moved to State Line, Nevada so that appellant could take a job with Rose Pest Control. After a few months, the Shockleys moved to nearby Reno. Then the Hensleys moved in with the Shockleys where they stayed for about a year. During this time, appellant worked for

Safeway, AM/PM Mini-Mart, Terminix and a golf course. (54 RT 15655-15657; 55 RT 17873-17874, 17880.)

David Vivo was appellant's neighbor and friend for two years while appellant lived in Reno. They worked together at a country club golf course, and socialized evenings and weekends. Vivo testified that appellant was a good father who played a lot of attention to children. Vivo said that appellant maintained his lawn and home, and the Hensleys kept a clean house. Appellant was a dependable employee, and did seasonal work. He was scheduled to be rehired, but due to drought the golf course was closed. (53 RT 15395-15402; 55 RT 17878, 17880.)

At the end of the golf season, appellant took work at an AM/PM market. Nola Martin worked with appellant there. She testified that appellant continuously talked about his wife and children. She said they were everything to him. (53 RT 15377-1537.)

While living in Reno, appellant continued to use marijuana. He desisted from using methamphetamine, but did take LSD. During this time the Shockleys moved back to California. In March of 1992, the Hensleys left Nevada and moved back in with the Shockleys at their Lodi, California home. (54 RT 15655-15659.)

Appellant went to work for Denise Underdahl at McDonald's.

During this time appellant and Shockley started their business, Wine Country Services, doing painting, repair, handyman and yard work. Shockley and appellant got along well and socialized together, such as going to the doughnut shop to have coffee. In May 1992, appellant and Shockley got into a dispute about money which resulted in a physical altercation. Shockley evicted appellant and his family from his home. For several months they did not speak, but approximately a week before Shockley died, he and appellant had made plans to work together again. (54 RT 15660-15662.)

During those months, appellant and his family were taken in at the homes of Anita's sisters. After that, the Hensleys camped at Boca Reservoir. After Anita's mother died on July 7, 1992, the family moved in with Anita's sister Sandy and her boyfriend, David Russell. (54 RT 15662-15664.)

After moving from Nevada, appellant continued using marijuana and began to use methamphetamine again. Anita saw the effects in appellant's behavior, and on two or three occasions she saw appellant take the drug. Although she never saw him inject it, she suspected that he did when she found a syringe in the bathroom. Appellant's behavior became "straight mean" and violent during this time. Anita attributed it to him becoming an intravenous drug user. At one point appellant developed a large bump on his arm – a "miss" which occurs when the drug fails to be injected into vein.

(54 RT 15664-15666.)

On August 27, 1992, appellant and David Russell robbed a bank. On August 31, 1992, appellant and Anita got into a argument after appellant failed to come home for almost three days. Anita accused him of taking drugs and appellant denied it. The argument escalated, and appellant ended up grabbing Anita by the throat and lifting her off the ground and striking her a couple of times. Appellant was arrested and stayed in jail for about a month, during which time he attended some Narcotics Anonymous meetings. After getting out of jail, he returned to using drugs. (54 RT 15567-15670.)

On October 15, 1992, Anita, appellant, Sandy, David Russell and their families were faced with eviction. Anita and the children went to stay with friends down the street. Appellant loaded up their belongings in a U-Haul truck and disappeared. Anita last saw him that evening around 8:00 p.m. Larry Shockley was with the family that day assisting them in purchasing a trailer. (54 RT 15670-15671.) That evening, appellant robbed the Baskin-Robbins. (24 RT 6569-6577.)

Following his being jailed on the present charges, appellant's wife Anita and their children would visit appellant every day in jail until the rules changed, after which the Anita was only permitted to visit twice a week. The children and appellant love each other and enjoy their visits together.

They all correspond frequently with appellant by way of cards and letters. Paul is a talented artist and regularly draws pictures which he sends to his family. (54 RT 15672-15679, 15682-15683.)

c. Appellant's Methamphetamine Addiction

There was defense expert testimony concerning appellant's severe addiction to methamphetamine. Methamphetamine is a drug that makes one feel good, more confident, stronger and more mentally alert. The drug is a central nervous stimulant which speeds up muscular activity. With small doses there may not be any noticeable effect on a person's behavior except dilation of the pupil. With larger doses a person may manifest symptoms of nervousness, anxiety, agitation and hyperactivity. If too much is taken, it leads to irritability, aggressiveness and hostility. Small doses can actually improve muscle coordination, but excessive amounts can cause muscle tremors and uncoordinated movements. The drug can induce a psychological dependence with repeated use. (51 RT 14726, 14645.)

The worst side effects are those that come with high dosage use over extended periods. These include drug-induced psychosis, in which the user loses touch with reality and paranoid behavior is typically observed.

Aggressiveness and hostility usually precedes actual psychosis. Irrational behavior is generally associated with abuse of methamphetamine. There is a pattern among those who abuse methamphetamine excessively to engage in a prolonged "run" or "binge" of the drug, during which they go without sleep and food. When addicts reach the point where they have to "crash," they will sleep for days at a time, getting up only long enough to eat, and then go back to sleep again. Although it is highly variable, some people can sleep with methamphetamine in their system. (51 RT 14746-14748.)

The average half-life of methamphetamine in the blood is about 12 hours, but it varies anywhere from 7 to 34 hours. The same person could experience a different half-life of methamphetamine from day to day. A blood level as low as .07 milligrams per liter has been correlated with clearly agitated behavior, but some users require higher doses to manifest this effect. (51 RT 14749-14752.)

Heroin is a central nervous system depressant, and has the opposite effects of methamphetamine. It is a narcotic and a very powerful analgesic. When they are combined, aspects of both are manifested so that one could experience being more confident and aggressive, but not being irritable or agitated. Heroin turns into morphine in the blood rather quickly. Its half-life is three to four hours, while the half-life of cocaine averages about one hour.

(51 RT 14752-14753.)

At the time of his arrest, appellant's blood test revealed .08 milligrams of methamphetamine per liter and 0.3 milligrams of amphetamine, which signified that the drug had been in appellant's system for at least two hours. Although the prosecution expert received a reading of .07 milligrams, this is an acceptable variation in testing. (51 RT 14753-14754, 14790.) Based on a figure of .08 milligrams of methamphetamine per liter of blood, the level of the drug originally taken would have been about 75 percent higher, or about .14 milligrams, assuming that the drug was taken eight hours prior to when the sample was obtained. The blood level 20 hours prior to obtaining the sample would be roughly .24 milligrams per liter. Whether that should be considered an unusually high amount depends upon the individual user, but even among addicts this level would be considered on the high side. (51 RT 14757-14758, 14791-14792.) The blood testing performed by appellant's expert also revealed a weak positive for opiates. (51 RT 14754-14757.)

d. Appellant's Potential Adjustment As a Life Prisoner

A prison expert, James Park, interviewed appellant and opined that if he were sentenced to a level four prison without the possibility of parole, that he would make a good, but not excellent, inmate with respect to his behavior in the state prison system. (52 RT 14917-14918.) This opinion was based on appellant's behavior in prior incarcerations and other pertinent factors. Favorable factors include that appellant was an excellent worker during his last incarceration, that after age 40 behavior problems become uncommon, and after age 50 they are rare, appellant was able to maintain employment outside and had earned his GED or high school diploma. Although he was the victim of an assault while in custody, he has never instigated an assault during any of his three prior incarcerations, has not possessed any weapons while incarcerated and has never been involved in gangs. (52 RT 14917-14923.)

Robert Cea was a pest control technician with the Department of Corrections in Vacaville when appellant was serving time. Appellant had a Branch II license from the Structural Pest Control Board, the same license as Cea, and appellant had assisted Cea with developing a pest control program for inmates. Cea considered appellant intelligent, intuitive and a nice person

to be around. Appellant took a leadership position. He liked his job and took it seriously. Cea testified that the program was benefitted by appellant's participation. (53 RT 15382-15389.) Appellant had told Cea that he had been using Cea's phone over the course of a month, something that inmates were not supposed to do. Cea was impressed that appellant confessed his misdeed, so he did not report him. (53 RT 15386, 15390-15391.)

Eugene Paradzinksi of Karl Holton CYA facility testified that during his stay between 1978 and 1979 appellant was a "leg hanger," meaning somebody who spent a great deal of time around staff and sought acceptance and protection from them. He stated that although appellant did not pull a perfect program at the CYA, the offenses that he committed were minor. (53 RT 15256-15264.)

The prosecution's prison expert, Robert Borg, noted that appellant had three serious disciplinary reports during his time at San Quentin between 1981 and 1984, including a rectal stash (bottle with a ten dollar bill), cell thievery and self- mutilation (he had cut his wrist). (56 RT 18101-18103.) At CMC East and the California Training Facility, appellant was involved in only minor incidents. Also, appellant's wife brought a marijuana pipe with residue into the facility which resulted in suspended visits. (56 RT 18104-

18105.) Appellant had a clean disciplinary record in Vacaville in 1987. (56 RT 18106.) Borg noted that there were 30 incidents for appellant at the San Joaquin County facility between 1993 and 1995, 19 of which Borg considered serious. Borg opined that probably because appellant is facing a long sentence, he is having a harder time adjusting to prison. (56 RT 18110-18118.)

Appellant's prison classification expert, James Park, testified that the possibility that appellant could escape was very remote. Beginning in the 1980s, prisoners are now classified according to a point system and put into one of four security levels, with level four being maximum security. All life without possibility of parole (LWOP) prisoners go to level four initially and are given 59 points. Factors that determine the classification of an inmate include length of sentence, age, education, marital status, recent job status and other factors. (52 RT 14897-14988.)

Level four prisons have double 12 foot fences, gun towers every 700 feet, gun coverage on all prisoners in the housing units and exercise yard. There is razor concertina wire on top of the fences and on the gun towers. (52 RT 14899-14902.) Level four security starts at 52 points. As an LWOP prisoner, appellant would start out with 59 points and his jail escape would add eight more points to his point total. (52 RT 14923-14924, 14926-

14927.) A prisoner can burn off eight points a year, but due to appellant's escape even if he were to achieve point reduction, he will not go down to a level three for many, many years. "[T]hat escape will haunt him for the next 40 or 50 years, probably." (52 RT 14967, 14969, 14974.)

Park opined that appellant would start with a total of at least 93 points based upon his record. Accordingly, it would take him at least five years to get to level three in terms of points. However, appellant's expert opined that it would more likely take 10 to 15 years before CDC would consider moving him to a level three facility, if ever. (52 RT 15064,15071-15072.) Prosecution expert John Iniquez opined that appellant would start with 141 points. (56 RT 18160.) Even if an LWOP prisoner reduces his points to a level three, he does not automatically get moved to a level three setting. Such an inmate must first be recommended by staff, and then undergo a Directors Review Board process. (52 RT 14967.) Some LWOP inmates have zero points due to good behavior, but they do not necessarily achieve transfer to less secure facilities. (56 RT 18167-18168.)

Park testified that there have only been three escapes from level four prisons. (52 RT 14925-14926, 14989.) Prosecution expert Robert Borg testified that there have been six level four escapes in the last nine years. (56 RT 18078.) Experts for both parties agreed that the point system has pushed

the escape rate to the lowest level it has ever been, with most of the escapes coming from community work furlough programs and forestry camps, and very few from higher security level prisons. (52 RT 14990; 56 RT 18020.)

Appellant's expert James Park testified that appellant could have a positive influence on fellow inmates. LWOP prisoners provide a stabilizing influence in the prison system and are sought after by work supervisors because they are going to be there for a long time. They also have a stake in keeping the prison running quietly because it is their home. Additionally, appellant has demonstrated that he can be helpful and caring in a prison setting. (52 RT 15015.)

Brian Wilson testified that while he was an inmate at the San Joaquin County Jail, appellant talked to him and comforted him through a particularly difficult night when he was contemplating suicide after learning that his fiancee had married someone else. Appellant also put Wilson in contact with a penpal. (58 RT 18640-18646, 18657.)

The prosecution offered testimony regarding the following jail incidents which took place since appellant's arrest in October 1992:

1) Appellant's escape on June 19, 1993, as charged by way of count 11. In addition, testimony was offered that one of the inmates that escaped with appellant at that time had been charged with murder, and had not been

r captured. (57 RT 18507, 18511.) Appellant did not have any significant problems while in the general jail population prior to his escape. (58 RT 18671.)

2) In October 1993, appellant contacted Rick Millonida, a psychiatry technician at the jail and asked to be changed from Administrative Segregation housing to another unit. Millonida noted in his report that appellant "got in his face" and attempted to manipulate him. As a consequence of the contact, the Millonida recommended that appellant be taken off of his medication, noting that he did not believe that appellant appeared to be depressed. Appellant was consequently taken off his medication for two weeks. Millonida testified that, in retrospect, he felt that he had misread appellant's behavior and that his recommendation to remove the medication was a product of Millonida's own anger. (58 RT 18633-18638.)

3) On April 11, 1994, when appellant was returning to jail from court, he began yelling very loudly at a trustee that another inmate was a rat. Calling somebody a rat in prison is a major incident because it can get somebody hurt or killed. After this, appellant yelled for the guard four to five times over the course of 15 to 20 minutes. When the guard finally came to his cell, appellant told him that he wanted to get the trash out of his cell

and that it was too big to go through the food slot. This was an unusual request and it was refused. (56 RT 18208-18211, 58 RT 18778-18783, 18786-18787.) A correctional officer involved in the event testified that he had not had any problems with appellant since then, and that appellant had drawn a picture of the officer and gave it to him. The officer's grandmother admired the picture and appellant drew another picture for her. (58 RT 18784.)

4) On January 14, 1995, appellant flooded his cell by damming up his toilet and flushing it continuously to create an overflow of water into common areas. Appellant was issued a violation notice and given a hearing date of January 17, 1995. While being escorted to the hearing, appellant yelled obscenities at the officers who were escorting him. He also yelled at the officer conducting the hearing and had to be restrained and removed from the room. Appellant continued yelling obscenities and attempted to hit one of the officers with a garbage can. Appellant was restrained and taken back to his cell. (56 RT 18321-18242) Earlier that day, following a visit with his wife, appellant was upset and requested something to calm him down. The medical staff gave him a "red-eye," which is a Mellaril and Benadryl combination. (58 RT 18628-18629.)

5) On January 20 and 21, 1995, appellant was involved in a flooding

incident, using his sheet to seal his door, clogging up the toilet and sink, flushing the toilet several times, and then releasing water out to the common areas. On January 22, 1995, appellant yelled to another inmate, inciting him to disobey staff orders. (56 RT 18258-18263, 18375, 18377, 18428.) Appellant had been acting out, hollering and screaming. Somebody, possibly appellant, yelled at a correctional facility officer and threatened to "kick his ass." Appellant eventually was extracted from his cell and put in another location. (56 RT 18383-18420.) After that time, the supervisor on duty did not have any problems with appellant. (57 RT 18437.)

Appellant later explained to the supervisor on duty during that episode that he had recently experienced a change in medication. (57 RT 18345.) Since appellant's incarceration, he has been treated for depression. Appellant has been taking Doxepin, an antidepressant which also helps one sleep. In January 1995, appellant reported that this medication was not working well, and that he was suffering from anxiety and sleeplessness. On January 12 appellant's medication was increased, but on January 19 appellant reported that he was experiencing blurry vision and was drowsy in the morning. His medication was changed to Pamelor, another antidepressant. (58 RT 18593-18599, 18620-18623, 18795-18799.) The prison psychiatrist testified that when changing from Doxepin, which has a

sedative effect, to Pamelor, a person can become "a little livelier." (58 RT 18799.)

The defense prison expert, James Park, had previously testified that the incidents where appellant flooded his cell coincided with medical problems and tensions which appellant was experiencing. (52 RT 14978.) Park testified that appellant's threats and bad-mouthing correctional officers amounted to blowing off steam or saving face so that he did not look like a punk to other prisoners, as opposed to appellant being a serious threat. (52 RT 14986.)

6) On April 6, 1995, appellant had an episode where, for an hour and a half, he yelled at one of the female correctional facility officers using racial and sexual slurs while kicking or pounding on his door after she informed the unit that she would not be providing cleaning supplies that night as punishment for the unit being too noisy. (57 RT 18475.) Appellant's expert Park testified that being bad mouthed by prisoners is an unpleasant thing to put up with, but that is the kind of thing prisoners do. Appellant's record indicates that appellant "run[s] his mouth when he should have been listening." This is a typical situation in state prison that results in a prisoner going to lock-up to cool off for a few days. (52 RT 14985-14986.)

ARGUMENT

PRETRIAL ISSUES

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE

A. Procedural Background

On May 11, 1994, appellant filed moving papers requesting a change of venue. (3 CT 679-696.) On May 18, 1994, the district attorney filed responsive opposition papers. (3 CT 705-727.) This motion was heard on May 23 and 31, and June 6, 1994. (3 CT 728, 827; 4 CT 841.)

Defense counsel asserted that a change of venue was warranted based upon substantial and prejudicial pretrial publicity. Appellant's counsel submitted over 70 newspaper stories from the Stockton Record, the Lodi News Sentinel, the Manteca Bulletin, the Modesto Bee, the Sacramento Union and the Sacramento Bee. (3 RT 312; see 2 CT 438-529.)[10] Counsel

[10] Newspaper articles and summaries of television news reports, originally provided by the defense as exhibits in support of its request for sequestered voir dire (2 CT 408-529), were deemed to be also submitted in support of the defense change of venue motion. (3 RT 311-312; 4 RT 650-651.)

also submitted videotapes containing over 100 television news items from local stations concerning appellant's case. (Defense Exhs. B1, B2 and B3 for March 14, 1994 hearing (see 2 CT 534); 3 RT 311; see 2 CT 409-437.)

Professor Roy Childs, Jr. testified for the defense as an expert witness at the hearing on the venue motion. He was a sociology professor at the University of the Pacific, where he had taught for 20 years. (4 RT 654.) He possessed a Ph.D. in sociology from Stanford University. (4 RT 659.)

Defense counsel had retained Professor Childs to conduct a public awareness survey in support of appellant's venue motion. Professor Childs had previously completed similar surveys in about 13 high-profile cases. (4 RT 654-655, 681, 709-711.) The juror survey was conducted by college students under Professor Childs' supervision. The students interviewed 395 respondents by telephone.[11] (4 RT 663-665, 671.)

According to this survey, 32 percent of respondents recalled that appellant had been featured on the America's Most Wanted television show and 22 percent identified appellant as being publicized as an "urban predator." Forty-eight percent recognized appellant as having planned and

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[11] Professor Childs estimated that about 30 to 50 percent of the persons called by his student interviewers refused to be interviewed. The figure of 395 respondents represented persons who allowed themselves to be interviewed for the juror survey. (4 RT 663-664, 671, 810-811.)

led the jail escape, and as being the most dangerous escapee. (4 RT 688.) Eighty-eight percent indicated some degree of familiarity with appellant's case. (4 RT 816.) This was relatively high, as compared to the other potential juror surveys Professor Childs had conducted. (4 RT 709, 710, 816.)

Professor Childs estimated that 58 percent of the survey respondents had prejudged appellant as being probably or definitely guilty of the charges he faced. (4 RT 675-677, 706, 816.) This was also a high rate of prejudgment as compared to the other cases in which the professor had conducted juror surveys. (4 RT 701, 708.) With respect to the death penalty, 77 percent of the respondents were inclined towards imposing a death sentence on appellant if he were convicted. (4 RT 706-707.)

Defense counsel argued to the court that the jailbreak, which involved appellant and five other inmates, had been highly publicized and was regarded as "[o]ne of the most infamous crimes in the modern history of San Joaquin County." (3 CT 679; see 4 RT 871.) Although the jail escape did not involve any violence, this crime struck a nerve with local citizens because the jail had been recently built at great public expense and had been represented by public officials as "a state-of-the-art" facility. (3 CT 679.) News reports about the escape described appellant as the "mastermind" of

the jailbreak, and the most dangerous of the six escapees. (3 CT 680.) Appellant was featured on the "America's Most Wanted" television show and publicity resulting from the escape had included recountings of appellant's past crimes. (3 CT 680.) News reports also indicated that it would cost taxpayers millions of dollars to correct the problems with the new jail, which the escape by appellant and his companions had brought to light. Therefore, even if the victims of appellant's alleged crimes lacked individual prominence, the taxpaying citizens of San Joaquin County as a whole should properly be viewed as the victims of appellant's jailbreak for purposes of ascertaining the prejudice which would result from denial of a change of venue. (3 CT 680, 692.) Although some time had passed since the jailbreak and appellant's recapture, media attention to the matter was likely to rekindle given that deficiencies in the jailhouse were expected to be focused on in the approaching contested election for County Sheriff. (3 CT 684; 4 RT 863-864.) Defense counsel also emphasized that the survey conducted by Professor Childs indicated that about 88 percent of respondents were familiar with some aspect of appellant's case, and that the more respondents could recall about the case the more likely they were to believe that appellant was guilty of all the charges he faced. (3 CT 680, 685.)

The prosecutor responded that a change of venue was not warranted because the nature of the pretrial publicity was not so extensive and prejudicial as to preclude the selection of an unbiased jury; most of the press coverage had been focused on the jail escape, rather than the capital murder charges; and San Joaquin was not one of the state's smaller counties. (3 CT 705-725.) Although the prosecutor had no problems with Professor Childs' expertise and academic background, he disputed the accuracy of the juror survey and maintained that it inflated the degree public prejudgment. (4 RT 875-882.)

On June 6, 1994, the court denied appellant's motion for a change of venue based upon its assessment of the relevant factors. The court found, with respect to "[t]he nature and gravity of the offenses" that the charged offenses were "not extraordinarily sensational or salacious." (5 RT 892-A.) With regard to San Joaquin County, the court stated that it assigned "great weight" that "the county is larger than many of the cases where a change of venue [was] granted." (5 RT 893.) The court noted that the victims of the charged crimes were not prominent persons in the public eye. (5 RT 893.) With respect to pretrial publicity, the court stated: "The nature and extent of the news coverage . . . does not appear to be sensationalized. It doesn't appear to be dwelling on things that would be inadmissible or things that

would incite the passions of the people. It does not appear to be a carnival-like atmosphere . . . that would militate in favor of granting a change of venue." (5 RT 893.) The court acknowledged the "political controversy" concerning the jail escape and that the security and quality of the jail arose as prominent issues between the rival candidates for county sheriff. However, the court stated that, "it doesn't appear the political controversy surrounds this particular case or people involved in this case. It just so happens that if one accepts the news articles as being true, it appears that the defendant . . . made an escape from the jail [which] simply pointed out the fact that the jail was not adequate in that it had hollow bars and breakable windows." (5 RT 894.)

With respect to the results of the defense survey, the court stated:

> The most important thing is I just don't feel that the survey would . . . is sufficient in and of itself to establish that there's been extensive pretrial publicity and that somehow the pretrial publicity will affect how jurors view the case.
>
> The questionnaire to me – and I don't purport to be an expert on questionnaires – the questionnaire seems to me kind of leads to the conclusion that somehow the defendant is guilty and somehow should receive serious punishment. But that's because of what is said, especially in question 8-A the information appears to be to be such that that will be all of the evidence that the prosecution's going to have

> with the exception of some other circumstance in aggravation to urge the death penalty.
>
> But on the issue of guilt, certainly stated all of the case for the prosecution and none of the case for the defense. Then asked the jurors how will they rule in a case like that? To me, that's really absurd to even ask a question like that and I'm not sure why the Professor decided to do that but I can see that his questionnaires, each one that he puts out seems to be a little different in each case. Perhaps he's tinkering with it and perhaps will arrive at a questionnaire that will really suit the purposes.
>
> Primary consideration is what publicity have we had and what are the percentages of the jurors who have heard the publicity? And the other thing to look at is what's the nature of the publicity? And that it seems to me is no greater than any of the other cases that we dealt with in the past.
>
> For that reason the court's going to deny the request for change of venue at this time.
>
> (5 RT 894-895.)

In denying the venue motion, the court noted that its present ruling was "without prejudice to a further request for a change of venue" (5 RT 892-A) and the issue might be revisited depending upon how jury voir dire proceeded. (5 RT 895.)

Also pertinent to the present venue issue is the court's ruling on appellant's motion for a press "gag order." On August 26, 1993, during

appellant's preliminary hearing in San Joaquin County, defense counsel moved for an order closing the preliminary hearing to the press while video and audio tapes of appellant's statements to the police were being played or described or, alternately, for an order prohibiting the press from publicizing the contents of appellant's statements to the police. Defense counsel also asked for an order prohibiting counsel, appellant, witnesses, police officers and court personnel from communicating to the press regarding appellant's statements to the police. (1 ACT 168-179; 1 CT 71.)[12] On August 27, 1993, appellant filed moving papers in support of this motion. (1 CT 75-75C.) Therein and by way of oral argument, defense counsel argued that the requested restrictions regarding appellant's statements to police were required to protect appellant's Sixth and Fourteenth Amendment right to a fair trial and, also, that Penal Code section 868 provided the court with the authority to close part of the preliminary hearing to the press. (1 CT 75-75C; 1 ACT 168-172, 175-178, 183-184.)

On August 27, 1993, counsel for the Lodi News Sentinel appeared to oppose appellant's motion. He argued that press access to a preliminary hearing could only be limited upon a specific showing of danger of

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[12] At this time a defense motion to suppress appellant's statements to the police was pending before the preliminary hearing judge. (See 1 ACT 165-166; 1 CT 76-91.)

substantial prejudice, which had not been made out here. (1 ACT 183, 197-198.) After hearing argument, the court issued an order on August 27, 1993, barring counsel, appellant and court personnel from speaking to the press regarding appellant's statements to the police and the recordings of those statements. However, the court allowed members of the press to be present during the playing of appellant's recorded statements and to report what they heard and saw. (1 ACT 210-211; 1 CT 73.) At the conclusion of the preliminary hearing, the court indicated that this order would remain in effect. (3 ACT 763-764; 1 CT 99.)

On August 28 and September 1, 1993, articles in the Lodi News Sentinel provided detailed descriptions of appellant's interrogation by the police following his capture. (2 CT 482-484.)

B. The Trial Court Erred in Denying the Motion

A criminal defendant facing trial by jury is entitled to be tried by "a panel of impartial 'indifferent' jurors." (Irvin v. Dowd (1961) 366 U.S. 717, 722 [6 L.Ed.2d 751, 81 S.Ct. 1639]; Gallego v. McDaniel (9th Cir. 1997) 124 F.3d 1065, 1070.) A change of venue is appropriate where there exists "a reasonable likelihood that in the absence of such relief, a fair trial cannot

be had." (People v. Williams (1989) 48 Cal.3d 1112, 1125; accord People v. Panah (2005) 35 Cal.4th 395, 447.) The presence of even a single biased juror violates a criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments. (Irvin v. Dowd, supra, 366 U.S. 717 at 722; In re Hitchings (1993) 6 Cal.4th 97, 110-111.) A defendant who demonstrates that "there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial" is constitutionally entitled to a change of venue. (Sheppard v. Maxwell (1966) 384 U.S. 333, 362 [16 L.Ed.2d 600, 86 S.Ct. 1507].)

Evaluation of this issue requires consideration of six factors: 1) where appellate review is post-trial, the responses of jurors and prospective jurors on voir dire; 2) "the nature and gravity of the offense"; 3) "the nature and extent of the news coverage"; 4) "the size of the community"; 5) "the statue of the defendant in the community"; and 6) "the popularity and prominence of the victim." (People v. Daniels (1991) 52 Cal.3d 815, 851-852; accord People v. Ramirez (2006) 39 Cal.4th 398, 434-435.) The trial court erred in denying appellant's request that venue be changed so that he could secure a fair jury trial. Analysis of the six pertinent factors set forth above clearly shows that a change of venue was warranted.

In the present case, the record of jury voir dire demonstrates that

media publicity regarding this case was widespread and highly prejudicial against appellant. In People v. Williams, supra, 48 Cal.3d 1112, this Court reversed based upon the denial of a change of venue motion. In its analysis, the Court deemed it significant that of the 116 prospective jurors questions "52 percent . . . had read or heard of the case" and eight of the actual twelve jurors had done so. (Id. at 1128.) By comparison, in the instant case, out of approximately 76 prospective jurors questioned in court for appellant's first trial, 27 had read or heard about appellant's case. (7 RT 1752; 10 RT 2634; 11 RT 2701, 2707, 2727, 2751-2752, 2924; 12 RT 2973, 3008-3011, 3032-3034, 3045-3046, 3188; 13 RT 3289-3290, 3509-3510; 14 RT 3618-3620, 3640-3642, 3681, 3692, 3744-3745, 3782-3786, 3833-3834; 15 RT 3916-3917, 4007; 16 RT 4150, 4392; 18 RT4884-4885; 19 RT 5130, 5171, 5190.) Of the twelve jurors ultimately chosen for appellant's first trial, four (33 percent) – C.H., J.Y., S.R., and J.R. – acknowledged having been exposed to the case through television, newspapers and/or word of mouth. (22 ACT 6469, 6483, 6484.14; 23 ACT 6608; 10 RT 2634; 11 RT 2701, 2707; 15 RT 4007; 19 RT 5130.)

Similarly, of the twelve jurors chosen for appellant's second (penalty) trial, five (42 percent) – E.G., S.M., G.W., C.P. and J.D. – acknowledged some recollection of media publicity about the case. (23 ACT 6711, 6805,

6850; 24 ACT 6937; 43 RT 12284, 12312-12313; 45 RT 13102-13103.) Furthermore, in selecting the second penalty jury, defense counsel exhausted all of his peremptory challenges, complained about the jury's final composition and unsuccessfully requested that the court provide additional peremptory strikes. (46 RT 13332-13336.)

The extent of community prejudice may be gauged in the behavior and comments of some of the excused jurors. Prospective juror Janet P. described the jailbreak as "pretty highly publicized." (14 RT 3618-3619.) She recalled her reaction, when hearing about it in the media: "Well, in my mind I was thinking, well . . . why would you escape if you felt that you were innocent." (14 RT 3620.) Janet P. was excused for cause based upon her prejudgment of this case. (18 RT 4894; see 4 CT 1074-1107.) Prospective juror Barbara S., who lived near the jail, recalled that her mother had called her on the night of the jailbreak to alert her to the situation. Barbara S. had followed the jail escape story in the media and was able to recount several details. She had been personally concerned for her own safety until appellant and the other escapees were apprehended. (12 RT 3008-3012.) Prospective juror Joe P. stated that his "gut feeling," based upon having followed the case in the newspaper, was that appellant was guilty of "murder." (12 RT 3032-3034.)

The charges of multiple murder and robbery murder are charges "of extreme seriousness and gravity" causing the second factor to weigh in favor of a change of venue. (People v. Daniels, supra, 52 Cal.3d at 852.) The fact that the subject offenses – in this case two charges of special circumstance robbery murder, the attempted murder and crippling of Stacey Copeland, plus a sensational jailbreak – are likely to be considered "especially heinous" by the public significantly favors a change of venue. (People v. Jennings (1991) 53 Cal.3d 334, 360; People v. Harris (1981) 28 Cal.3d 935, 948.) And that appellant was charged with a capital offense is a consideration "weighing heavily in favor" of changing venue. (Williams v. Superior Court (1983) 34 Cal.3d 584, 593; Odle v. Superior Court(1982) 32 Cal.3d 932, 941.)

The third factor to be weighed is the nature and extent of media coverage. Appellant's counsel submitted over 70 newspaper stories from the Stockton Record, the Lodi News Sentinel, the Manteca Bulletin, the Modesto Bee, the Sacramento Union and the Sacramento Bee. (3 RT 312; see 2 CT 438-529.) Counsel also submitted videotapes containing over 100 local television news items concerning appellant's case. (Defense Exhs. B1, B2 and B3 for March 14, 1994 hearing (see 2 CT 534); 3 RT 311; see 2 CT 409-437.)

The court, in ruling on the change of venue motion, concluded that the "nature and extent of the news coverage . . . does not appear to be sensationalized" and "does not appear to [reflect] a carnival-like atmosphere . . . that would militate in favor of granting a change of venue." (5 RT 893.) The court acknowledged the "political controversy" concerning the jail escape and that the security and quality of the jail had arisen as prominent issues with respect to the rival candidates for county sheriff. However, the court further noted that, "it doesn't appear the political controversy surrounds this particular case or people involved in this case. It just so happens that if one accepts the news articles as being true, it appears that the defendant . . . made an escape from the jail [which] simply pointed out the fact that the jail was not adequate in that it had hollow bars and breakable windows." (5 RT 894.)

The court below thereby failed to fully appreciate the sensational and prejudicial quality of media coverage surrounding this case. By unduly focusing on the jail escape as an isolated news event, the court ignored the fact that publicity regarding appellant's escape rekindled a flurry of publicity regarding the original crimes and the charges leveled against him. Plus, in the aftermath of the escape appellant's picture was repeatedly displayed by the media and he was portrayed as a serious threat to the general public.

(See 3 RT 354; 2 CT 443-448, 476-481, 486-494, 504-506, 513-514, 519-520.)

Many of the newspaper stories about appellant featured sensational headlines such as "Bloody journey over?" The Union, October 19, 1992 (2 CT 487); "Weekend crime spree leaves two dead," Modesto Bee, October 19, 1992 (2 CT 499); and "Murder victim a friend to all," Lodi News Sentinel, October 20, 1992 (2 CT 470). This last article, focusing sympathetically on Larry Shockley, spoke about the help Shockley regularly provided to friends and neighbors, and how Shockley had dutifully cared for his wheelchair-bound wife. (2 CT 470-471.) A June 23, 1993 article about the jail escapees, appearing in the Lodi News Sentinel, quoted Assistant Sheriff Bob Heidelbach as saying that appellant Hensley was "the one [escapee] that concerned [police authorities] the most." Heidelbach described appellant as "very dangerous, an urban predator," who "would [not] hesitate to kill again." (2 CT 477.) A June 22, 1993 article in the Sacramento Bee, entitled "San Joaquin fugitive linked to capital killing," carried this same damning quote. (2 CT 486-A.) Television reports likewise referred to appellant with the "urban predator" label. (2 CT 427, 435.) August 28 and September 1, 1993 articles in the Lodi News Sentinel provided detailed descriptions of appellant's interrogation by the police

following his initial capture. Appellant was quoted as saying, "I shot Larry" and telling an assistant district attorney, "You and I both know I'm never getting out of here" – meaning police custody. (2 CT 482-484.) "[M]any [news] reports were front-page or lead articles." (People v. Williams, supra, 48 Cal.3d at 1127 [reversal based upon error in denying change of venue].)

The fact that a particular homicide offense, as portrayed in the media, possesses "sensational" overtones setting it apart from the usual homicide favors the necessity of a change of venue. (People v. Williams, supra, 48 Cal.3d at 1127; Martinez v. Superior Court (1981) 29 Cal.3d 574, 580.) In the present case, the San Joaquin County community was exposed to extensive pretrial publicity describing appellant's alleged crime spree, including the Shockley and Renouf slayings, the grievous wounding of Stacey Copeland and the subsequent notorious jailbreak.

Concerning the impact of pretrial publicity on the population pool of potential jurors, defense counsel submitted Professor Childs' survey showing that out of 395 citizens polled, 88 percent were aware of some aspect of this case. (3 CT 680, 684; 4 RT 663-664, 671, 816.) The survey further revealed that 22 percent recognized appellant as the "urban predator," 32 percent were aware of his being featured on the "America's Most Wanted" television show, 33 percent identified appellant as the mastermind and leader

of the jail escape, and 48 percent regarded him as being the "most dangerous" of the six escapees from the county jail. (3 CT 386; 4 RT 688.) Forty-two percent of the respondents were aware of the Larry Shockley killing. (3 CT 684.) Moreover, the survey indicated that pretrial publicity had been highly prejudicial against appellant: the more pertinent news items the respondents could recall, the more likely they were to believe that appellant was definitely or probably guilty of all the charges he faced. (3 CT 385; 4 RT 693-694, 698-699.) Undoubtedly this was due, in part, to the earlier decision of the preliminary hearing judge denying the defense request for a gag order which would have precluded the press from reporting on appellant's incriminating statements to the police. (1 CT 73; 1 ACT 210-211.) As previously noted, August 28 and September 1, 1993 articles in the Lodi News Sentinel provided detailed descriptions of appellant's interrogation by the police. (2 CT 482-484.)

It was the opinion of Professor Childs that the actual degree of prejudice in the community against appellant prior to his trial was, in fact, even greater than that described in the preceding paragraph. Professor Childs estimated, based upon his research, that about 58 percent of the potential juror poll had prejudged appellant to be guilty before he went to trial. (4 RT 673, 675-677.)

Furthermore, the decision to deny appellant's request for a press gag order was additional constitutional error which prejudiced the jury pool. (Sheppard v. Maxwell, supra, 384 U.S. 333; Estes v. Texas (1965) 381 U.S. 532 [14 L.Ed.2d 543, 85 S.Ct. 1628].) The constitutional right of press access to judicial proceedings is not absolute. The publicity generated by such access can jeopardize a criminal defendant's right to a fair trial by exposing jurors or prospective jurors to prejudicial and inadmissible information about the case. (See People v. Jackson (2005) 128 Cal.App.4th 1009, 1021-1022.) The First Amendment does not trump the duty of a trial judge to "control adverse publicity to protect the right of an accused to a fair trial." (In re Willon (1996) 47 Cal.App.4th 1080, 1093.) A court faced with an access claim that has the potential to infect the fairness of legal proceedings must perform the difficult task of balancing these respective constitutional interests: "'[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it [is] a trying task to choose between them.'" (People v. Jackson, supra, 128 Cal.App.4th at 1021 [citing Bridges v. California (1941) 314 U.S. 252, 260 [86 L.Ed.2d 192, 62 S.Ct. 190].)

With regard to the fourth factor, size of community, San Joaquin County is "a relatively small community." (In re Miller (1973) 33

Cal.App.3d 1005, 1013.) At the time of the venue motion, official population estimates, as cited by the prosecution, indicated that San Joaquin County possessed a population of 514, 505, placing it 15th in rank among California's 58 counties. (3 CT 718 [prosecution opposition, citing San Joaquin Planning Division estimate as of January 1993].) By way of guidance, this Court stated in Martinez v. Superior Court:

> In [Fain v. Superior Court (1968) 2 Cal.3d 46, 52] we determined that Stanislaus County, with a population of 184,600 was too small to dissipate the effects of extensive pretrial publicity. In [Fraiser v. Superior Court (1971) 5 Cal.3d 287], we rendered the same finding with respect to Santa Cruz County which had a population of 123,700. And in Steffen v. Municipal Court [(1978)] 80 Cal.App.3d 623, the court ordered a change of venue from San Mateo County, the 11th most populous county in the state with almost 600,000 residents.
>
> . . . . While size of community does not in itself resolve the venue issue, it clearly composes an important factor which in the present case weighs toward the necessity of a change of venue.
>
> (Martinez v. Superior Court, supra, 29 Cal.3d at 581-582.)

The appellate courts of this state have come to realize that in a smaller county the impact of prejudicial pretrial publicity will be deep and long-acting in its impact.

> While a lengthy continuance might sufficiently protect the accused in some cases, it does not do so here. Delays may be an efficacious antidote to publicity in medium-size and large cities, but in small communities, where a major crime becomes embedded in the public consciousness, their effectiveness is greatly diminished.
>
> (Maine v. Superior Court (1968) 68 Cal.2d 375, 387 [emphasis added; fn. omitted]; accord Corona v. Superior Court (1972) 24 Cal.App.3d 872, 883.)

As to the fifth factor, the status of the defendant, although appellant previously enjoyed no prominence, he became notorious as a result of the intense media publicity surrounding the present crimes, including the jail escape, and he received further notoriety from being featured on the "America's Most Wanted" television show. (3 CT 680.)

The sixth factor, the popularity and prominence of the victims must also weigh in favor of a change of venue. Admittedly, none of the victims of the homicide and robbery counts were particularly prominent citizens. However, with respect to the jail escape charge, significant prejudice existed because the San Joaquin County taxpayers were, in a very real sense, the victims of the highly publicized jailbreak and, as such, those taxpayers who were also potential jurors would likely blame appellant for the problems with the jail and the high costs associated with remedying those problems. Also, homicide victim Larry Shockley was the subject of the highly sympathetic

article in the Lodi New Sentinel ("Murder victim a friend to all," October 20, 1992). (2 CT 470-471.)

In sum, a consideration of the pertinent factors – particularly the degree to which voir dire revealed the jury pool to be prejudiced, the extent and slant of media coverage, the gravity of the multiple murder charges and the relatively small population of San Joaquin County – weighed heavily in favor of the conclusion that appellant could not receive a fair trial in San Joaquin County. Given this one-sided balance, case law dictates that the change of venue motion was wrongfully denied. (People v. Williams, supra, 48 Cal.3d 1112; Martinez v. Superior Court, supra, 29 Cal.3d 574.)

In light of the preponderance of these factors it is no answer that the jurors seated in this case professed their fairness and impartiality.

> It is true, of course, that exposure to pretrial publicity does not automatically indicate prejudice. [Citations.] Indeed, the trial court in this matter was careful to inquire into each juror's prior knowledge, and most attested that they could render an impartial verdict. A juror's declaration of impartiality, however, is not conclusive. [Citations.] To be sure, perfection is not required: some knowledge of the case on the part of some jurors is often unavoidable. Here, however, a brutal murder had obviously become deeply embedded in the public consciousness (half of the jurors questioned knew something about the case). Thus, it is more than a reasonable possibility that the case could not be viewed with the requisite impartiality.

[Citations.]

(People v. Williams, supra, 48 Cal.3d at 1129 [emphasis added].)

Appellant acknowledges that his trial counsel did not specifically cite federal constitutional provisions in voicing his arguments regarding some of the matters set forth in the present argument. However, appellant's federal constitutional claims in this regard are adequately preserved for appeal because appellant's present constitutional arguments rest upon the same factual and legal issues as the objections defense counsel did assert. (People v. Yeoman (2003) 31 Cal.4th 93,117-118; see People v. Partida (2005) 37 Cal.4th 428, 433-439.)

C. This Error Compels Reversal

"Whether raised on petition for writ of mandate or on appeal from judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable." (People v. Williams, supra, 48 Cal.3d at 1125; Odle v. Superior Court, supra, 32 Cal.3d at 937.) "On appeal after judgment the defendant must show a reasonable likelihood that a fair trial was not had. [Citations.] . . . '[R]easonable likelihood' denotes a lesser standard of proof than 'more

probable than not.' [Citations]." (People v. Williams, supra, 48 Cal.3d at 1126.) "A showing of actual prejudice 'shall not be required.'" (Ibid. [quoting Maine v. Superior Court, supra, 68 Cal.2d at 383].)

One indication that appellant received less than a fair trial may be gauged by the extremely brief duration of guilt-phase jury deliberations for a case of this seriousness and complexity. The jurors deliberated for approximately a little over a day prior to bringing back a guilt-phase verdict for close to the maximum charges facing appellant. (26 RT 7407, 7419, 7424; 27 RT 7437.) This quick decision, resolving two capital charges, nine noncapital counts and numerous attendant enhancements, followed a guilt-phase trial in which the jury witnessed 19 days of testimony, argument and instructions, and wherein approximately 400 items had been introduced into evidence.

The quality of pretrial publicity also served to predispose members of the potential jury poll towards a death sentence. Appellant was repeatedly referred to as an "urban predator" and described as the mastermind and most dangerous of the six jail escapees. (2 CT 415, 418, 420, 427, 477, 486-A.) Articles in the Lodi News Sentinel and the Sacramento Bee both quoted an assistant county sheriff as saying that appellant, having escaped jail, "would [not] hesitate to kill again." (2 CT 477, 486-A.) A Lodi News Sentinel

article described murder victim Larry Shockley as "a friend to all" who dutifully cared for his disabled wife and regularly provided help to friends and neighbors. (2 CT 470-471.) Appellant was featured on the "America's Most Wanted" television show, and one local newspaper article noted that this was only the second time that a San Joaquin County case had merited this national publicity. (2 CT 453, 529.) It only stands to reason that persons in the community aware of this notorious distinction would react by concluding that appellant was deserving of the worst possible punishment, i.e., the death penalty. The local public's predisposition towards guilt and a death verdict was, in fact, reflected in the survey results obtained by Professor Childs, which indicated that 58 percent of the respondents thought that appellant was probably or definitely guilty, and 77 percent believed that he deserved the death penalty if convicted. (4 RT 675-677, 706-707.)

Although media attention was pervasive in the San Joaquin County area, this case did not receive statewide publicity. There is therefore every reason to believe appellant could have obtained the benefit of a jury relatively untainted by the media if he had been able to obtain a change of venue, particularly to a more metropolitan setting. (See People v. Manson (1976) 61 Cal.App.3d 102, 190.)

The denial of a change of venue denied appellant his constitutional

right under the Fifth, Sixth, Eighth and Fourteenth Amendments to be tried before an unbiased jury. (Irvin v. Dowd, supra, 366 U.S. at 728-729.) This error was structural in nature and requires per se reversal. (Ibid.; Sullivan v. Louisiana (1993) 508 U.S. 275, 279-282 [124 L.Ed.2d 182, 113 S.Ct. 2078].)

II. THE TRIAL COURT ERRED IN DENYING THE DEFENSE BATSON-WHEELER MOTION

A. The Batson-Wheeler Motion

During jury selection in appellant's first trial, the trial court heard and denied appellant's motion, pursuant to Batson v. Kentucky, supra, 476 U.S. 79 and People v. Wheeler, supra, 22 Cal.3d 258, to declare a mistrial and dismiss the existing jury panel. The Batson-Wheeler motion addressed the prosecutor's peremptory challenges of the only two black potential jurors available in the final phase of jury selection: Harmon B. and Falvia C. There were no black jurors or alternates who served in appellant's first trial. (See 19 RT 5217, 5278.)

On August 16, 1994, during jury selection, the prosecutor used a peremptory challenge against Harmon B., after which a 12-person jury was impaneled. (19 RT 5271-5272.) Shortly afterwards, during the selection of alternates, the prosecutor struck Falvia C., the only other black prospective juror available. (19 RT 5276, 5278.) At that point, defense counsel asserted a Batson-Wheeler motion, which was heard outside the presence of the prospective jurors. (19 RT 5276-5278.)

The proceedings relevant to appellant's Batson-Wheeler motion were as follows:

> THE COURT: All prospective jurors are out. I am assuming you want to make a Wheeler challenge.
>
> MR. FOX: That's correct, Your Honor. I ask the record reflect that there were only two black members of the venire that we dealt with this morning. One was Mr. Harmon [B.,] the other was Miss Falvia [C.] And the prosecution excluded both of them.
>
> I think it's a prima facie case that there is an exclusion of the entirety of all black jurors.
>
> THE COURT: Okay.
>
> MR. FOX: Ask the Court to inquire into his reasons.
>
> [¶.] [¶.] . . . .
>
> THE COURT: The record – I believe those are the only two black jurors we had on the group that survived. I don't remember that we had any others on the prospective jury list of the 300. We may have had a few. Excuse me, we did have a few.
>
> At this time, for the prosecution, can you explain both of those challenges?
>
> MR. DUNLAP: Your Honor, I don't have my notes with me. I apologize. They are in my office. I will need to pull my record sheets and my questionnaires. But my notes were extensive.

Miss [Falvia C], just off the top of my head, along with her questionnaire and her attitude during the actual individual selection itself, seems to be one of somewhat of an attitude problem.

Both times when she's taken roll, Daisy, the clerk, has asked for forgiveness as to pronunciation of the names. Miss [Falvia C] has both times corrected Daisy, in what I percept as a harsh tone, as to how to say her name.

I – I find her not being one with the attitude of openness and understanding to the jury process. Those are some of my immediate concerns.

As for a full explanation, again, I need to look through my notes.

Mr. [Harmon B.], we questioned extensively yesterday. I found him to be very factually oriented, with very little emotion and very little commitment either towards the death penalty or against the death penalty.

I was very concerned that he had sat in a case of extreme importance in a court martial that may have involved the death penalty case, that he cannot recall whether or not there was a death penalty verdict handed down or life sentence.

I found that his lack of understanding and failure to remember such an important issue in his past did not give him the sensitivity that this case required.

I note that Mr. [Harmon B.]'s emotions during questions, and even his mannerisms here

in court, are very short, very noncommittal.

And no opinion regarding psychology. No opinion regarding the death penalty.

THE COURT: No what?

MR. DUNLAP: No opinion regarding psychology, and no opinion regarding the death penalty.

His answers were short, to the point, and one of extreme precision.

He has an extensive military background. Computer analyst. I found that did not have the sensitivity required.

If the Court requires further explanation, I would be happy to pull my notes on each juror and go through their sheets.

THE COURT: In the interest of time, I wonder if we could get the questionnaires that we have, and let you look at those. If there is something else you missed, you probably be wise (sic) to place it on the record now.

MR. DUNLAP: If the Court wants to pull both questionnaires and give me the times they were here, and I will get my notes. I made extensive notes as to their physical gestures during questioning and so forth.

THE COURT: Do you have them with – your book with you?

MR. DUNLAP: I have all three books. I didn't have all the questionnaires. They were too bulky and wouldn't fit on my cart.

THE COURT: Would you pull the questionnaires?

MR. FOX: I have no objection to letting counsel consult whatever notes he's got, rather than beginning any –

THE COURT: He is going to do that. He needs the sequence of the jurors.

THE BAILIFF: Mr. [Harmon B.] was here on 8/15 in the p.m.

MR. DUNLAP: That was yesterday, I believe.

THE COURT: Yes, he was here yesterday.

MR. DUNLAP: Okay. My notes regarding Mr. [Harmon B.], I am ready to go through those at this point in time.

THE COURT: Okay.

MR. DUNLAP: Regarding Mr. [Harmon B.], his questionnaire, no opinion regarding the psychology, no opinion regarding the death penalty.

Very little emotional attachment. Talked about the Court's instructions. I found his attitude to be very mechanical, very stiff.

My specific notes were, "Zero emotion regarding his experience and what may have been a death penalty case in his past military service."

His lack of memory and recall regarding

that incident, which I think is something of extreme importance – and this Court will notice that we had another juror that sat in a death penalty case, that talked about it, and talked about the extreme emotional commitment it was. And that incident occurred – I think it was 14 years prior.

Mr. [Harmon B.]'s lack of emotion, lack of memory regarding such an important case, concerned me very greatly.

Another thing that Mr. [Harmon B.] bothered me on, talked about objective factors of intoxication. He was very reluctant to look at objective factors of intoxication as an indicator. Specific notes were he would not like objective factors of intoxication. He did bring up some points about other factors, say a diabetic, I think, was the example he used. And he was very reluctant to commit to such terms.

This case has a witness list that includes psychological, psychiatric testimony and drugs. I think that objective reasonable factors would be a very important part of this case. His reluctance to embrace those, I think, is another one of our major concerns.

Some of his specific comments regarding the death penalty, at one point in time when asked by the Court – and – this was what one of my major concerns with Mr. [Harmon B.] was – on the question 62, the Court was talking about his answers. And I was somewhat concerned why the Court went into Mr. [Harmon B.]'s answers, because from all of the questionnaires, Mr. [Harmon B.] wrote "disagree somewhat" for 62 and 63.

[¶.] [¶.] . . . .

THE COURT: Each of the questions, he answered "disagree somewhat" to all four.

MR. DUNLAP: Correct. [¶.] And, consistently, the Court has overlooked those when someone has answered those, because that's kind of what – the answer the Court's been looking for.

THE COURT: The reason the Court did that, I might tell you why, is because he put down, "Following the instructions of the judge – interpretation of the law."

MR. DUNLAP: I agree.

THE COURT: Then like I tried to explain to him it wasn't a question of law, whether you pick a death penalty or pick a life without parole. Once I explained it to him, he didn't seem to grasp that.

MR. DUNLAP: Actually, my notes on it was, I wrote – my notes were that the Court went on extensively on question 62 to try and get the personal sentiment of Mr. [Harmon B.], and he continually went back to the law.

My notes specifically said, "Tough understanding the judge. Judge gave up trying to clarify question 62" –

THE COURT: I did, yes.

MR. DUNLAP: – "and moved on."

His inability to come out with any type of personal sensitivity, give his personal insight as

to how he felt, bothered me.

I thought his mechanical approach to questioning, his mannerisms, and how he sat in the chair reflected those attitudes.

I also noticed that when the Court was talking about question 62, and could check the transcript, he – he said specifically, "I don't believe in two wrongs make a right. I don't believe in taking two lives."

I came back to him and asked him about that. And he said specifically, "I can follow the law."

And, again, I think what I'm asking for, what I was looking for, was his personal opinion and sensitivity towards his emotions towards the death penalty and life without the possibility of parole. And for those reasons, I did not think he would make a good juror.

I also point out that he had seen – had been in Vietnam, Germany, he lost his hearing to his right ear. He said that would not be a problem.

Again, with his lack of understanding the Court's questioning, I was concerned whether he was actually, in fact, hearing us. He said he could put a hearing aid in.

But, again, he seemed to be somewhat confused when we repeatedly tried to ask him questions. And my notes again reflect, "Judge abandoned questioning in an attempt to clarify."

THE COURT: Well, the Court felt either he didn't understand it, or was avoiding it, or

there was some difficulty getting across. It wasn't a question of law –

MR. DUNLAP: Anyway –

THE COURT: – in terms of the death penalty. That's why I abandoned the hope. I didn't want to become argumentative.

The Court's satisfied that the challenge regarding him is done in such a fashion it would not offend the principles of the Wheeler case. The prosecution has a good, legitimate reason for excusing him under the circumstances.

MR. DUNLAP: I would note –

THE COURT: I did note that you did question him more extensively than most jurors. I think probably because of the answers he gave in questions 62 and 65. Probably why you asked him so many questions.

MR. DUNLAP: Excuse me?

THE COURT: The way he answered 62 through 65, I am not surprised you asked him extra questions. [¶.] But, also, he was very mechanical. And I was puzzled about that. And he did say he had a tooth problem.

MR. DUNLAP: I would note that my objective observations of [Harmon B.] reflected that mechanicalism. Very, I thought, lack of emotion describing his opinions, including the murder of his father.

THE COURT: All right. I am satisfied on him. He did sit bolt upright in his chair and seemed to be very guarded in what he said.

All right. Mrs. [Falvia C], here is her questionnaire. Teacher with Stockton Unified School District. Teaches elementary school.

MR. DUNLAP: Okay. Miss – Miss [Falvia C].

THE COURT: Do you have any other recollection on her?

MR. DUNLAP: I have my extensive notes here, Your Honor. And, again, they are quite extensive as to Miss [Falvia C].

Again, some of the factors that include are her extensive, extensive children. And that she has a huge number of children. She has 14 grandchildren. And I think her sensitivity to the family background is something we need to look at.

Additionally, she talked about – one of her first things was how she talked about visiting the County Jail, and how she did not find that a pleasant experience, and talked about the wait.

Some of the things she talked about were her belief in "Thou shalt not kill." That was a quote that she talked about.

She said she could have an open mind. But, again, when we talked about drug use, she talked about being – again, I didn't – she lived in the area, it's on my questionnaire, and again, I apologize, that's – that's down in my office. But when talking about where she lived, I think it was the Nightingale area, there is an extreme drug problem there. She talks about witnessing what she thinks to be transactions going on.

We asked her about, "Can you understand, you know, objective factors of drug symptoms?" [¶.] She said she is not that close to them, she can't tell. [¶.] When asked extensively about objective factors and examining their intoxication or drug influence, she didn't think she could do it.

She talked about seeing these kids on the corner all the time. She doesn't know what they are doing, she's not that close to them. And I found that very unusual in the area that she lives in. [¶.] Again, I hope I am quoting that area correctly. I believe I am.

The other thing was that she said, and this is a quote of hers, was that she found drugs as an excuse. She said, "Drugs make them do things they wouldn't ordinarily do."

I talked about levels of intoxication. She was very reluctant to commit due to mildly intoxicated, due to extremely intoxicated, mild drug influence, to say even a blackout, and I did not feel she would be an objective juror in those circumstances.

Both the extensive background of children, which I think makes her sensitive to the nature of children in this case, along with the molestation issues, I think, along with her specific comments, "Thou shalt not kill," her reluctance to embrace the death penalty, and her unwillingness to talk about drugs, I felt that she was not going to be a juror that could encompass these factors and make decisions based upon what the prosecution intended to show.

I also want to know, of course, about child molestation and drugs. She had strong

feelings regarding both drugs and child molestation. And you have to look at her neighborhood, her extensive family background, but she thought she could have an open mind. We do have allegations that the victim in this case may have some allegations of child molestation history. And again, because of her excessive 14 grandchildren, which it sounds like she keeps a very hands-on activity, I did not feel make her an ideal in this circumstance.

THE COURT: Okay. The Court's also satisfied that excusing that juror, Mrs. [Falvia C], was not offensive under the . . . Wheeler standards.

In both instances, the Court finds the prosecution has dutifully explained the excuses given and has justified them in my mind regarding the fact that he did excuse them. For reasons other than that for race. And that the Court then finds no Wheeler problem in this case.

Ready to have the jurors back out again.

MR. DUNLAP: Thank you.

On both issues, Your Honor, I would like the Court to have notice that I didn't have the benefit of my questionnaire present. If the Court has any further questioning.

THE COURT: Nothing further, no.

(19 RT 5278-5288 [emphasis added].)

There were no black jurors or alternate jurors in appellant's guilt phase trial. (19 RT 5278.)

B. Background of the Two Black Prospective Jurors Who Were the Subjects of the Batson-Wheeler Motion

1. Harmon B.

Harmon B. was a 52-year-old black man. (15 ACT 4447; 19 RT 5278.) He had graduated college with a major in business administration. (15 ACT 4447.) He was currently employed full-time as a systems analyst in the defense industry. (15 ACT 4448; 19 RT 5192-5193.) Harmon B. was a former noncommissioned officer in the U.S. Army, who had served in Vietnam and Germany; he had retired from the military after 21 years. He had been married for 20 years and had two children. (15 ACT 4447-4449; 19 RT 5192.) He was unaffiliated with any political or anti-crime organizations. (15 ACT 4449, 4451, 4458.) He had previously served on one jury and, while in the military, had been involved in judging a court martial. The court martial proceeding took place in Germany and involved a charge of murder. He believed the defendant ultimately received a life sentence, but did not recall whether the prosecution had sought the death penalty – it had taken place "long ago." He described both his court martial service and prior jury experience as being "positive." (15 ACT 4450; 19 RT

5193-5194, 5199.) He had not personally been a party to any court actions, apart from a couple of minor traffic matters, and he possessed a positive view regarding the trustworthiness of both defense and prosecuting attorneys, as well as police officers. (15 ACT 4453.) Harmon B. indicated that he had no problem with the death penalty or California law governing its application. (15 ACT 4458-4459.) He would follow the law provided by the judge and base his decision on the evidence presented in the courtroom. (15 ACT 4459, 4461.)

Upon being questioned in court, Harmon B. strongly endorsed California's bifurcated death penalty trial structure, stating that the "two-step system like [the court] explained to us, . . . I think is one of the best system[s] that man can design. And [if] we find the defendant guilty of that, then there is no problem with the death penalty or life." (19 RT 5189.) Harmon B. indicated that he would be open to imposing either the death penalty or a life sentence, based on "the evidence and the weight" of what was presented. (19 RT 5189, 5195.) He remembered seeing something about appellant's case "on television in reference to the new jail," but recalled nothing further. (19 RT 5190.)

Harmon B. had lost some hearing in his right ear, but compensated by use of a hearing aid. He was duly responsive to the questions of the court

and counsel, and said that he was "able to hear everything that's going on." He also indicated that he was willing to raise his hand, if necessary, to indicate that he was having difficulty hearing any particular testimony. (19 RT 5192, 5202.)

In response to questioning by the prosecutor regarding psychiatric testimony, Harmon B. indicated that he did not have "any preconceived ideas" on that subject and his reactions as a juror would depend on "what the issues are and what the psychiatrists say," as well as the "reputation" of any expert witness. (19 RT 5199-5200.) Harmon B. agreed with the prosecutor's statement that there was "a sliding scale" with respect to an individual's state of intoxication and said that he had encountered individuals, such as diabetics, whose symptoms mimicked the behavior of intoxicated persons. (19 RT 5201-5200.)

2. Falvia C.

Falvia C. was a 56-year-old black woman. She was widowed and had 6 adult children and 14 grandchildren. (16 ACT 4709, 4711; 15 RT 3906-3907.) She possessed a college degree in social science. She was employed full-time as an elementary school teacher. (16 ACT 4710.) She did not

possess any prior jury service and she did not belong to any political or anti-crime organizations. (16 ACT 4713, 4720.) Falvia C. had no negative feelings with respect to defense attorneys, prosecutors or police officers. (16 ACT 4715.) She did not have any problems with the death penalty or with California law governing its application. (16 ACT 4720-4721.) She acknowledged that, prior to this time, she had not given California's death penalty much thought. (15 RT 3913-3914.) She indicated that she "agree[d] somewhat" with the view that "the State should execute everyone who unlawfully and intentionally murders another human being," as well as the view that it "should execute everyone who intentionally murders another human being during the course of a dangerous crime." (16 ACT 4721.) She also "strongly agree[d]" with the proposition that a "person who kills another impulsively is just as much to blame as one who murders according to a careful plan." (16 ACT 4721.) She would follow the law provided by the judge and base her decision on the evidence presented in the courtroom. (16 ACT 4721-4723.)

Falvia C. had several relatives who were involved in law enforcement: one of her brothers worked for a state agency involved in parole or probations hearings, another brother worked for the County of Sacramento Probation Department, three nephews and one nephew-in-law

were employed as prison or police officers. (15 RT 3910-3912.) She had once visited a friend in jail, but did not do so again because of the long wait to get in. (15 RT 3912-3913.)

Falvia C. had strong feelings opposed to people taking drugs because of the damage it did to them and because drugs made "people do things they wouldn't ordinarily do." (15 RT 3920-3922.) She was religious and attended church regularly. She took the Bible seriously, including the admonition "Thou shalt not kill." However, she also believed that "there are circumstances that justify the death penalty." (15 RT 3927; 16 ACT 4713, 4719.) In response to the prosecutor's questioning, she assured him that nothing about her religious beliefs would preclude her from voting in favor of the death penalty if the evidence warranted it. (15 RT 3928-3929.)

C. The Trial Court Erred in Denying Appellant's Batson-Wheeler Motion

Although defense counsel only referred to his motion as a "Wheeler challenge" (19 RT 5278), this Court has held that such a motion fully preserves a defendant's rights under Batson v. Kentucky, supra, and its progeny. (People v. Partida, supra, 37 Cal.4th at 433-439; People v. Yeoman, supra, 31 Cal.4th at 117-118.) Accordingly, appellant presently

refers to defense counsel's motion as a "Batson-Wheeler" motion.

The trial court's denial of appellant's Batson-Wheeler motion violated his right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution. (Batson v. Kentucky, supra, 476 U.S. at 86-87.) Under Batson, "the striking of a single black juror for racial reasons violates the equal protection clause." (People v. Fuentes (1991) 54 Cal.3d 707, 715 [citations and internal quotation marks deleted]; accord People v. Christopher (1991) 1 Cal.App.4th 666, 670-673; People v. Moss (1986) 188 Cal.App.3d 268, 275-277.)[13]

In Purkett v. Elem (1995) 514 U.S. 765 [131 L.Ed.2d 834, 115 S.Ct. 1769] the Supreme Court summarized the three step procedure relevant to a Batson motion:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

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[13] The striking of jurors for racial reasons also violates the equal protection rights of the prospective jurors to participate in the judicial process and serve on a jury. Appellant has standing to raise this constitutional violation. (See J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127, 145-146 [128 L.Ed.2d 89, 114 S.Ct. 1419].)

(Id., 514 U.S. at 767 [citations omitted].)

Analysis of the present record while keeping in mind the Batson process described above demonstrates that the trial court erred in denying appellant's Batson-Wheeler motion.

1. The Trial Court Correctly Found a Prima Facie Showing of Group Bias

Although the court below did not expressly announce a prima facie finding of improper bias with regard to the Batson-Wheeler motion, clearly the court made an implicit prima facie finding, as indicated by its specific demand that the prosecutor provide his reasons for striking both Harmon B. and Falvia C. (See 19 RT 5278, 5280.) "[W]hen the trial court inquires about the prosecutor's justifications" for striking specific jurors "the court has made 'at least an implied finding' of a prima facie showing." (People v. Fuentes, supra, 54 Cal.3d at 716 [citing People v. Johnson (1989) 47 Cal.3d 1194, 1217; People v. Turner (1986) 42 Cal.3d 711, 718-719; People v. Hall (1983) 35 Cal.3d 161, 165; and People v. Mason (1991) 52 Cal.3d 909, 937; fn. omitted].)

The trial court was well justified in finding a prima facie case of

racial discrimination in response to the defense Batson-Wheeler motion. At that point the prosecutor had used peremptory charges against both of the black potential jurors who had been available. (19 RT 5278.) While not conclusive, the removal of all members of a certain group may give rise to an "inference of impropriety." (People v. Howard (1992) 1 Cal.4th 1132, 1156; accord United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695, 698 [finding a prima facie case when prosecutor struck only prospective Latino juror and only prospective Latino alternate juror available in panel].)

2. The Prosecutor Failed to Refute the Court's Prima Facie Finding of Group Discrimination

If, as in the present case, the trial court "finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone." (People v. Wheeler, supra, 22 Cal.3d at 281; People v. Turner, supra, 42 Cal.3d at 720.) Furthermore, the question is not whether there existed objective good cause, in the abstract, for challenging certain jurors. Rather, the question is whether the prosecutor is able to demonstrate by his stated reasons that he personally possessed race-neutral motives for his strikes.

(People v. Fuentes, supra, 54 Cal.3d at 720; People v. Tapia (1994) 25 Cal.App.4th 984, 1017-1018.) "A race-neutral explanation is required precisely because race-neutral intent in striking potential jurors is required." (Splunge v. Clark (7th Cir. 1992) 960 F.2d 705, 709.) Here, the State failed to meet its burden of establishing race-neutral intent with respect to the Batson-Wheeler motion.

In Miller-El v. Dretke (2005) 545 U.S. 231 [162 L.Ed.2d 196, 125 S.Ct 2317], the United States Supreme Court employed comparative juror analysis at the appellate level to determine whether the prosecution had been motivated by racial bias in exercising its peremptory strikes. (Id., 545 U.S. at 240-263.) "Comparative juror analysis" refers, in this context, to an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to examine whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular racial group. Miller-El made clear that comparative juror analysis is an important tool that courts should utilize in assessing Batson claims: "More powerful than these bare statistics [revealing that the prosecution struck 91% of black potential jurors], however, are side-by-side comparisons of some black panelists who were struck and white panelists allowed to serve." (Id., 545 U.S. at 241.) The Miller-El court specifically found that "disparate questioning" of black

versus nonblack jurors may provide strong evidence that a Batson violation has occurred. (Id., 545 U.S. at 256-257.)

The principals of comparative juror analysis are illustrated by United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695. In Chinchilla, both defendants were Hispanic. The prosecutor struck the sole Hispanic prospective juror Osuna and the sole Hispanic prospective alternative juror Vasquez. The trial judge found a prima facie case in response to the defense Batson motion. The prosecutor explained that he had struck juror Osuna because of his place of residence and employment as a restaurant manager. The Ninth Circuit Court of Appeal began its analysis by noting the "great deference" paid to a trial court's finding of nondiscrimination by the prosecution. (Id. at 698.) The circuit court nonetheless reversed. With regard to juror Osuna, the court noted that an unchallenged non-Hispanic juror shared the same residential area. The remaining reason given – Osuna's employment as a restaurant manager would – the court stated, "normally be adequately 'neutral'" to pass scrutiny. However, the fact that the other given reason did "not hold up under judicial scrutiny militates against [its] sufficiency." (Id. at 699.) The prosecutor's stated reasons for striking alternate juror Vasquez – his age and appearance – failed under a similar analysis. (Id. at 698-699.)

Applying comparative juror analysis to the present case clearly reveals the disparate manner in which the prosecutor treated the two black prospective jurors as compared to his questioning of nonblack jurors who he permitted to sit on appellant's jury.

In defending his strike against Harmon B., the prosecutor cited several grounds, focusing particularly on Harmon B.'s lack of an opinion regarding psychology, his lack of recollection regarding serving as a panelist on a court martial in a murder case, and his general lack of emotion in responding to questions. In a situation where a prosecutor provides multiple reasons for a questioned strike, each reason should be separately evaluated by the court to determine if it is, in fact, bona fide and race neutral. (People v. Silva (2001) 25 Cal.4th 345, 385-386.)

It would clearly not be proper to sustain the prosecutor's justifications under Batson and Wheeler merely because one of the many stated grounds standing alone, may be considered bona fide and "racially neutral." A situation of this type arose in United States v. Chinchilla, supra, 874 F.2d 695, wherein the prosecutor cited two reasons, one of which was racially suspect, for striking a minority juror. The Ninth Circuit reversed Chinchilla's conviction, indicating that a judicial finding that one reason is invalid "militates against [the] sufficiency" of the other facially neutral

reason. (Id. at 699; accord McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209, 1221; People v. Gonzales (1989) 211 Cal.App.3d 1186, 1201 [reversal where prosecutor's primary reason for striking Mexican-American juror was not race neutral; prosecutor's express secondary reason of juror's "body language" could not save judgment].)

One major concern which the prosecutor claimed he had with Harmon B. was his attitude towards a court martial he had judged while in the military, which may have involved a death-eligible crime. (19 RT 5279, 5281.) The prosecutor stated that he "found that his lack of understanding and failure to remember such an important issue in his past did not give him the sensitivity that [the present] case required." (19 RT 5279.) Yet when the prosecutor had previously encountered a non-minority juror, Gloria H., who possessed an extensive legal background with respect to military courts martial, the prosecutor asked her absolutely no questions about this subject and permitted Gloria H. to serve on appellant's jury. (22 ACT 6524; 5 CT 1235; 16 RT 4279-4281 [prosecutor's questioning of Gloria H.].)

The prosecutor also claimed that he struck Harmon B. because he lacked an opinion regarding psychology. (19 RT 5279, 5281.) The judge noted that the prosecutor had, in fact, questioned Harmon B. "more extensively than most jurors" on this and other topics. (19 RT 5285.)

However, by contrast, there were several non-black jurors and alternates whom the prosecutor had permitted to be seated without questioning them at all on the subject of psychology: jurors Charles H. (see prosecutor questioning at 11 RT 2716-2719), Amanda M. (see 16 RT 4222-4227), Janice Y. (see 15 RT 4017-4021), Otto D. (see 14 RT 3564-3566) and alternate juror Lynn M. (see 12 RT 3181-3182). This raises the implication that the prosecutor's prolonged questioning of Harmon B. on psychiatry and other subjects merely represented an effort to uncover some pretext on which to dismiss this black prospective juror – otherwise how would one explain the prosecutor's disinterest regarding attitudes towards psychiatry when it came to these non-minority jurors? (See Miller-El v. Dretke, supra, 545 U.S. at 244-246.)

The prosecutor also said that he was concerned that Harmon B. suffered from a minor hearing impairment stemming from his military service. Harmon B. had said that he would be using a hearing aid. (19 RT 5284; see 19 RT 5202.) However, the prosecutor apparently had no problems with Thomas N. and Paul T., two nonblack alternate jurors who likewise suffered minor hearing impairments. (See 23 ACT 6693; 13 RT 3431-3432; 16 RT 4153-4157; 19 RT 5291.) Thus, this purported basis for the prosecutor's strike of Harmon B. was likewise suspect. (See Turner v.

Mitchell (9th Cir. 1997) 121 F.2d 1248, 1252; United States v. Chinchilla, supra, 874 F2d at 698-699.)

The prosecutor also repeatedly asserted that Harmon B. lacked "sensitivity." (See 19 RT 5279, 5280, 5283.) The prosecutor explained that he found Harmon B. "to be very factually oriented, with very little emotion." (59 RT 5279.) However, such a rationale for striking Harmon B. should be viewed as suspect because objectivity and reluctance to be easily swayed by appeals to emotion are generally considered characteristics of desirable jurors for the prosecution. (Turner v. Mitchell, supra, 121 F.2d at 1252 [prosecutor's strike of minority juror seen as suspect where juror possessed attributes of desirable pro-prosecution juror].) Likewise suspect was the prosecutor's explanation regarding Harmon B.'s attitude towards drugs: "He was very reluctant to look at objective factors of intoxication as an indicator." (19 RT 5282.) In actuality, Harmon B. had agreed with the prosecutor's statement that there was "a sliding scale" with respect to an individual's state of intoxication. Moreover, Harmon B. had not said anything indicating that he would be sympathetic to someone who commits a crime while under the influence of illegal drugs. (See 19 RT 5200-5202 [questioning of Harmon B. re drugs].) Again, the subject of drug use presented a situation where Harmon B. displayed an attitude favorable to the

prosecution, rather than one justifying the use of a prosecution peremptory strike.

Turner v. Mitchell, supra, 121 F.2d 1248 is instructive regarding the prosecutor's strike of Harmon B. In Turner, the prosecutor sought to justify his strike of McCain, a black prospective juror, on the basis that McCain had expressed reluctance to look at gruesome pictures. In reversing for Batson error, the Turner court noted that the prosecutor had allowed a white juror who had likewise voiced discomfort about looking at such photos to be seated on Turner's jury. (Id. at 1252.) The Turner court pointed out that the prosecutor's purported race-neutral ground for striking McCain was belied by the fact that McCain should have normally been considered an ideal prosecution juror:

> On the surface, McCain possesses all of the attributes of a classic prosecution juror. He testified that he served as a military policeman in Vietnam, that he was married with two small children, and that he worked as a production supervisor for Garrett Air Research. He also informed the court that he had a brother-in-law who was a DEA agent.
>
> (Turner v. Mitchell, supra, 121 F.3d at 1252.)

These attributes are strikingly similar to those possessed by Harmon B. Harmon B.'s strong military and defense industry background, coupled with his conservative personal lifestyle (married for 20 years with two

children), should have classified him as "a classic prosecution juror," similar to black juror McCain in the Turner case. As in Turner, this further supports the conclusion that the prosecutor's strike against Harmon B. was racially motivated.

The prosecutor's strike of Falvia C. was also racially suspect. When questioned about Falvia C., the prosecutor immediately recited that she had corrected a court clerk in "a harsh tone" for repeatedly mispronouncing her name. The prosecutor claimed this reflected lack of "an attitude of openness and understanding to the jury process." (19 RT 5279.) Completely absent from the prosecutor's statements regarding Falvia C. was any explanation of why her natural objection to the repeated mispronunciation of her name would make her more likely to disfavor the prosecution or favor the defense. The prosecutor below did no more to establish that Falvia C. was an undesirable juror from the prosecution's standpoint in light of her response to her name being mispronounced than did the Chinchilla prosecutor in asserting that potential juror Osuha would be sympathetic to the defendants in that case because of Osuna's residence and employment. The present prosecutor simply described Falvia C.'s reaction to the mispronunciation of her name and posited that she would make an undesirable prosecution juror for that reason.

The prosecutor also claimed that he was concerned with Flavia C.'s "unwillingness to talk about drugs" and her attitude regarding illegal drug use. (19 RT 5286-5287.) In fact, Falvia C. had expressed opposition to people using illegal drugs and concern for the problems drugs caused society. (15 RT 3920-3922.) Falvia C. also indicated general agreement with the idea that a person who kills someone under the influence of illegal drugs or alcohol deserves the same punishment as a sober person committing the same crime. (16 ACT 4721.) Thus, there was nothing about Falvia C.'s expressed attitudes and opinions regarding illegal drug use which would make her an undesirable juror for the prosecution.

The prosecutor also cited heavy reliance upon Falvia C. having "a huge number of children" and "14 grandchildren." (19 RT 5285.) He speculated that this background would "make[] her sensitive to the nature of children in this case" (19 RT 5287) – apparently a reference to the expectation that appellant's children would come into play as defense mitigation in the penalty phase.

However, several of the seated non-minority jurors and alternates possessed a significant number of children and/or grandchildren: Charles H. with four children and two grandchildren. (22 ACT 6458; 11 RT 2703.) Daniel T. with three children and one grandchild. (23 ACT 6612; 11 RT

2670.) Sandra R. with four children. (22 ACT 6484.3.) Given that a principal reason provided by the prosecutor for striking Falvia C. – a significant number of children and grandchildren – was shared by non-minority jurors and alternates which the prosecutor failed to strike, the prosecutor's strike of Falvia C. is thereby exposed as racially discriminatory. (McCain v. Prunty, supra, 217 F.3d at 1220-1224; United States v. Chinchilla, supra, 874 F.2d at 698-699.)

D. Conclusion

In sum, appellant's convictions must be reversed on the basis of Batson-Wheeler error involving prospective jurors Harmon B. and Falvia C. Appellant would once again emphasize that, under Batson and Wheeler, "the striking of a single black juror for racial reasons violates the equal protection clause." (People v. Fuentes, supra, 54 Cal.3d at 715 [emphasis added; citations and internal quotation marks deleted]; accord People v. Christopher, supra, 1 Cal.App.4th at 670-673.)

Reversal is required herein because: 1) the prosecutor's explanations for excusing these two prospective black jurors were, as to each, insufficient to rebut a prima facie case (People v. Turner, supra, 42 Cal.3d at 728; United

State v. Chinchilla, supra, 874 F.2d at 698-699); and/or 2) the court erred in abdicating its "Wheeler obligation of inquiry and evaluation" with respect to the prosecutor's stated grounds for dismissing the prospective black jurors. (People v. Fuentes, supra, 54 Cal.3d at 718).