In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **VAENE SIVONGXXAY,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S078895

Fresno County Superior Court,
Case No. F97590200-2

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 6, 1998, the Fresno County District Attorney filed an amended information charging appellant and co-defendant Oday Mounsaveng with one count of murder (count 1; Cal. Pen. Code, § 187);[1] fourteen counts of robbery (counts 2-15; §§ 211, 212.5); and one count of attempted robbery (count 16; §§ 664, 211, 212.5.) (3 CT 707-713.)[2] The information alleged as to count one the special circumstance that the murder was committed in the commission of a robbery; alleged as to counts one through 14 that both defendants personally used firearms (§ 12022.5); alleged as to counts 14 and 15 that Mounsaveng was armed with a firearm (§ 12022, subd. (a)(1)); alleged as count 16 that Mounsaveng personally used a firearm (§ 12022.5, subd. (a)); and alleged as to count 16 that appellant was armed with a firearm (§ 12022, subd. (a)(1)). (3 CT 759-766.) The information additionally alleged that appellant had a prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(e)); a prior serious felony conviction (§§ 667, subd. (a)(1), 1192.7); and had served a prior prison term (§ 667.5, subd. (a)). (3 CT 766-767.)

On July 27, 1998, appellant waived formal arraignment, pled not guilty to the charges, and denied the allegations. (3 CT 779.)

Sometime after June 19, 1998,[3] the district attorney filed a notice of evidence to be introduced as circumstances in aggravation. (3 CT 780-790.)

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

[2] Previously, on June 25, 1997, the Fresno County District Attorney gave notice that it would be seeking the death penalty. (3 CT 717.)

[3] Respondent's copy of the date stamp for this document is unreadable. The date near the signature line is June 19, 1998.

On December 17, 1998, appellant and Mounsaveng waived their right to a jury trial. (3 CT 795.)

On January 25, 1999, court trial commenced. (3 CT 812.)

On March 11, 1999, in a bifurcated proceeding, the trial court found appellant and Mounsaveng guilty of attempted robbery, a lesser included offense of count nine, and otherwise found them guilty as charged and found the allegations, except for the prior conviction allegations, to be true, including the special circumstance allegation. (4 CT 919-923; 12 SRT 2377-2378.)

On March 17, 1999, the penalty phase commenced. (4 CT 928.)

On March 25, 1999, the trial court found insufficient evidence of the prior "strike" allegation against the defendant. (4 CT 958.)

On April 1, 1999 the trial court found the adult convictions as to both defendants to be proven beyond a reasonable doubt; imposed the death sentence as to appellant, and imposed a sentence of life without the possibility of parole as to codefendant Mounsaveng. (4 CT 986-987.)

On April 29, 1999, appellant's motion for reconsideration of the death penalty was denied. (§ 190.4, subd. (e); 4 CT 988.)

This appeal automatically followed. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Attempted Robbery Of Thanh Tin Jewelry Store, July 31, 1996

Liem Phu Hyunh and his wife, Phung Ngoc Ho, owned the Thanh Tin Jewelry Store on Kings Canyon in Fresno. (7 SRT 1043, 1132.) On July 31, 1996, at approximately 1 p.m., Mounsaveng came into the store alone. (7 SRT 1050, 1132-1133, 1137.) Mounsaveng had come into the store on a previous day and looked around. (7 SRT 1133.)

Phung Ngoc Ho "buzzed" him into the store through an inner door. (7 SRT 1133-1134.) Inside the store, Mounsaveng looked at a gold necklace. (7 SRT 1051.) He then said he would come back with his brother to purchase it. (7 SRT 1051, 1138.)

Later that day, after 2 p.m., Mounsaveng returned with appellant. (7 SRT 1051-1052.) The two looked around and said they had to wait for a sister to come. (7 SRT 1052-1053.) Liem Huynh told them he did not want them waiting long inside the store; he wanted them to wait outside. (7 SRT 1053.) They asked when the store closed. (7 SRT 1056.) Eventually, they drove away in a car; Huynh took down the license number of the car. (7 SRT 1053-1056.)

Mounsaveng and appellant returned at approximately 4 p.m. (7 SRT 1056.) Huynh told Phung Noc Ho to be careful and went into a back room. (7 SRT 1058, 1098.) After the two looked at some jewelry, Mounsaveng pulled out a gun from the back of his waistband and put it to Phung Noc Ho's head while pulling at the back of her collar. (7 SRT 1147-1148.) Phung Noc Ho shouted in Vietnamese at Huynh to call the police. (7 SRT 1148-1149.) When Huynh heard Phung Noc Ho shout, he pressed a button for the alarm system in the store. (7 SRT 1086-1089.)

When the alarm went off, Mounsaveng released Phung Noc Ho, who lay on the ground. (7 SRT 1150.) Mounsaveng then pressed the button that unlocked the door. (7 SRT 1150.) Mounsaveng and appellant left the store and drove away in a car. (7 SRT 1150-1151.)

B. Robbery Of JMP Mini-Mart, August 16, 1996

Xeng Wang Her and his wife, Phayvang Voulome, owned the JMP Mini-Mart on Cedar in Fresno. (8 SRT 1241, 1321.) On August 16, 1996, Xeng Her, Voulome, and Xeng's daughter, Bobbie Her, were in the store. (8 SRT 1241-1242.) Xeng Her went to the bank. (8 SRT 1321-1322.)

Both Mounsaveng and appellant entered the store. (7 SRT 1196; 8 SRT 1242-1243.) Both went in and out of the store during a considerable period of time without purchasing anything. (7 SRT 1197-1199; 8 SRT 1244-1245, 1321-1328.)

Eventually, Xeng returned with over $8,000 in cash in a white bank bag. (8 SRT 1321-1322.) He concealed the cash underneath a coat and later put it underneath the counter. (8 SRT 1322, 1325.)

As Xeng stocked drinks, appellant pulled out a gun and pointed it at him. (8 SRT 1245-1246, 1329.) Appellant then told Xeng to freeze, forced him towards the cash register, and forced him to the ground. (8 SRT 1246, 1248, 1329-1330.) Mounsaveng ordered the customers to get down, and forced Her to give him the money. (8 SRT 1248.)

The two took all of the money in the store. (8 SRT 1334-1335.) They ripped the base of the cordless phone off the wall and took the cordless phone itself. (8 SRT 1335.) Right before appellant left, he kicked Xeng in the head. (8 SRT 1333-1334.) The two fled in a blue pickup truck. (7 SRT 1215-1216.) Bobbie then went to a nearby auto body shop to call the police. (8 SRT 1334.)

C. Phnom Phen Jewelry Store, October 10, 1996

Suntary Heng and her husband, Kee Meng Suy, owned the Phnom Phen Jewelry Store on North Fresno Street in Fresno. (9 SRT 1436-1437, 1601-1602.) On August 24, 1996, Mounsaveng came in the store with a girlfriend, Kathy Sengphet, to have a Buddha pendant repaired. (9 SRT 1441-1442.) Mounsaveng did not wait for the pendant to be repaired; he returned later in the day to pick it up once Suy finished with it. (9 SRT 1603-1604.)

On October 10, 1996, Heng and Suy were working in the store, and had their two young children with them. (9 SRT 1437.) At approximately 1:30 p.m., Heng "buzzed" appellant into the store through a security door. (9 SRT 1438-1440, 1498, 1604-1605.) Several minutes later, Heng let Mounsaveng in the store when appellant said he was appellant's friend. (9 SRT 1440-1441, 1443, 1498-1499, 1605.)

In the store, Mounsaveng gave a Buddha pendant to Suy to repair; it was the same pendant repaired on August 24, 1996. (9 RT 1444, 1605.) Mounsaveng said he had broken the pendant playing basketball. Suy thought Mounsaveng must have broken the pendant on purpose—he had never had to repair a pendant twice in the five years he had owned the store. (9 SRT 1606.) Additionally, the broken piece looked as if someone had broken it—"[i]t's not broken by itself." (9 SRT 1607.) Suy repaired the pendant by welding it. (9 SRT 1607.) Suy was going to repair the pendant for free, but Mounsaveng offered to pay Suy for the second repair. (9 SRT 1646.)

While Suy repaired the pendant, Heng showed the two other pieces of jewelry. (9 RT 1444.) Mounsaveng then said there was still a crack in the pendant that needed work, so Suy went back to his workbench to complete the work. (9 RT 1445, 1607.) Appellant stood and watched Suy while Mounsaveng paced back and forth. (9 RT 1445.)

Heng then took her children to the back of the store to get them something to eat. (9 RT 1445-1446.) After Heng did this, appellant and Mounsaveng ran through the gate separating the customer area of the store from the vendor area, and pointed handguns at Suy's head. (9 SRT 1446, 1607-1608.) Appellant told him not to scream, and that if he was to move, appellant would kill him. (9 SRT 1607-1608.)

Both men pushed Suy to the floor, beat and kicked him, bound him with cord from a floor fan, and put duct tape over his mouth. (9 SRT 1446-1448, 1608-1611.) Both wore leather boots. (9 SRT 1610.) Suy lost consciousness after his mouth and eyes were taped. (9 SRT 1612.) Heng saw this and begged the two not to hurt her husband, saying to go ahead and take what they wanted. (9 RT 1450, 1612.) Mounsaveng told Heng to shut up. (9 SRT 1450.) They put a piece of tape over Heng's mouth. (9 SRT 1455, 1507.)

Mounsaveng asked for the tape from the video camera and for Suy's gun. (9 SRT 1451.) However, there was no tape; the video camera was broken. (9 SRT 1451.) Suy had no gun, and Heng told Mounsaveng this. (9 SRT 1451.)

Mounsaveng asked for the key to the safe; Heng told him where the key ring that held the keys to the safe, cash register, and showcase were. (9 SRT 1452.) Mounsaveng took money from the safe and the cash register, and took jewelry from the showcase. (9 SRT 1452-1454.) Heng activated the silent alarm by pressing a switch while appellant and Mounsaveng were taking the jewelry out of the showcase. (9 RT 1454.)

Eventually, the two left and the telephone rang; it was the police. (9 SRT 1455.) As the telephone was ringing, Heng saw the two drive away in a light blue Honda southbound on Fresno Street. (9 SRT 1454-1455, 1502; 10 SRT 1762-1763.)

Approximately two minutes after the two left, the police arrived. (9 SRT 1457.) One of the responding officers, Fresno City Police Department Officer Sean Ryan, found Suy, Heng, and the children to be very emotional and crying. (10 SRT 1749-1751.)

The officers helped cut the duct tape off Suy. (9 SRT 1458; 10 SRT 1751.) He was bleeding from abrasions on his chest. (10 SRT 1752.) An ambulance took Suy to the hospital approximately ten to 15 minutes after Officer Ryan arrived, where Suy was prescribed medication. (9 SRT 1458; 10 SRT 1753.) Eight months after the robbery, he could not repair necklaces because of the pain. (9 SRT 1615.) At the time of trial, he could feel pain in his ribcage when lifting items. (9 SRT 1615.) Approximately $30,000 in property was taken. (9 SRT 1457, 1615-1616.)

Latent prints taken from the Phnom Phem jewelry store after the robbery matched appellant's prints. (9 SRT 1477-1479, 1484-1486.)

D. Second Robbery Of JMP Mini-Mart, December 14, 1996

On December 14, 1996, appellant and Mounsaveng, both armed with handguns, entered the JMP Mini-Mart. (8 SRT 1249, 1337.) Five or six customers were present, as well as Xeng Her and Phayvang Voulome. (8 SRT 1249.) Voulome was close to the cash register and Xeng was behind the cash register. (8 SRT 1249-1250.) Appellant told everyone to get down on the ground. (18 SRT 1338.)

Mounsaveng went around the counter to Xeng and asked, "Where's the money[.]" (18 SRT 1339.) Xeng said they did not have any money. (18 SRT 1339.) Mounsaveng took a gun that was underneath the counter. (18 SRT 1339.) He forced Xeng to give him money from the cash register. (18 SRT 1250-1251, 1338-1339.)[4]

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[4] This is according to Voulome's testimony; Xeng did not recall opening the cash register for Mounsaveng. (18 SRT 1345.)

He took Xeng into a small room behind the cash register and took change and cigarettes. (18 SRT 1341-1342.) He then left the room, telling Xeng not to leave the room. (18 SRT 1342.) Later Xeng peeked through the door; when Mounsaveng noticed this he pointed the gun at Xeng. (8 SRT 1342.) Xeng then shut the door. (8 SRT 1343.)

Then, while Mounsaveng pointed his gun at Voulome's face, he pulled her by her collar toward a broken cash register near the bathroom, and told her in English to open it or he would shoot her. (8 SRT 1250-1252.) Voulome told him the register was broken and placed the key on the cash register. (18 SRT 1252.) Mounsaveng did not open the register. (18 SRT 1252.) He then went towards the customers. (18 RT 1253.)

They ordered the customers to get down and ordered Xeng Her to open the cash register. One customer, Ying Xiong, age 72 or 73 at the time of trial, threw her purse as she lay on the ground. (18 SRT 1375-1377.) Appellant kicked and hit Xiong several times while saying "Give me your purse right now. If you don't give it to me, I'll kill you." (8 SRT 1379-1380; 9 SRT 1673.) Ying Xiong responded that she had thrown the purse away and said, "You can go find it over there." (8 SRT 1380.) He could not find the purse and left. (8 SRT 1381.) As a result of the blows, Ying Xiong suffered a split lip, headache, and pain in her back and neck. (8 SRT 1381; 9 SRT 1684-1685.) She was later taken to the hospital. (8 SRT 1347.) Four days later, the owner of the store helped Ying Xiong find the purse. (8 SRT 1381-1382.)

The two also took the purse of Choua Yang, Ying Xiong's granddaughter, who was in the store that day with Ying, as well as the purse of May Ker Yang, one of the customers in the store. (9 SRT 1679-1682, 1686-1692.)

During the robbery, Karen Lee, age 13, and Ge Xiong, Karen's mother, entered the store. (8 SRT 1388-1390.) Before entering the store, they noticed a light-colored car occupied by two men. (8 SRT 1390; 9 SRT 1670.) They looked in Karen Lee's and Ge Xiong's direction before entering the store. (8 SRT 1391; 9 SRT 1671.) Karen Lee noticed that the engine of the unoccupied car was still running. (8 SRT 1392.)

When Karen Lee and Ge Xiong entered the store, they saw Mounsaveng, who was one of the men that had been in the light colored-car, behind the cash register holding a gun. (8 SRT 1392-1393, 1401; 9 SRT 1672.) Mounsaveng pointed a gun at them and took their purses. (8 SRT 1393; 9 SRT 1672.) He then told them to get down on the ground. (8 SRT 1395; 9 SRT 1672.)

Near the end of the robbery, Der Her and her husband, Chong Thao walked into the store. (8 SRT 1297-1298, 1309-1310.) As they walked inside, Chong Thao noticed a white car outside the store that was unoccupied but had its engine running. (8 SRT 1298.)

Der Her went inside the store first; by the time Chong Thao entered the store, she was already lying on the ground. (8 SRT 1298.) They forced Chong Thao to lie down, and made him take out his wallet, but did not take it upon finding no money there. (8 SRT 1299.) One of the two then took Der Her's necklace and ring. (8 SRT 1300, 1310, 1398.) One of them told Der Her in English that he would kill her if she moved or spoke. (8 RT 1311.)

As Mounsaveng and appellant left the store, they said not to look, or they would shoot. (8 SRT 1301.) After the suspects left, Voulome looked through a window to get a license number of the car that appellant and Mounsaveng used. (8 SRT 1288-1289.) She then walked toward the door and appellant pointed a gun at her. (8 SRT 1289.) Voulome became scared

and went back inside the store. (8 SRT 1290.) She later wrote down a partial license plate number and gave the number to law enforcement officers. (18 SRT 1290-1291, 1307.) Approximately $2,000 was taken in the robbery, as well as some change, five cartons of cigarettes, and Xeng's gun. (18 SRT 1346.)

On March 14, 1997, Chong Thao identified Mounsaveng in a photographic lineup, saying "If it is, it got to be this one." (8 SRT 1297-1299; 10 SRT 1711-1713.) Chong Chou Thao could not recognize anyone from a photographic lineup that included appellant. (10 SRT 1716-1717.)

A latent fingerprint taken from the JMP Mini-Mart on August 16, 1996, matched appellant's prints. (11 SRT 2062-2063; 12 SRT 2374-2375.) No prints were found matching Mounsaveng's prints. (10 SRT 2065.)

E. Robbery Of The Sean Hong Jewelry Store And Murder Of Henry Song On December 19, 1996

In 1996, Seak Ang Hor and her husband, Henry Song, owned the Sean Hong Jewelry Store near Tulare and Maple in Fresno. (10 SRT 1769-1770, 1788-1789, 1795.) On November 27, 1996, Seak Ang Hor purchased some jewelry from appellant. (10 SRT 1789-1791.) On that day, appellant also left a Buddha pendant to be repaired. (10 SRT 1791-1792.)

On December 19, 1996, appellant and Mounsaveng entered the store; appellant entered the store first. (10 SRT 1792-1793.) Seak Ang Hor admitted the two through a security door. (10 SRT 1793-1794.) Henry Song was at a work table repairing jewelry at the time. (10 SRT 1799.)

Mounsaveng looked at the display case. (10 SRT 1800-1801.) Seak Ang Hor told appellant that the pendant had been repaired. (10 SRT 1801-1802.) Appellant said he did not have the money yet. (10 SRT 1802.) Mounsaveng asked to look at the pendant. (10 SRT 1802.)

Because Mounsaveng did not want a female touching the pendant, Henry Song obtained the pendant from the safe and brought it out to show the men. (10 SRT 1802-1803.) The safe was surrounded by a metal cage. There was a video camera in the store that the owners only activated when there was a customer in the store. (10 SRT 1797.)

Appellant took the pendant and looked at it. (10 SRT 1804.) Then Mounsaveng took the pendant from him. (10 SRT 1804-1805.) After looking at the pendant, appellant and Mounsaveng returned it to Henry Song, saying they did not have money yet. (10 SRT 1905.)

As Henry Song turned to go to the back with the pendant, Mounsaveng drew a gun and pointed it at Henry Song. (10 SRT 1907—1908.) He then yelled, "Give me the money and the gold." (10 SRT 1907.) Seak Ang Hor pressed a foot button to activate a silent alarm. (10 SRT 1907.) Appellant pointed a gun at Seak Ang Hor. (10 SRT 1907.) Mounsaveng then forced Henry Song to the cash register. (10 SRT 1907-1908.)

They pushed both Henry Song and Seak Ang Hor to the small room containing the safe. (10 SRT 1909.) Mounsaveng pulled Seak Ang Hor's hair as she crawled along the ground. (10 SRT 1909.) Mounsaveng then closed the door and left the room while Seak Ang Hor, Henry Song, and appellant remained in the room. (10 SRT 1910.) Mounsaveng returned a short time later and began hitting Henry Song with the gun. (10 SRT 1911.) Henry Song screamed. (10 SRT 1911.)

Appellant told Seak Ang Hor to open the safe. (10 SRT 1910.) Henry Song, also, told Seak Ang Hor to open the safe, but she did not do so. (10 SRT 1910.) She was frightened, and could not remember the combination. (10 SRT 1911.) Seak Ang Hor again pressed a button to the silent alarm. (10 SRT 1911-1912.) At some point, Henry Song reached for appellant's gun, touching appellant. (10 SRT 1925-1927.)

Mounsaveng pulled Seak Ang Hor out by her shirt. (10 SRT 1912.) Then Seak Ang Hor saw Henry Song standing next to appellant; Mounsaveng ran to stand next to Henry Song as well. (10 SRT 1912.) This was the last time Seak Ang Hor saw her husband standing. (10 SRT 1912.) She kicked a wall so that the proprietor of a grocery store next door could hear her. (10 SRT 1914.)

Mounsaveng, in English, said, "Let's go" to appellant. (10 SRT 1914; 11 SRT 1975.) Seak Ang Hor pushed the button to open the door for him to leave. (10 SRT 1914.)

Appellant then pointed a gun at Seak Ang Hor and told her to take out the money. (10 SRT 1915.) He broke the showcase and took jewelry from it. (10 SRT 1915.) Mounsaveng was at a second door, and told Seak Ang Hor to open that door; she did so. (10 SRT 1915.) Both men left the store. (10 SRT 1916.)

The phone rang; it was the alarm company saying they would come immediately to help. (10 SRT 1916.) Seak Ang Hor found Henry Song unconscious on the floor and wiped blood from his mouth with a tissue. (10 SRT 1916.) At that point, he still moved "a bit." (11 RT 1945.) She never saw anyone fire a gun nor did she hear gunshots. (10 SRT 1916.)

She called her 18-year-old daughter, who spoke English, and told her to call the police. (10 SRT 1917-1918.) Then she ran outside and asked for help from a person standing outside. (10 SRT 1918.) A short time later, the police arrived. (10 SRT 1918.)

Fresno City Police Officer Raymond Hernandez, one of the responding officers, was dispatched to the location with a reserve officer, Officer Vann, at approximately 2:13 p.m. (10 SRT 1769-1770.) Officer Hernandez found Seak Ang Hor to be "hysterical. Really out of it." (10 SRT 1773.) She could not give coherent answers when Officer Hernandez asked her questions. (10 SRT 1773-1774.)

Fresno City Police Department Detective Guy Ballesteroz arrived at the store at approximately 2:41 p.m. when Henry Song's body was still at the store. (10 SRT 1823-1825.) He obtained the video tape from the store. (10 SRT 1826-1829.) There was a loaded .45 caliber gun in a case in the store on the floor underneath the work bench. (10 SRT 1843, 1855-1856; 11 SRT 2173-2174.)

Henry Song's body had blood coming from his nose and mouth, and a large amount of blood was pooled around his body. (10 SRT 1840.) Three expended nine-millimeter cartridges were found in the store. (10 SRT 1844, 1863, 1878-1879; 11 SRT 2155-2156, 2166.) Analysis showed the casings were fired from the same gun. (11 SRT 2036; 13 SRT 2446-2447.) Two spent bullet fragments were also found at the scene. (10 SRT 1845, 1863; 11 SRT 2157.) Later ballistics analysis showed the bullets were fired from the same gun. (11 SRT 2033; 13 SRT 2447-2448.) There was what appeared to be bullet damage to a tray in the store, and a bullet hole in Plexiglas window on the south side of the store. (10 SRT 1846-1847; 11 SRT 2147-2148, 2188-2189.) Plexiglas and glass fragments were collected from the outside the store near the window. (11 SRT 2147-2148.) There were several areas in the store where there appeared to have been a struggle. (10 SRT 1857-1858.)

Fingerprints found at the crime scene on the display cases matched appellant's prints, as did latent fingerprints taken from a pawn receipt from the November 27, 1996, transaction. (11 SRT 2003-2004, 2043-2053, 2158-2163.) No fingerprints were found matching codefendant Mounsaveng's fingerprints. (10 SRT 2051.)

On December 19, 1996, at approximately 8:15 p.m., Fresno Police Department Detective Glenn Byrd found a 1983 Toyota Camry in an alley a block and a half away from the jewelry store. (10 SRT 1810-1815, 1818,

2003.) The front doors were open, the engine was running, the heater was on high, the ignition had been "punched" and the exterior driver's side door had been "pried." (10 SRT 1812, 1822.) A woman's gold watch, a gold ring, a live nine-millimeter cartridge, and some black hair strands were located in the vehicle. (10 SRT 1812; 11 SRT 2162.) The watch was one that was taken from the Sean Hong store during the robbery. (10 SRT 1920; 11 SRT 2153.) The bullet found in the car was marked "ELD" as were the shell casings found at the store. (11 SRT 2175.)

A discolored portion of the back seat near the passenger seat may have been blood. (10 SRT 1812.) The exterior driver's side door handle also had a smeared reddish substance that may have been blood. (10 SRT 1812-1813.) There was shattered glass on the passenger seat and floorboard. (10 SRT 1812.) Glass fragments were collected from the Toyota. (11 SRT 2151-2152.) The glass fragments found in the Toyota were consistent with the glass fragments from the display case. (13 SRT 2454-2455.)

Seak Ang Hor later learned from her daughter that Henry Song had died. (10 SRT 1919.) Approximately $30,000 to $40,000 in property was taken from the store. (10 SRT 1919.)

An autopsy performed on December 20, 1996, showed that Henry Song died from three gunshot wounds. (11 SRT 2055-2056; 12 SRT 2319-2326.) All three bullets went through Henry Song's body. (12 SRT 2325-2326.) Death occurred within four to seven minutes or less, and Henry Song could have been conscious when all three wounds were inflicted. (12 SRT 2325.) He could have continued to move with these injuries although some people will collapse immediately with similar injuries. (12 SRT 2368-2369.) However, California Department of Justice

criminalist Iqbal Sekhon testified that he would have expected blood in other places on the floor had Henry Song moved far after being shot. (13 SRT 2464.)

There were two perforations on the right front side of Henry Song's shirt. (12 SRT 2331.) There was no obvious soot or stippling on the clothing, which was consistent with a gunshot wound from 24 to 36 inches away. (12 SRT 2331-2332.) Later analysis showed Henry Song was at least three feet from the muzzle of the weapon when the three shots were fired. (13 SRT 2459-2461.) The shooter likely was at the northwest side of the store, south of the workbench, and fired in a southerly direction. (13 SRT 2468-2469.)

There was a cut on one finger of Song's hands. (11 SRT 2056-2057; 12 SRT 2334-2335.) Gunshot residue swabbings were taken from Song's hands. (10 SRT 2061-2063.) A blood sample was taken from Song. (10 SRT 2078.) Later examination of the gunshot residue swabbings did not reveal the presence of gunpowder. (13 SRT 2456.)

The videotape was taken into evidence and viewed by the trial court during trial. (11 SRT 1983-1985, 1996.) It was approximately 33 minutes long. According to Detective Ballesteroz, it was impossible to tell from the video who performed the shooting, because it did not capture who was in what location at the time of the shooting. (10 SRT 1861.) California Department of Justice criminalist Iqbal Sekhon listened to the tape a number of times but could not distinguish the gunshots from the other sounds in the video. (13 SRT 2438-2439, 2469.)

In 1998, Fresno Police Department Detective Solomon Wells took the video to the Department of Justice in Sacramento to make images on the tape sharper and more viewable. (11 SRT 1989-1990.) Some still photographs were enhanced. (10 SRT 1990-1992.) On February 10, 1998,

Stewart Shockley, a photo electronics technician with the California Department of Justice, took still photographs off the video of the robbery. (13 SRT 2491-2492 [Exhs. 60-70].)

California Department of Justice Photo Electronics Specialist Harold Davis enhanced the audio portion of the tape to make the voices more intelligible. (12 SRT 2292-2297, 2311.) The enhanced audiotape was played in synchronization as closely as possible with the videotape for the court. (12 SRT 2372-2374.)

Detective Wells described the videotape as follows:

Eleven minutes and 40 seconds into the tape, Mounsaveng pulled a gun from underneath his jacket; at almost the same time, appellant pulled out a gun and pointed it at Seak Ang Hor. (11 SRT 2015-2016.) Fourteen minutes and 30 seconds into the tape, a struggle occurred, and at approximately that time, a woman (presumably Seak Ang Hor) kicks a wall. (11 SRT 2016.) Mounsaveng jumped over a counter, turned towards the physical confrontation, and pointed his handgun in the general direction of the confrontation. (11 SRT 2017.) Detective Wells heard two distinct sounds at that time that appeared to be gunshots. (11 SRT 2017.) He was unable to tell which weapon was discharged. (11 SRT 2017-2018.)

At approximately 14 minutes and 41 seconds into the tape, Mounsaveng ran towards the scene of the struggle. (11 SRT 2019.) Shortly thereafter, Mounsaveng demanded, "Open the door." Fifteen minutes and 12 seconds into the tape, Mounsaveng ran out of the store. (11 SRT 2020.)

In the trial court's findings at the guilt phase, it made the following comments regarding the videotape:

> I find the People's witness, the DOJ expert on crime reconstruction, in my opinion to be incredible on the—his opinion as to hearing the victim, Mr. Song, talking after being

shot. This is based on the pathologist's testimony about the three wounds, the nature of the wounds, his opinion that he could not rule out some movement after the wounds were inflicted, but it's clear from my viewing and listening to the tapes involved, that there was not much movement after the shots were fired.

I also disagree with his testimony that he could not determine when the shots were fired. I think it's easy to figure out when the shots were fired by observing both by voice and, uh, visual observation when the victim was still alive and when he ceased to be seen or heard.

In a couple frames of the picture—the video you can see who I have every—have no doubt is the victim engaged in a struggle. You can see that whoever you're looking at has glasses on, and from previous pictures there's no indication that any of the other people who can be identified in the tape have glasses on, and it's pretty well established that there were only four people involved inside the premises at the time.

You reach a point in the tape where the first of the three shots can be heard. When I say the first of the three, there are three shots, one and then two others more rapid, all—in the confusion of all the banging and clanging and various sounds, those three are of an identical nature in my opinion and are clearly the shots. They are really—I think they're more identifiable on the unenhanced videotape than they are on the enhanced audio tape.

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

(15 SRT 3140-3141.)[5]

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[5] A transcript of the tape is contained in Volume Three of the Clerk's Transcript at pages 861-893.

Dr. Howard Terrell, a psychiatrist, testified that acute stress disorder resulted from a frightening, typically life-threatening event. (12 SRT 2382-2383.) This disorder could cause a person not to be able to recall or relate important aspects of the event. (12 SRT 2384.) Dr. Terrell watched the video of the Sean Hong jewelry store robbery, and testified that it qualified as an extreme traumatic stressor. (9 SRT 2386.) The fact that the female victim could not remember the shooting or even hearing three gunshots indicated a high likelihood of the person having post-traumatic stress disorder. (9 SRT 2386.) Frequently such people will remember the events before and after the event although they will have memory gaps for certain portions of the event, particularly those that are very painful emotionally. (9 SRT 2387.)

F. The Defendants' Arrest And Interviews

On February 3, 1997, Worthington, Minnesota, Police Sergeant Chris Heinrichs encountered Mounsaveng at a gas station in Worthington. (9 SRT 1574-1578.) Sergeant Heinrichs had previously received information from the Fresno Police Department in relation to Mounsaveng, but the department did not yet have an arrest warrant for him. (9 SRT 1574, 1578.) Sergeant Heinrichs notified the detective's office of the encounter. (9 SRT 1578.)

Julie Ann Munkel, an assistant manager at the gas station, noticed that Mounsaveng's car had California plates. (9 SRT 1586.) When Mounsaveng paid for the gas he purchased at the station, he displayed a large quantity of $100 bills. (9 SRT 1587.)

On February 5, 1997, Worthing, Minnesota, Detective Kevin Flynn executed an arrest warrant for Mounsaveng as well as search warrants for a residence and a vehicle. (9 SRT 1553-1555.) There, they encountered

Khanthlay Sengphet. (9 SRT 1556.) Mounsaveng came out of the house and was apprehended. (9 SRT 1557-1558, 1582.) Shoes and other clothing items were seized during the search of the residence. (9 SRT 1561-1562.) The officers found a .25 caliber clip in the house. (9 SRT 1571.) The search of the vehicle revealed a live 9-millimeter ammunition round, and a clip containing seven rounds of ammunition. (9 SRT 1563-1566.) No weapons for either clip were found during the search. (9 SRT 1571.)

On February 12, 1997, appellant was arrested by a Fresno Police Department officer. (1 CT 22.) On that day, Detective Solomon Wells interviewed appellant after *Mirandizing*[6] him. (13 SRT 2584-2585.) Appellant initially denied involvement in the robberies. (13 SRT 2586.) After showing appellant a picture of himself in the video, he said, "I don't know." (13 SRT 2587.) Later, however, he said he did not want to hurt anyone, and said the other person shot the store owner three times. (13 SRT 2590.) When told his blood would be tested, appellant said he had fought vigorously with the store owner, that his nose was bloodied during the confrontation, and that the blood found would probably be from him. (13 SRT 2592.) Appellant said the store owner hit him in the head with a chair. (13 SRT 2592.)

Appellant later said that the confrontation ended when he accidentally shot the store owner and that he had lied earlier when he said his accomplice shot the store owner. (13 SRT 2593-2595, 2618-2619.) He said he was sorry—he did not mean to, but the husband had hit him a lot and had tried to kill him, and he had to shoot the husband. (13 SRT 2596.) He said he had shot the victim three times. (13 SRT 2618-2619.) He later said his accomplice made him shoot the victim. (13 SRT 2619.)

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

During the interview, appellant said he was forced to do the robbery, that he had ingested a large quantity of cocaine, and that he could barely think. (13 SRT 2601.) He stated this was the only robbery in which he was involved. (13 SRT 2604.) He said he participated in the robbery because he feared his accomplice would shoot him. (13 SRT 2605.) He also stated he did the robbery because he had no money to buy cocaine. (13 SRT 2638.)

Appellant identified Mounsaveng (whom appellant called "Tony") as his accomplice. (13 SRT 2620-2621.) The February 12th interview was recorded and transcribed. (13 SRT 2618.)

Detective Wells interviewed appellant again on February 13th to clarify and confirm the information and statements received the previous day. (13 SRT 2616.) During the interview, appellant stated he received the gun from Mounsaveng. (13 SRT 2629.) The gun was a black nine-millimeter gun made in Korea. (13 SRT 2642.)

Appellant stated that Mounsaveng and others were at Mounsaveng's house, and that, while they were driving to the jewelry store, one of the others, named Ricky, told appellant to rob the jewelry store. (13 SRT 2640.) Appellant and Mounsaveng entered the store while the others waited outside. (13 SR 2640-2641.)

Appellant stated that during the confrontation with the victim, he handed the gun to Mounsaveng to hold. (13 SRT 2630.) Then, during the confrontation, the victim hit appellant in the face, causing his nose to bleed. (13 SRT 2630.) Mounsaveng gave the gun back to appellant, telling him to shoot the store owner and kill him. (13 SRT 2631-2632.)

On February 18, 1997, Mounsaveng was at Los Angeles International Airport to be transported to Fresno from Sioux Falls, South Dakota, escorted by two officers, Detective Scott Morrison and Detective Krug. (11 SRT 2094-2095, 2119-2120, 2122; 12 SRT 1217-1221.)

While boarding a plane, Mounsaveng fled from the officers. (11 SRT 2096-2097; 12 SRT 2227-2228.) Detective Krug fired several shots at Mounsaveng as he fled. (11 SRT 2098-2099.) After the last shot, Mounsaveng fell to the ground. (12 SRT 2237-2238.) An ambulance was called because of his injuries. (12 SRT 2239.)

G. Defense

1. Mounsaveng

Mounsaveng testified that on December 4, 1995, three people, including a person named Turre and an Asian person whom Mounsaveng believed to be appellant, kidnapped him, tied him up, and asked him for money. (14 SRT 2873-2878, 2924-2925.) Although Mounsaveng did not owe Turre any money, his friend, Lut, did. (14 SRT 2878, 2963-2964.) After a stereo and other items were taken out of his car, Mounsaveng was released. (14 SRT 2881-2882.) Later that night, Mounsaveng's kidnappers pointed a gun at him and followed him as he drove away in his car. (14 SRT 2884-2887.)

Mounsaveng and Kathy Sengphet moved to Portland, Oregon, and stayed with Mounsaveng's parents. (14 SRT 2887-2890.) On January 17, 1996, three Asian people, including Turre and a person who looked like appellant, came by the house, asked if he had money for them, and pointed a gun at him when he said, "No." (14 SRT 2891-2893.) Later, four people drove by and fired a gun at the house three or four times, breaking a kitchen window and putting holes in the garage. (14 SRT 2893-2895.)

Mounsaveng and Kathy Sengphet moved back to Fresno. (14 SRT 2898-2900.) In approximately May of 1996, three people, including Turre and appellant, contacted Mounsaveng and asked if he had money for them.

(14 SRT 2902-2903.) They asked if he wanted to rob a store with them; frightened, he agreed, saying, "Yes, do not disturb my family, myself." (14 SRT 2905.) They left, saying they would return. (14 SRT 2905.)

A month and a half later, appellant and two other people contacted Mounsaveng at his apartment and told him to come with them to rob a store. (14 SRT 2907.) Afraid, Mounsaveng agreed. (14 SRT 2907.) He drove two other people to a Laotian store on Fresno Street. (14 SRT 2907.) Mounsaveng testified that he stayed in the car while the others got out of the car. (14 SRT 2908.) When they returned to the car, they had a gun and money. (14 SRT 2908.) He went back to his apartment and the other two left, telling him not to say anything. (14 SRT 2908.)

A week or two later, appellant and his friend again contacted Mounsaveng, saying they were going to rob another store and that they wanted Mounsaveng to drive the car. (14 SRT 2909.) They said if he did not do this, they would do something to his family. (14 SRT 2909-2910.)

They then went to a Cambodian store on Tulare Street, where the others got out of the car, coming back a few minutes later with money and a gun. (14 SRT 2910.) Mounsaveng did not receive any of the money. (14 SRT 2910.)

Mounsaveng was present at the July 31, 1996, attempted robbery of the Than Tin store. (14 SRT 2911.) Mounsaveng and appellant went inside the store; Mounsaveng testified that he had an unloaded gun. (14 SRT 2911.) Mounsaveng claimed that he participated in the robbery because of fear of what would happen to him and his family. (14 SRT 2911.)

Similarly, Mounsaveng testified he participated in the August 16, 1996, robbery of the JMP Mini-Mart and the October 10, 1996, robbery of the Phnom Phen jewelry store with an unloaded gun. (14 SRT 2912-2914.)

Mounsaveng testified that he participated in the December 14, 1996, robbery of the JMP Mini-Mart after appellant pointed a gun at Mounsaveng's head and said he would shoot Mounsaveng or his family if he did not participate. (15 SRT 3008.)

Mounsaveng testified he was present during the December 19, 1996, robbery of the Sean Hong jewelry store, with an unloaded gun. (14 SRT 2915.) During the robbery, appellant and a male in the store fought. (14 SRT 2917.)

After the robbery, Mounsaveng drove with appellant and appellant's friend to an apartment near Fresno and Dakota. (14 SRT 2928-2929.) When Mounsaveng got out of the car, he saw blood on appellant. (14 SRT 2931.) Mounsaveng overheard appellant say he shot someone. (14 SRT 2930.)

Mounsaveng later went to Los Angeles and Phoenix, and then to Minnesota, where he met up with Kathy Sengphet and their children. (14 SRT 2932-2936.) After he was arrested, he was told he had killed someone. (14 SRT 2938.)

Mounsaveng testified he ran at the Los Angeles airport because he was scared and because he missed his wife and children. (14 SRT 2944.) At the time of trial, he still had three bullets in his body, and had no feeling in his lower abdomen and below. (14 SRT 2949-2950.)

Kathy Sengphet's testimony corroborated much of appellant's testimony concerning the circumstances surrounding the kidnapping and concerning the later shooting of the house in Portland. (14 SRT 2779-2805.) Detective Solomon Wells testified that there was a strong resemblance between appellant's appearance and that of Say Yaseng and Aloune Yaseng, twin brothers. (15 SRT 3042-3045.)

2. Appellant

Appellant was incarcerated from 1993 until his escape from a detention facility in Washington on February 28, 1996. (15 SRT 3079; Exh. 121.)

Bill Posey, a toxicologist with Central Valley Toxicology in Clovis, analyzed a sample of appellant's blood taken on February 13, 1997. (14 SRT 2752-2754, 2758.) The sample tested positive for .02 percent alcohol, as well as cocaine and Benzoylecgonine (BEC), a metabolite of cocaine. (14 SRT 2755.) This level was consistent with use within 12 hours, and did not indicate binge usage before that time. (14 SRT 2755-2756.) "In other words, it's not that high of a level." (14 SRT 2756.)

Cha Her managed the Eastwood Garden Apartments on Ninth Street, approximately a half mile from Cedar. (15 SRT 3053-3054.) On December 14, 1996, Her heard someone running behind her office, turned, and saw two people, aged 15 to 19 years old running. (15 SRT 3054-3055.) Later, a white 1984 Toyota Camry was found on the property. (15 SRT 3055, 3059.)

Janet May, an identification technician with the Fresno Police Department, lifted fingerprints from a vehicle in connection with the December 14, 1996, JMP Mini-Mart robbery, and also lifted fingerprints in connection with the July 31, 1996, Thanh Tin robbery. Both sets of prints were negative as to appellant and Mounsaveng. (15 SRT 3060-3063.)

H. Rebuttal

On December 4, 1995, Fresno City Police Department Officer Gerald Miller interviewed Kathy Sengphet at the Fresno Police Department Headquarters. (15 SRT 3081-3082.) Kathy stated her ex-boyfriend was "Mr. T[,]" that he lived in Porterville, and that she did not know his first or

last name. (15 SRT 3082.) She identified Exhibit 123, a photograph of Aloune Yaseng, as a photograph of the person who pointed a gun at her. (15 SRT 3082-3084.)

I. Penalty Phase

1. Victim Impact Evidence

a. Seak Ang Hor

Seak Ang Hor was married to Henry Song for 30 years. (15 SRT 3184.) Their first four children were born in Cambodia; the family emigrated to the United States in 1981. (15 SRT 3185-3186.) The youngest child, age 14 at the time of the penalty phase, was born in the United States. (15 SRT 3186.) Henry Song and Seak Ang Hor emigrated to the United States because of the war in Cambodia; they believed it would be safer for their children in the United States. (15 SRT 3189.)

Seak Ang Hor testified that Henry Song was a hard worker and a good person. (15 SRT 3189.) They owned the jewelry store for a little over four years before the murder. (15 SRT 3189.) They had no insurance on the business and no insurance on Henry Song's life. (15 SRT 3190.) Their entire life savings was in the business. (15 SRT 3190.) Seak Ang Hor's father also helped financially with the business. (15 SRT 3190.) After the robbery and murder, Seak Ang Hor never opened the business again, because she was afraid the same thing would happen again. (15 SRT 3190.) She cried when she drove by the location of the business, which occurred once every two or three days. (15 SRT 3191.)

In her last conversation with Henry Song, while they drove to the store on the day he was killed, he said he wanted to buy a boat so they could close the store for one day and go on a boat ride with the family. (15 SRT 3192.) Seak Ang Hor looked forward to this. (15 SRT 3192.) At

the time of her testimony, when she thought about her husband, she felt sad, and could not work. (15 SRT 3192.) When asked whether it would make her feel better to see appellant killed, rather than sentenced to prison for the rest of his life, she replied, "It's up to the Court." (15 SRT 3199.) This statement was admitted as to appellant only. (16 SRT 3361.)

b. David Song

David Song, the oldest son of Henry Song, learned that his father had been murdered when a detective told him at the scene outside the store. (15 SRT 3202.) He had stopped at the scene when he saw patrol cars there. (15 SRT 3203.) David Song's brother-in-law, Dai, also arrived at the scene, as did David's sister, Lilly. (15 SRT 3204.)

David Song and the others later went to the police headquarters. (15 SRT 3204-3205.) There, he told Seak Ang Hor that his father was dead. (15 SRT 3205.) She refused to believe it for two or three days. (15 SRT 3205.) During that time, she was "numb" and could not eat or sleep. (15 SRT 3205.)

After the police released the business back to the family, David Song and other male family members helped clean it up. (15 SRT 3205-3206.) David Song had never seen anything like this before, and the cleanup made him "[r]eal upset." (15 SRT 3206.)

Henry Song's funeral was on December 25th; the family members from out of town arrived on December 24th. (15 SRT 3208-3209.) It was traditional to hold the funeral seven days after the person passed away. (15 SRT 3208.) His family celebrated Christmas. (15 SRT 3209.)

Before the robbery, Henry Song talked about what he would do if the store was robbed. (15 SRT 3206-3207.) He said he was not afraid of the criminals, and would fight them. (15 SRT 3207, 3209.)

Seak Ang Hor's and Henry's entire life savings was in the business. (15 SRT 3206.) After the robbery, all of the family members had to work longer hours to support Seak Ang Hor and her youngest son. (15 SRT 3208.)

c. Lilly Song

Lilly Song, Henry Song's daughter, age 25 at the time of the penalty phase, testified that she felt very close to her father, because he always took care of her. (15 SRT 3212-3213, 3217.) She said he was a good man who would not hurt anyone. (15 SRT 3214.)

On the day of the murder, Lilly's husband, Dai, told her to go to the shop right away, and would not tell her why. (15 SRT 3213.) There, she saw many people and many law enforcement officers. (15 SRT 3214.) Dai told her that Henry had been shot, but she did not believe it, saying, "My dad cannot get shot." (15 SRT 3214.)

On the day of the murder, Lilly had her driver's license renewed. (15 SRT 3213.) Every time she used her license, the date on it reminded her of the murder. (15 SRT 3214-3215.)

Lilly testified that her mother, who was previously very active, "cannot do anything." (15 SRT 3216.) She stated her mother "just sit there all the time." (15 SRT 3216.)

In December of 1996, Lilly was attending college. (15 SRT 3213.) She had to quit college and "work, try to help everybody in the family." (15 SRT 3216.) She financially supported her mother and youngest brother, as well as her own child. (15 SRT 3216-3217.)

d. Xeng Wang Her

Xeng Wang Her testified as to the impact of the JMP Mini-Mart robberies on his family. (15 SRT 3220-3225.) The trial court later struck the testimony. (15 SRT 3244-3245; 16 SRT 3275-3276, 3366-3367.)

2. Other Aggravating Evidence

a. Against Mounsaveng

On December 7, 1986, Mounsaveng and another person held down a 14-year-old girl, pulled down her pants, and touched her breasts and vagina. (17 SRT 3551-3558.) They fled when the victim's mother came upon the scene. (17 SRT 3557-3558.) In a later police interview, Mounsaveng admitted holding the victim's arm while the other person pulled down her pants, but denied touching her breasts or vagina. (17 SRT 3569-3570; Exh. 139.)

On February 15, 1988, Mounsaveng and another juvenile held at gunpoint Michael Mayes, a clerk at the Plaid Pantry, a convenience store in Portland, Oregon, and took money from the cash register. (16 SRT 3291-3293, 3478-3481.) According to the other juvenile, Mounsaveng was the one who drew the gun and pointed it at the clerk. (16 SRT 3481.) The two later attempted to flee in Mayes's vehicle, but were unable to drive it because it had a manual transmission, and so they fled on foot. (16 SRT 3293, 3483.)

On January 4, 1989, in Portland Oregon, Mounsaveng was driving a white Datsun when he almost sideswiped a car driven by Carrie Barber, a student at a local high school, and occupied by Barber's friends, Ron and Jon Bloker. (16 SRT 3299-3301, 3338-3339, 3367-3368.) An altercation later ensued in which Barber and Jon Bloker were stabbed. (16 SRT 3307, 3342-3343.) At some point during the altercation, the occupants of the

Datsun yelled, "You wait until we get our gang, we're going to get you[.]" (16 SRT 3307.) In a *Mirandized* interview after his apprehension, Mounsaveng admitted being present, but claimed someone else stabbed Barber and Jon Bloker. He would not name the other participants. (Exh. 131.) A search of Mounsaveng's car revealed two screwdrivers in the trunk. (16 SRT 3367.)

On December 18, 1994, Kathy Sengphet received an injury to her forehead when she and Mounsaveng argued, and Mounsaveng pushed her into a door. (17 SRT 3584-3585.) Mounsaveng was later arrested. (17 SRT 3585-3586.)

On July 4, 1995, the two argued, and Mounsaveng scratched Sengphet in the thigh with a key, bruised her on the leg, pulled her by the hair, and hit her in the jaw with his fist. (17 SRT 3586-3589.) The next day, the two argued again, and Mounsaveng pushed Sengphet into a wall, causing her to receive a lump on the back of the head. (17 SRT 3589-3591, 3610-3612.)

b. Against Appellant

At approximately midnight on the night of September 8, 1992, five or six armed, masked intruders broke into a house in Kennewick, Washington, that was occupied by Sounthorn Vichit; Stephen Vichit, Sounthorn's son; Alice Vichit, Sounthorn's daughter; Peter Vichit, Sounthorn's son; Khamtheuane Vichit, Sounthorn's wife; Khamtheuane's father; and others. (17 SRT 3700-3703, 3714-3715.)

The intruders tied up the males in the house, including Sounthorn; kicked Sounthorn in the side three or four times; threatened to shoot Alice; and took various items of property, including jewelry, cash, and a gun. (17 SRT 3700-3720.) Sounthorn sustained a broken bone and missed three weeks of work. (17 SRT 3709.) As a result, appellant was convicted of

first degree robbery with a deadly weapon allegation, and was sentenced to 55 months in custody. (Exh. 121.) Appellant escaped from custody on February 28, 1996. (Exh. 121 at pp. 21-27.)

On September 5, 1996, Juan Isidro Lopez, a Bulldog gang member, lived on South Dearing near some apartments. (16 SRT 3444-3445, 3451, 3458.) He was outside his residence on that evening when he heard gunshots. (16 SRT 3445.) A few minutes later, a person, who later turned out to be appellant, walked up to Lopez and asked for a ride to Cedar and Kings Canyon in exchange for $20. (16 SRT 3392-3393, 3445-3447.) Lopez agreed and obtained his car keys. (16 SRT 3448.) Appellant appeared to be in a hurry. (16 SRT 3448.)

Lopez drove; Lopez's friend, Tommy Cervantes, sat in the back; and appellant rode in the front passenger seat. (16 SRT 3448, 3455.) Lopez drove a short distance before he was stopped by law enforcement. (16 SRT 3449.)

Fresno City Police Officer Leo Martinez stopped the car after being dispatched to the location in response to a shooting. (16 SRT 3388-3390.) When he did so, he saw appellant looking down in a manner indicating that he was trying to hide something. (16 SRT 3391.) Later, a nine-millimeter gun was found underneath the driver's seat of the car. (16 SRT 3391, 3397.) At the scene, appellant offered Lopez money if Lopez would say the gun was his. (16 SRT 3449-3450.) However, later, in a *Mirandized* interview, appellant admitted placing the gun underneath the seat, stating a friend had given it to him. (16 SRT 3398.) Nine-millimeter shell casings, a spent bullet, and bullet strike marks were found at an apartment at South Dearing. (16 SRT 3427-3429.)

Sangieme Keonhothy lived with appellant in 1996 for three or four months. (16 SRT 3461-3462.) Appellant did not let Sangieme go outside her apartment, and he became angry if she performed tasks, such as cooking, incorrectly. (16 SRT 3493-3494.) He hit her many times. (16 SRT 3473, 3494.) On one occasion, appellant forced Keonhothy to take a cold shower while he pointed a knife at her. (16 SRT 3495-3496.) At the time of her testimony, she had a broken index finger because appellant broke it with a gun. (16 SRT 3492.) She also had a scar on her forehead, caused by appellant hitting her in the head with a small gun. (16 SRT 3470-3471.) On one occasion, in October of 1996, a shotgun discharged at the apartment where Keonhothy lived, which resulted in both appellant and Keonhothy being arrested. (16 SRT 3468.)

Ty Koenhothy, Sangieme's older brother, lived in the same apartment complex as Sangieme. (16 SRT 3532.) On January 17, 1997, Sangieme came to Ty's apartment because she was afraid appellant would assault her. (16 SRT 3496-3497, 3532.) That evening, at approximately 10 p.m., appellant knocked on the door and asked whether Sangieme was there in a loud, apparently intoxicated voice. (16 SRT 3532-3533.) When Ty said she was, appellant said he wanted Ty to open the door, but Ty refused. (16 SRT 3533.) Appellant then yelled and broke a window. (16 SRT 3533.) Ty, afraid, called law enforcement. (16 SRT 3533.)

Fresno City Police Officer James Beebe responded to the call, finding appellant, who appeared to be intoxicated, yelling and screaming, and with a cut on his arm. (17 SRT 3544-3545, 3547.) He had a rock-like substance wrapped in aluminum foil in his pocket. (16 SRT 3548.) A search of appellant's Ford Thunderbird revealed a loaded pump-action shotgun. (16 SRT 3545-3546.) Appellant was arrested for possession of a firearm in a vehicle, possession of a controlled substance, and vandalism. (17 SRT 3550.)

On March 9, 1997, Fresno County Sheriff's Department Correctional Officer Eulalio Lopez was assigned to classification in the gang unit. (16 SRT 3409-3410.) When there was an altercation in the jail, Officer Lopez was assigned to interview the involved parties, determine who the actual assailant was, and then move people to appropriate housing. (16 SRT 3410.) After interviewing appellant, the other involved inmate, and two officers regarding an altercation that occurred on that date, Officer Lopez determined that appellant, formerly classified as a medium housing inmate, should be placed in isolation and clothed in a yellow suit, meaning staff were to use caution in dealing with him. (16 SRT 3382-3384, 3411-3414, 3426.)

When Officer Lopez told appellant of the reclassification, he became very hostile, and yelled, repeatedly, "I see you all the time on the streets, I'll remember you." (16 SRT 3413.) When appellant said this, he was three feet away from Officer Lopez, he took a "combative stance[,]" and his hands were clenched. (16 SRT 3413.) He appeared angry and hostile. (16 SRT 3421.) Officer Lopez stated, based on his experience as a correctional officer, that appellant's threat "reaffirmed my position he needed to be placed in isolation." (16 SRT 3414.) Appellant was placed in isolation from that time up to the time of Officer Lopez's testimony. (16 SRT 3414-3415.)

On May 15, 1997, Correctional Officer Terry Ann Bardwell, a correctional officer at the Fresno County Jail, searched appellant. (16 SRT 3368-3370.) She found a metal "shank" one inch wide and five and a half inches long. (16 SRT 3370-3371; Exh. 133.)

The shank was disposed of. (16 SRT 3371.) Officer Bardwell stated that an item such as a gun that had evidentiary value would have been retained. (16 SRT 3372.) She could not recall whether the metal had been sharpened. (16 SRT 3373.)

3. Mitigation Evidence

a. Mounsaveng

(1) Kathy Sengphet

Kathy Sengphet testified that she loved Mounsaveng, that her children loved him, and that he loved them. (17 SRT 3604-3605.) She told them her father was hurt in the leg and was in the hospital; they did not know he was in jail. (17 SRT 3605-3606.) She wanted a sentence of life for Mounsaveng so that she could continue to have contact with him. (17 SRT 3607.)

Kathy said she wanted to work and support him; she wanted him to be with the children; and she would cook and clean for him at home. (17 SRT 3608.)

b. Appellant

Appellant testified he was born in Laos on August 7, 1964. (17 SRT 3634-3635.) His family was poor, and his father and brother were both in the United States Army. (17 SRT 3636.) In 1975, the Communists took over, and his family left Laos to a refugee camp in Thailand. (17 SRT 3636.) He lived in a refugee camp before coming to the United States in 1987. (17 SRT 3635.) He was 23 years old when he came to the United States. (17 SRT 3638-3639.)

On June 2, 1992, in Oregon, he was convicted of felony unauthorized use of a vehicle. (17 SRT 3637.) He testified it was not true, but he pled guilty to it anyway. (17 SRT 3637.) On April 8, 1993, he pled guilty to felony unauthorized use of a vehicle in Oregon. (17 SRT 3637-3638.) He stated "I just wanted to get it over . . . ." (17 SRT 3638.)

On June 11, 1993, he was convicted of first-degree armed robbery in Benton County, Washington. (17 SRT 3638.) Appellant referred himself for chemical dependency treatment while in Washington State Prison. (17 SRT 3639.)

ARGUMENTS

I. APPELLANT'S JURY TRIAL WAIVER WAS SUFFICIENT

Appellant contends his waiver of his right to a jury trial was not knowing and intelligent, in that the "record fails to show that the waiver was made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon." (AOB 39-41.) Appellant further contends that he did not separately waive his right to a jury trial of the special circumstance allegation or his right to a jury trial at the penalty phase. (AOB 42-46.) Appellant contends the asserted error requires reversal without regard to prejudice. (AOB 47-48.) Appellant is incorrect.

A. Background

On December 17, 1998, Ernest Kinney, counsel for Mounsaveng, stated, "Your Honor, I believe we're ready to proceed on the 11th. . . . We're prepared to—waive a jury trial and have a judge trial in this death penalty case." (6 SRT 903.) Appellant's counsel agreed, "and I have, of course—would acknowledge that this particular court would still be hearing the case." (6 SRT 903.) The trial court stated that the case was "assigned to me for all purposes." (6 SRT 903.) The prosecutor stated the People's willingness to waive jury trial. (6 SRT 903-904.)

The trial court stated, and the parties agreed, there had been no previous in-chambers discussions on this matter. (6 SRT 904.) The trial court then stated the following:

> Mr. Mounsaveng, Mr. Sivongxxay, you each have a right to a trial, either by a jury of 12 people selected from this community, through a process that you would engage in with your attorneys, the district attorney and the Court, or a trial in front of a judge, acting alone without a jury.
>
> The burden of proof remains the same. The district attorney has the burden to go forth with evidence sufficient to prove your guilt beyond a reasonable doubt. Then, and only then, would we get to a penalty phase.
>
> In a court trial, I would hear the evidence. I, alone, would make the decision on whether that evidence was sufficient to prove your guilt beyond a reasonable doubt.
>
> In the event I made such a finding, as to either or both of you, we would then proceed to a penalty phase, where the district attorney would present aggravation evidence. Through your—you, through your attorney, would have the right to present mitigation evidence, and it would fall upon me to make the decision as to the appropriate punishment, which could result in a death penalty sentence.
>
> Do you give up your right to a jury trial and agree that this Court, alone, will make those decisions, Mr. Mounsaveng?

(6 SRT 904-905.)

Mounsaveng answered, "Yes" whereupon the trial court asked, "Mr. Sivongxxay?" Appellant then replied, "Yes." The prosecutor similarly said, "Yes, Your Honor, the People waive the jury trial." The trial court then stated, "All right. We'll show a jury waiver on all issues, confirm the matter for January the 11th." (6 SRT 905.)

B. Appellant Validly Waived Jury Trial As To The Guilt Phase

A defendant in a criminal prosecution has a right to a jury trial under the federal and state constitutions. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1071.) "A jury may be waived in a criminal case by the consent of both parties *expressed in open court by the defendant and the defendant's counsel.*" (*Ibid.*, emphasis in original.) Waiver must be express, and not implied from the defendant's conduct. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) Here, there can be no question appellant's waiver was express—he answered "Yes" when asked by the trial court whether he gave up his right to a jury trial and agreed that the trial court would make the determinations as to guilt and appropriate punishment. (6 SRT 904-905; see *People v. Evanson* (1968) 265 Cal.App.2d 698, 700.)

> To be valid, a defendant's waiver of the right to a jury must also be 'knowing and intelligent, that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it, as well as voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.

(*People v. Weaver, supra,* 53 Cal.4th at pp. 1072-1073, internal quotation marks omitted.)

Where a criminal defendant is represented by counsel and fails to show that either he or his counsel has been misled as to the result that might occur from waiving a jury trial, the trial court is not required to explain to that defendant the nature and consequences of his action of waiving a jury trial. (*People v. Lookadoo* (1967) 66 Cal.2d 307, 311; see also *People v. Tijerina* (1969) 1 Cal.3d 41, 45-46; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 344 [no specific formula or extensive questioning required

beyond assuring the waiver is personal, voluntary, and intelligent]; *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 [no requirement that defendant understand all the "ins and outs" of a jury trial in order to waive his right to one].) Nor is the trial court required to discuss the merits or disadvantages of a court trial versus trial by jury. (*People v. Acosta* (1971) 18 Cal.App.3d 895, 902.) "It is enough that the court determine that the defendant understands that he is to be tried by the court and not a jury." (*Ibid.*) There is no requirement that the trial court expressly find the waiver was knowing and voluntary. (*People v. Smith* (2003) 110 Cal.App.4th 492, 502.)

In *Weaver*, the trial court explained to the defendant that the waiver of a jury trial included "all triable issues before the court" including the special circumstance allegations. This Court held that the waiver was valid:

> Defendant understood and intended his waiver to include both guilt and special circumstances as well as, if it came to that, the penalty determination. To require more, or to mandate a different procedure, would exalt form over substance.

(*People v. Weaver, supra,* 53 Cal.4th at p. 1075.)

In *Tijerina*, the prosecutor stated the defendant, who was represented by counsel, was entitled to a jury trial; asked the defendant whether he understood what a jury trial was, who responded affirmatively; and explained a jury trial as "when twelve people sit over here in the box and hear all the evidence." The prosecutor then stated the defendant could give up his right to a jury trial and have the "judge alone determine all the issues in this case." The defendant then stated his preference for a court trial and waived his right to a jury trial. (*People v. Tijerina, supra,* 1 Cal.3d at p. 46, fn. 2.)

On appeal, the defendant claimed his waiver of a jury trial was ineffective on the ground that he was not told the jury's verdict must be unanimous. (*People v. Tijerina, supra,* 1 Cal.3d at p. 45.) This Court

rejected the assertion, stating that, given he said he knew what the evidence was and given the explanation of a jury trial given by the prosecutor, "the court was not required to explain further to the defendant the significance of his waiver of a jury trial." (*Id.* at p. 46; see also *People v. Thomas* (1969) 269 Cal.App.2d 327, 330-331 [rejecting a similar challenge].)

In *Evanson,* defense counsel stated, "I have explained to Mr. Evanson [the defendant] his constitutional rights to a jury trial and explained to him the nature of a criminal case. He understands that and he desires to proceed without the necessity of a jury." (*People v. Evanson, supra,* 265 Cal.App.2d at p. 699.) The trial court asked, "Is that agreeable with you, Mr. Evanson?" to which the defendant gave a positive reply. (*Ibid.*) The defendant asserted on appeal that the trial court should have "given him full advice concerning his rights and ascertaining through a procedure comparable to that required for an effective waiver of counsel that the waiver was competent." (*Id.* at p. 701.) The appellate court held that the waiver was effective:

> [W]here a defendant is represented by counsel it is to be expected that counsel will intentionally refrain from asserting, or advise waiver of, certain constitutional rights from time to time in his choice of defense tactics. It is not necessary that whenever such a tactical waiver occurs the court interrupt the proceedings to advise defendant of the right which is to be waived and question him to ascertain whether the waiver is made with full appreciation of the consequences.

(*Id.* at pp. 701-702.)

Here, the trial court advised appellant that he had a right to a jury trial of twelve people selected in a process that involved defense counsel, the prosecutor, and the trial court, and that, only if the district attorney proved guilt beyond a reasonable doubt, the case would proceed to a penalty phase. (6 SRT 904.) The trial court then advised the defendants that, in a court

trial, "I, alone, would make the decision on whether that evidence was sufficient to prove your guilt beyond a reasonable doubt" and that if there was a penalty phase, "it would fall upon me to make the decision as to the appropriate punishment, which could result in a death penalty sentence." (6 SRT 904.) This is far more detailed than the advisements given in *People v. Tijerina, supra,* 1 Cal.3d at p. 46, fn. 2, in which the defendant was told that a jury trial was where twelve people sat in the box and heard all the evidence; and it was also more detailed than the advisement in *Evanson*, in which defense counsel merely asserted that he had explained to the defendant the right to a jury trial and the nature of a criminal case. (*People v. Evanson, supra,* 265 Cal.App.2d at p. 699.) It is similar to, although more detailed than, the waiver given in *Weaver*, in which the waiver was explained to encompass all triable issues before the court. (*People v. Weaver, supra,* 53 Cal.4th at p. 1075.)

The record therefore shows that appellant's waiver was made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon his right to a jury trial. Accordingly, appellant's claim to the contrary fails.

C. Appellant Validly Waived His Right To A Jury Trial On The Special Circumstance Allegations

Appellant also asserts he did not validly waive his right to a jury trial for the special circumstance allegation. (AOB 42-43.) He is incorrect.

Waiver of a defendant's right to have a jury determine the truth or falsity of an alleged special circumstance must be made by the defendant personally and must be "separate" in that the record must show the defendant is aware the waiver applies to both the guilt and the special circumstances. (*People v. Diaz* (1992) 3 Cal.4th 495, 565.) However, there

is no requirement that there be a separate interrogation of the defendant about his special circumstance jury trial rights as distinct from his other jury trial rights. (*People v. Wrest, supra,* 3 Cal.4th at p. 1105.)

In *People v. Memro* (1985) 38 Cal.3d 658, 705, fn. 55,[7] counsel stipulated to the court finding the special circumstance allegation, but there was no personal jury waiver on the multiple murder special circumstance allegation. This Court held that the trial court erred in failing to take a personal jury waiver on the multiple murder special circumstance allegation. (*Id.* at p. 704.)

In making this determination, this Court looked at two statutory provisions of the 1977 death penalty law. Former section 190.1, subdivision (a), provided that "[the] defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged. . . ." Then section 190.4, subdivision (a) provided, "[If] the defendant was convicted by the court sitting without a jury, the trier of fact [on the special circumstance allegation(s)] shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court." (*People v. Memro, supra,* 38 Cal.3d at p. 701.)[8] This Court, following *People v. Granger* (1980) 105 Cal.App.3d 422, noted the inherent conflict between the statutes: where a jury trial has been waived as to the guilt phase, it is impossible for the special circumstances to be tried by jury and the guilt and special circumstances to be tried at the

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[7] *Memro* was overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, n. 2.

[8] See current sections 190.1, subdivision (a), and 190.4, subdivision (a).

same time. (*Ibid.*) The Court, again following *Granger*, held that section 190.4 should prevail, meaning a personal waiver of jury trial on the special circumstance allegation was required. (*People v. Memro, supra*, 38 Cal.3d at pp. 701-702)

This Court rejected the Attorney General's argument that a separate jury trial waiver was only required where "proof of the special circumstance charge consisted of evidence which would not necessarily have been presented on the question of guilt. . . ." (*People v. Memro, supra,* 38 Cal.3d at p. 702.) The Court noted that section 190.4 contained no limitation on the special circumstances which came within its ambit, and stated that the interpretation would severely restrict the application of statute. (*Ibid.*) The Court stated that the rule announced was unlikely to have any "dramatic effect" on the trial of guilt and special circumstances, since a trial court could take separate waivers of the right to jury of guilt and special circumstances, and, even if an accused waived jury trial on the question of guilt but exercised it as to special circumstance allegations, it was not likely that such a trial would be overly time consuming. (*Id.* at p. 704.)

In *People v. Granger, supra,* 105 Cal.App.3d at page 425, the defendant was told he had a right to a unanimous jury verdict as to his guilt and as to a prior offense allegation. He was also told, "Do you also understand that the Court will have to determine whether or not special circumstances did or did not exist." (*Id.* at p. 426.) The *Granger* court held that the waiver was not valid:

> His waivers of jury trial on the guilt phase and on the prior conviction allegation were preceded by elaborate and careful explanation to the defendant, on the record, that he had a right to a jury trial on those issues; those waivers were made with full knowledge of the rights he waived. But the record nowhere shows that defendant also knew that he could, if he so desired,

> have a jury trial on the third, important issue. That matter was presented to him in such a fashion that he could only have been led to believe that waiver of jury trial on the special circumstances followed, as a matter of law, from his waiver of jury trial on the other issues.

(*Id.* at p. 428.)

In *People v. Diaz, supra,* 3 Cal.4th at page 564, the trial court told the defendant that he would be giving up the right to have a jury of 12 people unanimously decide his guilt or innocence and, assuming he was guilty, to unanimously agree as to punishment. When the defendant answered, "I'm giving that up" the court asked if he understood that the waiver applied to "both phases . . . of the special circumstances case." (*Ibid.*) The defendant assented. (*Ibid.*) This Court held that the waiver was valid:

> [T]he trial court explained to defendant that the waiver of his right to trial by jury applied to *all* aspects of his special circumstances case, from beginning to end. Defendant also told the court that he had discussed the matter "quite thoroughly" with his counsel. Although the trial court's admonition was not a model of clarity, we believe it was sufficient to advise defendant that his waiver, which included all aspects of guilt and penalty, included within it a waiver of the right to jury trial on the truth or falsity of the special circumstance allegations.

(*Id.* at p. 565, emphasis in original.)

In *People v. Wrest, supra,* 3 Cal.4th at pages 1103-1104, the defendant acknowledged that a jury would have to unanimously agree as to guilt and the "*the special circumstances*" and that he did not want a jury trial on the issue of "*guilt or the special circumstances or the enhancements*[.]" (Emphasis in original.) He also stated he had discussed this with his attorney. (*Id.* at p. 1104.) This Court held that the jury trial waiver was valid:

> [D]efendant was made aware that "the waiver of his right to trial by jury applied to all aspects of his special circumstances case, from beginning to end" and defendant himself informed the court that he had taken advantage of the opportunity to discuss the issue of jury-trial waiver with defense counsel. [Citation.] Under these circumstances, no more was required to meet constitutional or statutory standards.

(*Ibid.*)

Here, the trial court explained to appellant that he was giving up his right to a jury trial in both the guilt phase and the penalty phase. This was similar to waiver in *Diaz* of "both phases . . . of the special circumstances case." (*People v. Diaz, supra,* 3 Cal.4th at p. 564.) The trial court's statement in the present case that "this Court, alone, will make those decisions" (6 SRT 905) is also similar to the waiver in *Weaver*, which included "all triable issues before the court." (*People v. Weaver, supra,* 53 Cal.4th at p. 1075.) It is distinguishable from *Granger* in that the "elaborate and careful" explanations of the other rights given in that case may have misled the defendant into thinking he had no right to a jury trial on the special circumstance allegations. (*See People v. Granger, supra,* 105 Cal.App.3d at p. 428.) Accordingly, the jury trial waiver was valid.

D. Appellant's Jury Trial Waiver As To The Penalty Phase Was Valid

Finally, appellant asserts his waiver of a jury trial at the penalty phase was not valid. Appellant specifically argues he did not reaffirm his jury waiver at the conclusion of the guilt phase; he was not aware of his right to a unanimous and impartial jury at the penalty phase; the court failed to define the terms "aggravation" and "mitigation[;]" and the trial court failed to explain that the sentencing function at the penalty phase is inherently moral and normative. (AOB 43-46.) Appellant is incorrect.

In *People v. Hovarter* (2008) 44 Cal.4th 983, 1024, a jury convicted the defendant in a capital case but was unable to reach a verdict in the penalty phase, triggering a mistrial. The parties then agreed to waive a jury trial on the retrial of penalty phase. (*Ibid.*) On appeal, the defendant asserted permitting him to waive a jury trial for the penalty phase retrial violated section 190.4, as well as his constitutional rights. (*Id.* at pp. 1024-1025.)

Section 190.4 provides,

> If defendant was convicted by the court sitting without a jury[,] the trier of fact at the penalty hearing shall be a jury *unless a jury is waived* by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.
>
> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury *and shall order a new jury impaneled* to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(*People v. Hovarter, supra,* 44 Cal.4th at p. 1025, italics added by *Hovarter* court.)

The *Hovarter* defendant singled out the language that the trial court "*shall* order a new jury impaneled" to argue that the direct language of the statute precluded a jury trial waiver for a penalty phase retrial where the guilt phase was tried to a jury. The defendant further argued that permitting a jury trial waiver under these circumstances would render the waiver language in the first paragraph of section 190.4, subdivision (b), surplusage. (*People v. Hovarter, supra,* 44 Cal.4th at p. 1025.)

This Court rejected the assertion. This Court, while emphasizing the importance of the right to a jury trial, pointed out that this right could be waived. (*People v. Hovarter, supra,* 44 Cal.4th at pp. 1025-1026.) The Court stated,

> Because the default position in criminal cases is a trial by jury, with a jury trial waiver the exception, the first paragraph of section 190.4, subdivision (b) must be read to mean that, despite the fact an accused waived his right to a jury for the guilt phase, the trial court must presume the defendant wants a jury to try the penalty phase unless a jury is again waived. In other words, as an added protection for criminal defendants, a single jury trial waiver given early in the trial process is insufficient; a defendant must reaffirm his waiver for the penalty phase. This view of section 190.4, subdivision (b) explains why the first paragraph includes an explicit mention of waiver.
>
> The meaning of the second paragraph dovetails with the first: If a jury was *not* waived for the penalty phase of trial, it shall be presumed the defendant also desires a jury for any retrial of that phase. This presumption, however, can—as in all situations in which the jury trial right attaches—be overcome with a knowing and intelligent waiver, personally given in open court. Contrary to defendant's suggestion, this interpretation of the two paragraphs in section 190.4, subdivision (b) recognizes no surplusage, no redundancy, and no anomalous preclusion of waiver.

(*People v. Hovarter, supra,* 44 Cal.4th at pp. 1026-1027, emphasis in original.) The Court further found it understandable that the Legislature made no specific provision for the unusual circumstance in which a party would want to waive a jury trial after one jury has found guilt but was unable to reach a verdict on the penalty phase. (*Id.* at p. 1027.)

In *People v. Robertson* (1989) 48 Cal.3d 18, 36-39, fn. 4, the trial court took a detailed waiver of the defendant's right to a jury trial. This Court rejected the defendant's assertions that the waiver was invalid because the trial court omitted to explain the effect of a jury deadlock or

that the trial court would review any verdict of death returned by the jury. (*Id.* at pp. 37-38.) This Court stated, "Defendant's requirements for an effective waiver are too stringent for any situation; no waiver requires the court to explain every single conceivable benefit and burden of the choice being made." (*Id.* at p. 38, fn. omitted.)

In *People v. Diaz, supra,* 3 Cal.4th at page 564, the trial court informed the defendant that he would be giving up the right to a jury in two different functions: first to decide guilt or innocence and second, assuming the jury decided he was guilty, to determine punishment. The trial court asked the defendant if he understood the waiver applied to both phases of the special circumstances case. (*Ibid.*) This Court upheld the waiver against the defendant's challenge that he did not separately waive jury trial to both the guilt and special circumstances. (*Id.* at p. 565.) The issue whether there needed to be a separate waiver at the beginning of the penalty phase appears not to have been raised.

In *People v. Scott* (1997) 15 Cal.4th 1188, 1207-1208, the trial court took a detailed waiver of the defendant's jury trial rights a few months before trial, and a briefer waiver when the case was called for trial. This court upheld the waiver against various challenges; again, the issue whether a separate waiver needed to be taken before the start of the penalty phase appears not to have been considered. (*Id.* at pp. 1208-1209.)

Preliminarily respondent notes that there is no federal constitutional right to have a jury determine whether or not to impose the death penalty. (*Proffitt v. Florida* (1976) 428 U.S. 242, 252; *Clemons v. Mississippi* (1990) 494 U.S. 738, 745; *see also*, e.g., *Irvin v. State* (2005) 940 So.2d 331, 364-365.) Moreover, appellant does not cite, and respondent is not aware of, any authority other than *Hovarter* for the proposition that a defendant must "reaffirm" his jury trial waiver at the penalty phase.

Indeed, the factual circumstances of *Robertson*, *Diaz*, and *Scott* seem rather at odds with the proposition that a separate jury trial waiver is required before the start of the penalty phase, since there is no indication that this occurred in any of these three cases, and no challenge on that basis, even though the effectiveness of the jury trial waiver was challenged in all three cases on other grounds.

The statement by the *Hovarter* court appears to be dicta, in that it was not strictly necessary for this Court to reach its conclusion that a defendant could validly waive jury trial in the penalty phase after a jury was unable to reach a verdict in that phase.[9] Rather, the *Hovarter* court could have reached the same conclusion simply by concluding, as it did, that the Legislature simply made no specific provision for the unusual circumstance that presented itself in that case.

The language in section 190.4, subdivision (b), used to support the proposition that a separate jury trial waiver is required immediately before the penalty phase is, instead, best interpreted in a similar manner to which similar language in section 190.4, subdivision (a), of the same statute is currently interpreted: Waiver of a defendant's right to have a jury determine the truth or falsity of an alleged special circumstance must be made by the defendant personally and must be "separate" in that the record must show the defendant is aware the waiver applies to both the guilt and

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[9] "The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion. To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised."

(*Areso v. CarMax* (2011) 195 Cal.App.4th 996, 1006, internal quotation marks omitted.)

the special circumstances, but there is no requirement that there be a separate interrogation of the defendant about his special circumstance jury trial rights as distinct from his other jury trial rights. (*People v. Diaz, supra,* 3 Cal.4th at p. 565; *People v. Wrest, supra,* 3 Cal.4th at p. 1105.)[10] In this case, the statute may be interpreted to mean that a defendant must be aware that there will be a penalty phase and that the jury waiver applies to this phase, but there need not be any separate interrogation concerning these rights, either at the time of the original jury trial waiver or at the commencement of the penalty phase. Accordingly, appellant's contention that his jury trial waiver of the penalty phase was invalid because he did not reaffirm that waiver at the conclusion of the guilt phase fails.

Appellant's other contentions regarding the waiver of jury trial at the penalty phase similarly fail. This Court has rejected the assertion that a defendant must be told that a jury's verdict must be unanimous, at least in the context of a non-capital case. (*People v. Tijerina, supra,* 1 Cal.3d at pp. 45-46.) Respondent urges this Court to similarly reject appellant's contention in the present case. As stated by this Court in *People v. Weaver, supra,* 53 Cal.4th at page 1074, "One can always think of new things to argue the court should explain while taking a jury waiver. . . ." The sum of appellant's contentions would, if followed, put severe constraints on trial courts attempting to take valid jury trial waivers.

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[10] However, respondent stands by her earlier argument that a valid jury trial waiver suffices to waive the right to a jury trial on the special circumstances, except in the event of a prior murder special circumstance allegation. (Argument I.C., ante, citing *People v. Diaz, supra,* 3 Cal.4th at pp. 576-577 and § 109.1, subd. (a).)

For similar reasons, appellant's contentions that the trial court failed to define "aggravation" and mitigation" and failed to explain that the jury's function at the penalty phase was moral and normative fail. (AOB 45-46.) As stated by this Court in *Weaver*, "Defendant understood and intended his waiver to include both guilt and special circumstances as well as, if it came to that, the penalty determination. To require more, or to mandate a different procedure, would exalt form over substance." (*People v. Weaver, supra,* 53 Cal.4th at p. 1075.) Put another way, "There is no constitutional requirement that appellant understand 'all the ins and outs' of a jury trial in order to waive his right to one." (*People v. Wrest*, supra, 3 Cal.4th at p. 1105.)

E. Harmless Error

Denial of the right to jury is generally considered structural error not subject to a prejudice analysis. (*People v. Collins* (2001) 26 Cal.4th 297, 304, 311 [waiver of jury improperly induced by promise of a "benefit"].) In *People v. Ernst* (1994) 8 Cal.4th 441, 446, this Court held that the absence of an express jury trial waiver required reversal without prejudice analysis.

In *Memro*, the Court expressly left open the question of the standard of prejudice to be applied in the context of a failure to obtain a separate waiver of a jury on the trial of a special circumstance allegation. (*People v. Memro, supra,* 38 Cal.3d at pp. 704-705.) In *Granger*, the Second District Court of Appeal reversed because it could not say beyond a reasonable doubt that a jury could not rationally have found in the defendant's favor on the special circumstance. (*People v. Granger, supra,* 105 Cal.App.3d at p. 429.) Similarly, in *People v. Moreno* (1991) 228 Cal.App.3d 564, 579, the Fifth District Court of Appeal found the deprivation of a jury trial on

special circumstances allegation was not harmless beyond a reasonable doubt because it could not say that a rational jury would necessarily have found the special circumstance to be true. By contrast, in *People v. Gastile* (1988) 205 Cal.App.3d 1376, 1383-1384,[11] the appellate court found that the failure to obtain a waiver of the right to a jury on a special circumstance allegation was harmless because the special circumstance alleged, a multiple murder special circumstance, necessarily applied once the trial court found both killings were first-degree murder.

Here, any error with regard to appellant's waiver regarding the special circumstances was harmless beyond a reasonable doubt. The sole special circumstance alleged was that the murder occurred during the commission of a robbery. (3 CT 760.) Given the evidence of the other robberies committed by appellant, evidence that Henry Song's death occurred as Mounsaveng and appellant attempted to have either Song or Seak Ang Hor open the safe (10 SRT 1907-1911), and evidence that Mounsaveng and appellant took jewelry and other items from the store as they left (10 SRT 1915-1916), it is beyond a reasonable doubt that a jury would have found the special circumstance to be true. Accordingly, any error with regard to the jury trial waiver of the special circumstance finding was harmless.

As to the alleged error with regard to the jury waiver of the penalty phase, respondent is not aware of any authority regarding the prejudice standard to be applied. Given the lack of any federal constitutional right to a jury at this stage in the proceedings, respondent submits that the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) standard of prejudice for state

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[11] To the extent *Gastile* and *Moreno* held or implied that there is a required prescribed ritual for taking a waiver of a jury-trail special circumstance allegation, they were overruled in *People v. Wrest, supra,* 3 Cal.4th at pp. 1104-1105.)

law error applies, to the extent the right to a separate jury trial waiver on the penalty phase exists at all. (*Proffitt v. Florida, supra,* 428 U.S. at p. 252; *Clemons v. Mississippi, supra,* 494 U.S. at p. 745; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Moreover, respondent submits any error in this regard should be deemed harmless unless there is a reasonable probability the defendant would not have waived jury trial had the trial court attempted to take a second waiver at the commencement of the penalty phase. (*See, In re Moser* (1993) 6 Cal.4th 342, 351 [misadvisement regarding a guilty plea only grounds for relief if defendant shows he would not have entered the plea if the trial court had given the proper advisement].)

Here, assuming, arguendo, an additional waiver of jury trial is required at the start of the penalty phase, any error was harmless. The trial court explained at the time of the jury trial waiver before the guilt phase that

> I, alone, would make the decision on whether that evidence was sufficient to prove your guilt beyond a reasonable doubt" and that if there was a penalty phase, "it would fall upon me to make the decision as to the appropriate punishment, which could result in a death penalty sentence.

(6 SRT 904-905.) Nevertheless, appellant made no attempt, then or later to preserve his right to a jury trial with regard to the penalty phase of the trial. Accordingly, he cannot show a reasonable probability that had the trial court taken a later waiver of jury trial rights, he would have asserted his right to a jury trial. Accordingly, any error was harmless.

Respondent acknowledges the possibility that this Court may interpret prejudice analysis of jury waiver of the penalty phase to determine whether a jury impaneled at the penalty phase would have reached a different outcome than the trial court. Even assuming, arguendo, this is the case, there is no reasonable probability a jury would not have imposed the death

penalty, given that appellant was the gunman, given that appellant committed a string of brutal robberies before the robbery that resulted in Henry Song's death; given the aggravating circumstances of appellant's prior record, treatment of Keonhothy, and misbehavior in jail; and given the relative lack of mitigating circumstances presented. Accordingly, any error in this regard was harmless.

II. THE TRIAL COURT PROPERLY CONSIDERED APPELLANT'S POSSESSION OF A METAL WEAPON IN JAIL

Appellant argues the death penalty must be reversed because the trial court erroneously considered evidence that he possessed a piece of metal in Fresno County Jail, under section 190.3, factor (b). (AOB 49-62.) Appellant specifically contends the metal object was not a "sharp instrument" under section 4502, subdivision (a). (AOB 52-56.) He is incorrect.

A. Background

Before presentation of evidence on appellant's possession of a shank, defense counsel brought up the issue:

> They found a metal object . . . in his clothing . . . but then the question later, the particular officer said that I did not know if that was sharpened. So whether it's a shank or not—as far as the discovery is concerned, it was a piece of metal about, I believe, five inches, but . . . they say "I don't remember if it was sharpened or not.

(16 SRT 3282.) The prosecutor stated she sought to introduce evidence from the jail witnesses under factor (b), "Violent acts or threats of violence amounting to a crime[.]" (16 SRT 3283.)

After a recess, the trial court stated,

> I think the evidence of the—of the shank, if sufficient to prove a crime beyond a reasonable doubt, is going to be admissible. The case law seems to hold there is an implied threat of violence in the possession of a weapon by a prisoner to allow it in.

(16 SRT 3286.)

After the testimony, defense counsel stated, "I'm not conceding that it's a shank. It's a piece of metal." (16 SRT 3406.) Defense counsel further stated, "But does a piece of metal, which she doesn't even say was sharpened, considered a shank?" (16 SRT 3407.) The trial court responded,

> You're free to argue the weight of the evidence, but I think it's admissible. It's contraband. It is contraband because it is an item that can be used as a weapon. So there's case law that says even if there's a reasonable inference that the item seized was in fact a tattoo needle and not a stabbing utensil, that it still is admissible as a weapon because it can be used as a weapon. Might have been a shoe horn, about five-and-a-half inches long, inch wide.
>
> So if there's an objection, it is overruled. If there's a motion to strike, it's denied.

(16 SRT 3407.)

Later, when determining whether the death penalty was justified in appellant's case, the trial court mentioned the shank as follows:

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

(17 SRT 3757-3758.)

B. Argument

Section 190.3, factor (b), provides,

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . .
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

The mere possession of a potentially dangerous weapon in custody involves an implied threat to use force or violence. (*People v. Moore* (2011) 51 Cal.4th 1104, 1137; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v. Martinez* (2003) 31 Cal.4th 673, 694.) Section 4502, subdivision (a), prohibits persons confined in a penal institution from possessing "any dirk or dagger or sharp instrument[.]" A chisel is a "sharp instrument" within the meaning of the statute. (*People v. Harris* (1950) 98 Cal.App.2d 662, 666.) Accordingly, evidence that appellant violated section 4502 is admissible under factor (b).

Section 4574 proscribes any incarcerated person from possessing any "firearm, deadly weapon, explosive, tear gas or tear gas weapon[.]" A deadly weapon is one "likely to produce death or great bodily injury." (*People v. Savedra* (1993) 15 Cal.App.4th 738, 744.) It is the potential of an item that determines its classification. (*Id.* at p. 745.) "The application of section 4574, subdivision (a), is necessarily broad because of manifest security concerns in prisons. Therefore, possession of a potentially dangerous item is a crime of relatively strict liability[.]" (*People v. Martinez* (1998) 67 Cal.App.4th 905, 910.)

Here, it is reasonably inferable that a piece of metal five inches long and one inch wide was one that was "likely to produce death or great bodily injury" within the meaning of the statute (*People v. Savedra, supra,* 15 Cal.App.4th at p. 744), when considering the potential for harm if such a piece of metal were used to attack a victim's eyes, throat, spine, or other vulnerable parts of the body. Moreover, it is also a reasonable inference that a piece of metal that size is similar to a chisel in function, which comes within section 4502. Accordingly, the trial court did not err in considering appellant's possession of the "shank" when determining the appropriate penalty. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 237-238 [defendant's possession of a shank admissible under factor (b)].)

Assuming there was error, it was harmless in any event. Evidence that appellant possessed a shank while in jail was trivial compared other properly admitted evidence, including the brutal nature of the charged crimes, in which appellant kicked or otherwise assaulted a number of his victim, as well as appelllant's uncharged acts, including his physical abuse of Keonhothy and his attempt to break into her brother's apartment in which she had sought refuge. Accordingly, there is no reasonable possibility evidence of appellant's possession of the shank had any effect on the verdict. (*People v. Lewis* (2008) 43 Cal.4th 415, 530-531; *People v. Valdez* (2012) 55 Cal.4th 82, 172.)

Appellant claims that the error in admitting evidence of the shank violated his right to due process under the state and federal constitutions. Appellant did not object on constitutional grounds, and has therefore forfeited this claim of error. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1236, fn. 18.) Even if appellant had preserved this claim, the admission of evidence, even if erroneous under state law, does not offend due process

unless it renders the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal. 4th 428, 439.) Absent such fundamental unfairness, the traditional *Watson* test for harmless error applies. (*Ibid.*) Moreover, the federal Constitution allows consideration of non-statutory as well as statutory aggravating factors. (See *Barclay v. Florida* (1983) 463 U.S. 939, 947.) Accordingly, appellant's constitutional claim fails.

III. THE TRIAL COURT PROPERLY CONSIDERED APPELLANT'S STATEMENTS TO A CORRECTIONAL OFFICER

Appellant contends the trial court erroneously considered evidence, while in custody, he told a correctional officer "I see you all the time on the streets, I'll remember you." (AOB 63-74.) He is incorrect. The trial court properly considered the evidence, and, in any event, any error was harmless.

A. Background

At the penalty phase, the prosecutor sought to admit evidence of a fight in jail between appellant and another inmate, and a threat appellant made to a correctional officer who investigated the fight. (3 CT 787-788; 15 SRT 3175; 16 SRT 3283-3284.) Appellant's counsel stated, "I will, of course, object to like I said the testimony of correctional officers, umm, as briefly mentioned by Miss Detjen [the prosecutor]." (15 SRT 3179.)

Counsel argued that the statement "very strongly suggests a communication problem" and stated, "I don't see how we can treat under 190.3(b), and I don't see where it will treat anywhere else. So what does that mean, 'I see you on the streets a lot of time'?" (16 SRT 3282.)

The trial court stated,

> The fight in itself probably is not admissible, because if you have a victim—you know, if you had the testimony of a victim, or if you had an eyewitness to an assault, that would be different, but if it's just the residuals, two people fighting without knowing who the aggressor was or whether there was self-defense being used, I don't think that's going to be admissible.

(16 SRT 3287.) As to the threats, the trial court stated, "I'll probably just hear that and see whether it amounts to a threat in my mind." (16 SRT 3287.)

At argument, the prosecutor recounted that when Officer Lopez reclassified appellant because of the fight, appellant

> responded to that officer with a threat of violence.
>
> The officer testified that the threat was so hostile that the officer concluded it to be real and dangerous to both he and his co-workers, a threat which comes in under factor B as a violation of section 69 of the Penal Code.

(17 SRT 3736.)

In determining that the death penalty was justified, the trial court stated,

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

(16 SRT 3757-3758.)

B. Argument

A prosecution case in aggravation is limited to the factors listed in section 190.3, exclusive of factor (k). (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Under section 190.3, subdivision (b), a finder of fact may

hear facts surrounding prior criminal activity involving force or violence. (*People v. Moore, supra,* 51 Cal.4th at p. 1135; *People v. Jurado* (2006) 38 Cal.4th 72, 135; *People v. Zapien* (1993) 4 Cal.4th 929, 987.) Factor (b) evidence must demonstrate the commission of an actual crime, specifically, a violation of a penal statute. (*People v. Jurado, supra,* 38 Cal.4th at p. 136.) Evidence of other violent crimes is admissible regardless of when committed or whether they led to criminal charges or conviction. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052.) A defendant must object to the introduction of factor (b) evidence to preserve the matter for appeal on either statutory or constitutional grounds. (*Ibid.*)

Threats made while in custody immediately after an otherwise admissible violent criminal incident are admissible under factor (b). (*People v. Kipp* (2001) 26 Cal.4th 1100, 1134; see also *People v. Montiel* (1993) 5 Cal.4th 877, 915-917 [threats made during violent resistance to arrest admissible to demonstrate aggravated nature of conduct].) Evidence concerning a defendant's fights with other inmates was properly admitted into evidence as aggravating evidence in *People v. Moore, supra,* 51 Cal.4th at page 1136.

In *People v. Tuilaepa, supra,* 4 Cal.4th at pages 589-590, the prosecution introduced evidence of several outbursts made by the defendant while he was in California Youth Authority ("CYA") custody. The defendant made sexual taunts and death threats to two female employees while locked in a maximum security cell and, while being reprimanded for cutting the seams of his pants, threatened to a male advisor that he would burn the pants and burn the male advisor's face. This Court concluded that there was no substantial showing "that defendant harbored the requisite intent--interfering with the performance of official duties--or that his statements had the requisite effect--creating a reasonable belief the threat would be carried out." (*Id.* at p. 590.)

> Defendant had no apparent history of attacking or injuring CYA officials, and the recipients of these threats indicated they did not actually fear for their safety. Defendant was locked in his cell for the night when he harassed the two women, and his response to Bron's [the male advisor's] criticism was obviously intended as an angry retort.

(*Ibid.*) Nevertheless, the Court found the admission of the threat evidence harmless. (*Id.* at p. 591.)

The present case is distinguishable from *Tuilaepa*. Here, appellant admitted a rules violation for fighting on March 9, 1997, and Officer Eulalio Gomez determined that appellant was the aggressor in the fight. (16 SRT 3382-3384.) Appellant was neither locked safely in a cell, as was the defendant in *Tuilaepa* during some of his putative threats, nor was his merely an angry outburst as was the *Tuilaepa* defendant's statement to the male advisor promising to burn his face. Instead, appellant was three feet away from Officer Lopez, took a "combative stance" and had his hands clenched when he made the statement that "I see you all the time on the streets, I'll remember you." (16 SRT 3413.)

Appellant's rather chilling statement was a far cry from the angry outburst of the *Tuilaepa* defendant, and his proximity to Officer Lopez added to the gravity of his threats, when compared with the *Tuilaepa* defendant's statements to the female employees. Given the proximity of appellant at the time to Officer Lopez, the gravity of the statement, and its proximity in time to Officer Lopez's decision to alter appellant's security classification, the trial court could reasonably conclude that appellant's statement was an attempt to discourage Officer Lopez from reclassifying appellant, and could reasonably conclude that the target of the threat, Officer Lopez, could reasonably fear retaliatory action on some future

occasion if appellant were released. (See, *People v. Hines* (1997) 15 Cal.4th 997, 1060 [threats that an officer would "be sorry [he] ever saw" the defendant, that the defendant would kill the officer, and that the defendant would kick an officer if he searched the defendant's property all admissible under factor (b)].) Accordingly, appellant's threat was properly admissible as being made immediately after an otherwise admissible violent incident. (*People v. Kipp, supra*, 26 Cal.4th at p. 1134; *see also People v. Montiel, supra*, 5 Cal.4th at pp. 915-917 [threats made during violent resistance to arrest admissible to demonstrate aggravated nature of conduct].) The evidence was admissible under factor (b) and appellant's contentions to the contrary fail.

In any event, any error made by the trial court in considering the evidence was harmless, for the reasons cited, ante (Argument III.) The impact of the evidence was minor, in comparison with properly admitted aggravating evidence, and could not have affected the penalty determination.

IV. APPELLANT FORFEITED ANY CLAIM OF ERROR REGARDING THE TRIAL COURT'S CONSIDERATION OF THE FACT THAT THE CHARGED OFFENSES WERE COMMITTED AFTER AN ESCAPE FROM CUSTODY UNDER FACTOR (A)

Appellant contends his death sentence must be reversed because the trial court erroneously considered his "walkaway" escape from a prison camp in Washington nine months before he murdered Henry Song. (AOB 75-86.) He is incorrect.

A. Background

In a notice of evidence to be introduced in aggravation, the People offered, pursuant to section 190.3, factor (a),

> [T]he escape of Vaene Sivongxxay from Coyote Ridge Prison in Washington State seven months before the first charged crime was committed and discussions by Vaene Sivongxxay while presently incarcerated relating to current plans to escape.

(3 CT 780-781.)

Exhibit 121, pages 21-22, describes how two inmates, one of whom was appellant, were found to have escaped from Coyote Ridge Correctional Facility on February 28, 1996. Appellant offered it into evidence during the guilt phase of trial. (15 SRT 3079.)

During the opening statement of the penalty phase, the prosecutor stated,

> [T]he People will offer Mr. Sivongxxay's escape from the Washington State Prison on February 28, 1996, escape from his incarceration on that first degree armed robbery. He escaped just five months before he committed the first charged armed robbery with defendant Mounsaveng at the Thanh Tin Jewelry Store in Fresno.

(15 SRT 3171-3172.) No objection appears at this point in the record.

During closing arguments, the prosecutor stated,

> [T]he evidence in this case has shown under factor A that just five months after his escape from Washington State Prison, which demonstrates . . . Mr. Sivongxxay's lack of willingness to learn from his prior punishment, and shows his incarceration did not change his violent character, because just five months after—five months after his escape from Washington State Prison, he has under factor A victimized Liem Hyunh and Phung Ngoc Ho, the owners of the Thanh Tin Jewelery Store, and victimized Xeng Wang Her, the ex-owner of the JMP Mini-Mart. . . .

(17 SRT 3730-3731.) Again, no objection appears in the record here.

During closing argument, appellant's counsel asserted,

> The evidence is pretty strong about Mr. Sivongxxay's chemical dependence. Even in prison he had committed himself in for treatment. They gave him pills to take, and he had obviously behaved himself, because towards the end of his prison stint, he was transferred to a camp. Unfortunately, he was told to stop taking the pills and he walked out of that camp.

(17 SRT 3741.)

In making its decision, the trial court stated,

> As to Mr. Sivongxxay, the continuing pattern argued by the Prosecutor, including weapons, offenses committed while he was on escape he was on escape status as a previously convicted felon, are by case law admissible because of the threat of violence shown by that.
>
> I'm not considering any circumstances of his escape itself. I'm assuming it was a walkaway from the evidence that we know about it, being from a camp.
>
> But as a convicted felon on escape status, his continued acts of violence, including possession of firearms on multiple occasions, show a continuing pattern of ongoing violent conduct and criminality: The shotgun that was taken from his car after the incident with his girlfriend's brother; the five or six separate acts of violence testified to by Mr. Sivongxxay's girlfriend—former girlfriend involving guns used to strike her; the breaking of bones; a shot being fired next to her with a shotgun; threats with a knife.

(17 SRT 3757.) At no point did appellant object to the trial court's consideration of his escape.

B. Appellant Has Forfeited His Claim

A defendant must object to the introduction of factor (b) evidence to preserve the matter for appeal on either statutory or constitutional grounds. (*People v. Lewis & Oliver, supra*, 39 Cal.4th at p. 1052.) Here, appellant himself introduced, in the guilt phase (15 SRT 3079), the evidence he now claims was improperly considered at the penalty phase, and he did not

object to its use in the penalty phase. Accordingly, he has forfeited his claim. Appellant acknowledges the forfeiture rule, but asserts that this Court should address the merits because "whether the nonviolent walkaway escape was admissible under factor (a), or any factor, is a pure question of law;" because "the relevant facts are in writing (the documents in Exh. 121) and undisputed[;]" and because "addressing the merits would contribute to the reliability of the death sentence." (AOB 77.)

Respondent disagrees. Whether an escape is admissible under any of the factors is dependent on the individual facts of the case, and, accordingly, is not a "pure question of law" as appellant asserts. (*See*, *People v. Johnson* (1992) 3 Cal.4th 1183, 1243 [fact that defendant committed crimes only six days after release from prison supports inference that incarceration failed to change his violent character]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1334-1335 [evidence of nonviolent escapes inadmissible under factor (b) but admissible to rebut defendant's character evidence]; *People v. Burgener* (2003) 29 Cal.4th 833, 874 [evidence of escapes admissible to rebut evidence of good character]; *People v. Medina* (1995) 11 Cal.4th 694, 767-768 [evidence of escape that involved actual or threatened use of violence admissible in penalty phase]; *People v. Mason* (1991) 52 Cal.3d 909, 955-956 [attempted escape admissible where a completed escape would almost certainly have involved a confrontation with a guard].) Whether or not the facts are undisputed, appellant cites no authority for the proposition that this negates the long-standing rule of forfeiture. Finally, the circumstance that ignoring the forfeiture rule in the present case might lead to greater reliability in the penalty determination is arguably applicable to *any* capital case, which would result in the forfeiture rule never being applied to any case of arguable *Boyd* error. Appellant does not advance any argument that the

circumstance of arguably increased reliability of the penalty determination applies uniquely to his case as compared to other capital cases in which *Boyd* error is asserted. Accordingly, the argument fails.

C. The Trial Court Did Not Improperly Consider Appellant's Escape

A prosecutor may broadly argue all reasonable inferences from statutorily admissible aggravating evidence. (*People v. Turner* (1990) 50 Cal.3d 668, 713.) In *Turner*, the prosecutor asserted that the defendant was incarcerated for each of his prior felony offenses and that he committed the murder within months after his most recent release, as one of the circumstances of that crime. This Court held that the prosecutor could properly do so: "The suggestion that the . . . homicide took place under 'circumstances' indicating defendant's unwillingness to learn from prior punishment was entirely proper." (*Id.* at pp. 713-714.) Here, similarly, the trial court could properly take into account the circumstance of the present crimes that they were committed by a person who had recently escaped from incarceration to show appellant's dangerousness.

Appellant attempts to distinguish the present case from *Turner* on the ground that in the present case the capital offense took place nine months after the escape, which occurred "far from the future locale of the capital crime." (AOB 80-81.) First, the string of robberies that ended with Henry Song's death began in July, just five months after appellant's escape. (7 SRT 1043-1059, 1082-1120, 1131-1151 [attempted robbery at Thanh Tin Jewelry Store].) Second, for purposes of the trial court's analysis, respondent sees no meaningful way to distinguish between the unspecified number of months in *Turner* versus five or nine months in the present case. Finally, the circumstance that appellant committed his capital crime at a far

distance from the locale of his escape hardly works in his favor—it shows he was willing, and able, to travel long distances to avoid incarceration and continue his criminal lifestyle. Appellant's attempted distinction from *Turner* fails.

D. Harmless Error

Even assuming, arguendo, the trial court improperly considered appellant's nonviolent escape in imposing the death penalty, any error in this regard was harmless. In *People v. Wright* (1990) 52 Cal.3d 367, 426[12] this Court stated, "We have never held that *Boyd* error *alone* constituted reversible error." (Emphasis in original.) In *People v. Carrington* (2009) 47 Cal.4th 145, 194, this Court stated that evidence of the defendant's alleged escape "was relatively trivial in comparison to the circumstances of the crimes of which defendant was convicted—defendant murdered two individuals and attempted to murder a third during the course of three separate incidents of burglary and robbery." Similarly, in *People v. Farnam* (2002) 28 Cal.4th 107, 189-190, properly admitted evidence of the defendant's "extreme acts of cruelty and aggression" including brutal sexual assaults and murders completely overshadowed evidence of defendant's CYA escape plan.

In the present case, the evidence showed appellant committed several brutal robberies, fatally shooting Henry Song three times in one of those robberies. Moreover, the trial court stated it did not consider the circumstances of the escape itself, which it assumed to be a walkaway

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[12] *Wright* was overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

escape. (17 SRT 3757.) Under the circumstances, even if the trial court erred in considering appellant's escape, it could not have prejudiced appellant.

Appellant argues the asserted error violates federal law. (AOB 82-83.) This claim fails for the reasons stated in Argument II., ante. Appellant forfeited his constitutional claim by not raising it at trial, and, in any event, consideration of nonstatutory aggravating factors is not unconstitutional and did not render the present trial fundamentally unfair. Appellant's claim of constitutional error fails.

E. Cumulative Error

Appellant asserts the cumulative effect of this and other asserted penalty phase errors should be considered together. (AOB 49.) Appellant is entitled to a fair trial, not a perfect one, even where his life is at stake. (*People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156.) When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemeyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence." (*Ibid.*)

Here, notwithstanding appellant's arguments to the contrary, the record contains few, if any, errors, and no prejudicial error has been shown. Even considered cumulatively, any errors are insufficient to justify reversal of the judgment. Accordingly, appellant's claim fails.

V. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE UNITED STATES CONSTITUTION OR INTERNATIONAL LAW

Appellant raises a number of general challenges to California's death penalty law. (AOB 87-108.) As discussed, post, all fail.

A. Section 190.2 Is Not Impermissibly Vague Or Overbroad

Appellant asserts section 190.2 is impermissibly vague and overbroad because it does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 87-89.) Appellant further argues that

> because the substantive felony murder offense, the special circumstance, and the circumstances of the offense (§ 190.3, factor (a)) are duplicative, a death judgment that is based on such factors, as here, violates the Fifth Amendment's prohibition against double jeopardy. . . .

(AOB 88.)

As appellant acknowledges, this Court has rejected similar claims. (*People v. Nelson* (2011) 51 Cal.4th 198, 225 [§ 190.2 adequately narrows the pool of those eligible for death]; *People v. Gonzalez* (2011) 51 Cal.4th 894, 957; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Holt* (1997) 15 Cal.4th 619, 693 [because § 190.3 expressly permits sentencer to consider both the circumstances of the crime and a special circumstance based on conviction of a felony which underlies the first degree felony-murder conviction, there is no federal double jeopardy violation]; AOB 89.) Appellant presents no persuasive reason why this Court should reconsider these prior holdings. This Court should reject appellant's present challenge to section 190.2.

B. Section 190.3, Factor (A), Is Not Vague And Overbroad, Either On Its Face Or As Applied Here

Appellant argues section 190.3, factor (a), violates the Eighth Amendment because "it is fatally ambiguous, fails to direct the discretion of the jury, fails to perform any narrowing function, and leads to unreviewable arbitrary and capricious results[.]" (AOB 89-91.) As appellant acknowledges, similar claims have been rejected by this Court and the United States Supreme Court. (*Tuilaepa v. California* (1994) 512 U.S. 967, 980; *People v. Cain* (1995) 10 Cal.4th 1, 68; *People v. Sims* (1993) 5 Cal.4th 405, 466; AOB 91.) Appellant presents no compelling reason why this Court should reconsider its prior decisions. Accordingly, respondent respectfully urges this Court to reject appellant's claim.

C. Section 190.3, Factor (B), Does Not Violate The First, Sixth, Eighth, Or Fourteenth Amendments

Appellant argues that section 190.3, factor (b), on its face and as applied, violates his right to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (AOB 91-95.) This Court has rejected similar claims. (*People v. Cain, supra,* 10 Cal.4th at pp. 69-70, and cases cited therein; *People v. Hartsch* (2010) 49 Cal.4th 472, 515; AOB 95.) Respondent respectfully asks this Court to similarly reject appellant's claim here.

D. Section 190.3, Factors (D) And (H), Do Not Erect Unconstitutional Barriers To The Sentencer's Consideration Of Mitigation

Appellant argues that the

> restrictive adjectives—"extreme" and "substantial"—used in the list of potential mitigating factors, and in particular factors (d) and (h), are unduly vague and overbroad, and unconstitutionally acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments.

(AOB 95.) As appellant acknowledges, this Court has rejected similar claims. (AOB 95; *People v. Foster* (2010) 50 Cal.4th 1301, 1365; *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Morrison* (2004) 34 Cal.4th 698, 730 [statutory instruction "whether or not" did not impermissibly invite jury to aggravate sentence on basis of nonexistent or irrational aggravating factors]; *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) Respondent respectfully urges this Court to similarly reject appellant's claims here.

E. Factor (I) Does Not Violate Restrictions Against Vagueness, Arbitrariness, And Unreliability Under The Eighth And Fourteenth Amendments

Appellant argues that factor (i), which instructs the jury that it can consider the age of the defendant at the time of the crime "gives the jury no guidance whatsoever, and performs no narrowing function whatsoever." (AOB 96.) This Court has held otherwise. (*People v. Lucky* (1988) 45 Cal.3d 259, 302 [either counsel may argue any age-related inference in every case, and jury need not be instructed that age can only be a mitigating factor]; *People v. Thomas* (2012) 53 Cal.4th 771, 833; *People v. Ramirez* (2006) 39 Cal.4th 398, 473 [where no age related matter suggested by the evidence, court's instruction to consider age, without elaboration, was sufficient].) Appellant's challenge to this factor is without merit.

F. Factor (K) Is Not Unconstitutionally Vague

Appellant argues that factor (k) is unconstitutionally vague because "it fails to provide guidance to the sentencer on how to distinguish a death-worthy case from one that is not, and fails to guide the sentencer's discretion in deciding the appropriate penalty." (AOB 96.) Appellant has failed to provide support for his claim, either through citation to relevant authority, reasoned argument, or citation to the record. Accordingly he has forfeited this claim. (See, *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1543, fn. 3; *People v. Griffin* (2004) 33 Cal.4th 536, 589, fn. 26, overruled on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) In any event, the claim fails on the merits. (*People v. Mendoza* (2000) 24 Cal.4th 130, 192 [challenge to factor (k) "misapprehends the nature of the capital case penalty phase"].) Appellant argues that empirical research shows "there is no instruction about factor (k) that is sufficient to guide a sentencer's discretion." (AOB 96.) However, appellant points to no such research in the record on appeal. (*People v. Strickland* (1974) 11 Cal.3d 946, 955 [appellate court's jurisdiction limited to matters presented by the record].)

G. Relative Culpability Is Not Mitigating Evidence

Appellant argues the relative culpability between defendants charged with the same incident is mitigating evidence and should have been considered by the sentencer. (AOB 96-97.) Appellant does not show the trial court actually erred in this regard. (See, *People v. Montano* (1992) 6 Cal.App.4th 118, 121 [reviewing court entitled to presume sentencing court properly exercised its discretion].) Moreover, this Court has rejected similar claims. (*People v. Danielson* (1992) 3 Cal.4th 691, 717-718 [rejecting consideration of sentence imposed on defendant's accomplice],

overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1188-1189 [focus in penalty phase is on the character and record of the individual offender].) In any event, considering that the trial court found appellant to be the person who fired the actual shots in the present case (15 SRT 3141), and assuming that the trial court should have considered relative culpability, appellant fails to show any prejudice.

H. Imposition Of The Death Penalty Is An Inherently Normative Process That Has No Burden Of Proof

Appellant argues the death penalty statute fails to set forward the appropriate standard of proof. He is incorrect, as discussed, post.

1. The Trier Of Fact Does Not Need To Be Convinced Of The Aggravating Factors Beyond A Reasonable Doubt

Appellant asserts that the sentencer must be convinced beyond a reasonable doubt that aggravating factors were present, that they outweighed the mitigating factors, and that the aggravating factors were so substantial as to make death an appropriate punishment. (AOB 97-98.) As appellant recognizes, this Court has held otherwise. (AOB 97; *People v. Homick* (2012) 55 Cal.4th 816, 902.) Respondent respectfully requests that this Court similarly reject appellant's claim.

2. Instructions On Burden Of Proof Are Unnecessary

Appellant argues that some burden of proof was required regarding the existence of factors in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty; and alternatively argues that "presuming it were permissible not to have

any burden of proof, the trial court erred prejudicially by failing to articulate that fact. According to appellant, "there is a possibility that the sentencer would vote for the death penalty because of a misallocation of a nonexistent burden of proof." (AOB 99.) However, the sentencing function is inherently normative, not factual, and instructions on burden of proof are not necessary. (*People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.)[13] Since, in this case, the trial court itself imposed sentence, it is unlikely in any event that there was a "misallocation" of a "nonexistent burden of proof" as appellant claims. (AOB 99.) Appellant's claim fails.

I. The Death Penalty Does Not Turn On Impermissibly Vague And Ambiguous Instructions And Standards

Appellant claims the death penalty determination turns on impermissibly vague and ambiguous instructions and standards. (AOB 100-104.) As discussed post, his claim fails.

1. The Phrases "So Substantial" And "Warrants" Are Not Impermissibly Vague

Appellant contends the phrases "So substantial" and "Warrants" in CALJIC No. 8.88 are impermissibly vague and broad. (AOB 100, citing 17 SRT 3755 [trial court cites CALJIC No. 8.88].) This Court has previously rejected similar claims. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. Carter* (2003) 30 Cal.4th 1166, 1226.) Appellant presents no compelling argument to reconsider this Court's previous holdings rejecting this argument.

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[13] But see *People v. Williams, supra,* 49 Cal.4th at p. 459 [beyond a reasonable doubt instructions appropriate as to factor (b) and factor (c) evidence, but error harmless under state law.

2. The Instructions Are Appropriately Clear

Appellant contends the instructions do not make clear that "the ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty." (AOB 100-101.) This Court has previously rejected such claims, and respondent respectfully requests that it do so here. (*People v. Duenas* (2012) 55 Cal.4th 1, 27 [rejecting defendant's attempted distinction between "warrant" and "appropriate" in CALJIC No. 8.88].)

3. The Sentencing Factors In Section 190.3 Adequately Guide The Sentencer's Discretion

Appellant contends the

> factors listed in section 190.3 fail to guide or limit the sentencer's discretion, create a pro-death bias, create the impermissible risk that vaguely-defined factors would result in the arbitrary selection of appellant for execution, and afford no meaningful basis on which this Court may review the sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The combined effect of all the factors renders the entire scheme unconstitutional.

(AOB 101.) This Court has previously rejected similar claims. (*People v. Booker* (2011) 51 Cal.4th 141, 196 [sentencing factors in § 190.3 do not fail to adequately channel or limit sentencer's discretion]; see also *People v. Duncan* (1991) 53 Cal.3d 955, 978-979 [instructions did not create presumption in favor of death]; AOB 102.) Appellant presents no compelling argument that should cause this Court to reconsider its previous holdings rejecting this challenge.

4. The Instructions Did Not Mislead The Jury With Regard To Its Duty To Return A Life Sentence If The Aggravating Factors Do Not Outweigh The Mitigating Factors

Appellant contends CALJIC No. 8.88 is flawed because it does not instruct the jury that a life sentence is mandatory if the aggravating factors do not outweigh the mitigating factors, or if it finds that death is not an appropriate punishment. (AOB 102-103.) As appellant recognizes, this Court has previously rejected similar claims. (*People v. Duncan, supra,* 53 Cal.3d at p. 978 [no need to instruct jury that if mitigating factors outweigh aggravating factors, life without parole is the appropriate penalty]; *People v. Kipp, supra,* 26 Cal.4th at p. 1137 [no need to instruct jury on "presumption of life"]; *People v. Gamache* (2010) 48 Cal.4th 347, 407 [same]; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 124 [rejecting claim that CALJIC No. 8.88 was vague and misleading with regard to jury's duty to return death verdict only if it found death to be an appropriate sentence]; AOB 102-103.) Appellant fails to offer compelling reason for this Court to reconsider these holdings.

5. The Sentencer Need Not Be Instructed That There Is A Presumption Of Life

Appellant asserts that the sentencer should be instructed that there is a presumption of life. (AOB 104.) This Court has previously rejected this argument. (*People v. Kipp, supra,* 26 Cal.4th, at p. 1137; *People v. Gamache, supra,* 48 Cal.4th at p. 407.)

J. Appellant Is Not Entitled To Written Findings

Appellant asserts that the

> failure to require written or other specific findings deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed, and his Fourteenth Amendment right to equal protection of the law.

(AOB 105.) This Court has rejected similar claims, and respondent respectfully requests that it do so again here. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1364 [failure to require jury to make written findings does not preclude meaningful appellate review].) In any event, given the trial court's oral statement of reasons set forth in the record in the present case, appellant could not have been prejudiced in this regard. (17 SRT 3754-3759.)

K. Inter-Case Proportionality Is Not Required

Appellant contends that the

> failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process.

(AOB 105-106.) This Court and the United States Supreme Court have rejected similar claims, and respondent respectfully requests that this Court do so again here. (*People v. Watkins* (2012) 55 Cal.4th 999, 1034; *People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *Pulley v. Harris* (1984) 465 U.S. 37, 50-51.)

L. California's Capital-Sentencing Scheme Does Not Violate Equal Protection Guarantees

Appellant contends that California's capital sentencing scheme violates equal protection because it "provides significantly fewer

procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes[.]" (AOB 106.) As appellant acknowledges, this Court has rejected these arguments, and respondent respectfully requests that it do so again here. (*People v. Scott* (2011) 52 Cal.4th 452, 497; *People v. Nelson, supra,* 51 Cal.4th at p. 227; *People v. Jackson* (2009) 45 Cal.4th 662, 701.)

M. California's Use Of The Death Penalty Does Not Violate International Law Or The Eighth Amendment

Appellant contends that use of the death penalty, or, alternatively, regular use of the death penalty, "violates international law, the Eighth and Fourteenth Amendments" and "evolving standards of decency." (AOB 106-107.) This Court has rejected similar claims in the past, and respondent respectfully requests that it do so again here. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1143 [California's death penalty scheme does not violate international law or norms of humanity and decency]; *People v. Perry* (2006) 38 Cal.4th 302, 322 [rejecting claim that "regular" imposition of the death penalty violated international norms and thus constituted cruel and unusual punishment in violation of the Constitution].)

Appellant also contends his trial violated specific provisions of international law because of previously claimed errors regarding his waiver of a jury trial and admission of certain incidents in the penalty phase of his trial. (AOB 107-108.) However, as shown previously (Arguments I-IV), the trial court did not err with regard to appellant's jury trial waiver or the evidence admitted at the penalty phase, and, in any event, any error did not prejudice appellant. Accordingly, this claim, too, fails. (*People v. Hoyos* (2007) 41 Cal.4th 872, 925; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511 [court need not consider whether violation of state or federal law also

violated international law due to a failure to show a violation of state or federal constitutional law; had prejudicial error been shown under domestic law, judgment would have been set aside without resort to international law].)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: March 1, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains 21,993 words.

Dated: March 1, 2013.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Sivongxxay***
Case No.: **S078895**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 1, 2013, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 1, 2013, at Fresno, California.

Debbie Pereira-Young
Declarant

Debbie Pereira-Young
Signature

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